Exporting Environmental Values through Open Skies

by

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Occasional Paper Series:
Sustainable International Civil Aviation

The attached Occasional Papers have been prepared by a group of scholars associated with the Institute of Air and Space Law (IASL) at McGill University. They are the result of a collaborative effort between the IASL and the Centre for International Sustainable Development Law and are designed to be part of a book prepared by authors from both groups which will eventually be published by the Cambridge University Press under the title Sustainable International Civil Aviation.

As the title of the book suggests, bringing together these various scholars and papers is the central theme of the sustainable development of international aviation. In particular, the work of the International Civil Aviation Organization (ICAO), the primary United Nations body tasked with regulating the environmental aspects of international aviation, and the provisions of the Chicago Convention which lays down powers of the Organization and the fundamental rules of international air law, form the primary focus of this collection. At the next ICAO Assembly in September-October of 2016, ICAO has the ambitious mandate to finalise a global scheme to limit CO2 emissions from international aviation. As many of the articles contained in the book are of immediate relevance to the discussions due to take place at ICAO, publishing and disseminating these draft chapters will contribute to the growing interest and debates on the issue of the environmental impact of aviation. It is hoped that these papers will contribute to the work of the Assembly and that informed readers and delegates participating at the ICAO Assembly will have constructive comments to share with the authors.

Readers are invited to send their comments to the authors whose e-mail addresses are set out on the title page of each paper as well as a copy to the following address: edannals.law@mcgill.ca

The authors and the Editors of this collection of papers thank all readers for their attention and their comments.

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Promotion of sustainable development in aviation through bilateral/multilateral relations: How does the European Union (EU) export its policies and regulations on environment through air transport agreements?

The issue:
• Whether the EU has been able to make other States adopt its policies and regulations on environment through air transport agreements

Its importance:
• Aviation is the most rapidly growing mode of transportation.
• Together with the rapid growth of aviation is the pollution that it brings, such as noise and, more importantly, greenhouse gases.
• The International Civil Aviation Organization (ICAO) has yet to come up with a concrete global measure that will address aviation emissions.

The treaty law:
• Article 1 of the Chicago Convention:

  The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

• Article 6 of the Chicago Convention:

  No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

• Article 11 of the Chicago Convention:

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

The analysis:

- The EU has been committed in promoting sustainable development in aviation as evidenced by its air transport agreements with several countries that include provisions addressing aviation’s environmental impact.
- The EU has succeeded in infusing measures that will justify environmental measures.
- The provisions relating to the adoption of environmental measures are conditioned to be consistent with the objectives of ICAO, and are to be applied in a non-discriminatory manner.

Options for decision-makers:

1) The EU may continue to influence non-EU countries to adopt environmental measures in air transport agreements pending the development of any concrete environmental protection measure by ICAO.

2) ICAO may issue a concrete measure addressing environmental concerns in aviation and resolve the matter through a multilateral approach.

3) No action in the matter that may lead to unilateral regulation by concerned States.
EXPORTING ENVIRONMENTAL VALUES THROUGH OPEN SKIES: 
THE CASE OF THE EUROPEAN UNION

by

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I. INTRODUCTION

Globally, aviation is the most rapidly growing mode of transportation. Attached to such rapid growth in the aviation sector is the negative externality of pollution that has in the past three decades attracted attention worldwide. Not only do aircraft create noise, the most pressing form of pollution comes from the burning of aviation fuels which releases gasses and particles that can alter atmospheric greenhouse gases and trigger global warming. Various international and national initiatives have been undertaken to address how the aviation sector can sustain its growth while minimising the impact this vital economic force has on the environment. At the multilateral level, the International Civil Aviation Organization (ICAO) has been mandated to formulate and implement measures to limit or reduce the emission of anthropogenic gases derived from the aviation sector. However, to date ICAO has only embraced an "aspirational goal" of fuel efficiency improvements of 2% annually until 2050, and no firm and binding emissions reduction target has been set.

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3 ICAO, Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change, para 5, ICAO Res. A38-18, online: ICAO <www.icao.int/Meetings/a38/Documents/Resolutions/a38_res_prov_en.pdf> [ICAO Res A38-18]. ICAO did decide to develop a global market based measure geared for implementation by 2020, the details of which would be finalized at the 2016 ICAO Assembly: ibid, para 19.

4 Indeed, these "aspirational goals" explicitly do not "attribute specific obligations to individual States": ibid, para 6.
In contrast, the European Union (EU) has actively pursued policies and regulations to address aviation pollution. These policies apply not only internally between Member States, but have, by virtue of the Union's external competences and activities, become integral parts of treaty obligations vis-à-vis third parties. In relation to aviation, the EU has entered into air transport agreements that encompass provisions committing parties to adopt measures to address the environmental impacts of air transport. The discussion that follows will outline the EU's policies and regulations protecting the environment and how these have been "exported" through air transport agreements.

II. SUSTAINABLE DEVELOPMENT AND AVIATION: EU POLICIES AND REGULATIONS

Comprised of 28 Member States, the EU is the largest single market in the world, and naturally, as a collective, it is also one of the most important players in international aviation.\(^5\) With an annual growth rate of up to 4%,\(^6\) air transport is by far the fastest growing mode of transport in the EU.\(^7\) Though emissions from the aviation sector make up very little of the EU's total emissions,\(^8\) between 1990 and 2011, the increase in the aviation sector's greenhouse gas emissions, at over 94%, was the steepest percentage increase of all sectors in the EU.\(^9\) Aspiring to be the aviation "frontrunner in the use of low-carbon fuels" and to reach its emissions reduction target in 2050,\(^10\) the EU has over the last decade alone adopted a wide range of policies and measures to reduce the impact

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\(^{9}\) International aviation and shipping contributes to approximately 6% of the EU’s total greenhouse gas emissions: A closer look at urban transport 2013, supra note 6 at 18. See also European Commission, Mobility and Transport, "All facts and figures", online: European Commission <ec.europa.eu/transport/themes/strategies/facts-and-figures/all-themes/index_en.htm>.

and amount of aviation externalities, in particular aviation emissions.11

A. OUTLINE OF THE EU'S LEGAL FRAMEWORK

The Treaty on European Union (TEU), which describes the foundations of the pillar structure of the EU and gave the Union international legal personality, established that Europe prioritize the concept sustainable development based on "a high level of protection and improvement of the quality of the environment".12 In short, sustainable development denotes the ability to meet the needs of the present generation without compromising how future generations meet their needs, and is the "overarching objective" of all EU policies and activities.13

Vis-à-vis the world, the EU acts on behalf of its Member States in the pursuit of, among others, common foreign actions and policies that "ensure sustainable development" and aimed at preserving and improving the quality of the environment.14 The Treaty on the Function of the European Union (TFEU), which details the policies of the EU, stipulates environmental protection measures must be an integral part of the "definition and implementation of the [EU’s] policies and activities",15 while the EU committed itself to preserve, protect and improve the quality of the environment within the Union and at the international level.16 Clearly expressed, the EU's environment policy


16 TFEU, supra note 15, art. 191(1).
is grounded in the "precautionary principle" and the belief that environmental damage should firstly "be rectified at source and that the polluter should pay". 17

In playing a "leading role" in protecting the environment, 18 the EU's Sustainable Development Strategy (SDS) recognized economic growth and environmental protection as being "mutually supporting". 19 To reduce the "carbon intensity" of the economy and prevent "dangerous anthropogenic interference" with the climate system, 20 market-based measures were identified as the most "cost-effective and economically efficient" 21 means of combating emissions and halting the speed of climate change. In 2003, an emissions trading scheme (ETS) was instituted across the EU, 22 and all sectors of the economy were obliged to partake in offsetting their emissions.

B. "SUSTAINABLE AVIATION"

The EU's transportation policy specifically integrates its commitment to environmental protection as laid out in its founding treaties. 23 Already in 1999, the EU began looking into using emissions trading as a possible market-based measure to combat the impact of aviation on climate change. 24 In its 2001 White Paper on European Transport Policy, the European Commission underlined the introduction of measures to combat noise and gaseous emissions as a sine qua non for striking a balance between growth in air transport and protecting the environment. 25 In short, this arguably laid the hallmarks of the concept of "sustainable aviation".

Months after the Kyoto Protocol came into effect in 2005, 26 the European Commission announced a series of possible measures to mitigate the climate impact of

17 Ibid, art. 191(2).
18 Declaration on the Environment, supra note 13, para 4.
22 EU ETS, supra note 21.
26 The application of the Kyoto Protocol to the EU was laid out in Council Decision of 25 April 2002 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, [2002] OJ L 130/1.
Alongside dedicating more research into cleaner air transport and improving air traffic management, the Commission noted emissions trading is "a fundamental design feature of the Kyoto Protocol and is a key component of the EU's future climate change strategy", and as such is economically and environmentally speaking the "best way forward" to combat climate change. In the face of global inaction in combating emissions from aviation, particularly due to the procrastination on the part of ICAO, the international body saddled with the legal mandate to tackle the issue global aviation emissions, in 2008, Directive 2008/101/EC legally incorporated international aviation into the EU emission trading scheme.

C. EU ETS AND AVIATION: ATTEMPT AT GLOBAL ENVIRONMENTAL LEADERSHIP

Directive 2008/101/EC was an "ambitious" measure to combat aircraft emissions and an excellent demonstration of the Union's commitment to environmental protection and vying for global environmental leadership in this domain. Initially entered into

28 See "Clean Sky" Joint Undertaking, supra note 11.
29 Initiatives, such as the Single European Sky, will dramatically improve the efficient use of European air space by threefold while cutting emissions per flight by up to 10%: Greening Transport, COM(2008) 433 final (8 July 2008) at 9, online: EUR Lex <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0433:FIN:EN:PDF>.
30 Reducing the Climate Change Impact of Aviation, supra note 27, sect 6.3
35 The EU has managed to shape global dialogue and action on environmental issues by proposing so-called "win-win solutions" to the environmental discourse, i.e. advocating that a climate policy has environmental benefits and does not have to come at the expense of economic development: see Radoslav S. Dimitrov, “Environmental Diplomacy: International Conferences and Negotiations”, pp. 259-271 in Paul G. Harris, Routledge Handbook of Global Environmental Politics (London: Routledge, 2014), particularly pp. 266-267. Indeed, the EU held the potential to be a "norm entrepreneur" with respects to the climate change issue: see Alejandro Piera Valdés, Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges in Marietta Benkö, ed, Essential Air and Space Law, vol. 14 (Utrecht: Eleven International
force on 1 January 2012, the directive applied the emissions trading scheme to all flights "which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty",\(^{36}\) Effectively, this covered all carriers with operations within, flying out of or into the EU.\(^{37}\)

Though the impact of the European directive would be proportionally greater on EU carriers than non-EU carriers, internationally, States were vehemently against the adoption and application of EU ETS to aviation.\(^{38}\) A subsequent ICAO Assembly resolution urged that the implementation of an aviation emissions trading system can only be based on mutual agreement between States.\(^{39}\) Other than allegations that the EU’s aviation ETS directive is extraterritorial and unilateral,\(^{40}\) critics also cite that it failed to take into account the concept of common but differentiate responsibility which holds much influence in environmental circles, particularly in emerging economies.\(^{41}\)

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36 Directive 2008/101/EC, supra note 33, Annex. Member States denotes not only those of the EU but also the EEA, thus including Norway and Iceland.

37 Only certain flights, such as transporting heads of State or military flights, are exempted. Intended to exonerate developing countries from the scheme, an air carrier that operates less than 243 flights or emits less than 10,000 tonnes of CO2 over a period of year is also excluded. See Ibid, Annex, 'Aviation', (a), (b) and (j).

38 See e.g. Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS (22 February 2012); and Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties, FCCC/CP/2011/INF.2/Add.1at 6. Some argue that the EU ETS would distort competition in the aviation market and have very limited impact on reducing aviation emissions: Annela Anger & Jonathan Koehler, "Including aviation emissions in the EU ETS: Much ado about nothing? A review" (2010) 17 Transport Policy 38, pp. 43-44.


In response, the 42 Member States of the (then) European Community and the European Civil Aviation Conference (ECAC), which endorse the EU ETS's application to aviation as being fully consistent with international law, filed a reservation to the ICAO resolution. See Written statement of reservation on behalf of the member states of the European Community (EC) and the other states members of the European Civil Aviation (ECAC), Memo/07/391 (2 October 2007), online: European Commission <europa.eu/rapid/press-release_MEMO-07-391_en.htm>:

> Whilst being ready and willing of the willingness to continue to take part in ICAO activities aimed at promoting the reduction of aviation emissions, the forty-two States of the European Community and ECAC must also express in the strongest terms their great disappointment with the lack of ambition and concrete actions in the resolutions tackling greenhouse gas emissions being adopted by this Assembly […]


41 See Scott & Rajamani, supra note 34 at 476.
Directive 2008/101/EC was much criticized and legally challenged by a coalition of aviation-related trade organizations and airlines. In the ATA case, the European Court of Justice (ECJ) ultimately held the EU directive as being legal and, indeed, consistent with provisions of the Chicago Convention—oft cited and celebrated as the “Constitution” governing all matters related to international civil aviation.

Despite the affirmative ruling of the EU's highest court and the firm belief the inclusion of aviation into the EU ETS may very well “serve as a model for the use of emissions trading worldwide”, in the face of fierce international opposition and reluctance to be subject to the scheme, the EU has now temporarily suspended the application of the EU ETS to flights originating from or to non-European countries. The suspension of the application of EU ETS is until 2016, the year ICAO is expected to clarify the mechanism for a global emissions mitigation.

III. SUSTAINABLE AVIATION AND AIR TRANSPORT AGREEMENTS

Having outlined the policies and intricacies relating to the EU’s commitment to sustainable development and aviation, it is of interest to turn to the EU's external policies and activities vis-à-vis third countries. In this vein, environmental provisions in the EU's air transport agreements are most enlightening and provide evidence of the EU’s laudable attempts to export its environmental values globally.

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42 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, C-366/10 [2011] ECR I-13755 [ATA].
43 Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6, art. 38 (entered into force 4 April 1947) [Chicago Convention].
44 Paul S. Dempsey, Public International Air Law (Montreal: McGill University, Centre for Research in Air and Space Law, 2008) at69.
A. THE CHICAGO CONVENTION AND AIR TRANSPORT AGREEMENTS

The Chicago Convention\(^{50}\) laid the foundation whereby States would grant or restrict commercial access under the air transport agreements. Article 1 of the Chicago Convention provides that every State has complete and exclusive sovereignty over the airspace above its territory. Article 11 stipulates laws and regulations relating to the admission/departure of an aircraft engaged in international air navigation to/from the territory of a contracting State shall be applied "without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State". Charges for the use of such airports and air navigation facilities by the aircraft of any other and stipulates that these charges must be levied uniform conditions and cannot discriminate based on nationality.\(^{51}\) Article 6 of the Chicago Convention provides scheduled international air service over or into the territory of a contracting State must obtain permission or other authorisation of the State, and must be compliant with the terms of such permission or authorisation. These provisions are pertinent to the air transport agreements discussed below, provisions of which stipulate that States must adhere to technical, operational or environmental standards to be granted access to the EU's aviation market.

B. AVIATION SINGLE MARKET AND EXTERNAL AVIATION POLICY

Much of the growth of the EU aviation sector can be attributed to the liberalization of the aviation sector,\(^{52}\) which began internally amongst Member States of the Union and the members of the European Economic Area (EEA) and Switzerland.\(^{53}\) Since the 1990s, the EU adopted a series of legislative packages to create a single market in air transport sector\(^{54}\) and apply common rules governing aviation safety, security and environmental

\(^{50}\) Chicago Convention, supra note 43.

\(^{51}\) Ibid, art 15.


\(^{53}\) Norway and Iceland (and Lichtenstein, though it has neither an airport nor an air carrier) are already part of the single market by virtue of the European Economic Area (EEA), whereas Switzerland signed an agreement with the Union whereby air transport has been liberalised to the same basis as EU legislation: see Agreement between the European Community and the Swiss Confederation on Air Transport - Final Act, [2002] OJ L 114/73; see also COM(2002) 649 final, supra note 5, paras. 18-19.

\(^{54}\) Known as the "Third Package" of measures adopted in 1992, principles of the single market applied to the aviation industry and guaranteed equal access to all air carriers of Member States, thereby establishing "Community air carriers" with equal market access rights and subject to common standards of safety, environmental and passenger protection: see COM(2002) 649 final, supra note 5, paras 4-7. See also Brian F Havel, Beyond Open Skies: A New Regime for International Aviation (Alphen aan den Rijn: Kluwer Law International, 2009), pp. 401-402.
According to legal principle of parallelism between internal and external powers, once the Union has promulgated measures related to the single market in a particular policy area (in this case the aviation sector), in its external relations the EU retains the exclusive competence to act on behalf of Member States to conclude agreements with third parties pertaining to that policy area. The ECJ's "Open Skies judgments" confirmed the Union’s exclusive competence to act in the pursuit of a common aviation policy, and paved the way for a common external aviation policy.

In order to align earlier aviation bilaterals with Union rules and policies, the Commission undertook to pursue so-called "horizontal agreements" with third States. Core to these agreements were provisions aimed at liberalizing the aviation market, but also promoting sustainable aviation. Explicitly, the Commission underlined the importance of acting with a single voice so as to best "counter the negative effects on the environment of the growth of the aviation sector, notably in terms of climate change".

Immediately surrounding the EU, the Commission's external aviation policy is centred on the signing of comprehensive air services agreements with the EU's
neighbouring States to the south and to the east. The creation of an European Common Aviation Area (ECAA) would operate according to the same market and regulatory rules as the EU’s internal market, and domains such as aviation safety, security, air traffic management, and the environment would be subject to "common rules". Further afield, the external aviation policy actively pursues the conclusion of air services agreements with key aviation players such as China and Russia and third countries in the Asia-Pacific and the Americas.

To date, the EU has negotiated comprehensive air transport agreements with the United States, Canada, Morocco, the Western Balkan countries, Jordan, Georgia, Moldova and Israel, and an agreement is expected to be signed with Ukraine. Negotiations are expected to be completed with Brazil in the near future and negotiations are on-going with Azerbaijan, Tunisia and Lebanon. In early 2014, the EU has taken the steps to establish an Open Skies Agreement with the Association of Southeast Asian Nations (ASEAN), which if eventually implemented would form the "world’s first comprehensive region-to-region aviation agreement". The following air transport agreements demonstrate the EU’s commitment to incorporate environmental provisions and promote the notion of sustainable aviation.

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64 The ECAA forms part of the EU’s broader European Neighbourhood Policy (ENP) which aims to promote stability and sustainable development in the region. Agreements were to be first concluded with Romania and Bulgaria, at the time still pre-accession States, and with Western Balkan States and Morocco. For an overview of the States deemed by the EU as key aviation partners, see External Aviation Maps - European neighbourhood and key partners, online: Europa <ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/doc/external-aviation-maps.pdf>.


66 Agenda for the Community’s external aviation policy, supra note 60, sect II, para 2.1.

67 Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, [2006] OJ L 285/3, art 1.

68 EU’s External Aviation Policy, supra note 63, paras 51-53.

69 Ibid, para 6.

70 Though signature from the Brazilian side is still pending. See "EU & Brazil re-start Open Skies negotiation", European Cockpit Association (6 February 2014), online: Eurocockpit <www.eurocockpit.be/stories/20140206/au-brazil-re-start-open-skies-negotiation>.


C. EU-US AIR TRANSPORT AGREEMENT

The conclusion of a comprehensive air transport agreement with the US sealed "the integration of the two largest aviation markets" and paved way for a "new regulatory framework for international civil aviation".73 The first stage of the EU-US "Open Skies" Agreement74 was signed on 30 April 2007, and entered into force on 30 March 2008. It provided for the liberalisation of air traffic and removed restrictions on air fares on either side of the Atlantic.75 Overall, the comprehensive air transport agreement between the EU's Member States76 and the US aimed to create more harmonisation in the policies between the US and EU States.

Under the EU-US Agreement, no party can unilaterally limit the "volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party".77 The only derogation from this general free access to the market is an exception based on technical, operational or environmental reasons.78

The original Article 15 reflects the positions of the EU and the US with regard to the environment. Both parties recognise the importance of protecting the environment.79 Any proposed environmental measures must consider "possible adverse effects" on the rights of either party contained in the Agreement.80 Article 15(3) stipulates "except where differences have been filed", environmental measures adopted by either parties must follow standards adopted by ICAO.81 This provision would be most pertinent to the application of EU ETS to aviation, for which the Member States of the EU have filed a reservation to the ICAO standard.82 Further, environmental measures must be applied in a non-discriminatory manner in accordance with the "fair and equal opportunity"

73 Agenda for the Community’s external aviation policy, supra note 60, sect II.
74 Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand [2007] OJL 134/4 [EU-US Agreement].
75 For a summary, see European Commission, Information Note: Air Transport Agreement between the EU and US (6 March 2007), online: Europa <ec.europa.eu/transport/modes/air/international_aviation/country_index/doc/2007_03_05_us_information_note.pdf>.
77 EU-US Agreement, supra note 76, recital 11 and art 3(4).
78 Ibid.
79 Ibid, supra note 76, art 15(1).
80 Ibid, 15(2).
81 See also ATA, supra note 44, paras 7, 34 and 40.
82 The EU has indeed done this in regard to ICAO Res A36-22, App L: see supra note 43.
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The Memorandum of Consultations following the EU-US Agreement "noted the intention" of either side to enhance technical cooperation that "will enhance safety, improve fuel efficiency, and reduce emissions in air transport". Expressly, both sides underlined the provisions of the Agreement do not restrict "in any way [the parties'] respective legal and policy positions on various aviation-related environmental issues".

However, the planned implementation of the EU ETS and ATA reference to the EJC changed the dynamic of the open skies negotiations across the Atlantic. The second stage EU-US Agreement, which appeared in the form of an amendment protocol, went into effect on 24 June 2010 and addressed various market access opportunities and regulation in areas including aviation safety and security and the environmental impact of aviation. Severe disagreements over the application of the EU ETS to all flights entering or leaving the EU led to the complete scrapping and replacement of the environment provision with a much watered-down provision, and the EU and US issued a statement which underlined the commitment of both sides to address the environmental impact of aviation through multilateral forums like ICAO.

It can be safely presumed that any environmental measures adopted by either side must continue to be applied in a non-discriminatory manner in accordance with the "fair and equal opportunity" clause. To address aircraft noise, the Amended Protocol adopted the "balanced approach principle" coined by ICAO as the "environmentally responsive and economically responsible" manner to alleviate noise at the source. New to the Amendment Protocol, parties expressed their intention to "work together to limit or reduce, in an economically reasonable manner, the impact of international aviation on...

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83 EU-US Agreement, supra note 76, art 2. See also ATA, supra note 44, para 99.
84 EU-US Agreement, supra note 76, Memorandum of Consultations, para 36 [emphasis added].
85 Ibid, para 54.
86 Proceedings were brought on 16 December 2009, and a reference to the ECJ was made on 28 May 2010, a month before the Amended Protocol came into effect: see R (Air Transport Association Of America Inc etc.) v Secretary Of State For Energy And Climate Change [2010] EWHC 1554 (Admin); see also ATA, supra note 44, paras 43-44.
87 Protocol to amend the Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part, [2010] OJ L 223/3 [Amendment Protocol].
89 EU-US Agreement, supra note 76, art 2. See also ATA, supra note 44, para 99.
90 Amendment Protocol, supra note 89, art 15(4)-15(5); see also EU-US Agreement, Memorandum of Understanding, para 35.
91 ICAO Res. 35-5, Consolidated statement of continuing ICAO policies and practices related to environmental protection, Appendix C; ICAO, Guidance on the Balanced Approach to Aircraft Noise Management, ICAO Doc 9829 (2008), sect 1.2.
the environment."\textsuperscript{92} The adverse effects on the rights of the other party contained in the Agreement must be evaluated when adopting an environmental measure, and the Amendment Protocol inserted a clause which allows any party to have a description of mitigation measures to be implemented. \textsuperscript{93} The parties only endorsed "exchange information and regular dialogue" aimed at enhancing cooperation in finding solutions to the environmental impact of aviation. \textsuperscript{94} Such exchanges could centre around the development of environmentally-friendly technology and coordinating "views on issues and options in international fora" to deal with the environmental effects of aviation. \textsuperscript{95} With regard to the ability of either party to adopt market-based measures to mitigate emissions, in case of a dispute regarding the interpretation or application of the Agreement, \textsuperscript{96} parties can request a meeting of the Joint Committee "to consider the issue and develop appropriate responses to concerns found to be legitimate". \textsuperscript{97}

\textbf{D. EU-CANADA AIR TRANSPORT AGREEMENT}

Following the agreement between the EU and the US, the EU-Canada Air Transport Agreement, \textsuperscript{98} signed on 17-18 December 2009 and not yet in effect, is deemed the "most ambitious" of the EU's air transport agreements. \textsuperscript{99} The EU-Canada Air Transport Agreement places no limitation on the frequency and capacity of air services either party offers. \textsuperscript{100} Again, derogation from this general free access to the market is an exception based on technical, operational or environmental reasons. \textsuperscript{101} Article 15, on air traffic management, has a general reference to the parties cooperating to ensure the efficient and economic enhancement of air navigation systems in a way, where possible, that reduces the environmental impact of aviation.

Article 18 of the EU-Canada Agreement specifically deals with the environment. \textsuperscript{102} Of interest to note, the original EU-US Agreement provisions governing the

\textsuperscript{92} Amendment Protocol, supra note 89, amended art 15(1).
\textsuperscript{93} Ibid, amended art. 15(2).
\textsuperscript{94} Ibid, amended art. 15(6).
\textsuperscript{95} Ibid, amended art. 15(6)(e).
\textsuperscript{96} EU-US Agreement, supra note 76, art. 18(2).
\textsuperscript{97} Ibid, art. 18(4)(b).
\textsuperscript{98} Agreement on Air Transport between Canada and the European Community and its Member States, [2010] OJ L 207/32 [EU-Canada Agreement].
\textsuperscript{99} "International Aviation: Canada", online: European Commission <ec.europa.eu/transport/modes/air/international_aviation/country_index/canada_en.htm>.
\textsuperscript{100} EU-Canada Agreement, supra note 100, art. 13(2)
\textsuperscript{101} Ibid.
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did not disappear when it was repealed and replaced with the watered-down provisions contained in the Amendment Protocol. Instead, the same text governing the environment reappeared in the EU-Canada Agreement. Here, the EU and Canada reiterated the importance of protecting the environment in developing and implementing international aviation policy, and both sides reserve the right to "take and apply the appropriate measures to address the environmental impacts of air transport" within its own sovereign jurisdiction. Such measures must not prejudice the rights and obligations of the parties under international law (and the Chicago Convention) and must be applied "without distinction as to nationality." While recognizing the importance of working together to mitigate the effects of aviation on the environment, any environmental measures undertaken must be consistent with the objectives of the Agreement and should follow ICAO standards. The Agreement also provides for a party to differ from international standards provided that the party has filed the difference with ICAO. Perhaps taking account of the critical voices against the unilateral implementation of the EU ETS at the time, the EU-Canada Agreement explicitly cautions that when adopting environmental measures, "possible adverse effects on the exercise of rights" must be considered and that steps must be taken to mitigate these adverse effects. Article 18(6) provides for the possibility of engaging in consultation to discuss measures that aim to protect the environment which may "a significant effect on the international air services".

E. EU-ISRAEL AIR TRANSPORT AGREEMENT

The EU-Israel Air Transport Agreement signed in 2013 also includes a provision with regard to the protection of the environment. Similar to the EU-Canada Agreement, the agreement with Israel stipulates that both parties can take "all appropriate measures", so long as they do not discriminate on the basis of nationality, to

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103 EU-US Agreement, supra note 76, art. 15.
104 EU-Canada Agreement, supra note 104, recital 11 and art. 18(1). The EU and Canada share the commitment to a low-carbon economy and a market for achieving emissions reduction: see EU-Canada Summit Declaration, 9547/09 (6 May 2009), online: European Commission <ec.europa.eu/transport/modes/air/international_aviation/country_index/doc/2009-05-06-eu-ca_summit_declaration_en.pdf>.
105 EU-Canada Agreement, supra note 100, art. 18(2). Indeed, prior to negotiations, the Commission was adamant the Agreement must be consistent with commitments to sustainable development and not hamper the EU’s ability to "apply regulatory or economic instruments to mitigate" side-effects of aviation: see Developing a Community civil aviation policy towards Canada, COM(2006) 871 final, para 5.3.
106 EU-Canada Agreement, supra note 100, art 18(2).
107 Ibid, art 18(4).
108 Ibid, art 18(5).
110 Ibid, art 18(3).
111 Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part and the government of the State of Israel, of the other part (2 August 2013) OJ L 208/3 [EU-Israel Agreement].
address the environmental impact of air transport. Similarly, during negotiations the Commission underlined the need to incorporate sustainable development into any aviation agreement with Israel and noted that any agreement must not hamper the EU's ability to "regulatory or economic instruments to mitigate unwanted side-effects of growth in air traffic".

IV. IMPACT OF THE EU’S ENVIRONMENTAL POLICIES AND VALUES ON THE CHICAGO CONVENTION

The judgement and reasoning of the ECJ in ATA, as well as the environmental provisions inserted into the EU's bilaterals with countries around the world, are of great interest, not only as evidence of how ambitious the EU wishes to be global leader in dealing with aviation emissions but also for the implementation of the Chicago Convention.

As has been alluded to, the EU's air transport bilaterals, which are in fact signed by all Member States of the Union with third States, make repeated references to the Chicago Convention. In ATA the ECJ held, perhaps controversially, that the EU is not bound by the Chicago Convention because it is not a party to the Convention. However, the effect of the judgement and references made to provisions of the Chicago Convention in fact reinforces the status of that instrument as the principal source of international air law.

Article 82 of the Chicago Convention specifically prohibits any “obligations and understandings” that are inconsistent with its terms. As the ECJ reasoned, though the EU itself is not a party to the Convention or ICAO, the EU aviation ETS relates to "the objective of improving environmental protection" and is perfectly consistent with ICAO’s guiding principles for the design and implementation of market-based measures.

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112 Ibid, art 16(4).
115 ATA, supra note 42, paras. 3, 60 and 71. In rejecting the applicability of the Chicago Convention Benoît Mayer writes the ECJ embarked on a path of “isolationism”, which is dangerous for the integrity of international law: see Benoît Mayer, “Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011” (2012) 49 CMLR 1113, especially pp. 1123-1125.
117 Chicago Convention, supra note 43, art 82. See also Milde, supra note 116 at 18.
118 ATA, supra note 42, para 138.
for international aviation. An aircraft operator wishing to land or take off at an EU airport simply must comply with the high standard of environmental protection the EU has set for itself and as is required by the EU legislator. Though such EU standards are higher than what is required by ICAO, they are valid as long as they are applied in a non-discriminatory manner, and as long as they are not duplicative in nature.

In less than twenty years, the matter of environment has been propelled from a passing mention in ICAO’s Strategic Objectives to become one of the established comprehensive objective for the 2014-2016 triennium. The fact that environmental matters are now a core objective of ICAO can perhaps be attributed to the EU’s ambitious efforts in this regard, though often much to the chagrin of other States. In referring to the provisions of the Chicago Convention, despite repeated denial of its application to the Union as an entity, the European court in fact affirms the obligations and rights of States, individually and collectively, contained in the primary source of international aviation law.

Though the Chicago Convention does not explicitly mention, let alone deal with, environmental matters of aviation, the text of the Convention, perhaps due to the astute foresight of the drafters, does contain enough leeway to allow ICAO to adopt measures to deal with “all aspects of international civil aeronautics”. This “capture” phrase can and should be used by ICAO to adopt concrete measures and policies to address aviation emissions, and till ICAO does so, nothing can prevent a State, or in the case of the EU,

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119 Ibid, para 149-150; see also ICAO Res. A37-19, Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection – Climate Change, Annex, b) and f) respectively, online: ICAO <www.icao.int/environmental-protection/37thAssembly/A37_Res19_en.pdf>.
120 ATA, supra note 42, para 128. For compliance with laws and regulations relating to the admission to or departure from its territory of aircraft engaged in international air navigation, see Chicago Convention, supra note 43, art. 11.
121 ATA, supra note 42, paras. 154-155. See also Directive 2008/101/EC, supra note 33, Preamble, recitals 17, 21.
122 ATA, supra note 42 paras. 150-151.
123 ICAO, Strategy: Guiding International Civil Aviation into the 21st Century, online: ICAO <www.icao.int/Documents/strategic-objectives/sap1997_en.pdf>. The ICAO report noted “[…] as for the environment there is a perception that the aviation sector may be contributing unduly to both existing and emerging problems”: ibid, at 7 [emphasis added].
125 Chicago Convention, supra note 43, art 44(i).
an international legal person, from adopting measures which are widely recognized as requiring concerted action yet have for decades been postponed due to the inability to achieve the necessary consensus. The European Union's internal legislation, external agreements, and even the jurisprudence of its highest court, serve to remind us that it takes one to challenge global inaction and spearhead change.

V. CONCLUSION

Though the contribution of aviation to climate change accounts around 2-3% of all CO2 emissions, the rapid growth of the industry will certainly mean that emissions will increase.\(^{127}\) Aviation remains the "least climate friendly" mode of transport.\(^{128}\) The reaching of an ICAO agreement on market-based measures was cited as "an historic milestone for air transport and for the role of multilateralism in addressing global climate challenges".\(^{129}\) However, this historic "agreement" merely passed the matter along to 2016. Despite the reiteration that ICAO is/should be the legally mandated international body to tackle aviation emissions in the draft Paris Protocol,\(^{130}\) it is yet to be seen whether any concrete global measures will in fact be in place by the time the next ICAO Assembly concludes.


EXPORTING ENVIRONMENTAL VALUES THROUGH OPEN SKIES: THE CASE OF THE EUROPEAN UNION

The EU, on the other hand, is on target to reach its goals to reduce greenhouse gas emissions by 20% compared to 1990 levels by 2020.131 As it attempts to be "global aviation hub",132 EU has projected itself "a new heavyweight player"133 in the field of aviation and as a leader in combating emissions.134 Internally, the EU's founding principles empower policies and regulations that place economic development on par with protecting the environment. These principles and policies have infused applicable regulations that ensure "sustainable aviation" in the internal market. At times, the EU has engaged in unilateral environmental action as a means to prompt greater multilateral action,135 of which the adoption of the EU aviation ETS is a prime example. Alternatively, and something which is commendable, in its external relations and in the air transport agreements that have been actively sought with third countries, the EU has succeeded in infusing environmental protections and not forgone its commitment to "decarbonising the economy".136

In the latest review of the EU's external aviation policy, the EU underlined its "continued willingness to agree a global approach in ICAO on the issue of aviation emissions so as to enable sustainable development of the aviation industry".137 Indeed, as the EU has continuously insisted, aviation is by nature international and in order to effectively address emissions from international aviation in a manner that is sustainable, economically viable and enjoys the support of all stakeholders, it is necessary to secure an international agreement to that effect.138

131 By 2012, the EU already achieved the target of a 18% reduction compared to 1990 levels of greenhouse gas emissions, and is projected to over-achieve the target by reaching a reduction of 24% compared to 1990s levels in 2020. See Taking Stock of the Europe 2020 Strategy for smart, sustainable and inclusive Growth, COM(2014) 130 final/2 (19 March 2014), pp. 12-13, online: European Commission <ec.europa.eu/europe2020/pdf/europe2020stocktaking_en.pdf>.
132 Roadmap to a Single European Transport Area, supra note 10, para 28.
133 Agenda for the Community's external aviation policy, supra note 60, sect I, para 1.
135 See Elisa Morgera, "Ambition, Complexity, and Legitimacy of Pursuing Mutual Supportiveness Through the EU’s External Environmental Action", 195-208 in Vooren, Blockmans & Wouters (2013), supra note 14 at 197-198. Indeed, the Lisbon Treaty, under Article 21(2)(h) mandates the Union to "promote an international system based on stronger multilateral cooperation [...]". See also COM/2013/0722, supra note 46 at 2.
Mayer notes that:
It is not a secret that the EU was built at least partly as a way to ensure that European States maintain a say in international matters in a decolonized world. Thus, it is not surprising for the EU to press for international efforts, and such actions may not be illegitimate, provided they are compatible with international law and global interests.
Mayer, supra note 115 at 1138.
136 EU’s External Aviation Policy, supra note 63, para 9.
137 Ibid.
138 See e.g. Regulation (EU) No 421/2014, supra note 48, Preamble, recital 1-2.
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