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## Including Aviation in the European Union Scheme for Emission Allowance Trading: Stimulating Global Market-Based Measures

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**INCLUDING AVIATION IN THE EUROPEAN UNION  
SCHEME FOR EMISSION ALLOWANCE TRADING:  
STIMULATING GLOBAL MARKET-BASED MEASURES**

MELLE BAKKER\*

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I. INTRODUCTION

**T**O REALIZE INTERNATIONAL emission reduction targets, the European Union introduced a scheme for emission allowance trading. Despite large resistance from countries and companies, aviation activities were included in the scope of the trading scheme. In *Air Transport Ass'n of America v. Secretary of State for Energy & Climate Change*, the Court of Justice of the European Union had to decide whether the scheme was contrary to international law. After long disagreement at an international level, the International Civil Aviation Organization decided to look into market-based models for international aviation. Therefore, the European Union decided to temporarily derogate from the enforcement of its scheme. Whether this will give rise to a global scheme by 2020 is yet to be revealed.

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This article will show what led the European Union to introduce its scheme for emission allowance trading in the field of aviation. Nevertheless, the main question is why the European Union decided to “stop the clock” on the application of aviation activities. Perhaps it could be as a result of large international concerns or a desire to create an international market-based model. The question remains whether the application of the emission allowance trading in the field of aviation is contrary to international agreements and customary international law, or whether the European Union wanted to take a leading role with its emission allowance trading scheme. The final question is if there is a future for the European Union emission trading scheme for aviation activities or whether the scheme will be substituted for a worldwide market-based measure.

First, the origins of the emission allowance trading scheme are discussed. Next, the international concerns are discussed together with international agreements. Additionally, this paper assesses the discussions for market-based measures at an international level and how this led the European Union to decide to stop the clock. To conclude, this article discusses how the European Union’s cornerstone scheme could serve as a model for the use of emissions trading worldwide.

## II. BACKGROUND

This section will discuss the origin of the European Union’s emission allowance trading scheme and its inclusion of aviation activities.

The first environmental considerations in European law were mostly taken with a view to serve the common market.<sup>1</sup> As said by the court, requirements relating to the environment and health may create imbalanced conditions of competition.<sup>2</sup> In 1987, the Single European Act would be the first European Treaty to clearly include environmental goals.<sup>3</sup> The European Community would take actions “to preserve, protect and improve the quality of the environment.”<sup>4</sup>

The ultimate objective of the 1992 United Nations Framework Convention on Climate Change was “stabilization of greenhouse gas concentrations in the atmosphere at a level that would pre-

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<sup>1</sup> J.H. JANS & H.H.B. VEDDER, EUROPEAN ENVIRONMENTAL LAW 3–5 (2012).

<sup>2</sup> Case 91/79, *Comm’n v. Italy*, 1980 E.C.R. 1099, para. 8.

<sup>3</sup> Single European Act, 1987 O.J. (L 169).

<sup>4</sup> *Id.* arts. 130r–130t.

vent dangerous anthropogenic interference with the climate system.”<sup>5</sup> In pursuit of that objective, the European Community was party to the Kyoto Protocol (1997).<sup>6</sup> The European Community ensured that its carbon dioxide emissions of greenhouse gases would be reduced by 8% of the 1990 levels, by 2008 to 2012.<sup>7</sup> More recently, the European Council has renewed the target for emission reductions to 20% by 2020 and 80–95% by 2050, both compared to 1990 levels.<sup>8</sup>

In light of the obligations under the United Nations Framework Convention on Climate Change and Kyoto Protocol, the European Commission proposed a scheme for greenhouse gas emission allowance trading.<sup>9</sup> The first scheme for greenhouse gas emission allowance trading was established in 2003.<sup>10</sup> The Directive defined an “allowance” as the “allowance to emit one tonne of carbon dioxide . . . during a specified period.”<sup>11</sup> From 2005, European Union member states were to ensure that greenhouse gas emitting installation would only operate if they hold a greenhouse gas emissions permit.<sup>12</sup> During the first phase, member states were required to allocate a large majority of the allowances free of charge and develop a national plan by taking into account the comments of the public and European Commission.<sup>13</sup> From 2005 to 2008, at least 95% of the allowances were to be allocated free of charge and similarly, from 2008 to 2013, at least 90%.<sup>14</sup>

The European Union had the desire to reduce the climate change impact of international air transport.<sup>15</sup> Therefore, the

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<sup>5</sup> United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 1771 U.N.T.S. 107, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>6</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> [hereinafter Kyoto Protocol].

<sup>7</sup> *Id.* art. 3(7).

<sup>8</sup> See Presidency Conclusions, Brussels European Council (Oct. 29/30, 2009); see also Conclusions, European Council (March 25/26, 2010).

<sup>9</sup> See *Proposal for a Directive of the European Parliament and of the Council Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC*, COM (2001) 581 (Oct. 23, 2001); see also European Commission, *Green Paper on Greenhouse Gas Emissions Trading Within the European Union*, COM (2000) 87 final (Aug. 3, 2000).

<sup>10</sup> Council Directive 2003/87/EC, 2003 O.J. (L 275) (EC).

<sup>11</sup> *Id.* art. 3.

<sup>12</sup> *Id.* art. 4.

<sup>13</sup> *Id.* art. 10.

<sup>14</sup> *Id.*

<sup>15</sup> Council Directive 2008/101/EC, 2008 O.J. (L 8) 4–5.

Directive was amended in 2008 to include air transport services for the carriage of passengers, freight, or mail in the scheme for greenhouse gas emission allowance trading.<sup>16</sup> Directive 2008/101 (the Directive) hereby includes flights, which depart or arrive in the territory of a member state, and excludes amongst others: low weight, low frequency, military, medical, rescue, visual, training, and scientific flights.<sup>17</sup> Additionally, the European Commission provided further guidelines on the aviation activities and type of flights that are applicable or exempted from the emission allowance trading scheme.<sup>18</sup> For 2012, aircraft operators would receive an allowance equivalent to 97% of the historical aviation emissions and 15% of the allowances would be auctioned.<sup>19</sup> From 2013 onwards, the percentage of auctioned allowances was set to gradually increase until all allowances are auctioned in 2027.<sup>20</sup>

### III. INTERNATIONAL CONCERNS

The previous section discussed the inclusion of aviation activities within the European Union's emission allowance trading scheme. Multiple countries, associations, and companies expressed concerns related to the applicability of the scheme in the field of aviation activities. These concerns will be examined in this section.

In 2009, the Air Transport Association of America, American Airlines, Continental Airlines, and United Airlines brought proceedings concerning the validity of the Directive.<sup>21</sup> The measures implementing this Directive in the United Kingdom fell "within the competence of the Secretary of State for Energy and Climate Change."<sup>22</sup> In 2010, the International Air Transport Association and the National Airlines Council of Canada received permission to intervene in support of Air Transport Association of America and Others.<sup>23</sup> Moreover, the High Court of Justice of England and Wales also granted five environmental organiza-

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<sup>16</sup> *Id.* art. 1.

<sup>17</sup> *Id.* annex.

<sup>18</sup> Council Directive 2009/450/EC, 2009 O.J. (L 149).

<sup>19</sup> Council Directive 2008/101/EC, art. 1(4), 2009 O.J. (L 8).

<sup>20</sup> *Communication from the Commission to the European Parliament and the Council Towards an Enhanced Market Oversight Framework for the EU Emissions Trading Scheme*, COM (2010) 796 final (Dec. 21, 2010).

<sup>21</sup> *See* Case C-366/10, *Airport Transport Ass'n of America v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R. I-13755.

<sup>22</sup> *Id.* para. 43.

<sup>23</sup> *Id.* para. 44.

tions permission to intervene in support of the Secretary of State for Energy and Climate Change.<sup>24</sup> The Queen's Bench Division of the High Court of Justice of England and Wales decided to refer its questions on the Directive to the Court of Justice of the European Union (the Court) in a preliminary ruling.<sup>25</sup>

Although this topic was heavily debated at an international level, it was the first time that the Court had to decide on it.<sup>26</sup> Australia, Canada, China, Japan, South Korea, and the United States already wrote in 2007 that they had deep concerns with the inclusion of airlines in the trading scheme.<sup>27</sup> They said that European Union unilateral measures would "potentially violate" international agreements.<sup>28</sup> Therefore, the countries urged the Council of Ministers of the European Union to "exclude operations of non-European aircraft from the scope of the [trading scheme]."<sup>29</sup> In the same year, the International Air Transport Association fully supported anyone challenging the European Commission's proposal.<sup>30</sup> Its Director, Giovanni Bisignani, said that airlines' fuel costs were the biggest financial incentive to improve environmental performance and that unilateral application of trading scheme would be in breach of the Chicago Convention.<sup>31</sup> Eventually, in 2010, as said before, the International Air Transport Association intervened in support of the Air Transport Association of America and others before the High Court of Justice of England and Wales.<sup>32</sup>

The Ministers from Brazil, South Africa, India, and China also jointly expressed strong concerns regarding the decision to include the aviation sector in the emission trading system, includ-

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* para. 45.

<sup>26</sup> Jan Wouters et al., *Worlds Apart? Comparing the Approaches of the ECJ and the EU Legislature to Int'l Law* (Leuven Ctr. for Global Governance Studies, Working Paper No. 96, Aug. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2274763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274763)

<sup>27</sup> Letter from the Ambassadors of Austl., Can., China, Japan, S. Kor. and the U.S. to Peter Witt, Deputy Permanent Representative of Ger. to the European Union (Apr. 6, 2007), available at <http://2001-2009.state.gov/s/1/2007/112708.htm>.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> Giovanni Bisignani, Dir. Gen & CEO, IATA, Address at Global Media Day, Geneva (Dec. 12, 2007), available at <http://www.iata.org/pressroom/speeches/Pages/2007-12-12-01.aspx>.

<sup>31</sup> *See id.*

<sup>32</sup> Case C-366/10, *Airport Transport Ass'n of America v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R. I-13755, para. 44.

ing flights to and from its territory by non-European Union companies.<sup>33</sup> In 2012, representatives of Armenia, Argentina, Belarus, Brazil, Cameroon, Chile, China, Cuba, Guatemala, India, Japan, Korea, Mexico, Nigeria, Paraguay, Russia, Saudi Arabia, the Seychelles, Singapore, South Africa, Thailand, Uganda, and the United States unanimously asked the European Union and its member states to cease application of the Directive to airlines or aircraft operators that are registered in third states.<sup>34</sup> They said that the “inclusion of international civil aviation in the [emissions trading system] would lead to serious market distortions and unfair competition.”<sup>35</sup> The U.S. Secretary of State, Hillary Clinton and Secretary of Transportation Ray LaHood, said that the United States would be compelled to take action if the European Union proceeded.<sup>36</sup> Eventually the European Union Emissions Trading Scheme Prohibition Act of 2011 passed the U.S. House of Representatives and U.S. Senate.<sup>37</sup>

#### IV. INTERNATIONAL LAW

The previous section examined the international concerns that related to the applicability of the emissions trading scheme in the field of aviation activities. This section will discuss the international law that could affect the validity of the Directive.

The international law related to certain principles of international agreements and customary international law. These international agreements include the Chicago Convention, the Kyoto Protocol, and the Open Skies Agreement between the European Union and the United States.

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<sup>33</sup> Press Release, Dep’t of Int’l Relations & Cooperation, Joint Statement Issued at the Conclusion of the Eighth Basic Ministerial Meeting on Climate Change (Aug. 30, 2011), *available at* <http://www.dfa.gov.za/docs/2011/braz0830.html>.

<sup>34</sup> *Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS*, POLITICO (Feb. 22, 2012), <http://images.politico.com/global/2012/02/120222.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> Nicola Clark, *Carbon Emission Fees for Flights Upheld*, N.Y. TIMES (Dec. 21, 2011), [http://www.nytimes.com/2011/12/22/business/global/court-upholds-europes-plan-to-charge-airlines-for-carbon-emissions.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/22/business/global/court-upholds-europes-plan-to-charge-airlines-for-carbon-emissions.html?pagewanted=all&_r=0).

<sup>37</sup> European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477 (2012).

All member states ratified the Chicago Convention (1944).<sup>38</sup> However, the European Union was itself not a party to it.<sup>39</sup> Under Article 1, “every State has complete and exclusive sovereignty over the airspace above its territory.”<sup>40</sup> Laws and regulations should be applied without distinction, under Article 11.<sup>41</sup> Besides that, Article 12 lays down that the applicable rules and regulations are those of the territory in which the aircraft maneuvers.<sup>42</sup> Additionally, the rules of the Chicago Convention apply for the high seas. Under Article 15, any charges for international air services shall not be higher than those that would be paid by national aircraft engaged in similar international air services.<sup>43</sup> Article 17 provides that aircraft have the nationality of the State in which they are registered.<sup>44</sup> The Convention also exempts fuel, lubricating oils, spare parts, regular equipment, and aircraft stores from customs duty, inspection fees, or similar national or local duties and charges under Article 24.<sup>45</sup>

As said before, the European Union is party to both the United Nations Framework Convention on Climate Change (1992) and Kyoto Protocol (1997).<sup>46</sup> The ultimate objective of the Convention was “stabilization of greenhouse gas concentrations in the atmosphere.”<sup>47</sup> The Kyoto Protocol followed in pursuit of the United Nations Framework Convention on Climate Change objective.<sup>48</sup> Article 2(2) of the Kyoto Protocol provides that the parties are to “pursue limitation or reduction of emissions of [certain] greenhouse gases . . . from aviation and marine bunker fuels, working through the International Civil Aviation Organisation.”<sup>49</sup>

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<sup>38</sup> Brian F. Havel & John Q. Mulligan, *Flying too High? Extraterritoriality and the EU Emissions Trading Scheme: the Air Transport Association of America Judgment*, EUTOPIA L. (Feb. 2, 2012), <http://eutopialaw.com/2012/02/02/958>.

<sup>39</sup> International Civil Aviation Organization, Convention on Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

<sup>40</sup> *Id.* art. 1.

<sup>41</sup> *Id.* art. 11.

<sup>42</sup> *Id.* art. 12.

<sup>43</sup> *Id.* art. 15.

<sup>44</sup> *Id.* art. 17.

<sup>45</sup> *Id.* art. 24.

<sup>46</sup> See *supra* Part II.

<sup>47</sup> United Nations Framework Convention on Climate Change, *supra* note 5, art. 2.

<sup>48</sup> See Kyoto Protocol, *supra* note 6.

<sup>49</sup> *Id.*



The European Union, including its member states, and the United States are also parties to an Air Transport Agreement (2007).<sup>50</sup> The European Commission negotiated a Protocol to amend this Open Skies Agreement in 2010.<sup>51</sup> Under Article 2, airlines should have a fair and equal opportunities.<sup>52</sup> Article 3 provides that neither party should unilaterally limit volume, frequency or aircraft types operated by airlines.<sup>53</sup> Additionally airlines should not be required to file schedules, program charter flights or plan certain operations.<sup>54</sup> However, Article 3 gives exemptions for customs, technical, operational, or environmental reasons under the condition that the burden is equal for all airlines.<sup>55</sup> Article 7(1) states that aircraft who enter or depart from the territory of a member states are required to comply with its legislation.<sup>56</sup> Article 11 exempts aircraft's regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts, aircraft stores, and other items intended for or used solely in connection with the operation or servicing of aircraft from all import restrictions, property taxes and capital levies, customs duties excise taxes.<sup>57</sup> The exemption also included similar charges imposed by the European Union that are not based on the cost of on-board services.<sup>58</sup> Article 15 states that environmental measures are to follow the aviation environmental standards as adopted by the International Civil Aviation Organization, "except where differences have been filed."<sup>59</sup> The effect of any environmental measures should affect air services in accordance with the agreed exemptions and equal treatment of airlines.<sup>60</sup>

Other applicable laws in *Air Transport Ass'n of America* were principles of customary international law.<sup>61</sup> It is clear from the Court's case law that rules of customary international law are

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<sup>50</sup> Air Transport Agreement, 2007 O.J. (L 134) 2–4 (EU) [hereinafter Open Skies Agreement].

<sup>51</sup> Decision 2010/465/EU, of the Council and the Representatives of the Governments of the Member States of the European Union, 2010 O.J. (L 223) 1,2.

<sup>52</sup> See Open Skies Agreement, *supra* note 50, art. 2.

<sup>53</sup> *Id.* art. 3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* art. 7(1).

<sup>57</sup> *Id.* art. 11.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* art. 15.

<sup>60</sup> *Id.*

<sup>61</sup> Case C-366/10, *Air Transport Ass'n of America v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R. I-13755, paras. 101–11.

binding upon the European Union institutions and form part of the European Union's legal order.<sup>62</sup> These customary principles comprised of a state's complete and exclusive sovereignty over its airspace, no sovereignty over any part of the high seas, and the freedom to fly over the high seas.<sup>63</sup> Furthermore, it was disputed whether aircraft overflying the high seas are subject to the exclusive jurisdiction of the country constituted part of the customary international law.<sup>64</sup>

## V. VALIDITY OF THE DIRECTIVE

This chapter will discuss the validity of the Directive in light of international law. As said before, the issue of validity was discussed in the case *Air Transport Ass'n of America*.<sup>65</sup> The applicable international law related to certain principles of international agreements and customary international law.<sup>66</sup>

Before a European Union measure's incompatibility with a provision of international law can affect the validity of that measure, the Community must be bound by that provision.<sup>67</sup> Additionally, that provision of international law must also be unconditional and sufficiently precise.<sup>68</sup> The Court said that the Chicago Convention does not bind the European Union, since not all powers have been transferred to the European Union.<sup>69</sup> Therefore, the Court could not examine the validity of the Directive in the light of the Chicago Convention.<sup>70</sup> Similarly, the Kyoto Protocol obliged the European Union to pursue limitation or reduction of emissions of greenhouse gases working through the International Civil Aviation Organization.<sup>71</sup> The Court did not consider this provision to be unconditional and sufficiently precise.<sup>72</sup> Therefore, *Air Transport Ass'n of America*

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<sup>62</sup> See Case C-162/96, *Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-3655, para. 46; see also Case T-115/94, *Opel Austria GmbH v. Council of the European Union*, 1997 E.C.R. II-00039, para. 90; Case C-286/90, *Anklagemyndigheden v. Poulsen & Diva Navigation*, 1992 E.C.R. I-6019, para. 9.

<sup>63</sup> *Air Transport Ass'n of America*, 2011 E.C.R. I-13755, para. 111.

<sup>64</sup> *Id.* para. 106.

<sup>65</sup> See *id.*

<sup>66</sup> *Id.* para. 45.

<sup>67</sup> Joined Cases 21/72 to 24/72, *Int'l Fruit Co. v. Produktschap Voor Groenten en Fruit*, 1972 E.C.R. 1226; Case C-308/06, *Int'l Ass'n of Indep. Tanker Owners v. Sec'y of State for Transport*, 2008 E.C.R. I-4057, paras. 44–45.

<sup>68</sup> *Id.*

<sup>69</sup> *Airport Transport Ass'n of America*, 2011 E.C.R. I-13755, para. 71.

<sup>70</sup> *Id.* para. 72.

<sup>71</sup> *Id.* paras. 73–76.

<sup>72</sup> *Id.* para. 77.

could not rely on this obligation in the Kyoto Protocol to contest validity of the Directive.<sup>73</sup>

Additionally, the Open Skies Agreement contained several unconditional and sufficiently precise obligations that were relied upon for the purpose of assessing the validity of the Directive.<sup>74</sup> However, the Directive did not infringe on the obligation to exempt fuel load from any duty, tax, fee, or charge because the allowance trading scheme constituted a market-based measure.<sup>75</sup> Additionally, the Directive was not invalid in light of the Open Skies Agreement since the allowance trading scheme was applied in a non-discriminatory manner to aircraft operators established both in the European Union and in third states.<sup>76</sup> Hence, the Open Skies Agreement did not preclude the application of the Directive that applies to flights, which arrive at or depart from the territory of a member state.<sup>77</sup>

The principles of customary international law include that states "have complete and exclusive sovereignty over their airspace."<sup>78</sup> The Court said that the European Union and its member states have the right to permit an aircraft on the condition that the operator complies with certain criteria.<sup>79</sup> Other principles of customary international law included that no state may claim sovereignty over the high seas and the general freedom to fly over the high seas.<sup>80</sup> However, aircraft flying over the high seas are not subject to the allowance trading scheme.<sup>81</sup> Moreover, in certain circumstances, aircraft can cross the airspace of one of the member states without its operator being subject to that scheme.<sup>82</sup> Therefore, the Court said that the European Union had competence to adopt the Directive.<sup>83</sup>

To conclude, the Court's examination in *Air Transport Ass'n of America* showed no factor that would affect the validity of the Directive.<sup>84</sup> The final decision of the Queen's Bench Division of the High Court of Justice of England and Wales is pending. The

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<sup>73</sup> *Id.* para. 78.

<sup>74</sup> *Id.* paras. 79–100.

<sup>75</sup> *Id.* para. 142.

<sup>76</sup> *Id.* paras. 154–56.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* para. 103.

<sup>79</sup> *Id.* para. 128.

<sup>80</sup> *Id.* para. 103.

<sup>81</sup> *Id.* para. 126.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* para. 130.

<sup>84</sup> *Id.* para. 157.

case could be brought to other forums, should the High Court of Justice of England and Wales decided in line with the Court's decision.<sup>85</sup> The Chicago Convention and Open Skies Agreement would also allow for other ways forward, since the International Civil Aviation Organization's Council can decide on the disagreement.<sup>86</sup> If an appeal were raised, an arbitral tribunal or the International Court of Justice (ICJ) would review such a decision.<sup>87</sup> Additionally, the Open Skies Agreement also provides for disputes to be settled by an arbitrator in accordance with the procedures set in Article 19 of that Agreement.<sup>88</sup>

## VI. CONCLUSION: STOPPING THE CLOCK AND GOING GLOBAL

According to the *Air Transport Ass'n of America* case, the international agreements and principles of customary international law did not affect the validity of the Directive.<sup>89</sup> However, the European Union still decided to temporarily exclude aviation activities from the scope of the Directive.<sup>90</sup> This concluding chapter describes that this perhaps results from the prospect of a worldwide market-based measure.

As said by the European Commissioner for Climate Action, Connie Hedegaard, it somewhat seemed that because of some countries' dislike of the European Union scheme, many countries were prepared to move towards a market-based mechanism at the global level.<sup>91</sup> The Council of the International Civil Aviation Organization agreed in 2012 to form a special group that was to provide recommendations on global market-based measure schemes for international aviation.<sup>92</sup>

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<sup>85</sup> B. Mayer, *Case C-366/10, Airport Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, 49 COMMON MKT. L. REV. 1113, 1139 (2012).

<sup>86</sup> Chicago Convention, *supra* note 39, arts. 84–85.

<sup>87</sup> *Id.*

<sup>88</sup> Open Skies Agreement, *supra* note 50, art. 19.

<sup>89</sup> See Case C-366/10, *Airport Transport Ass'n of America v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R. I-13755, para. 157.

<sup>90</sup> *Proposal for a Decision of the European Parliament and of the Council Denigrating Temporarily from Directive 2003/87/EC of the European Parliament and of the Council Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community*, COM (2012) 697 [hereinafter *Emission Allowance Trading Proposal*].

<sup>91</sup> Memorandum from the European Comm'n on Stopping the Clock of ETS and Aviation Emissions Following Last Week's ICAO Council (Nov. 12, 2012).

<sup>92</sup> *New ICAO Council High-level Group to Focus on Environmental Policy Challenges*, COM (2012) 20/12 (Nov. 15, 2012).

The European Commission decided that it would be good to “reinforce this positive momentum.”<sup>93</sup> There was a will to enhance the chances of a successful outcome of the International Civil Aviation Organization’s global market-based measures.<sup>94</sup> Therefore, the European Commission proposed to “stop the clock.”<sup>95</sup> This decision would temporarily defer enforcement in respect of incoming and outgoing flights under the emission allowance trading scheme.<sup>96</sup> The European Parliament and the European Council agreed with the decision to temporarily derogate from the Directive.<sup>97</sup> This derogation was provided to “facilitate an agreement at the 38th session of the [International Civil Aviation Organization Assembly].”<sup>98</sup> Flights to and from aerodromes in countries outside the European Union were exempted from the allowance trading scheme.<sup>99</sup> Aircraft operators that wished to continue to comply were able to do so.<sup>100</sup>

The 38th Assembly of the International Civil Aviation Organization in 2013 showed that global market-based models could be technically feasible.<sup>101</sup> The European Union highlighted the general support for a global market-based model.<sup>102</sup> The International Civil Aviation Organization Assembly’s report included the agreement to a global market-based model by 2020.<sup>103</sup> After the agreement within the International Civil Aviation Organization, Connie Hedegaard said that “the [European Union’s] hard work has finally paid off.”<sup>104</sup> She added that “if it hadn’t been for the [European Union’s] hard work and determination, we would not have got this decision [within the International Civil Aviation Organization].”<sup>105</sup> Although the European Commission wanted to have more countries to accept the regional

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<sup>93</sup> *Emission Allowance Trading Proposal*, *supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

<sup>97</sup> Council Decision 377/2013/EU, 2013 O.J. (L 113/1), 2 (EU).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Int’l Civil Aviation Org. [ICAO], *Report of the Executive Committee on Agenda Item 17*, at 17-5, ICAO Doc. A38-WP/430 (2013), [http://www.icao.int/Meetings/a38/Documents/WP/wp430\\_en.pdf](http://www.icao.int/Meetings/a38/Documents/WP/wp430_en.pdf).

<sup>102</sup> *Id.* at 17.3.39.

<sup>103</sup> *Id.*

<sup>104</sup> Press Release, European Comm’n, The Commission Welcomes Agreement on Global Aviation Emissions Deal (Oct. 4, 2013), *available at* [http://europa.eu/rapid/press-release\\_IP-13-918\\_en.pdf](http://europa.eu/rapid/press-release_IP-13-918_en.pdf).

<sup>105</sup> *Id.*

scheme, progress was made towards a global market-based model.<sup>106</sup> After, the European Commission would take the global agreement into account when deciding, together with the member states and European Parliament, on the way forward with the emissions trading scheme.<sup>107</sup>

It is still unsure if this means that the European Union scheme will be substituted for a global market-based model in 2020.<sup>108</sup> The greenhouse gas emission allowance trading scheme has been seen as one of the cornerstones of the European Union's environmental protection policy.<sup>109</sup> The Directive already aforesaid that the European Union and its member states take a leading role in the negotiation of international agreements that should achieve the objective of limiting global greenhouse gas emissions.<sup>110</sup> It also suggested that the European Union scheme might serve as a model for the use of emissions trading worldwide.<sup>111</sup> This situation is somewhat comparable to an international 'California effect', since the European Union took new measures, setting a model for others to follow.<sup>112</sup> Whether the European Union scheme will give rise to a global scheme by 2020 is yet to be revealed.

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<sup>106</sup> ICAO Assembly *Climate Change Outcome Hailed by Industry but Seen as a Missed Opportunity by Environmental NGOs*, GREEN AIR (Oct. 6, 2013), <http://www.greenaironline.com/news.php?viewStory=1763>.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> Case C-127/07, *Société Arcelor Atlantique et Lorraine v. Premier Ministre*, 2008 E.C.R. I-09895, para. 2.

<sup>110</sup> Council Directive 2008/10/EC, 2008 O.J. (L 8) 4.

<sup>111</sup> *See id.* at 5.

<sup>112</sup> R. BALDWIN ET AL., UNDERSTANDING REGULATION THEORY, STRATEGY, AND PRACTICE 362-63 (2011).

