IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

REFERENCE FROM THE HIGH COURT OF JUSTICE, LONDON

CASE C-366/10

THE QUEEN
on the application of
(1) THE AIR TRANSPORT ASSOCIATION OF AMERICA
(2) AMERICAN AIRLINES, INC.
(3) CONTINENTAL AIRLINES, INC.
(4) UNITED AIR LINES, INC.

Claimants

-and-

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION
THE NATIONAL AIRLINES COUNCIL OF CANADA

Interveners

v

THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

-and-

THE AVIATION ENVIRONMENT FEDERATION
WWF-UK
THE EUROPEAN FEDERATION FOR TRANSPORT AND ENVIRONMENT
THE ENVIRONMENTAL DEFENSE FUND
EARTHJUSTICE

Interveners

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM

12 November 2010

INTRODUCTION

1. The United Kingdom submits these observations on the questions referred under Article 267 TFEU by the High Court of Justice, Queen's Bench Division, Administrative Court ("the referring court") and set out in paragraph 2 of the request for a preliminary ruling.

2. The Claimants are the principal trade association of the US airline industry and three leading US airlines. They are supported by two interveners in the national proceedings: the International Air Transport Association ("IATA") and the National Airlines Council of Canada ("NACC").[1] The Defendant is the Secretary of State for Energy and Climate Change, and is supported by five interveners ("the Environmental Organisations").

3. The reference concerns the amendment of Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Union ("the 2003 Directive") by Directive 2008/101/EC of the European Parliament and of the Council ("the 2008 Directive"), so as to include aviation activities within the Emissions Trading Scheme ("the ETS").

4. The nominal target of the Claimants' challenge is a statutory instrument made by the Secretary of State for Energy and Climate Change, which had the sole purpose of implementing the 2008 Directive in the United Kingdom.[2] They do not suggest, however, that the United Kingdom Regulations fail to achieve that purpose, or that they are defective as a matter of national law. The Claimants' challenge is in substance directed solely to the validity of the 2008 Directive, and thus to the 2003 Directive as amended by it ("the Amended Directive").

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[1] Further details of the parties to and interveners in the national proceedings are given at paragraphs 3-8 of the Reference.

[2] The Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 (SI 2009/2301) ("the 2009 Regulations"), which entered into force on 17 September 2009 and implemented a number of provisions of the 2008 Directive. The remaining provisions of the 2008 Directive were implemented in the United Kingdom by the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (SI 2010/1996), which revokes the 2009 Regulations with certain savings and transitional provisions. In consequence, the Claimants' challenge is now in effect a challenge to those 2010 Regulations.

5. The Claimants contend (as summarised in paragraph 24 of the request for a preliminary ruling) that the 2008 Directive is unlawful under EU law because it is contrary to:

   a. Customary international law;

   b. The Chicago Convention on International Civil Aviation of 1944;

   c. The Kyoto Protocol to the UN Framework Convention on Climate Change; and

   d. The Air Transport Agreement between the United States of America, the Member States and the European Community made in April 2007 ("the Open Skies Agreement").

   Whilst a number of other international agreements are referred to by IATA and NACC (in particular the Agreement on Air Transport between Canada and the European Union), their relevance is not clear to the United Kingdom. It is not open to the interveners to expand the scope of the issues between the parties, as reflected in the questions referred. This principle is accepted by IATA and NACC (IATA and NACC written observations, paragraph 33)[3]. Accordingly, the significance of the further provisions referred to is said to be that they are generally reflective of the same principles of sovereignty that apply in relation to the Open Skies Agreement (ibid., also paragraph 153). In such circumstances, it is difficult to understand what, if anything, they add to the case.

6. The United Kingdom (in common with the Secretary of State for Energy and Climate Change) considers each of the arguments advanced by the Claimants to be without merit. It contends, in short summary, as follows:

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[3] IATA, NACC and the Environmental Organisations were given permission to intervene in the proceedings before the referring court. Permission was granted on the condition that they serve upon the other parties the written observations they intended to file with this Court 28 days in advance of the final deadline, so that their arguments could be known and addressed in the written procedure. It is for this reason that the United Kingdom is able to reference and reply to the interveners' observations as filed.

a. As to Question 1 of the referring court, the validity of the 2008 Directive may not be assessed in the light of the provisions relied on by the Claimants, with the exception of the customary international law principle, reflected in Article 1 of the Chicago Convention, that each State has complete and exclusive sovereignty over its airspace and, insofar as it is of any relevance, the customary international law principle that no State may validly purport to subject any part of the high seas to its sovereignty. However, the customary principles identified by the Claimants do not in any event fall to be applied directly: rather, they apply in the first instance to determine the territorial scope of Member State sovereignty, which in turn affects EU competence.

b. As to Questions 2-4 of the referring court, even if the Claimants were entitled, as a matter of law, to rely upon each of the legal rules that they invoke, none of those rules on its proper construction prohibits the inclusion of aviation activities in the ETS, either to the extent that flights take place outside the airspace of the Member States (Questions 2-3) or generally (Question 4).

7. After some introductory words on the ETS, the United Kingdom addresses the questions of the referring court in turn.

THE EMISSIONS TRADING SCHEME ("ETS")

Significance and functioning of the ETS

8. The ETS, introduced by the 2003 Directive, is one of the key policies introduced by the Union to help meet its greenhouse gas emissions reduction target under the Kyoto Protocol.[4] The Union is required to make an 8% reduction in emissions compared to 1990 levels by the first Kyoto Protocol commitment period (2008 to 2012).

9. The ETS (which is briefly summarised in paragraph 9 of the request for a preliminary ruling) is a market-based mechanism that incentivises the reduction of greenhouse gas emissions in a cost-effective and economically efficient manner. It operates through the allocation and trade of greenhouse gas emissions allowances throughout the EEA. One allowance represents one tonne of carbon dioxide equivalent. For

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[4] The introduction of the ETS is described in detail in paragraphs 5-18 of the judgment in Case C-127/07 *Societé Arcelor Atlantique et Lorraine* [2008] ECR I-9895.

Phase II (2008-2012) an overall limit, or "cap", has been set by each Member State on the total number of allowances issued to installations in the ETS, based on the Member States' emission reduction targets (under the Kyoto Protocol and/or national law). The allowances are distributed by Member States to the installations in the ETS.

10. At the end of each year, operators of installations are required to ensure they have enough allowances to account for their actual emissions. They have the flexibility to buy additional allowances (on top of their allocation), or to sell any surplus allowance generated from reducing their emissions below their allocation.[5] The buying and selling of allowances takes place on a Union-wide market. An operator must demonstrate that it is in compliance with the ETS by surrendering the relevant number of allowances by 30 April each year. If the operator fails to do so, it will face financial penalties. The ETS provides a flexible compliance regime for operators, while ensuring that emissions in the Union (and indeed the EEA[6]) are reduced to the level of the cap.

Application of the ETS to aviation activities

11. On 20 December 2006, the Commission presented a proposal for a directive amending the 2003 Directive so as to include aviation activities in the system for greenhouse gas emission allowance trading within the Union. That proposal led to the adoption on 19 November 2008 of the 2008 Directive, which amends the 2003 Directive.

12. The relevant provisions of the Amended Directive are set out in paragraphs 11-20 of the request for a preliminary ruling. In short summary:

    a. By Article 3a and Annex I of the Amended Directive, the ETS applies (with limited exceptions) to flights which depart from or arrive in an aerodrome

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5 In Phase II, 93% of allowances will be allocated free to existing UK installations in five equal annual instalments; the remaining 7% will be auctioned or otherwise sold.

6 It is to be noted that the scheme under the 2003 Directive has been extended to the EEA, and the Amended Directive will likewise be extended to cover the EEA in due course.

situated in the territory of a Member State to which the Treaty (the TFEU) applies.

b. Each aircraft operator which is subject to the rules in the Amended Directive has an administering Member State.[7] The Commission adopted in August 2009 a list of the operators to be regulated by each Member State (see Commission Regulation (EC) No. 748/2009). The list must be updated annually, and this has been done most recently by Commission Regulation (EU) 82/2010 of 28 January 2010.

c. From 2012, net CO_2 allowances, and therefore emissions, for aircraft operators will be subject to a cap of 97% of average levels of emissions in the period 2004 to 2006. The cap will tighten to 95% of these levels from 2013 onwards.[8] Any emissions above those levels will have to be matched by equivalent reductions in other sectors in the ETS, so that expansion in aviation will not lead to an overall increase in net CO_2 emissions.

d. 85% of allowances are to be allocated free to operators according to a formula for distribution.[9] To qualify for a share of these allowances, operators must submit a benchmarking plan, monitor tonne kilometre data in accordance with that plan during the benchmarking year (which is 2010 in the case of allowances allocated for 2012, and for the period 2013-2020) and report the data to the regulator.[10] The remaining 15% of allowances will be distributed via auctions.[11]

e. Aircraft operators are required to surrender allowances equal to their emissions from the beginning of 2012.[12] If operators exceed the number of

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7 Amended Directive, Article 18a.

8 Article 3c(1) and (2).

9 Subject to Article 3f, which provides that 3% of the total quantity of allowances to be allocated shall be set aside in a special reserve for fast-growing aircraft operators and new entrants to the market in future years.

10 Article 3e.

11 Article 3d.

12 Article 12.

free allowances received, they will have to purchase additional allowances before the end of the compliance year. This may be done via the aviation ETS auction process, from the ETS more generally (that is, purchase from other emissions sectors which have a surplus), or via Certified Emission Reductions and Emission Reduction Units under the Kyoto Protocol, up to the specified limits.

f. Failure to surrender sufficient allowances to cover emissions for the compliance year will result in the application of a financial penalty of €100 per tonne of CO_2 emitted.[13]

g. As some 85% of the allowances are allocated free to operators, any operators that are able to reduce their emissions in 2012 and beyond to 85% or less of the emissions in the relevant monitoring year should have no need to purchase further allowances at all.[14]

13. As appears from the features as outlined above, the ETS cannot correctly be characterised as falling within either Articles 15 or 24 of the Chicago Convention (i.e. as imposing some form of fee, due or other charge in respect solely of a right of transit or entry, or as customs duty or similar charge on fuel), or Article 11(2)(c) of the Open Skies Agreement (i.e. as imposing a tax on fuel). As explained at recital (14) of the Amended Directive, the objective of the amendments to the Directive is to reduce the climate change attributable to aviation: the ETS is not a charge for the use of airports or a means of raising revenue from fuel (or otherwise). Indeed, as discussed further below in the context of Question 4, the Claimants' characterisations are inconsistent with the approach of both the ICAO Council and the ICAO Assembly.

14. Based on Bloomberg analysis of Eurocontrol growth rates and CE Delft emission estimates, an Impact Assessment carried out by the UK estimates that the inclusion of aviation in the ETS for the whole of the EU will lead to a total reduction of 480 million tonnes of CO_2 emissions for the period 2012-2020. That reduction would be unavailable if the Claimants were correct that the ETS may not be extended to

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13 Article 16(3).

14 The monitoring year is established pursuant to Article 3e(1). It is noted that pursuant to Article 30(4), the functioning of the Directive in relation to aviation activities is to be reviewed by the Commission by 1 December 2014.

aviation activities at all (see Question 4). A substantial proportion of this reduction would be unavailable if the Claimants were correct that the ETS may not be applied to parts of flights that take place outside the airspace of the Member States (see Questions 2 and 3).

QUESTION 1: CLAIMANTS' ENTITLEMENT TO RELY ON THE RULES INVOKED

15. Question 1 raises the issue of whether a series of identified rules of international law are capable of being relied upon in this case to challenge the validity of the Amended Directive. These comprise rules of customary international law (see *Questions 1(a)-(d)*) and rules derived from treaties (*Questions 1(f)-(g)*). The basis upon which the Claimants claim to be entitled to rely upon the various rules of public international law that they invoke is set out at paragraphs 67-68 of the request for a preliminary ruling. The treaty provisions upon which it is sought to rely are set out at paragraphs 36, 41 and 42 of the request for a preliminary ruling.[15] The United Kingdom submits, in respect of each rule upon which it is sought to rely, as follows.

Question 1(a)-(d): entitlement to rely on customary international law

16. ***As to Questions 1(a)-(c)***, the United Kingdom accepts that the validity of the Amended Directive may be reviewed against the customary international law principle, reflected in Article 1 of the Chicago Convention, that each State has complete and exclusive sovereignty over its airspace (Question 1(a)). The same applies so far as concerns the principle that no State may validly purport to subject any part of the high seas to its sovereignty (Question 1(b)), although it is not accepted that this principle could be of any relevance save to the extent it comprises the principle of freedom of overflight of the high seas (Question 1(c)).

17. The United Kingdom wishes however to clarify the basis upon which that acceptance is made.

18. Paragraph 51 of Case C-308/06 *Intertanko* [2008] ECR I-4057 (referred to in the request for a preliminary ruling at paragraph 67) recalls the well-known proposition that the Union is bound by principles of customary international law, and therefore by treaties which codify such principles (while then going on to point out that the

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15 See also bundle accompanying the request for a preliminary ruling, tabs A-11, A-15 and A-17.

relevant provisions of Marpol 73/78 did not represent such a codification). It is equally well-established, however, that not every rule of international law by which the Union is bound may be used as a benchmark for assessing the validity of Union legislation. In the case of international agreements concluded by the Union, it is clear that other criteria must be satisfied before a provision may be used for this purpose (*Intertanko*, paragraphs 42-45); and by parity of reasoning, the same must be true where it is sought to rely upon principles of customary international law. The need for caution in this regard was emphasised by Advocate General Jacobs in Case C-162/96 *Racke* [1998] ECR I-3655, Opinion at paragraphs 70-85. The point is further illustrated by the fact that the right of innocent passage in the territorial sea, which was among the provisions of UNCLOS relied upon by the claimants in *Intertanko*, is a codification of a principle of customary international law.[16] The Court held none the less that the "nature and the broad logic of UNCLOS" prevented the assessment of the validity of a measure in the light of that Convention (paragraph 65 of the judgment).

19. EU legislation must always, no doubt, be interpreted so far as possible in a manner consistent with customary international law.[17] It is also the case that an EU measure may be reviewed on the basis of an international obligation of the EU (including an obligation arising under customary international law) when it is clear that the measure is intended to give effect to that international obligation: the so-called *Nakajima* exception,[18] which was applied in *Racke*.[19] The Claimants seek to apply customary international law principles to quite different effect. It is noted that the IATA/NACC written observations also refer to Case T-115/94, *Opel Austria* [1997] ECR II-39.

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16 See *Oppenheim's International Law* (9th edn.) Vol. 1, §198, p. 614.

17 Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para 9 (cited in *Intertanko* para 51). This case is relied on by IATA/NACC at paragraphs 115-116 of their written observations. IATA/NACC also invoke "the technique of harmonious or consistent interpretation in international law, a recognized method of analysis that in the United States goes by the name of the 'Charming Betsy' doctrine". Their contention is that the Directive must at least be narrowly construed in light of customary international law. However, the Directive is not inconsistent with customary international law; and nor could there be any scope for the narrow construction that is sought by IATA/NACC (that it only apply within the airspace of Member States). The Directive applies in unambiguous terms to "all flights which arrive at or depart from an aerodrome situated in the territory of a Member State": see the wording of Annex I of the Amended Directive inserted before the table of activities in that Annex (emphasis added), which is subject only to the specific exclusions set out in that table.

18 Case C-69/89 *Nakajima v. Council* [1991] ECR I-2069; see further Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para 49.

19 Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 48.

However, that case turned on protection of the legitimate expectations of the claimant. Thus the customary international law principle of good faith relied upon in that case was found to be the corollary of the principle of the protection of legitimate expectations, which is a general principle forming part of the Union legal order.[20]

20. The United Kingdom would further accept that the principles of customary international law may be relied upon to determine the scope of the territorial competence of the Union.[21] It is on this basis that the acceptance summarised at 16 above is made. The principles identified in Questions 1(a)-(c) do not fall to be applied directly: rather, they apply in the first instance to determine the territorial scope of Member State sovereignty, which in turn affects EU legislative competence.[22] While the point may be academic in the present case, the United Kingdom should not be taken to accept that the validity of Union legislation may in other (let alone all) circumstances be reviewed on the basis of its compliance with customary international law.

21. As to ***Question 1(d)***, the United Kingdom does not accept the existence of the alleged principle of customary international law to the effect that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided by international treaty (Question 1(d)). The treaty provisions (Article 92(1) UNCLOS and Article 6(1) of the Convention on the High Seas) concern the flag State's exclusive jurisdiction over ships on the high seas, not aircraft, and the same applies so far as concerns the other legal materials relied on by the Claimants. The Claimants have made no attempt to establish the existence of a customary rule in relation to aircraft.

Question 1(e): entitlement to rely on Chicago Convention

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20 Case T-115/94, *Opel Austria* [1997] ECR II-39, paragraphs 93-94.

21 As in Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 12-15, the other case cited in *Intertanko* para 51.

22 Article 52 TEU and Article 355 TFEU specify the territories to which the Treaties apply, which must also determine the scope of legislative competence under the Treaties. The Amended Directive, like all Union measures, must be reviewable in accordance with that territorial limitation, which itself must be construed in accordance with customary international law.

22. The United Kingdom submits that the Claimants are not entitled to rely upon the Chicago Convention to challenge the validity of the Amended Directive for the following reasons:

    a. Neither the EU nor its predecessor, the EC, is a party to the Chicago Convention (as recalled at recital (9) to the 2008 Directive). Nor has the EU assumed the powers previously exercised by the Member States which are signatories. The EU is therefore not bound by the Chicago Convention, and the Chicago Convention does not form part of the body of law which can be used to assess the validity of EU rules: Case C-308/06 *Intertanko*, paragraphs 44, 47-52.

    b. Pre-accession agreements to which Article 351 TFEU applies but to which the EU is not a party do not prevail over provisions of secondary Union legislation.

    c. Article 351 cannot confer enforceable rights upon individuals where none are conferred by the pre-accession agreement itself. EU law requires that only directly effective Treaty provisions may be relied upon by natural or legal persons. The United Kingdom does not accept either that the "nature and broad logic" of the Chicago Convention is such as to permit it to be used for examining the validity of Union legislation, or that the provisions relied upon are "unconditional and sufficiently precise": Case C-308/06 *Intertanko* paragraph 45.

    d. The purpose of Article 351 is in any event to make it clear, in accordance with the principles of international law, that application of the Treaties is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations. Article 351 may not be relied upon when Member States do not seek to comply with the obligations that are alleged to exist under such agreements (whether because they have concluded that no such obligations exist, or otherwise).

23. As to the arguments made in the IATA/NACC written observations:

    a. IATA/NACC contend that the EU has assumed the powers previously exercised by the Member States under the Chicago Convention, and in this respect place considerable weight on the fact that the Union is a party to the Open Skies Agreement (written observations, paragraphs 128-130).

However, it is not because the Union is party to an agreement that is self-evidently different in scope and content that it may somehow be considered a party to the Chicago Convention.

b. IATA/NACC refer to Case C-466/98 *Commission v. United Kingdom* [2002] ECR I-9427, but the issue in that case was whether the Member State's rights under the relevant bilateral agreement had to be exercised in accordance with Article 43 of the EC Treaty (now Article 49 TFEU). The position is that Member States have retained competence in the sphere of civil air transport, including with respect to rights and obligations under the Chicago Convention, as is also implicit from recital (9) to the 2008 Directive in which reference is made to the actions of Member States within the framework of the Chicago Convention. Cases C-471/98, *Commission v. Belgium* [2002] ECR I-9681, and C-475/98, *Commission v. Austria* [2002] ECR I-9797, to which IATA/NACC also refer, do not suggest otherwise.[23]

c. It is not because the Chicago Convention refers in general terms in its preamble to the establishment of international air transport service, or that Articles 11-12 establish whether it is international or municipal law that applies to the admission or departure, overflight or manoeuvre of aircraft, that the Convention can be taken as conferring enforceable rights upon individuals. As to the reliance on a Florida District Court case where it was held that certain provisions of the Chicago Convention were self-executing, this is merely an instance of a US court applying entirely different tests both as to treaty interpretation and as to direct effect.[24]

d. Considerable emphasis is also placed on the so-called *Hushkits* arbitration – a claim brought by the USA against various Member States under the

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[23] Case 471/98, paragraphs 74-75 and 111-126; Case 475/98, paragraphs 74-75 and 111-126. The Court identified three specific areas of exclusive Community competence, namely airport slots, computer reservation systems and intra-Community fares and rates. There could be no suggestion by reference to this that the Union has exclusive competence in respect of the Chicago Convention generally.

[24] Cf. IATA/NACC observations, paragraphs 130-134, referring to *Aerovias Interamericanas de Panama, SA v. Bd. Of County Commissioners of Dade County*, 197 F. Supp. 230 (SD Fla 1961). The other US case that IATA/NACC refer to is a judicial review claim brought in circumstances where US domestic legislation requires administrators to exercise their powers in accordance with international agreements to which the US is a party.

Chicago Convention.[25] However, the arbitration claim was settled. So far as concerns the proceedings before this Court, in Joined Cases C-27/00 and C-122/00 *Omega Air Ltd & Ors* [2002] ECR I-2569, the claim was brought on the basis that the relevant regulation was in violation of (a) the duty to give reasons, (b) the general principle of proportionality, (c) such rights as private parties may derive from the General Agreement on Tariffs and Trade and/or the Agreement on Technical Barriers to Trade. Notably, the claim was not brought on the basis that the Chicago Convention rendered the regulation invalid.[26]

Questions 1(f) and (g): entitlement to rely on Open Skies and Kyoto

24. It is common ground that the EU is a party to both the Open Skies Agreement and the Kyoto Protocol and is therefore bound by them pursuant to Article 216(2) TFEU (formerly Article 300(7) TEC). It does not however follow that the Court of Justice has jurisdiction to review the validity of Union legislation on the basis of such international agreements.

25. In order for an international agreement to which the EU is a party to be used as a basis for reviewing the lawfulness of EU secondary legislation:

    a. "the nature and broad logic" of the international agreement must not preclude its use for the purposes of examining the validity of EU legislation; and

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25 See IATA/NACC written observations, in particular at paragraph 145.

26 In their written observations (paragraph 145), IATA/NACC assert that in the Hushkits arbitration "the EU argued that the American firms could invoke the ...Treaty... to have the ECJ determine the relationship between treaty obligations of Member States, including those under the Convention". The position of the EU Member States was that there were local remedies available to the USA with respect to its complaints about the Regulation in question, and was more nuanced than IATA/NACC suggest. It was merely stated, by reference to (what is now) Article 351 TFEU that "The relationship between the treaty obligations of the EC Member States, for example under the Convention, and EC law, including the Regulation, is also exhaustively regulated by the EC Treaty and is a matter for interpretation by the European Court of Justice (or Court of First Instance)." The Member States relied on the existence of Cases 27/00 and 122/00 to make good their point that local remedies were available – cases where, as already noted, the Chicago Convention was not in fact invoked. See Preliminary Objections presented by the Member States of the European Union, 18 July 2000, paragraphs 24-26.

b. its provisions must appear, as regards their content, to be unconditional and sufficiently precise.[27]

26. These conditions amount to a requirement that the treaty as a whole must be capable of affording directly effective rights, and that the specific provisions relied upon must also be directly effective. Neither the Open Skies Agreement nor the Kyoto Protocol satisfies these conditions.

27. The key provision on grant of rights in the Open Skies Agreement makes clear that the grant is to the other Party as opposed to establishing directly effective rights for airlines. Thus, Article 3(1) provides: "Each Party grants to the other Party the following rights for the conduct of international air transportation by the airlines of the other Party." Other key provisions in the Agreement concern application of laws (Article 7), safety (Article 8), and security (Article 9). Taken as a whole, the Open Skies Agreement is not correctly characterised as affording directly effective rights, and the same applies to the individual provisions relied on (Articles 3(4), 7 and 11). To the extent that the Agreement may appear to attach rights to aircraft (cf. Article 11), such rights were not thereby conferred upon their owners. The international legal status of an aircraft is dependent on its registration in accordance with the national laws and regulations of the registering state: cf. the treatment of UNCLOS in Case C-308/06 *Intertanko*, paragraphs 59, 64-65. In addition, the specific provisions of the Open Skies Agreement that the Claimants rely on, namely Articles 3(4), 7 and 11, cannot be considered unconditional and sufficiently precise. The same basic points apply to the EU-Canada Agreement on which IATA/NACC rely (written observations, paragraph 137) – although the issue cannot arise at all in relation to that Agreement as its provisions are not being relied on to challenge the 2008 Directive.

28. There is no sense in which individuals are granted independent rights and freedoms by virtue of the Kyoto Protocol (cf. *Intertanko*, paragraph 59). Indeed, IATA/NACC have now taken the position that the Claimants' case does not allege a substantive violation of their rights under the Kyoto Protocol, and thus they need not demonstrate that the Protocol envisioned private claims (written observations, paragraph 138). Insofar as it matters, the specific provision that the Claimants rely on (Article 2(2)) cannot meet the requisite threshold in terms of being unconditional and sufficiently precise.

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27 Case C-183/03 *Intertanko* [2008] ECR I-4057, para 45.

QUESTION 2

29. Question 2 (like Questions 3 and 4) arises only to the extent that Question 1 may be answered in the affirmative. It asks whether the principles of customary international law identified by the Claimants in Question 1 invalidate the ETS if and insofar as it applies to those parts of flights (either generally or by aircraft registered in third countries) which take place outside of the airspace of EU Member States.

30. The Claimants' submissions on Question 2 are summarised at paragraphs 78-81 of the request for a preliminary ruling.

31. The United Kingdom submits that neither the principle of customary international law that each State has complete and exclusive sovereignty over its air space, nor any other principle upon which the Claimants may be entitled to rely, impinges upon the application of an emissions trading system such as the ETS, which does not purport to regulate the airspace of a third country or airspace over the high seas. The fact that operators of flights to or from an EU airport are required to have allowances to cover emissions caused by flights which pass over the territory of third countries or the high seas does not amount to regulation over the territory of a third country State or the high seas.

32. The analogy to the ICAO Decision concerning the US Notice of Proposed Rulemaking is inapposite (cf. IATA/NACC written observations, paragraph 151). The Notice would have required regulatory conduct on the territory of another state, i.e. the imposition of security measures by foreign air carriers when departing other States en route for the USA that were identical to US measures. By contrast, although the first of the customary international law principles relied on by the Claimants (that each state has complete and exclusive sovereignty over the air space above its territory) is reiterated at Article 1 of the Chicago Convention, it is not the position of the ICAO Assembly that Article 1 is infringed by the Amended Directive (see further below under Question 4: the same point applies so far as concerns the other provisions of the Chicago Convention relied on by the Claimants). In addition, as the Environmental Organisations have pointed out at paragraph 35 of their observations, the customary rule concerning the high seas on which the Claimants rely is subject to exceptions – as the Permanent Court held in the *Lotus* case (on which the Claimants rely): "But it by no means follows that a State can

never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas."[28]

33. Furthermore, regulation such as the ETS has no impact whatsoever on the sovereignty of other States, which remain free to impose emissions trading systems and other rules so far as concerns aviation over, into or from their territory or in respect of airspace over the high seas. The fact that a State's laws impact upon the actions of third country nationals does not *ipso facto* mean that they impact upon the sovereign rights of third countries. Indeed, the Amended Directive expressly foresees that other States will impose measures for reducing the climate change impact of flights, and to this end provides at Article 25(a):

> "Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission, after consulting with that third country, and with Member States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community scheme and that country's measures.
>
> Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3)."

34. Implicit in the Claimants' approach to Question 2 is that it would be compatible with international law for the ETS to be restricted to aircraft registered in EU Member States. The United Kingdom does not accept this. As the Environmental Organisations have pointed out (see request for a preliminary ruling paragraph 84), Articles 15(3) and 2 of the Open Skies Agreement, and Article 11 of the Chicago Convention expressly require that all regulations adopted by signatory states be applied without distinction as to nationality.

35. Alternatively, if (which the United Kingdom denies) the application of the ETS to such flights did constitute an "*extra-territorial act*", it would still be lawful. The Claimants relied before the national court on the requirements for lawfulness for acts that were identified by Professor Brownlie in *Principles of Public International Law* (7th ed.), pp. 311-312. However:

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[28] *Case of the SS Lotus (France v Turkey)* PCIJ Series A, No. 10 (1927),p. 25.

a. Those requirements are of no application, since they concern respectively (i) the assertion of criminal jurisdiction, (ii) the rule of comity, and (iii) the exercise by a State of jurisdiction over its own nationals abroad, and in any event expressly do not concern the regime of the high seas.[29] In addition, as noted by Brownlie at p. 320, aircraft have not fitted very readily into the jurisdictional rules of either domestic or international law.

b. Even if the rules relied on did apply, those requirements would be satisfied so far as concerns the ETS. They provide as follows:

> "Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
>
> (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
>
> (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
>
> (iii) that a principle based on elements of accommodation, mutuality and proportionality should be applied..."

36. Although it is noted that the NACC/IATA accord a very lengthy treatment to these requirements (written observations, paragraphs 168-206), there is no substantial basis for saying that any of the above are not satisfied in the instant case. The key points are as follows:

a. As to (i), the connection between the subject matter of the ETS, i.e. emissions from aviation, and jurisdiction under the Amended Directive is substantial and *bona fide*: the aircraft in question are making emissions at least in part within the EU and are operating to/from an EU airport.

b. As to (ii), there is no question of intervention into the domestic or territorial jurisdiction of other States, who remain entirely free to adopt such emissions trading systems as they see fit: see Article 25a of the Amended Directive, referred to above.

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[29] In their written observations at paragraph 166, IATA/NACC incorrectly suggest that the United Kingdom accepts the application of these principles. It does not, and nor could it be said to do so by reference to any fair reading of the reference for a preliminary ruling (paragraph 85).

c. As to (iii), a principle based on elements of accommodation, mutuality and proportionality can readily be seen as having been applied, again by reference to Article 25a, but also in light of the scale of the problem caused by global aviation emissions and the reduction of CO_2 emissions that the ETS will achieve (see paragraph 14 above).[30]

QUESTION 3

37. Question 3 also arises only to the extent that Question 1 may be answered in the affirmative. It asks whether certain provisions of the Chicago Convention (Question 3(a)) and the Open Skies Agreement (Question 3(b)) invalidate the ETS if and insofar as it applies the ETS to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of the Member States.

Question 3(a): Articles 1, 11, 12 of Chicago

38. The Claimants contend that the ETS, insofar as it applies to those parts of flights which take place outside the airspace of the Member States, infringes Articles 1, 11 and/or 12 of the Chicago Convention. Those provisions are set out at paragraphs 36(a)-(c) of the request for a preliminary ruling and are entitled, respectively, "Sovereignty", "Applicability of air regulations" and "Rules of the air". The Claimants' contentions in relation to each provision are summarised at paragraphs 88-93 of the request for a preliminary ruling.

39. As to Article 1, the United Kingdom would comment that Article 1 does no more than state the principle of customary international law already referred to. It adds nothing to the Claimants' case. The submissions made by the United Kingdom under Question 2, above, are repeated *mutatis mutandis*.

40. Article 11 requires that rules which are applied by a Contracting State within its airspace shall be applied to aircraft of all nationalities without discrimination, and that the aircraft within that State's airspace shall comply with those rules. Article 12 requires that Contracting States adopt measures to ensure that rules on flight and

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[30] The position adopted in the IATA/NACC written observations is extreme, and perplexing. For example, notwithstanding Article 25a of the Amended Directive, it is said (paragraph 194) that the Union has chartered a unilateral course, and it is asserted (ibid.): "These actions, by any measure, demonstrate complete disregard for any semblance of mutuality and accommodation."

manoeuvre in their airspace are complied with (and enforced by prosecution), and that such rules are kept uniform with those established from time to time under the Chicago Convention. It also states that the rules in force over the high seas on flight and manoeuvre shall be those established under the Chicago Convention.

41. The United Kingdom does not accept that the ETS constitutes regulation of or in the airspace of third countries. In any event, however, it infringes neither Articles 11 nor 12. The following points are made:

    a. Neither Article 11 nor Article 12 even purports to govern a system such as the ETS. Article 11 concerns laws and regulations relating to the admission and departure of aircraft and their operation and navigation within a Contracting State's territory. It ensures that applicable laws and regulations are applied on a non-discriminatory basis. The ETS is non-discriminatory. Article 12 relates to regulations concerning the flight and manoeuvre of aircraft. Neither applies to environmental legislation regarding emissions trading.

    b. Insofar as it matters, neither Article 11 nor Article 12 state that the *only* regulations which can apply in relation to a Contracting State's airspace are those made by the State in question.

    c. Neither Article 11 nor Article 12 purport to prevent environmental legislation from being adopted by States (or by the Union) on the ground that ICAO has not itself developed such legislation. The ICAO rules and regulations referred to in Article 12 are those relating to flight and manoeuvre. The analogy that the Claimants seek to draw between aircraft dropping or spraying (a matter regulated by ICAO) and an emissions trading system is self-evidently inapposite.

42. The ICAO Secretariat analysis of February 2004, relied upon by the Claimants at paragraph 93 of the request for a preliminary ruling,[31] is likewise not to the point. First, it simply reflects the opinion of the Secretariat at a given point in time. Second, as is clear from paragraphs 3.1 and 3.2 of that analysis, it pertains to emissions charges and not to emission trading systems. In this respect, the analysis of the Secretariat proceeds on the basis that "a charge is a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil

[31] Legal framework and policy issues related to the use of emission-related levies, February 2004, CAEP/6-WP/24 (document 36 of the Bundle accompanying the request for a preliminary ruling).

aviation" (see at paragraph 2.3 of the ICAO Secretariat analysis). The ETS evidently does not fall within this definition (and see further with respect to Question 4(b) below).

Question 3(b): Article 7 of Open Skies

43. The Claimants contend that the ETS, insofar as it applies to those parts of flights which take place outside the airspace of the Member States, infringes Article 7 of the Open Skies Agreement. That provision (entitled "Application of laws") is set out at paragraph 42(c) of the request for a preliminary ruling. "Territory" for the purposes of the Open Skies Agreement is defined in Article 1(9) of the Agreement, set out at paragraph 42(a) of the request for a preliminary ruling. The Claimants' submissions in relation to it are briefly summarised (by reference to their submissions on Article 11 of the Chicago Convention) at paragraph 98 of the request for a preliminary ruling.

44. Article 7 of the Open Skies Agreement being materially identical to Article 11 of the Chicago Convention, the United Kingdom repeats and adopts, *mutatis mutandis*, the submissions made above in relation to Article 11. Like that provision, Article 7 of the Open Skies Agreement does not contain any principle which prevents the adoption of the ETS.

45. The other agreements referred to by IATA/NACC (request for a preliminary ruling, paragraphs 99-100) are irrelevant to the questions of the referring court and could not improve the Claimants' position in any event, since as IATA/NACC accept, their terms are substantially the same as Article 7 of the Open Skies Agreement.

QUESTION 4

46. Question 4, like Questions 2 and 3, arises only to the extent that Question 1 is answered in the affirmative. It asks whether certain provisions of the Kyoto Protocol, the Open Skies Agreement and the Chicago Convention invalidate the ETS. It is however even broader in its implications than Questions 2 and 3. Whereas an affirmative answer to those questions would preclude the application of the ETS to those parts of flights which take place outside the airspace of the Member States, an affirmative answer to Question 4 would preclude the application of the ETS to any aviation activities.

Question 4(a): Article 2(2) of Kyoto and Article 15(3) of Open Skies

47. The Claimants contend that, by extending the ETS to aviation activities, the Union has infringed obligations under Article 2(2) of the Kyoto Protocol and Article 15(3) of the Open Skies Agreement to address aircraft emissions through ICAO. Those provisions are set out at paragraphs 41(b) and 42(d) of the request for a preliminary ruling. The Claimants' contentions in relation to each provision are summarised at paragraphs 103-107 of the request for a preliminary ruling.

48. The United Kingdom submits that references to ICAO and the Chicago Convention in Article 2(2) of the Kyoto Protocol and Article 15(3) of the Open Skies Agreement fall short of what would be required to incorporate Articles 1, 11, 12, 15 and 24 of the Chicago Convention into the EU legal order as a legal benchmark by which the validity of the Amended Directive could be judged.

49. In any event, Article 2(2) of the Kyoto Protocol and Articles 15(3) and 3(4) of the Open Skies Agreement do not require parties to those agreements to address aircraft emissions *exclusively* through ICAO. In that regard, the United Kingdom would point out the following:

    a. Article 2(2) of the Kyoto Protocol requires the parties to pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation fuels "working through [ICAO]". It does not require them to work exclusively through ICAO. Nor does it require them to agree with other ICAO members when they do discuss these matters in the context of ICAO. Article 2(2) imposes at most an obligation of conduct, not of result. Its language is not ambiguous and, while there is no basis for recourse to the *travaux préparatoires*, the United Kingdom notes that the preparatory materials relied on by IATA/NACC (written observations, paragraphs 216-218) do not undermine the basic point: Article 2(2) does not require parties to work exclusively through ICAO.

    b. Further, as the Environmental Organisations have submitted (see request for a preliminary ruling, paragraph 112; written observations, paragraph 60), the Union has worked through ICAO in its attempt to pursue a multilateral solution,[32] and has provided that it and the Member States shall continue to

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[32] See, in particular, the Member States' statement, recorded in the Minutes of the Ninth Plenary Meeting of the ICAO Assembly: Bundle accompanying the request for a preliminary ruling, tab E-46.

pursue multilateral efforts to address greenhouse gas emissions from the aviation sector: see recital (17) to the 2008 Directive and also Article 25a(2) of the Amended Directive.[33] The EU thus continues to comply with its obligation to work through the ICAO.

c. ICAO Resolution A36-22,[34] set out at paragraphs 54-55 of the request for a preliminary ruling and relied upon by the Claimants, is not legally binding, and does not purport to be legally binding, on EU Member States.[35] It has now been superseded in any event by ICAO Resolution A37-19 of 8 October 2010.[36]

d. While Resolution A37-19 resolves (at paragraph 6) that "ICAO and its member States with relevant organizations will work together to strive to achieve a collective medium term global aspirational goal of keeping the global net carbon emissions from international aviation from 2020 at the same level", it is at the same time recognised that "some States may take more ambitious actions prior to 2020" (paragraph 6(c)). The resolution recognised the important role of market-based measures (MBMs), such as emissions trading, and agreement was reached on a range of 15 guiding principles to be applied by States designing and implementing MBMs, with which the ETS is compliant. Thus paragraph 14 of the resolution: "*Urges* States to respect the guiding principles listed in the Annex, when designing new and implementing existing MBMs for international aviation, and to engage in constructive bilateral and/or multilateral consultations and negotiations with other States to

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33 As stated in the first sentence of Recital 17: "The Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation." Article 25a(2) provides: "The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary."

34 Bundle accompanying the request for a preliminary ruling, tab D-32.

35 As stated at paragraph 110 of the request for a preliminary ruling, as a general matter, Assembly resolutions cannot be used to diminish the rights of Contracting States to the Chicago Convention, or to add to their obligations. More specifically, Resolution A36-22 merely "encourages" Contracting States and the Council to adopt measures consistent with a given framework (which in turn does no more than to "urge" Contracting States not to implement an emissions trading scheme on other Contracting States' aircraft operators except on the basis of mutual agreement between those States).

36 See ICAO Resolution A37-19 of 8 October 2010, ICAO Doc. A37-WP/402, p. 17-10, at paragraph 1.

reach an agreement." This is evidently inconsistent with the contention that regional MBMs such as the ETS are unlawful as a matter of the Chicago Convention (including the customary international law principle of sovereignty reflected in Article 1 of the Convention).[37]

e. Likewise, it cannot credibly be said that the EU has either indirectly approved the Chicago Convention or agreed to be bound by all of its terms, although the simple point is that the Chicago Convention makes no provision for emissions trading systems and extending the ETS to aviation activities is consistent with its provisions.

f. Article 15(3) of the Open Skies Agreement is relied upon solely for its reference to Article 3(4) of the same Agreement, which in turn refers to Article 15 of the Chicago Convention. That reference is however a very limited one. It means no more than that any requirements to file flight schedules, programmes for charter flights and operational plans for environmental reasons should be imposed "under uniform conditions consistent with Article 15 of the Convention" - in other words, on a non-discriminatory basis. It does not incorporate the last sentence of Article 15 of the Chicago Convention, which cannot avail the Claimants anyway, as submitted below in answer to Question 4(b). Further, it is noted that the ETS does not in fact require the filing of flight schedules etc, and it is also recalled that the ETS is not discriminatory.

50. The provisions of the EU-Canada Agreement relied upon by IATA/NACC (request for a preliminary ruling, paragraphs 115-118) are not relevant to the questions of the

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[37] Belgium has entered a reservation with respect to certain paragraphs of Resolution A37-19 (formerly known as A37-17/2) on behalf of the Union, its Member States and the 17 States members of the European Civil Aviation Conference. This reservation is principally clarificatory in aim. It states in relevant part: "It is important also to make clear that in no way can paragraph 14 be construed as requiring that market-based measures may only be implemented on the basis of mutual agreement between States. The Chicago Convention contains no provision which might be construed as imposing upon the Contracting Parties the obligation to obtain the consent of other Contracting Parties before applying the market based measures referred to in Resolution A37-17/2 to operators of other States in respect of air services to, from or within their territory. On the contrary, the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own laws and regulations to aircraft of all States." For completeness, it is also recalled that the Claimants have a misconceived contention that reservations to ICAO Assembly resolutions are not permitted: see paragraph 107 of the request for a preliminary ruling. Such resolutions are not legally binding and the law concerning reservations to treaties does not apply to them, whether by analogy or otherwise.

referring court, or do not in any event add to the provisions relied upon by the Claimants, save that Article 18.4 of that Agreement does in fact appear to envisage that the parties may seek to address emissions from aviation independently of ICAO.[38]

51. IATA/NACC have also introduced a new argument that the Union is seeking to impose the strictures of the Kyoto Protocol on the USA, which has not ratified the Protocol, and it is said that this contravenes principles of customary international law (written observations, paragraphs 211-214). The interveners are not, of course, entitled to expand the scope of the issues between the parties. The argument is anyway wholly misconceived. The provisions of the Vienna Convention on the Law of Treaties concerning territorial application (Article 29) and binding third states (Article 34) are of no relevance in this case, and the Amended Directive does not of course seek to establish obligations on the USA.

Question 4(b): Article 15 of Chicago, Articles 3(4) and 15(3) of Open Skies

52. The Claimants contend that, by extending the ETS to aviation activities, the Union has infringed the last sentence of Article 15 of the Chicago Convention, which is set out at paragraph 36(d) of the request for a preliminary ruling. This prohibits the imposition by contracting states of fees, dues or other charges "in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon". They refer also to Articles 3(4) and 15(3) of the Open Skies Agreement (request for a preliminary ruling, paragraphs 42(b) and (d)) for the proposition that charges imposed under environmental measures must be in accordance with Article 15 of the Chicago Convention. The Claimants' contentions are summarised at paragraphs 119-120 of the request for a preliminary ruling.

53. So far as Article 15 of the Chicago Convention is concerned, the United Kingdom denies that the ETS is a charge imposed "in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of any contracting State".

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[38] This provides in relevant part (emphasis added): "The Parties recognise the importance of working together, and within the framework of multilateral discussions, to consider the effects of aviation on the environment ...". Cf. the IATA/NACC contentions that Article 2(2) of the Kyoto Protocol establishes an obligation to deal with ICAO exclusively.

54. First, the United Kingdom submits that the ETS is a market-based mechanism under which allowances are freely allocated or purchased. It establishes a market framework in which environmental protection is efficient and operators have the flexibility to buy and trade allowances. As already noted (see paragraph 12 above), some 85% of the allowances are allocated free to operators, with the result that any operators who are able to reduce current emissions accordingly will have no need to purchase further allowances at all. Indeed, an operator could stand to benefit from the ETS: if an operator is able to lower its emissions below its level of free allocation, it may sell remaining allowances. A financial penalty is payable only in the event of an airline choosing not to surrender sufficient allowances for the compliance year. The ETS is thus in no sense a charge within Article 15 of the Chicago Convention. Further, it is recalled that ICAO has defined a charge as "a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation" (see e.g. paragraph 2.3 of the February 2004 ICAO Secretariat analysis relied on by the Claimants).[39]

55. Secondly, ICAO Assembly Resolution A36-22 in fact distinguishes between (a) "emissions-related charges and taxes" and (b) "emissions trading" (Appendix L, at I-73).[40] Consistent with this, the ETS is neither a charge nor a tax for the purposes of the Chicago Convention (as to taxes, see further below under Question 4(c) below).[41] There is no basis for conflating emissions-related charges and taxes with emissions trading systems, whether under international law or EU law.

56. Thirdly, even if the ETS or some aspect of it could somehow be described as a charge, it would not be imposed in respect "solely" of the right of transit over or entry into or exit from territory and therefore would not fall within the scope of Article 15 of

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[39] See also Article 12 of the Open Skies Agreement ("User charges") as a further elucidation of the intended scope of the term "charges" under Article 15 of the Chicago Convention.

[40] It is also noted that, in its 2004 Working Paper "Aviation and Climate Change" presented to the ICAO Assembly (Doc. A35-WP/85; document 37 of the Bundle accompanying the request for a preliminary ruling), IATA also distinguishes between charges and taxes (see at paragraph 2.5) and emissions trading systems (at paragraphs 2.8-2.11).

[41] As recorded in (e.g.) ICAO Council Resolution on Environmental Charges and Taxes, dated 9 December 1996: "ICAO policies make a distinction between a charge and a tax, in that they regard charges as levies to defray the costs of providing facilities and services for civil aviation, whereas taxes are levies to raise general national and local governmental revenues that are applied for non-aviation purposes". See also ICAO's Policies on Taxation in the Field of International Air Transport, Third Edition – 2000, Doc. 8362 (document 35 of the Bundle accompanying the request for a preliminary ruling).

the Chicago Convention. The United Kingdom refers to the judgment in an English case, *R* (*Federation of Tour Operators v Secretary of State for Transport* [2007] EWHC 20652 (Admin), in which the High Court held (at paragraph 56):

> "A due imposed for something other than transit or entry or exit of an aircraft (or persons or property on it) is not a due imposed solely in respect of the specified rights. This is consistent with the remainder of Article 15. It is essentially an anti-discrimination provision (or most favoured State provision), precluding a State from favouring its national airline or airlines when imposing charges. A fee, due or other charge imposed in relation to the right to enter the territory of a State, or the right to leave it, or to transit over it, would discriminate in favour of a local or national airline as against the airlines of foreign States. A fee, due or charge that is payable on take-off, irrespective of destination, and including destinations within the territorial State, does not discriminate against foreign airlines, and is therefore not objectionable. It is correct that a passenger on a flight going to a foreign destination may feel that he is paying a tax because his plane is exiting from the territory of the imposing State; but the tax is not in fact payable "solely" for the right to exit that territory, since it would be equally payable if his flight did not leave that territory."

57. It is to be noted that this conclusion was reached in circumstances where the court had the benefit of detailed evidence on the *travaux préparatoires* to Article 15,[42] i.e. the same elements of the *travaux* now being relied on by IATA/NACC in their written observations (paragraphs 227-230). A review of the *travaux* shows that the substance of what was a US proposal was adopted as the last sentence of Article 15, subject to addition of the word "solely", which provided an important clarification to the intended scope of the provision. Further, the *travaux* confirm that Article 15 is aimed at securing freedom of transit without discrimination, and the decision of the English High Court reflects this.

58. Consequently, the United Kingdom considers that the ETS is not a fee, due or other charge imposed (or imposed solely) in respect of transit, entry or exit, any more than was the air passenger duty under consideration in the *Federation of Tour Operators* case, and there is no question of discrimination in relation to its application. While IATA/NACC also rely (at paragraph 231) on a decision of the Belgian Council of State (*BAR Belgium v. The Belgian State*), that court did not have the benefit of a review of the *travaux*, while the English translation relied on by IATA/NACC is in any

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42 See the Witness Statement of Anthony Parry dated 3 May 2007, which is attached to these Observations as Annex A and which contains a detailed account of the *travaux*.

event inaccurate.[43] In addition, the BAR Belgium case concerned an annual direct tax on the operation of aircraft imposed by the Municipal Council of Zaventem that is readily distinguishable from the ETS (see in particular the features of the ETS outlined at paragraphs 12-13 above). Article 15 of the Chicago Convention is thus neither engaged nor infringed.[44]

59. The Open Skies Agreement, far from assisting the Claimants' argument, militates against it.

60. First, the Claimant relied on Article 15(3) for its reference to Article 3(4), which in turn refers to Article 15 of the Chicago Convention. However, ICAO has not established any environmental standards in relation to emissions trading as referred to in Article 15(3), and this provision is not correctly construed as applying to a system such as the ETS.

61. Secondly, the reference to Article 15 of the Chicago Convention in Article 3(4) of the Open Skies Agreement means no more than that any requirements to file flight schedules, programmes for charter flights and operational plans for environmental reasons should be imposed "under uniform conditions consistent with Article 15 of the Convention" - in other words, on a non-discriminatory basis. That does not assist the Claimants in any way.

62. Thirdly, it is strongly implicit in paragraphs 35-36 and 54 of the Memorandum of Consultations appended to the Open Skies Agreement (to which the Claimants refer) that neither Party to that Agreement considered that it contained a prohibition affecting the ETS. The Memorandum merely records the differing positions of the

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[43] Insofar as the Court needs to consider further this issue, it is respectfully requested to refer to the *BAR Belgium* judgment in the original: Council of State, Department of Administration, Judgment No. 144.081 of 3 May 2005. IATA/NACC rely in particular on the interpretation of Article 15 at paragraph 3.10 of the judgment.

[44] It is noted that the IATA/NACC written observations, paragraphs 233-234, also draw attention to what are described as royalty payments that the Russian Federation is said to extract for overflights of Siberia as a way to subsidise Aeroflot and provide a revenue stream to invest in air traffic and infrastructure. The United Kingdom notes that, on 28 October 2010, the European Commission launched infringement procedures against France, Germany, Austria and Finland over their bilateral air service agreements with Russia, which inter alia include provisions concerning Siberian overflights. As appears from press release IP/10/1425, the Commission is concerned that such provisions may be in breach of EU antitrust rules and could lead to competition distortions to the disadvantage of both EU airlines and consumers. The Commission is actively assessing the compliance with EU law of the twenty three other Member States' bilateral air service agreements with Russia. It is also concerned that the overflight charges violate the Chicago Convention.

Parties on the issue of emissions trading, and notes the intention to work in this respect within the framework of ICAO.

63. Finally, as noted at paragraph 44 of the request for a preliminary ruling, on 23-25 March 2010, the Parties reached *ad referendum* agreement on, and initialled the text of a Protocol to amend the Open Skies Agreement. If approved, the Protocol inter alia would replace Article 15 in its entirety. Further, the new Article 15(7) would state as follows: "If so requested by the Parties, the Joint Committee, with the assistance of experts, shall work to develop recommendations that address issues of possible overlap between and consistency among market-based measures regarding aviation emissions implemented by the Parties with a view to avoiding duplication of measures and costs ....". It is submitted that this is quite inconsistent with the position now taken by the Claimants on the unlawful nature of the ETS.

Question 4(c): Article 24 of Chicago, Article 11(2)(c) of Open Skies

64. The Claimants contend that the Amended Directive infringes the prohibition on fuel taxes on international aviation, contrary to Article 24 of the Chicago Convention ("Customs duties")[45] and Article 11(2)(c) of the Open Skies Agreement.[46] Their contentions in this regard are summarised at paragraphs 131-133 of the request for a preliminary ruling.

65. That contention is misconceived. Article 24 of the Chicago Convention prohibits the imposition on certain aviation fuel of "customs duty, inspection fees or similar national or local duties and charges". The ETS cannot realistically be suggested to be a national or local duty or charge that is similar to customs duty or inspection fees imposed upon aviation fuel. In this respect, it is recalled that the ICAO Assembly has distinguished between charges and taxes, on the one hand, and emissions trading systems on the other. It has not taken the position that emissions trading systems violate Article 24.[47] It is also noted that, according to the ICAO Secretariat analysis

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45 Paragraph 36(e) of the request for a preliminary ruling; accompanying bundle tab A-11.

46 Bundle accompanying the request for a preliminary ruling, tab A-17.

47 See also ICAO's Policies on Taxation in the Field of International Air Transport, Third Edition – 2000, Doc. 8362, on which the Claimants seek to rely (see fn 24 to the request for a preliminary ruling). In fact, at paragraph 2, this document notes that the Chicago Convention did not attempt to deal comprehensively with tax matters and that Article 24 simply provides that fuel and lubricating oils on board aircraft shall be exempt from customs duty, etc (document 35 of the Bundle accompanying the request for a preliminary ruling).

of February 2004 on which the Claimants rely, "en-route" taxes on emissions are not specifically covered by Article 24 or related practices, policies or resolutions.[48]

66. Even if the Claimants were correct in their broader interpretation of Article 24 as "exempting from taxation aviation fuel used in international transport", which is not accepted, it remains the case that the ETS (unlike the Swedish tax at issue in Case C-346/97 *Braathens Sverige*, relied upon by the Claimants at paragraph 133 of the request for a preliminary ruling) is not a tax: see the particular features of the ETS outlined at paragraphs 12-13 above. Further, the *Braathens* case is of course addressing a different measure (an environmental protection tax) in a different context (compatibility with applicable principles on the harmonisation of the structures of excise duties on mineral oils). One key question in that case was whether the tax in question infringed an exemption at Article 8(1) of Directive 92/81/EEC concerning "mineral oils supplied for use as fuels for the purpose of air navigation other than private pleasure flying". The answer to that question does not assist the Court on a quite different question concerning the scope of Article 24 of the Chicago Convention.

67. Similarly, the ETS does not fall within the categories of taxes, levies, duties, fees and charges referred to in Article 11(1) of the Open Skies Agreement from which the categories of fuel referred to in Article 11(2)(c) are to be exempt.

68. The further agreement relied upon by IATA/NACC is not relevant to the questions of the referring court, and does not in any event add to the provisions relied upon by the Claimants (see the EU-Canada Agreement, referred to at paragraph 236 of the IATA/NACC written observations).

CONCLUSION

69. For the above reasons, the United Kingdom submits that the questions of the referring court should be answered as follows:

Question 1

The principle(s) of customary international law referred to in Questions 1(a)-(c) may be invoked for the purpose of determining the territorial scope of the competence of

[48] Cf. fn. 23 to the request for a preliminary ruling, referring to Legal framework and policy issues related to the use of emission-related levies, February 2004, CAEP/6-WP/24, paragraph 2.2, and see also paragraph 2.5.

the Union to adopt the 2008 Directive. Save as aforesaid, the rules identified may not be relied upon to challenge the validity of the Amended Directive.

Questions 2-4

To the extent that these questions require decision, they must be answered in the negative.

[redacted]

LAWRENCE SEEBORUTH

Agent for the United Kingdom

DAVID ANDERSON Q.C.

SAM WORDSWORTH

LIST OF ANNEXES

Annex Reference	Page Number	Description of Annex	Length of Annex (pages)	Page and paragraph number
Annex A	32	Witness Statement of Anthony Parry in the English case *R (Federation of Tour Operators) v Secretary of State for Transport* [2007] EWHC 20652 (Admin)[1]	25	Page 26, Paragraph 57, footnote 42

[1] An unsigned version of the witness statement is annexed to these observations, however it is identical in content to the signed version filed in the High Court, London.

IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

REFERENCE FROM THE HIGH COURT OF JUSTICE, LONDON

CASE C-366/10

THE QUEEN
on the application of
(1) THE AIR TRANSPORT ASSOCIATION OF AMERICA
(2) AMERICAN AIRLINES, INC.
(3) CONTINENTAL AIRLINES, INC.
(4) UNITED AIR LINES, INC.

Claimants

-and-

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION
THE NATIONAL AIRLINES COUNCIL OF CANADA

Interveners

v

THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

-and-

THE AVIATION ENVIRONMENT FEDERATION
WWF-UK
THE EUROPEAN FEDERATION FOR TRANSPORT AND ENVIRONMENT
THE ENVIRONMENTAL DEFENSE FUND
EARTHJUSTICE

Interveners

ANNEX A

Witness Statement of Anthony Parry in the English case *R (Federation of TourOperators) v Secretary of State for Transport* [2007] EWHC 20652 (Admin)

Anthony Parry
On behalf of H M Treasury
First witness statement
Exhibit "AP1"
3 May 2007

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

CLAIM No: CO/1505/2007

BETWEEN

(1) THE FEDERATION OF TOUR OPERATORS

(2) TUI UK LIMITED

(3) KUONI TRAVEL LIMITED

CLAIMANTS

AND

HER MAJESTY'S TREASURY

DEFENDANT

AND

HER MAJESTY'S REVENUE AND CUSTOMS

INTERESTED PARTY

WITNESS STATEMENT OF ANTHONY PARRY

I, ANTHONY PARRY, of Treasury Legal Advisers, H M Treasury, 1 Horse Guards' Road, London WILL SAY as follows:

1. I am an employed barrister in Treasury Legal Advisers in H M Treasury the Defendant in this action. I am a legal adviser to the Environment and

Transport Taxes Team which provides policy advice to Treasury Ministers in relation to aspects of taxation in relation to the field of transport including matters relating to air passenger duty (APD).

2. I make this witness statement in support of the case of H M Treasury and H M Revenue and Customs in contesting the claim for judicial review brought by the Claimants.

3. Save where otherwise indicated, the facts and matters set out in this witness statement are within my own knowledge and are true. Where the facts and matters are not within my own direct knowledge, they are true to the best of my information and recollection, and I state the sources from which they are derived.

4. I have researched the history (*travaux préparatoires*) of the Chicago Convention on International Civil Aviation of 7 December 1944 ("Chicago Convention") and in particular:

    1. The negotiating history of the last sentence of Article 15.

    2. The use of the term "territory" in the Convention.

5. I also draw attention to Article 2 of the UN Convention on the Law of the Sea 1982, which contains a more modern definition of territory.

6. I believe that I have reviewed all of the pertinent available documents relating to the adoption of Article 15 in its final form and also to the definition and uses of the word "territory" in the Convention. I also believe that the summary I have given below describes all of the relevant developments and matters so far as they appear from the documents in these two areas. I should add that I have annexed only relevant extracts from the documents in order to keep the size of the exhibits to the minimum necessary, but again I believe that I have exhibited all of the relevant extracts which are available.

BACKGROUND

7. The Chicago Convention replaced The Paris Convention of 1919[1] and, as between those parties to the Havana Convention which became parties to the Chicago Convention, the Havana Convention of 1928.[2] Although I have provided the references to these two earlier conventions in my footnotes, I have not exhibited them to this statement.

8. Neither the Paris Convention nor the Havana Convention contained a provision corresponding to Article 15, last sentence, of the Chicago Convention: this provision was new.

9. Both the Paris Convention and the Havana Conventions had provisions on "territory" which were to some extent carried over into the Chicago Convention. As will appear, however, the Chicago Convention is not entirely consistent in the use of this term.

10. The *travaux préparatoires* of Chicago Convention consist of the documents of the Chicago Conference on International Civil Aviation which was held from 1st November to 7th December 1944 ("ICAC").

11. Many of the ICAC documents are to be found in the UK National Archives. However, this record is somewhat incomplete. In particular it appears that not all of the minutes of the subcommittees are there. The principal holdings of the UK National Archives are to be found in files FO 371/42580-42598.

12. The publication entitled *Proceedings of the International Civil Aviation Conference* issued by the U.S. Department of State[3] reproduces most if not all of the relevant ICAC documents and copies of the most relevant

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[1] Convention relating to the Regulation of Aerial Navigation, Paris 13 Oct 1919, 11 LNTS 173; BTS 1922/2; BSP v 112 p 931. Web text: http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/dfat/treaties/1922/6.html

[2] Convention on Commercial Aviation signed at Habana on 20 February 1928. U.S. Treaty Series No 840; Hudson, *International Legislation*, Vol IV, p.2355. The UK was never a party to the Havana Convention, which was adopted as a Pan-American Convention.

[3] *Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1-December 7, 1944*, 2 Vols. U.S. Department of State Publication 2820, 1949.

pages of this very long publication are attached as **AP1 Tab 2** of my exhibit. All references to ICAC documents are to the documents as reprinted in the US State Department publication except where otherwise indicated.

13. The history of Article 15 is summarised by the commentary also contained in the State Department publication as follows (p. 1383-4) [**AP1 Tab 2** pages 151-2]:

> *Article 15, Airport and similar charges, represents a combination of Articles 9 and 22 of the United States draft convention. The drafting committee was asked by the fifth meeting of Subcommittee 2 to revise Article 22 in the light of instructions on Article 9 referred to by the fourth meeting, to make it clear that there was no obligation implied to treat domestic aircraft the same as international, and to substitute a new phrase for "aircraft of the most-favoured-nation." The committee was also asked to eliminate any duplication between the two articles. The drafting committee's revision (Article 14, Doc. 414, p.659) was discussed at the final meeting of the Subcommittee and was referred back with four suggestions for changes. The revised article (Article 15, Doc. 454) was considered by the 2 December meeting of Subcommittees 1 and 2, in conjunction with Article 68* [Doc 465, p 652]. *It was decided to delete subparagraph (b) of the latter, and transfer the proviso to Article 15. The article as so revised was incorporated in Document 467, and was approved at the joint meeting of Subcommittees 1,2 and 3 held December 4, subject to a reservation by Cuba.*

ARTICLE 15 NEGOTIATING HISTORY IN DETAIL:

14. In the section which follows I shall refer to page numbers of either AP1 Tab 1 of my exhibit, which is a copy of the "*Report of the Chicago Conference on International Civil Aviation, Nov 1 - Dec 7, 1944, Summary of the Proceedings*, UNIO 1945, or to AP1 Tab 2 of my exhibit, which is the

record of the Proceedings of the ICAC, and I have ensured that the page numbering runs consecutively, and does not begin again at the start of each Tab.

15. Article 15 CC, last sentence, derives from the U.S. proposal for a Convention on Air Navigation, presented as part of the agenda at Chicago [AP1 Tab 1, page 9]. The U.S. proposal for a Convention on Air Navigation was ICAC Doc 16 (p. 554) [AP1 Tab 2, page 60] and Article 9 appears at p. 557 [AP1 Tab 2, page 63].

16. Article 9 proposed as follows:

> *Aircraft in transit and persons and property thereon shall not be subject to any dues, fees or charges imposed on the right of transit (including entry and exit). In so far as any dues, fees or charges may be levied in connection with any landings made by aircraft in transit such dues, fees or charges shall not be levied under any conditions other than those applicable to national aircraft or the aircraft of the most-favoured-nation, and shall not be greater than those imposed upon national aircraft or aircraft of the most-favoured-nation.*

Article 9 is listed in the Table of contents to Doc 16 as "*Aircraft in transit not subject to dues.*" (p.554) [AP1 Tab 2, page 60].

17. As stated above, this provision had no direct counterpart in the Paris Convention. However, Article 24 of the Paris Convention provided for use of public airports and facilities on a non-discriminatory basis. There is mention of this principle as part of the Chicago agenda (Part II, Proposed Agenda 2(d)) [AP1 Tab 1, page 7].

18. Article 4 of the Havana Convention conferred a "*freedom of innocent passage*". However, the content of this freedom was not defined. Again it provided that national regulations "*shall be applied without distinction of nationality*". The minutes of the Joint Meeting of Subcommittees 1 and 3 of

Committee I on 11th November (Doc 178, p.650 at p.651) [AP1 Tab 2 pages 111 and 112] show that:

> *It was further agreed that the phrase in Article 5 of Doc 16, "the right to fly across its territory without landing" would be used instead of the phrase "the right of innocent passage".*

19. Article 9 of the U.S. draft was ultimately combined with Article 22 of the U.S. draft (also in Doc 16, p.554 at p.561) [AP1 Tab 2 pages 60 and 67]. This provided as follows:

> *Aircraft of the Contracting States shall be entitled to the use of airports open to public use in the other Contracting States and the benefit of all navigational facilities and aids available for civil air traffic, including the meteorological, radio, fueling, lighting, day and night signalling, and like services as such airports, on the basis of the enjoyment of such rights under as favorable conditions as are applicable to national aircraft or to the aircraft of the most-favored-nation. The scale of fees and charges for landing and the use of accommodations and facilities in the territory of a Contracting State by aircraft of another Contracting state shall be no greater than that applicable to national aircraft or to the aircraft of the most-favored-nation.*

Article 22 is listed in the Table of contents to Doc 16 as *"Use of airports and navigational facilities."* P 554 [AP1 Tab 2, page 60].

20. The **Steering Committee for Committee I** meeting on 6th November (see Doc 79, p 675 at p 676 [AP1 Tab 2, pages 136 and 137] considered the division of work among Subcommittees 1, 2 and 3 (see Doc 99, p. 676) [AP1 Tab 2 page 137] as follows:

> 1. *Since the proposals of Canada and the United States (Docs. 50 and 16) have been prepared in the form of draft multilateral conventions, it is recommended that the one or the other be adopted in each Subcommittee as the primary basis for discussion, without prejudice*

to other proposals which may be brought into the discussion in the form of proposed amendments

2. *It is recommended that the Canadian draft be used as the primary basis for discussion in Subcommittees 1 and 3 and that the United States draft be similarly used in Subcommittee 2.*

The 2nd meeting of Subcommittee 2 of Committee I on 7th November (Doc. 99, p. 676) [AP1 Tab 2, page 137] received the report of the Steering Committee which allocated Article 9 (and 22) of the U.S. draft to it and also noted that these provisions corresponded to Article 2, Section 2(b) of the Canadian draft as can be seen from the list in item 6 of the report, p. 677 [AP1 Tab 2, page 138].

21. Article 2, Section 2(b) of the Canadian draft (Doc 50, p. 570 at p. 574) [AP1 Tab 2 pages 76 and 80] provided as follows:

Article II

Obligations of member states

Section 2:

Each member state may
(b) impose or permit to be imposed on any international air service just and reasonable charges for the use of the air ports and other facilities in its territory, which shall not be higher than would be paid by national aircraft engaged in comparable international services.

22. The 7th November meeting gave Articles 1 to 12 of the U.S. draft (i.e. including Article 9) a first reading "*for the purpose acquainting delegates with its provisions and eliciting a preliminary expression of views.*" (Doc. 99, p. 676 at p.678) [AP1 Tab 2, pages 137 and 139]

23. **3rd meeting on 8th November (Doc. 120, p. 678)** [AP1 Tab 2 page 139]. This meeting resumed the first reading of the United States proposal, Articles 13 to 22.

24. **4th meeting on 10th November (Doc 160, p. 679)** [AP1 Tab 2, page 140]

This meeting received the decision of the Steering Committee that Articles 9 and 22 (Doc 16) would be assigned to Subcommittee 2, see item 2 on p. 679 [AP1 Tab 2, page 140]. The record also states at p. 680 [AP1 Tab 2 page 141] that:

> *The drafting committee was instructed to amend Article 9, so as to make it clear that there is no obligation implied to treat domestic aircraft the same as international and to substitute for the phrase "aircraft of the most-favoured-nation" an expression such as "aircraft of any foreign nation."*

25. **5th meeting on 11th November (Doc 176, p 681 at page 682)** [AP1 Tab 2 pages 142 and 143]:

> *The drafting committee was asked to revise Article 22 in the light of the previous agreements on Article 9, and to eliminate any duplication between the provisions of the two articles regarding fees and charges.*

26. **6th meeting on 15th November (Doc 293, p 682):** [AP1 Tab 2, page 143] No discussion of Articles 9 or 22.

27. **7th meeting on 21st November (Doc. 363, p.683 at p. 684)** [AP1 Tab 2, pages 144 and 145]:

> *The drafting committee was also asked, in combining Articles 9 and 22 as previously instructed* [sic – cf. 5th meeting], *to clarify the application of such new article as might be proposed to consular fees.*

28. **Interim Report of the Drafting Committee Subcommittee 2 of Committee I (Doc. 356, undated, p.670 at p. 672)** [AP1 Tab 2, pages 131 and 133]:

> *Your drafting committee, to which have been referred certain Articles of Document 16, respectfully files this interim report.*
>
> ....
>
> *Article 9*
>
> *The substance of this article is to be included in a new Article 22 to be later reported.*

29. **8th meeting on 23rd November (Doc. 379, p.685)** [AP1 Tab 2 page 146]: no discussion of Article 9 or 22. The business of this meeting was to "*complete discussion of Document 356, the interim report of the drafting committee.*" [The references to Doc 356 appear in the previous paragraph)]

30. **Second Interim Report of the Drafting Committee Subcommittee 2 of Committee I (Doc. 414, undated, p.659, 663)** [AP1 Tab 2 pages 120 and 124]. I have set out the text of Article 14 here. By this stage the last sentence, which became the last sentence of Article 15, had reached its final form:

> *Article 14*
>
> ***Airport and similar charges**. Subject to the provision of Article II, Section 5 (Document 402), and subject to such conditions as may be declared and published by the State in whose territory the airport is situated, every airport in a contracting State which is open to public use by its national aircraft shall likewise be open uniformly to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.*

Each contracting State shall establish scales of charges for the use of such airports and air navigation facilities which shall be uniformly applicable to the aircraft of all other States, and which shall be published and communicated to the international air Organization. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon. [underlining supplied]

31. **9th and final meeting on 30th November (Doc 449, p. 686)** [AP1 Tab 2, page 147]:

> *...the principal business of the meeting was to consider Doc 414* [p. 659] [AP1 Tab 2, page 120], the *second interim report of the drafting committee.*

As regards Article 14 the minutes state (pp. 687-8) [AP1 Tab 2, pages 148 and 149]:

> *The second paragraph of Article 14 was referred to the drafting committee with the following suggestions:*
>
> *(1) That the words "Each contracting State shall establish scales of charges" be replaced by "Any charge which a contracting State may establish";*
> (2) *That the paragraph be reworded along the lines of Article II, Section IV Section 4 (Document 442).*[4]
> (3) *That the word "contracting" be inserted before "States" and a proviso added that non non-member State may receive more*

[4] We do not have Doc 442 but this is evidently a reference to what is now Article I, Section IV, of the International Air Services Transit Agreement (IASTA), also agreed on 7th December 1944, which is indeed similarly worded to that part of Art 15 CC beginning with the third sentence (but excluding the proviso and the last sentence).

favourable treatment than a member State in respect of such charges;

(4) *That the words "in the case of aircraft engaged in international air navigation be added after "States".*

The Representative of France suggested that the words "such as fuel, supplies at a fair price, etc." be added after the word "facilities." The chairman of the drafting committee pointed out that the term "air navigation facilities" was not generally used to cover such things as fuel and supplies. The Representative of India commented that the prices charged for fuel and supplies are determined by private contract, and cannot be guaranteed in a convention between States. In the absence of a motion, the suggestion was lost.

32. **Meeting of Subcommittees 1 and 2 of Committee I, 2nd December (Doc 465, p 652-3** [AP1 Tab 2, pages 113 and 114]**):** Article 15 of Doc. 454 (p. 616 at p. 622) [AP1 Tab 2, pages 98 and 103] – see full text annexed, which replaced Article 14, Doc 414 [set out above], was considered in conjunction with Article 68. [The text of Article 68 of Doc 454 p 616 at p 635-6 [AP1 Tab 2, pages 98 and 104-105] is also annexed]:

It was agreed that Article 15 should be amended so as to include a cross reference to Article 68, and that the question of overlapping between the two should be considered at the time Article 68 is discussed.

....

The Subcommittee agreed to retain Subparagraph (a) of Article 68, and to delete subparagraph (b), subject to the consideration that the proviso included in the latter be transferred to Article 15. The Representative of the United Kingdom expressed the view that Subparagraph (a) should also be included in the Interim, International Air Transport, and "Two Freedoms" Agreements.

33. **Meeting of Subcommittees 1, 2 and 3 4th December (Doc 485, p 654)** [AP1 Tab 2 page 115]: A proposed Cuban amendment dealing with the power of review by the Council which appears in Art 15 as contained in the revised articles of the proposed convention in Doc 467 (pp 642 & 643) [AP1 Tab 2, pages 106 and 107], i.e. the final text was put forward, but was not seconded and the motion was therefore lost. Cuba stated its reservation. (P. 654 and 655) [AP1 Tab 2 pages 115 and 116].

Article 15 summary:

34. **The substance of the U.S. proposal, i.e. the first sentence of Article 9 as it appeared in Doc 16, was adopted as the last sentence of Art 15 CC, subject to (a) the addition of "solely" and (b) drafting changes which did not receive mention in the minutes.**

35. **This text had already reached final form in Second Interim Report of the Drafting Committee Subcommittee 2 of Committee I (Doc. 414, undated, p.659, 663** [AP1 Tab 2, pages 120 and 124]**).**

"TERRITORY" NEGOTIATING HISTORY IN DETAIL:

36. Article 1 of the Paris Convention provided as follows:

> *The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.*
> *For the purposes of the present convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.*

37. Article I of the Havana Convention is very similar: it provided as follows:

The High Contracting Parties recognize that every State has complete and exclusive sovereignty over the air space above its territory and territorial waters.

38. Articles 1 and 2 of the Chicago Convention provide as follows:

Article 1
Sovereignty
The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2
Territory

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

39. Articles 1(10), 2 and 3 of the U.S. draft (ICAC Doc 16) (p. 554, pp. 555-6) [AP1 Tab 2, page 60 at pages 61 and 62] provided as follows:

Article 1(10)

The term "territory" shall mean the land areas and territorial waters of each Contracting state, and shall include the outlying territories, possessions, colonies, protectorates and mandated territories under the jurisdiction of such State.

Article 2

The High Contracting Parties recognize that each Contracting State has complete and exclusive sovereignty over the airspace above its territory.

Article 3

The present Convention shall be applicable to all territory over which each Contracting State exercises sovereignty or jurisdiction and the airspace above such territory.

40. The **Steering Committee for Committee I meeting on 6th November (see ICAC Doc 99, p. 676)** [AP1 Tab 2 page 137] considered the division of work among Subcommittees 1, 2 and 3 as follows:

1. Since the proposals of Canada and the United States (Docs. 50 and 16) have been prepared in the form of draft multilateral conventions, it is recommended that the one or the other be adopted in each Subcommittee as the primary basis for discussion, without prejudice to other proposals which may be brought into the discussion in the form of proposed amendments

2. It is recommended that the Canadian draft be used as the primary basis for discussion in Subcommittees 1 and 3 and that the United States draft be similarly used in Subcommittee 2.

41. The **2nd meeting of Subcommittee 2 of Committee I on 7th November (Doc. 99, p. 676 at p.677)** [AP1 Tab 2 pages 137 and 138] received the report of the Steering Committee which allocated Articles 2 and 3 of the U.S. draft to it and also noted that these provisions corresponded to Article 11 of the Canadian draft (Doc 50) (p.570) [AP1 Tab 2, page 76].

Article XI of the Canadian draft (p.582) [AP1 Tab 2 page 88] provided as follows:

Each member state recognizes that every state has complete and exclusive sovereignty over the airspace above its territory.

42. The 7th November meeting gave Articles 1 through 12 of the U.S. draft (i.e. including Articles 1(10), 2 & 3) (p.678) [AP1 Tab 2, page 139] a first reading *"for the purpose acquainting delegates with its provisions and eliciting a preliminary expression of views."*

43. **4th meeting on 10th November (Doc 160, p. 679 at p. 680)** [AP1 Tab 2, pages 140 and 141]:

> *It was agreed that the definition of "territory (Article 1(10)) should be drafted as a separate article of the convention, rather than as a definition. The United Kingdom and Poland each submitted proposed amendments, consideration of which was deferred to a later meeting.*
>
> *The drafting committee was also asked to give consideration to a proposal advanced by Poland that Article 2 be redrafted, omitting the words complete and exclusive" recognizing instead that the sovereignty of each contracting state extends to the airspace above its territory.*
>
> *It was agreed that, if the definition of "territory" were reformulated, Article 3 could be omitted.*

44. **7th meeting on 21st November (Doc. 363, p.683 and p. 684)** [AP1 Tab 2 pages 144 and 145]:

> *It was agreed that the definition of "territory", Article 1, subsection (10) should be covered by a separate article of the Convention and that the precise language used should be a matter for discussion by the drafting committee with the joint drafting committee of Subcommittee 1 and 3 of Committee I, in the light of the definition proposed in Article XX, subsection (e), of Document 358.*[5]
>
> *At the suggestion of Poland, discussion of the drafting committee's proposed amendment to Article 2 (Doc 16) was deferred until such time*

[5] Document not available.

[next line some words illegible] *agreed that the recommendation to eliminate Article 3 would also be considered at that time.*

45. **Interim Report of the Drafting Committee Subcommittee 2 of Committee I (Doc. 356, undated, p.670 and p.671)** [AP1 Tab 2, pages 131 and 132]:

Article 1 Subsection (10)

Your drafting committee has carefully considered the definition of the word "territory" in Document 16 as well as Document 50 and also the proposed amendments which have been filed. Your committee feels that the importance of the determination of what constitutes "territory" of a State for the purposes of the Convention is such that the language should be included not as a definition but as a definite article of the Convention and therefore proposes that the term "territory" should be [next line illegible] *16. As to the specific language to be used, your Committee desires to report later after an opportunity to confer with the drafting committee of Subcommittees 1 and 3 of Committee I.*

Article 2

Your drafting committee has carefully considered the language of Document 16 and of Document 50 as well as the provisions of the Paris and Havana Conventions and also a proposed amendment offered by the Delegation from Poland. After due consideration, we recommend that the article be redrafted to read as follows:

"The High Contracting Parties recognize that every State has complete and exclusive sovereignty over the air space above its territory."

Article 3

As reported above, we recommend the elimination of Article 3 and the substitution of a definitive one as to "territory".

46. **Second Interim Report of the Drafting Committee Subcommittee 2 of Committee I (Doc. 414, undated, p.659, 660)** [AP1 Tab 2 pages 120 and 121]:

Article 1

***Sovereignty**. The High Contracting Parties recognize that every State has complete and exclusive sovereignty over the airspace above its territory.*

Article 2

***Territory**. For the purposes of this Convention, the territory of a State shall be the land areas and territorial waters under sovereignty, suzerainty, protection or mandate of such State.*

47. **9th and final meeting on 30th November (Doc 449, p. 686)** [AP1 Tab 2, page 147]:

...the principal business of the meeting was to consider Doc 414, the second interim report of the drafting committee.

Article 1 (document 414) was approved

Article 2 was approved, with the words "adjacent thereto" inserted after "territorial waters" and the word "the" inserted before "sovereignty".

48. There was some recognition of the need to have uniform definitions: "*The Delegate from the United States agreed that it would be desirable to use a uniform definition of "territory" in Article 1 and 2*": Minutes of Joint Meeting of Subcommittees 1 and 3 of Committee I, 11th November: Doc 178 p.650 at p.651) [AP1 Tab 2, pages 111 and 112].

TERRITORY AND THE CHICAGO CONVENTION TEXT

49. The Convention is not entirely consistent as to whether "territory" includes airspace or not. A number of articles use phrases such as "in or over" territory (e.g. Arts 30 and 35) and Art 96 is at first sight unequivocal in apparently distinguishing airspace from territory:

> *(b) "International air service" means an air service which passes through the air space over the territory of more than one State.*

50. However, many articles refer to entering territory and clearly include sovereign airspace in this:

> ***Article 10***
>
> ***Landing at customs airport***
>
> *Except in a case where, under the terms of this Convention or a special authorization, aircraft are permitted to cross the territory of a contracting State without landing, every aircraft which enters the territory of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination.*
>
> ***Article 11***
>
> ***Applicability of air regulations***
>
> *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.*

Article 12

Rules of the air

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

Article 27

Exemption from seizure on patent claims

(a) While engaged in international air navigation, any authorized entry of aircraft of a contracting State into the territory of another contracting State or authorized transit across the territory of such State with or without landings shall not entail any seizure or detention of the aircraft or any claim against the owner or operator thereof or any other interference therewith by or on behalf of such State or any person therein, on the ground that the construction, mechanism, parts, accessories or operation of the aircraft is an infringement of any patent, design, or model duly granted or registered in the State whose territory is entered by the aircraft, it being agreed that no deposit of security in connection with the foregoing exemption from seizure or detention of the aircraft shall in any case be required in the State entered by such aircraft.

Article 68

Designation of routes and airports

Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use.

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Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Conclusion on "territory"

51. **There are a number of clauses in the Chicago Convention which use territory in such a way as to indicate that it includes airspace within it.**

Statement of Truth

I believe the facts stated in this witness statement are true

....

Anthony Parry Date

Treasury Legal Advisers

Annex

Article 14 Doc 414 (p. 659 at p.663) [AP1 Tab 2, pages 120 and 124]

Airport and similar charges. Subject to the provision of Article II, Section 5 (Document 402), and subject to such conditions as may be declared and published by the State in whose territory the airport is situated, every airport in a contracting State which is open to public use by its national aircraft shall likewise be open uniformly to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Each contracting State shall establish scales of charges for the use of such airports and air navigation facilities which shall be uniformly applicable to the aircraft of all other States, and which shall be published and communicated to the international air Organization. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

Article 15 Doc 454 (page 616 at p.622) [AP1 Tab 2, pages 98 and 103]

Airport and similar charges. Subject to such conditions as may be declared and published by the State in whose territory the airport is situated, every airport in a contracting State which is open to public use by its national aircraft shall likewise be open uniformly to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

Article 68 Doc 454 (page 616 at pp.635 & 636) [AP1 Tab 2, pages 98 and 104 and 105]

Chapter XV

Airports and other navigational facilities

Article 68

Designation of route and imposition reasonable charges [sic]. Each contracting State may, subject to the provisions of this Convention,

(a) Designate the route to be followed within its territory by any international air service and the airports which any such service may use;

(b) Impose or permit to be imposed on any such service just and reasonable charges for the use of such airports and other facilities; these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international air services;

Provided that, upon representation by an interested airline through the State of which it is a national, the changes imposed for the use of airports and other facilities shall be subject to review by the council, which shall report and make recommendations thereon for the consideration of the State or States concerned.

Article 15 Doc 467 (final text) (pp 642 & 643) [AP1 Tab 2, pages 106 and 107]

Airport and similar charges. Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.