JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 *

In Case C-366/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 8 July 2010, received at the Court on 22 July 2010, in the proceedings

Air Transport Association of America,

American Airlines Inc.,

Continental Airlines Inc.,

United Airlines Inc.

v

Secretary of State for Energy and Climate Change,

* Language of the case: English.

interveners:

International Air Transport Association (IATA),

National Airlines Council of Canada (NACC),

Aviation Environment Federation,

WWF-UK,

European Federation for Transport and Environment,

Environmental Defense Fund,

Earthjustice,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Prechal, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, E. Levits, A. Ó Caoimh, L. Bay Larsen, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 July 2011,

after considering the observations submitted on behalf of:

— the Air Transport Association of America, American Airlines Inc., Continental Airlines Inc. and United Airlines Inc., by D. Wyatt QC and M. Hoskins and M. Chamberlain, Barristers, instructed by D. Das, Solicitor,

— the International Air Transport Association (IATA) and the National Airlines Council of Canada (NACC), by C. Quigley QC,

— the Aviation Environment Federation, WWF-UK, the European Federation for Transport and Environment, Environmental Defense Fund and Earthjustice, by J. Turner QC and L. John, Barrister, instructed by K. Harrison, Solicitor,

— the United Kingdom Government, by L. Seeboruth, acting as Agent, and S. Wordsworth, Barrister,

— the Belgian Government, by T. Materne, acting as Agent,

— the Danish Government, by C. Vang, acting as Agent,

— the German Government, by T. Henze, J. Möller and N. Graf Vitzthum, acting as Agents,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the French Government, by G. de Bergues, S. Menez and M. Perrot, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Polish Government, by M. Szpunar, M. Nowacki and K. Zawisza, acting as Agents,

— the Swedish Government, by A. Falk, acting as Agent,

— the Icelandic Government, by I. Lind Sæmundsdóttir, acting as Agent,

— the Norwegian Government, by K. Moe Winther and M. Emberland, acting as Agents,

— the European Parliament, by I. Anagnostopoulou, R. Kaškina and A. Troupiotis, acting as Agents,

— the Council of the European Union, by K. Michoel, E. Karlsson and A. Westerhof Löfflerová, acting as Agents,

— the European Commission, by E. White, K. Simonsson, K. Mifsud-Bonnici and S. Boelaert, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the circumstances in which principles of customary international law and provisions of international treaties may be relied upon in the context of a reference for a preliminary ruling on the validity of a measure and, secondly, the validity, in the light of international treaty law and customary international law, of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

2 The reference has been made in proceedings brought by the Air Transport Association of America, American Airlines Inc., Continental Airlines Inc. and United Airlines Inc. (collectively 'ATA and others') against the Secretary of State for Energy and Climate Change concerning the validity of the measures implementing Directive 2008/101 that have been adopted by the United Kingdom of Great Britain and Northern Ireland.

I — Legal context

A — *International law*

1. The Chicago Convention

3 The Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944 ('the Chicago Convention'), has been ratified by all the Member States of the European Union, but the European Union is not itself a party to it. The Chicago Convention established the International Civil Aviation Organisation (ICAO), which, as provided in Article 44, has the objective of developing the principles and techniques of international air navigation and of fostering the establishment and stimulating the development of international air transport.

4 Article 1 of the Chicago Convention provides:

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

5 Article 11 of the Chicago Convention, headed 'Applicability of air regulations', provides:

'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.'

6 Article 12 of the Chicago Convention, headed 'Rules of the air', provides:

'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.'

7 Article 15 of the Chicago Convention, headed 'Airport and similar charges', states:

'Every airport in a contracting State which is open to public use by its national aircraft shall likewise... be open under uniform conditions to the aircraft of all the other contracting States. …

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,

…

(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 [ICAO], 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.'

8 Article 17 of the Chicago Convention provides that 'aircraft have the nationality of the State in which they are registered.'

9 Article 24(a) of the Chicago Convention is worded as follows:

'Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an

aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. …'

2. The Kyoto Protocol

10 The United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992 ('the Framework Convention'), has the ultimate objective of achieving stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. On 11 December 1997 the parties to the Framework Convention adopted, pursuant thereto, the Kyoto Protocol to the United Nations Framework Convention on Climate Change ('the Kyoto Protocol'), which entered into force on 16 February 2005. The European Union is a party to both those instruments.

11 The purpose of the Kyoto Protocol is to reduce, during the period 2008 to 2012, overall emissions of six greenhouse gases, including carbon dioxide ('CO_2'), to at least 5 % below 1990 levels. The parties included in Annex I to the Framework Convention commit themselves to ensuring that their greenhouse gas emissions do not exceed the percentages assigned to them by the Kyoto Protocol; they can fulfil their obligations jointly. The overall commitment entered into by the European Union and its Member States under the Kyoto Protocol relates to a total reduction of greenhouse gas emissions during the period mentioned above to 8 % below their 1990 levels.

12 Article 2(2) of the Kyoto Protocol provides:

'The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the [ICAO] and the International Maritime Organisation, respectively.'

3. The Air Transport Agreement between the European Community and the United States

13 On 25 and 30 April 2007, the European Community and its Member States, of the one part, and the United States of America, of the other part, concluded an air transport agreement designed in particular to facilitate the expansion of international air transport opportunities by opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic. The Council of the European Union and the representatives of the Governments of the Member States of the European Union, meeting within the Council, adopted Decision 2007/339/EC of 25 April 2007 on the signature and provisional application of that agreement (OJ 2007 L 134, p. 1).

14 Subsequently, the Council and the representatives of the Governments of the Member States of the European Union, meeting within the Council, adopted Decision 2010/465/EU of 24 June 2010 on the signing and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of

the one part, and the European Community and its Member States, of the other part (OJ 2010 L 223, p. 1). Recitals 1 to 6 of that decision are worded as follows:

'(1) The Air Transport Agreement … included an obligation on both Parties to enter into second stage negotiations.

(2) As a consequence of the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union has replaced and succeeded the European Community.

(3) The Commission has negotiated on behalf of the Union and of the Member States a protocol to amend the [Air Transport Agreement] (hereinafter, the "Protocol") in accordance with Article 21 of that Agreement.

(4) The Protocol was initialled on 25 March 2010.

(5) The Protocol is fully consistent with the Union legislation, particularly with the EU Emissions Trading System ["the allowance trading scheme"].

(6) The Protocol negotiated by the Commission should be signed and applied provisionally by the Union and the Member States, to the extent permitted under domestic law, subject to its possible conclusion at a later date.'

15 Article 1(3) of Decision 2010/465 provides that, 'pending its entry into force, the Protocol shall be applied on a provisional basis by the Union and its Member States, to the extent permitted under domestic law, from the date of signing'.

16 Under Article 1(9) of the Air Transport Agreement, as amended by the Protocol ('the Open Skies Agreement"), for the purposes of the agreement and unless otherwise stated, '"territory' means, for the United States, the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or jurisdiction, and, for the European Community and its Member States, the land areas (mainland and islands), internal waters and territorial sea in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and any successor instrument'.

17 Article 2 of the Open Skies Agreement, headed 'Fair and equal opportunity', states:

'Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.'

18 Article 3(2), (4) and (5) of the Open Skies Agreement provide:

'2. Each airline may on any or all flights and at its option:

(a) operate flights in either or both directions;

(b) combine different flight numbers within one aircraft operation;

(c) serve behind, intermediate, and beyond points and points in the territories of the Parties in any combination and in any order;

(d) omit stops at any point or points;

(e) transfer traffic from any of its aircraft to any of its other aircraft at any point;

(f) serve points behind any point in its territory with or without change of aircraft or flight number and hold out and advertise such services to the public as through services;

(g) make stopovers at any points whether within or outside the territory of either Party;

(h) carry transit traffic through the other Party's territory;

and

(i) combine traffic on the same aircraft regardless of where such traffic originates;

without directional or geographic limitation and without loss of any right to carry traffic otherwise permissible under this Agreement.

…

4. Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the [Chicago] Convention.

5. Any airline may perform international air transportation without any limitation as to change, at any point, in type or number of aircraft operated …'

19 Article 7 of the Open Skies Agreement, headed 'Application of laws', states in paragraph 1:

'The laws and regulations of a Party 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 utilised by the airlines of the other Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first Party.'

20 Article 10 of the Open Skies Agreement provides, inter alia, that the airlines of each party are to have the right to establish offices in the territory of the other party for the promotion and sale of air transportation and related activities. They are also to have the right to engage in the sale, in any freely convertible currency, of air transportation in the territory of the other party directly and/or, at their discretion, indirectly through their sales agents or other intermediaries appointed by them. In addition, by virtue of that article the airlines of each party may pay for local expenses, including purchases of fuel, in the territory of the other party in freely convertible

currencies. Furthermore, they may enter into cooperative marketing arrangements, such as blocked-space or code-sharing arrangements, and, subject to certain conditions, franchising or branding arrangements and arrangements for the provision of aircraft with crew for international air transportation.

21 Article 11 of the Open Skies Agreement, relating to customs duties and charges, states:

'1. On arriving in the territory of one Party, aircraft operated in international air transportation by the airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), aircraft stores (including but not limited to such items of food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges that are (a) imposed by the national authorities or the European Community, and (b) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft.

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

…

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

…'

22 Article 15 of the Open Skies Agreement, headed 'Environment', is worded as follows:

'1. The Parties recognise the importance of protecting the environment when developing and implementing international aviation policy, carefully weighing the costs and benefits of measures to protect the environment in developing such policy, and, where appropriate, jointly advancing effective global solutions. Accordingly, the Parties intend to work together to limit or reduce, in an economically reasonable manner, the impact of international aviation on the environment.

2. When a Party is considering proposed environmental measures at the regional, national, or local level, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects. At the request of a Party, the other Party shall provide a description of such evaluation and mitigating steps.

3. When environmental measures are established, the aviation environmental standards adopted by the [ICAO] in annexes to the [Chicago] Convention shall be followed

except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and Article 3(4) of this Agreement.

4. The Parties reaffirm the commitment of Member States and the United States to apply the balanced approach principle.

…

6. The Parties endorse and shall encourage the exchange of information and regular dialogue among experts, in particular through existing communication channels, to enhance cooperation, consistent with applicable laws and regulations, on addressing international aviation environmental impacts and mitigation solutions, including:

…

(e) exchange of views on issues and options in international fora dealing with the environmental effects of aviation, including the coordination of positions, where appropriate.

7. 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 and reducing to the extent possible the administrative burden on airlines.

Implementation of such recommendations shall be subject to such internal approval or ratification as may be required by each Party.

8. If one Party believes that a matter involving aviation environmental protection, including proposed new measures, raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.'

23 By virtue of Article 19(1) of the Open Skies Agreement, any dispute relating to the application or interpretation of that agreement may, under certain conditions and where it is not resolved by a meeting of the Joint Committee, be referred to a person or body for decision by agreement of the parties. If the parties do not so agree, the dispute is, at the request of either party, to be submitted to arbitration in accordance with the detailed rules set out in Article 19.

B — *European Union law*

24 The Council has adopted Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 1) and Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). In accordance with the first paragraph of Article 2 of the latter decision, the European Union and its Member States are to fulfil their commitments under the Kyoto Protocol jointly.

25 Since the Commission considered that greenhouse gas emission allowance trading would, with other measures, be an integral and major part of the Community's strategy in combating climate change, it presented, on 8 March 2000, a Green Paper on greenhouse gas emissions trading within the European Union (COM(2000) 87 final).

1. Directive 2003/87/EC

26 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32) was adopted on the basis of Article 175(1) EC.

27 According to recital 5 in its preamble, that directive has the aim of contributing to more effective fulfilment of the commitments of the European Union and its Member States to reduce anthropogenic greenhouse gas emissions which have been entered into under the Kyoto Protocol in accordance with Decision 2002/358, through an efficient European market in greenhouse gas emission allowances ('allowances'), with the least possible diminution of economic development and employment.

28 According to recital 23 in the preamble to that directive, allowance trading should 'form part of a comprehensive and coherent package of policies and measures implemented at Member State and Community level'. As stated in the first sentence of recital 25 in its preamble, 'policies and measures should be implemented at Member State and Community level across all sectors of the European Union economy, and not only within the industry and energy sectors, in order to generate substantial emissions reductions'.

29 Article 1 of Directive 2003/87 defines its subject-matter as follows:

'This Directive establishes a scheme for … allowance trading within the Community … in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

30 Directive 2003/87 applies, in accordance with Article 2(1), to emissions from the activities listed in Annex I and to the six greenhouse gases listed in Annex II, one of which is CO_2.

2. Directive 2008/101

31 Under Article 30(2) of Directive 2003/87, the Commission, on the basis of experience of the application of that directive, was to draw up by 30 June 2006 a report, accompanied by proposals as appropriate, on the directive's application, considering in particular 'how and whether Annex I should be amended to include other relevant sectors, inter alia the chemicals, aluminium and transport sectors, activities and emissions of other greenhouse gases listed in Annex II, with a view to further improving the economic efficiency of the scheme'.

32 In this connection, the European Union legislature adopted Directive 2008/101, which amends Directive 2003/87 by including aviation in the allowance trading scheme.

33 Recitals 8 to 11, 14, 17 and 21 in the preamble to Directive 2008/101 are worded as follows:

'(8) The Kyoto Protocol to the [Framework Convention] … requires developed countries to pursue the limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol [on Substances that Deplete the Ozone Layer] from aviation, working through the [ICAO].

(9) While the Community is not a Contracting Party to the … Chicago Convention …, all Member States are Contracting Parties to that Convention and members of the ICAO. Member States continue to support work with other States in the ICAO on the development of measures, including market-based instruments, to address the climate change impacts of aviation. At the sixth meeting of the ICAO Committee on Aviation Environmental Protection in 2004, it was agreed that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices seemed sufficiently unattractive that it should not then be pursued further. Consequently, Resolution A35-5 of the ICAO's 35th Assembly held in September 2004 did not propose a new legal instrument but instead endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. Appendix L to Resolution A36-22 of the ICAO's 36th Assembly held in September 2007 urges Contracting States not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States. Recalling that the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States, the Member States of the European Community and fifteen other European States placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a

non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory.

(10) The Sixth Community Environment Action Programme established by Decision No 1600/2002/EC of the European Parliament and of the Council … provided for the Community to identify and undertake specific actions to reduce greenhouse gas emissions from aviation if no such action were agreed within the ICAO by 2002. In its conclusions of October 2002, December 2003 and October 2004, the Council has repeatedly called on the Commission to propose action to reduce the climate change impact of international air transport.

(11) Policies and measures should be implemented at Member State and Community level across all sectors of the Community economy in order to generate the substantial reductions needed. If the climate change impact of the aviation sector continues to grow at the current rate, it would significantly undermine reductions made by other sectors to combat climate change.

…

(14) The objective of the amendments made to Directive 2003/87/EC by this Directive is to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the Community scheme.

…

(17) The Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. The Community scheme may serve as a model for the use of emissions trading worldwide. The Community and its Member States should continue to be in contact with third parties during the implementation of this Directive and to encourage third countries to take equivalent measures. If a third country adopts measures, which have an environmental effect at least equivalent to that of this Directive, to reduce the climate impact of flights to the Community, the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country's measures, after consulting with that country. Emissions trading schemes being developed in third countries are beginning to provide for optimal interaction with the Community scheme in relation to their coverage of aviation. Bilateral arrangements on linking the Community scheme with other trading schemes to form a common scheme or taking account of equivalent measures to avoid double regulation could constitute a step towards global agreement. Where such bilateral arrangements are made, the Commission may amend the types of aviation activities included in the Community scheme, including consequential adjustments to the total quantity of allowances to be issued to aircraft operators.

…

(21) Full harmonisation of the proportion of allowances issued free of charge to all aircraft operators participating in the Community scheme is appropriate in order to ensure a level playing field for aircraft operators, given that each aircraft operator will be regulated by a single Member State in respect of all their operations to, from and within the EU and by the non-discrimination provisions of bilateral air service agreements with third countries.'

34 By virtue of Article 1(4) of Directive 2008/101, Directive 2003/87 now contains a Chapter II, which reads as follows:

‘Chapter II

Aviation

Article 3a

Scope

The provisions of this Chapter shall apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I.

…

Article 3c

Total quantity of allowances for aviation

1. For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 97 % of the historical aviation emissions.

2. For the period referred to in Article 11(2) beginning on 1 January 2013, and, in the absence of any amendments following the review referred to in Article 30(4), for each subsequent period, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 95 % of the historical aviation emissions multiplied by the number of years in the period.

…

Article 3d

Method of allocation of allowances for aviation through auctioning

1. In the period referred to in Article 3c(1), 15 % of allowances shall be auctioned.

2. From 1 January 2013, 15 % of allowances shall be auctioned. This percentage may be increased as part of the general review of this Directive.

3. A Regulation shall be adopted containing detailed provisions for the auctioning by Member States of allowances not required to be issued free of charge in accordance with paragraphs 1 and 2 of this Article or Article 3f(8). The number of allowances to be auctioned in each period by each Member State shall be proportionate to its share of the total attributed aviation emissions for all Member States for the reference year...

…

4. It shall be for Member States to determine the use to be made of revenues generated from the auctioning of allowances. Those revenues should be used to tackle climate change in the EU and third countries, inter alia, to reduce greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, especially developing countries, to fund research and development for mitigation and adaptation, including in particular in the fields of aeronautics and air transport, to reduce emissions through low-emission transport and to cover the cost of administering the Community scheme. The proceeds of auctioning should also be used to fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and measures to avoid deforestation.

…

Article 3e

Allocation and issue of allowances to aircraft operators

1. For each period referred to in Article 3c, each aircraft operator may apply for an allocation of allowances that are to be allocated free of charge. An application may be made by submitting to the competent authority in the administering Member State verified tonne-kilometre data for the aviation activities listed in Annex I performed by that aircraft operator for the monitoring year. …

…'

35 Article 1(10)(b) of Directive 2008/101 provides for the insertion, in Article 12 of Directive 2003/87, of paragraph 2a which is worded as follows:

'Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.'

36 Under Article 1(14)(b) of Directive 2008/101, Article 16(2) and (3) of Directive 2003/87 are replaced by the following:

'2. Member States shall ensure publication of the names of operators and aircraft operators who are in breach of requirements to surrender sufficient allowances under this Directive.

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.'

37 Also, Article 1(14)(c) of Directive 2008/101 provides inter alia for the addition to Article 16 of Directive 2003/87 of paragraph 5, which is worded as follows:

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

38 Under Article 1(18) of Directive 2008/101, Article 25a, headed 'Third country measures to reduce the climate change impact of aviation', is inserted in Directive 2003/87, providing as follows:

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

Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

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

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

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

39 As provided in the annex to Directive 2008/101, the title of Annex I to Directive 2003/87 is now 'Categories of activities to which this Directive applies' and paragraph 2 of the introduction preceding the table set out in Annex I to Directive 2003/87 has the following subparagraph added to it:

'From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.'

40 The annex to Directive 2008/101 also amends Annex IV to Directive 2003/87, by adding thereto Part B which is entitled 'Monitoring and reporting of emissions from aviation activities' and provides:

'Monitoring of carbon dioxide emissions

Emissions shall be monitored by calculation. Emissions shall be calculated using the formula:

Fuel consumption × emission factor

Fuel consumption shall include fuel consumed by the auxiliary power unit. Actual fuel consumption for each flight shall be used wherever possible and shall be calculated using the formula:

Amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for that subsequent flight.

…

A separate calculation shall be made for each flight and for each fuel.

Reporting of emissions

Each aircraft operator shall include the following information in its report under Article 14(3):

A. Data identifying the aircraft operator, including:

— name of the aircraft operator,

— its administering Member State,

…

B. For each type of fuel for which emissions are calculated:

— fuel consumption,

— emission factor,

— total aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,

— aggregated emissions from:

  — all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which departed from an aerodrome situated in the territory of a Member State and arrived at an aerodrome situated in the territory of the same Member State,

  — all other flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,

— aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which:

  — departed from each Member State, and

  — arrived in each Member State from a third country,

— uncertainty.

Monitoring of tonne-kilometre data for the purpose of Articles 3e and 3f

For the purpose of applying for an allocation of allowances in accordance with Article 3e(1) or Article 3f(2), the amount of aviation activity shall be calculated in tonne-kilometres using the following formula:

tonne-kilometres = distance × payload

where:

"distance" means the great circle distance between the aerodrome of departure and the aerodrome of arrival plus an additional fixed factor of 95 km; and

"payload" means the total mass of freight, mail and passengers carried.

…'

C — *National law*

41 In the United Kingdom, Directive 2008/101 has been transposed by the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 (SI 2009 No 2301), and by other provisions envisaged to be adopted in 2010.

II — The facts in the main proceedings and the questions referred for a preliminary ruling

42 According to the information provided by the referring court, the Air Transport Association of America, a non-profit-making entity, is the principal trade and service association of the United States scheduled airline industry. The airlines American Airlines Inc., Continental Airlines Inc. and United Airlines Inc. operate flights in the United States, Europe and the rest of the world. The United Kingdom is their administering Member State within the meaning of Directive 2003/87, as amended by Directive 2008/101.

43 On 16 December 2009, ATA and others brought judicial review proceedings asking the referring court to quash the measures implementing Directive 2008/101 in the United Kingdom, which fall within the competence of the Secretary of State for Energy and Climate Change. In support of their action, they pleaded that that directive was unlawful in the light of international treaty law and customary international law.

44 On 28 May 2010, the referring court granted the International Air Transport Association (IATA) and the National Airlines Council of Canada permission to intervene in support of ATA and others, and granted five environmental organisations, namely the Aviation Environment Federation, WWF-UK, the European Federation for Transport and Environment, Environmental Defense Fund and Earthjustice, permission to intervene in support of the Secretary of State for Energy and Climate Change.

45 It is in those circumstances that the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are any or all of the following rules of international law capable of being relied upon in this case to challenge the validity of Directive 2003/87/EC as amended

by Directive 2008/101/EC so as to include aviation activities within the EU Emissions Trading Scheme …:

(a) the principle of customary international law that each State has complete and exclusive sovereignty over its airspace;

(b) the principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty;

(c) the principle of customary international law of freedom to fly over the high seas;

(d) the principle of customary international law (the existence of which is not accepted by the Defendant) that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty;

(e) the Chicago Convention (in particular Articles 1, 11, 12, 15 and 24);

(f) the Open Skies Agreement (in particular Articles 7, 11(2)(c) and 15(3));

(g) the Kyoto Protocol (in particular, Article 2(2))?

To the extent that question 1 may be answered in the affirmative:

(2) Is [Directive 2008/101] invalid, if and in so far as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States, as contravening one or more of the principles of customary international law asserted [in question 1]?

(3) Is [Directive 2008/101] invalid, if and in so far as it applies the Emissions Trading Scheme to those parts of flights (either generally or by aircraft registered in third countries) which take place outside the airspace of EU Member States:

(a) as contravening Articles 1, 11 and/or 12 of the Chicago Convention;

(b) as contravening Article 7 of the Open Skies Agreement?

(4) Is [Directive 2008/101] invalid, in so far as it applies the Emissions Trading Scheme to aviation activities:

(a) as contravening Article 2(2) of the Kyoto Protocol and Article 15(3) of the Open Skies Agreement;

(b) as contravening Article 15 of the Chicago Convention, on its own or in conjunction with Articles 3(4) and 15(3) of the Open Skies Agreement;

(c) as contravening Article 24 of the Chicago Convention, on its own or in conjunction with Article 11(2)(c) of the Open Skies Agreement?'

III — Consideration of the questions referred

A — *Question 1*

46 By its first question, the referring court asks, in essence, whether the principles and provisions of international law which it mentions are capable of being relied upon in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101 inasmuch as it includes aviation in the allowance trading scheme under Directive 2003/87.

47 It is to be recalled at the outset that, in accordance with settled case-law, national courts do not have the power to declare acts of the European Union institutions invalid. The main purpose of the jurisdiction conferred on the Court by Article 267 TFEU is to ensure that European Union law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of an act of European Union law is in question. Differences between courts of the Member States as to the validity of acts of European Union law would be liable to jeopardise the very unity of

the European Union legal order and to undermine the fundamental requirement of legal certainty (Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27 and the case-law cited).

48 The Court of Justice alone therefore has jurisdiction to determine that an act of the European Union, such as Directive 2008/101, is invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 17; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 17; Case C-6/99 *Greenpeace France and Others* [2000] ECR I-1651, paragraph 54; *IATA and ELFAA*, paragraph 27; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 54).

1. The international treaties relied upon

49 First of all, in conformity with the principles of international law, European Union institutions which have power to negotiate and conclude an international agreement are free to agree with the third States concerned what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice, in the same manner as any question of interpretation relating to the application of the agreement in the European Union (see Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17, and Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 34).

50 It should also be pointed out that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union (see, to this effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52;

Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 307).

51 It follows that the validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law. Where such invalidity is pleaded before a national court, the Court of Justice ascertains, as is requested of it by the referring court's first question, whether certain conditions are satisfied in the case before it, in order to determine whether, pursuant to Article 267 TFEU, the validity of the act of European Union law concerned may be assessed in the light of the rules of international law relied upon (see, to this effect, *Intertanko and Others*, paragraph 43).

52 First, the European Union must be bound by those rules (see Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 7, and *Intertanko and Others*, paragraph 44).

53 Second, the Court can examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this (see Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 110).

54 Finally, where the nature and the broad logic of the treaty in question permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise (see *IATA and ELFAA*, paragraph 39, and *Intertanko and Others*, paragraph 45).

55 Such a condition if fulfilled where the provision relied upon contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14; Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, paragraph 39; and Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-1255, paragraph 44 and the case-law cited).

56 It must accordingly be ascertained in the case of the provisions of the treaties mentioned by the referring court whether the conditions as recalled in paragraphs 52 to 54 of the present judgment are in fact met.

(a) The Chicago Convention

57 As is apparent from the third recital in its preamble, the Chicago Convention lays down 'certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically'.

58 The Chicago Convention has a wide field of application in that it governs, inter alia, the rights of aircraft not engaged in scheduled services, including in relation to flying over the contracting States' territory, the principles applicable to air cabotage, the circumstances in which an aircraft capable of being flown without a pilot may be so flown over the territory of a contracting State, the definition by the contracting States of areas which are prohibited from being flown over for reasons of military necessity or public safety, the landing of aircraft at a customs airport, the applicability of air regulations, the rules of the air, the imposition of airport and similar charges, the

nationality of aircraft, and measures to facilitate air navigation, such as the facilitation of formalities, the establishment of customs and immigration procedures, air navigation facilities and standard systems.

59 The Chicago Convention also lays down the conditions to be fulfilled with respect to aircraft, including conditions relating to the documents that must be carried, to aircraft radio equipment, to certificates of airworthiness, to the recognition of certificates and licences, and to cargo restrictions. Furthermore, the convention provides for the adoption by the ICAO of international standards and recommended practices.

60 As has been stated in paragraph 3 of the present judgment, it is undisputed that the European Union is not a party to the Chicago Convention while, on the other hand, all of its Member States are contracting parties.

61 Although the first paragraph of Article 351 TFEU implies a duty on the part of the institutions of the European Union not to impede the performance of the obligations of Member States which stem from an agreement prior to 1 January 1958, such as the Chicago Convention, it is, however, to be noted that that duty of the institutions is designed to permit the Member States concerned to perform their obligations under a prior agreement and does not bind the European Union as regards the third States party to that agreement (see, to this effect, Case 812/79 *Burgoa* [1980] ECR 2787, paragraphs 8 and 9).

62 Consequently, in the main proceedings, it is only if and in so far as, pursuant to the EU and FEU Treaties, the European Union has assumed the powers previously exercised by its Member States in the field, as set out in paragraphs 57 to 59 of the present judgment, to which that international convention applies that the convention's provisions

would have the effect of binding the European Union (see, to this effect, *International Fruit Company and Others*, paragraph 18; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16; and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 25).

63 Indeed, in order for the European Union to be capable of being bound, it must have assumed, and thus had transferred to it, all the powers previously exercised by the Member States that fall within the convention in question (see, to this effect, *Intertanko and Others*, paragraph 49, and *Bogiatzi*, paragraph 33). Therefore, the fact that one or more acts of European Union law may have the object or effect of incorporating into European Union law certain provisions that are set out in an international agreement which the European Union has not itself approved is not sufficient for it to be incumbent upon the Court to review the legality of the act or acts of European Union law in the light of that agreement (see, to this effect, *Intertanko and Others*, paragraph 50).

64 As the Swedish Government has essentially pointed out in its written observations, both Article 80(2) EC and Article 100(2) TFEU provide that the European Union is able to adopt appropriate provisions concerning air transport.

65 Certain matters falling within the Chicago Convention have been covered by legislation adopted at European Union level, in particular on the basis of Article 80(2) EC. As regards air transport, as the Court has already had occasion to point out in Case C-382/08 *Neukirchinger* [2011] ECR I-139, paragraph 23, that is true, for example, of Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ 2002 L 240, p. 1) and of Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ 1991 L 373, p. 4), as amended by Regulation (EC) No 1900/2006 of the European Parliament and of the Council of 20 December 2006 (OJ 2006 L 377, p. 176).

66 The European Union legislature has likewise adopted Directive 2006/93/EC of the European Parliament and of the Council of 12 December 2006 on the regulation of the operation of aeroplanes covered by Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988) (OJ 2006 L 374, p. 1).

67 As regards the issue of taxation of the fuel load, the Council has also adopted Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51) which, in Article 14(1)(b), lays down a tax exemption for energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying, in order that, as is apparent from recital 23 in the preamble to that directive, the European Union complies in particular with certain international obligations, including those connected with the tax exemptions on energy products intended for civil aviation which are granted to airlines on the basis of the Chicago Convention and of international bilateral air service agreements concluded by the European Union and/or the Member States with certain third States (see Case C-79/10 *Systeme Helmholz* [2011] ECR I-12511, paragraphs 24 and 25).

68 It should, moreover, be pointed out that, by the adoption of Council Decision 2011/530/EU of 31 March 2011 on the signing, on behalf of the Union, and provisional application of a Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation (OJ 2011 L 232, p. 1), the European Union has sought to develop a framework for cooperation as regards security audits and inspections in the light of the standards set out in Annex 17 to the Chicago Convention.

69 Nevertheless, whilst it is true that the European Union has in addition acquired certain exclusive powers to agree with third States commitments falling within the field of application of the European Union legislation on international air transport and, consequently, of the Chicago Convention (see, to this effect, Case C-476/98

Commission v *Germany* [2002] ECR I-9855, paragraph 124), that does not mean that it has exclusive competence in the entire field of international civil aviation as covered by that convention.

70 As the French and Swedish Governments have pointed out, the Member States have retained powers falling within the field of the Chicago Convention, such as those relating to the award of traffic rights, to the setting of airport charges and to the determination of prohibited areas in their territory which may not be flown over.

71 Consequently, it must be concluded that, since the powers previously exercised by the Member States in the field of application of the Chicago Convention have not to date been assumed in their entirety by the European Union, the latter is not bound by that convention.

72 It follows that in the context of the present reference for a preliminary ruling the Court cannot examine the validity of Directive 2008/101 in the light of the Chicago Convention as such.

(b) The Kyoto Protocol

73 It is apparent from Decisions 94/69 and 2002/358 that the European Union has approved the Kyoto Protocol. Consequently, its provisions form an integral part of the legal order of the European Union as from its entry into force (see Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5).

74 Thus, in order to determine whether the Court may assess the validity of Directive 2008/101 in the light of the Kyoto Protocol, it must be determined whether the nature and the broad logic of the latter do not preclude such examination and whether, additionally, its provisions, in particular Article 2(2), appear, as regards their content, to be unconditional and sufficiently precise so as to confer on persons subject to European Union law the right to rely thereon in legal proceedings in order to contest the legality of an act of European Union law such as that directive.

75 In that regard, by adopting the Kyoto Protocol the parties thereto sought to set objectives for reducing greenhouse gas emissions and undertook to adopt the measures necessary in order to attain those objectives. The protocol allows certain parties thereto, which are undergoing the process of transition to a market economy, a certain degree of flexibility in the implementation of their commitments. Furthermore, first, the protocol allows certain parties to meet their reduction commitments collectively. Second, the Conference of the Parties, established by the Framework Convention, is responsible for approving appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the protocol.

76 It is thus clear that, even though the Kyoto Protocol imposes quantified greenhouse gas reduction commitments with regard to the commitment period corresponding to the years 2008 to 2012, the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree.

77 In particular, Article 2(2) of the Kyoto Protocol, mentioned by the referring court, provides that the parties thereto are to pursue limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels, working through the ICAO. Thus, that provision, as regards its content, cannot in any event be considered to be

unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of Directive 2008/101.

78 Consequently, the Kyoto Protocol cannot be relied upon in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101.

(c) The Open Skies Agreement

79 The Open Skies Agreement has been approved on behalf of the European Union by Decisions 2007/339 and 2010/465. Consequently, its provisions form an integral part of the legal order of the European Union as from its entry into force (see *Haegeman*, paragraph 5).

80 Thus, the question arises first of all whether the nature and the broad logic of the Open Skies Agreement permit the validity of Directive 2008/101 to be examined in the light of that agreement.

81 As is apparent from the third and fourth recitals in its preamble, the Open Skies Agreement is intended to make it possible for airlines of the contracting parties to offer the travelling and shipping public competitive prices and services in open markets. The agreement also seeks to have all sectors of the air transport industry, including airline workers, benefiting in such a liberalised agreement. The parties thereto, in so doing, announced their intention of establishing a precedent of global significance to promote the benefits of liberalisation in this crucial economic sector.

82 As the Advocate General has observed in point 91 of her Opinion, airlines established in the territory of the parties to the Open Skies Agreement are thus specifically addressed by that agreement. Articles 3(2) and (5) and 10, provisions which are designed to confer rights on those airlines directly, are particularly revealing in this regard, whilst other provisions of the agreement are designed to impose obligations upon them.

83 With regard to the fact that the parties have agreed, under Article 19 of the Open Skies Agreement, that any dispute relating to the application or interpretation of the agreement may be subject to a procedure that can result in referral to an arbitration tribunal, it should be borne in mind that the fact that the contracting parties have established a special institutional framework for consultations and negotiations between them in relation to the implementation of that agreement is not sufficient to exclude all judicial application of the agreement (see, to this effect, *Kupferberg*, paragraph 20).

84 Since the Open Skies Agreement establishes certain rules designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms which are capable of being relied upon against the parties to that agreement, and the nature and the broad logic of the agreement do not so preclude, the conclusion can be drawn that the Court may assess the validity of an act of European Union law, such as Directive 2008/101, in the light of the provisions of the agreement.

85 It must therefore be examined whether the provisions of the Open Skies Agreement that are mentioned by the referring court appear, as regards their content, to be unconditional and sufficiently precise, so as to enable the Court to examine the validity of Directive 2008/101 in the light of those particular provisions.

(i) Article 7 of the Open Skies Agreement

86 As the Advocate General has observed in point 103 of her Opinion, Article 7 of the Open Skies Agreement, headed 'Application of laws', lays down a precise and specific obligation applying to aircraft utilised by the airlines of the parties to that agreement. Under Article 7, when these aircraft engaged in international air navigation enter, depart from or are within the territory of one of the contracting parties, they are to be subject to and must observe the laws and regulations of that party, be they provisions relating to the admission or departure of aircraft on that party's territory or those relating to the operation and navigation of aircraft.

87 Consequently, Article 7 of the Open Skies Agreement may be relied upon by airlines in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101.

(ii) Article 11 of the Open Skies Agreement

88 In circumstances such as those of the main proceedings, it is apparent that, of the products referred to in Article 11(1) and (2) of the Open Skies Agreement, only fuel as such proves relevant and that, moreover, the through-put charges for such a product within the meaning of Article 11(7) are not at issue.

89 Article 11(1) and (2)(c) of the Open Skies Agreement exempt from taxes, duties, fees and charges, on the basis of reciprocity, inter alia fuel introduced into or supplied in the territory of the European Union for use in an aircraft of an airline established in

the United States engaged in international air transportation, even when the fuel is to be used on a part of the journey performed over the territory of the European Union.

90 So far as concerns the fuel load for international flights, it is to be noted that the European Union has expressly laid down an exemption from taxation for energy products supplied for use as fuel for the purpose of air navigation, in order in particular to comply with existing international obligations resulting from the Chicago Convention and with those owed by it under international bilateral air service agreements which it has concluded with certain third States and which prove, in this respect, to be of the same nature as the Open Skies Agreement (see *Systeme Helmholz*, paragraphs 24 and 25).

91 It is also undisputed that, so far as concerns international commercial flights, that exemption existed before Directive 2003/96 was adopted (see, in this regard, *Systeme Helmholz*, paragraph 22) and that in laying down in Article 11(1) and (2)(c) of the Open Skies Agreement an obligation to exempt the fuel load from taxation, the parties to that agreement, both the European Union and the Member States and the United States, merely reiterated, in the case of the fuel load, an obligation derived from international treaties, in particular the Chicago Convention.

92 Finally, it has not in any way been alleged, by either the Member States or the institutions of the European Union which have submitted observations, that within the framework of the Open Skies Agreement the European Union's trading partner has not exempted the fuel load of the aircraft of airlines established in a Member State.

93 It follows that, as regards fuel specifically, the condition of reciprocity in Article 11(1) and (2)(c) of the Open Skies Agreement does not constitute, in particular in circumstances such as those of the present case, in which the contracting parties have reciprocally performed the obligation in question, an obstacle preventing the obligation,

laid down in that provision, to exempt the fuel load from taxes, duties, fees and charges from being relied upon directly for the purpose of reviewing the validity of Directive 2008/101.

94 In the light of the foregoing, it must be accepted that Article 11(1) and (2)(c) of the Open Skies Agreement, so far as concerns the obligation to exempt the fuel load of aircraft engaged in international air services between the European Union and the United States from taxes, duties, fees and charges, with the exception of charges based on the cost of the service provided, may be relied upon in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101 in the light of that provision.

(iii) Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof

95 The first sentence of Article 15(3) of the Open Skies Agreement is intended to impose upon the contracting parties the obligation to follow the aviation environmental standards set out in annexes to the Chicago Convention, except where differences have been filed. This last point is not an element defining the obligation on the European Union to follow those standards, but constitutes a possibility of derogating from that obligation.

96 That sentence thus appears unconditional and sufficiently precise for the Court to be able to assess the validity of Directive 2008/101 in the light thereof (see, with regard to compliance with environmental norms derived from a convention, *Pêcheurs de l'étang de Berre*, paragraph 47).

97 The second sentence of Article 15(3) provides that any environmental measures affecting air services under the Open Skies Agreement must be applied by the parties in accordance with Articles 2 and 3(4) of that agreement.

98 Thus, whilst the European Union may, in the context of application of its environmental measures, adopt certain measures which have the effect of unilaterally limiting the volume of traffic or frequency or regularity of service within the meaning of Article 3(4) of the Open Skies Agreement, it must, however, apply such measures under uniform conditions that are consistent with Article 15 of the Chicago Convention, which provides, in essence, that airport charges which are or may be imposed on aircraft engaged in scheduled international air services are not to be higher than those that would be paid by national aircraft engaged in similar international air services.

99 It follows that, having regard to Article 2 of the Open Skies Agreement, which provides that each party is to allow a fair and equal opportunity for the airlines of both parties to compete in providing international air transportation, Article 15(3) of that agreement, read in conjunction with Articles 2 and 3(4) thereof, must be interpreted as meaning that, if the European Union adopts environmental measures in the form of airport charges which have the effect of limiting the volume of traffic or the frequency or regularity of transatlantic air services, such charges imposed on airlines established in the United States are not to be higher than those payable by European Union airlines and in so doing, from the viewpoint of any liability on their part to such charges, the European Union must allow a fair and equal opportunity for those two categories of airline to compete.

100 Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof, therefore contains an unconditional and sufficiently precise obligation that may be relied upon for the purpose of assessing the validity of Directive 2008/101 in the light of that provision.

2. Customary international law

101 Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union (see, to this effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraphs 45 and 46).

102 Thus, it should be examined first whether the principles to which the referring court makes reference are recognised as forming part of customary international law. If they are, it should, secondly, then be determined whether and to what extent they may be relied upon by individuals to call into question the validity of an act of the European Union, such as Directive 2008/101, in a situation such as that in the main proceedings.

(a) Recognition of the principles of customary international law relied upon

103 The referring court mentions a principle that each State has complete and exclusive sovereignty over its airspace and another principle that no State may validly purport to subject any part of the high seas to its sovereignty. It also mentions the principle of freedom to fly over the high seas.

104 These three principles are regarded as embodying the current state of customary international maritime and air law and, moreover, they have been respectively codified in Article 1 of the Chicago Convention (see, on the recognition of such a principle, the judgment of the International Court of Justice of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986*, p. 392, paragraph 212), in Article 2 of the Geneva Convention of 29 April 1958 on the High Seas (*United Nations Treaty Series*, Vol. 450, p. 11) (see also, on the recognition of this principle, the judgment of the Permanent Court of International Justice of 7 September 1927 in *the Case of the S.S 'Lotus'*, PCIJ 1927, Series A, No 10, p. 25) and in the third sentence of Article 87(1) of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, which entered into force on 16 November 1994 and was concluded and approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

105 Nor has the existence of those principles of international law been contested by the Member States, the institutions of the European Union, the Republic of Iceland or the Kingdom of Norway in their written observations or at the hearing.

106 As regards the fourth principle set out by the referring court, namely the principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the State in which they are registered, it must be found by contrast that, apart from the fact that the United Kingdom Government and, to a certain extent, the German Government dispute the existence of such a principle, insufficient evidence exists to establish that the principle of customary international law, recognised as such, that a vessel on the high seas is in principle governed only by the law of its flag (see *Poulsen and Diva Navigation*, paragraph 22) would apply by analogy to aircraft overflying the high seas.

(b) Whether and under what circumstances the principles at issue may be relied upon

107 The principles of customary international law mentioned in paragraph 103 of the present judgment may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act (see Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193, paragraphs 14 to 18, and Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraphs 11 to 16) and, second, the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard.

108 In the main proceedings, those principles of customary international law are relied upon, in essence, in order for the Court to determine whether the European Union had competence, in the light thereof, to adopt Directive 2008/101 in that it extends the application of Directive 2003/87 to aircraft operators of third States whose flights which arrive at and depart from an aerodrome situated in the territory of a Member State of the European Union are carried out in part over the high seas and over the third States' territory.

109 Therefore, even though the principles at issue appear only to have the effect of creating obligations between States, it is nevertheless possible, in circumstances such as those of the case which has been brought before the referring court, in which Directive 2008/101 is liable to create obligations under European Union law as regards the claimants in the main proceedings, that the latter may rely on those principles and that the Court may thus examine the validity of Directive 2008/101 in the light of such principles.

110 However, since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles (see, to this effect, *Racke*, paragraph 52).

111 Having regard to all the foregoing considerations, the answer to the first question is that the only principles and provisions of international law, from among those mentioned by the referring court, that can be relied upon, in circumstances such as those of the main proceedings and for the purpose of assessing the validity of Directive 2008/101, are:

— first, within the limits of review as to a manifest error of assessment attributable to the European Union regarding its competence, in the light of those principles, to adopt that directive:

— the principle that each State has complete and exclusive sovereignty over its airspace,

— the principle that no State may validly purport to subject any part of the high seas to its sovereignty, and

— the principle which guarantees freedom to fly over the high seas,

— and second:

— Articles 7 and 11(1) and (2)(c) of the Open Skies Agreement, and

— Article 15(3) of that agreement read in conjunction with Articles 2 and 3(4) thereof.

B — *Questions 2 to 4*

112 By its second, third and fourth questions, and given the Court's answer to the first question, the referring court asks in essence, if and in so far as Directive 2008/101 is intended to apply the allowance trading scheme to those parts of flights which take place outside the airspace of the Member States, including to flights by aircraft registered in third States, whether that directive is valid in the light of the principles of customary international law mentioned in the Court's answer to the first question as well as in the light of Articles 7 and 11(1) and (2)(c) of the Open Skies Agreement and of Article 15(3) thereof read in conjunction with Articles 2 and 3(4).

113 Having regard to the wording of these questions and the fact that the claimants in the main proceedings are airlines registered in a third State, it should first be determined whether and to what extent Directive 2008/101 applies to those parts of international flights that are performed outside the airspace of the Member States by such airlines. Second, the directive's validity should be examined in that context.

1. The scope *ratione loci* of Directive 2008/101

114 Directive 2003/87 applies, in accordance with Article 2(1) thereof, to emissions from the activities listed in Annex I and to the six greenhouse gases listed in Annex II, one of which is CO_2.

115 Directive 2008/101 amended Annex I to Directive 2003/87 by inserting a category of activity headed 'Aviation' and adding to paragraph 2 of the annex's introduction a second subparagraph stating that 'from 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included'.

116 The exclusions set out in Annex I do not include criteria linked, in the case of aircraft departing from a European Union aerodrome, to the aerodrome of arrival or, in the case of aircraft arriving at a European Union aerodrome, to the aerodrome of departure. Consequently, Directive 2008/101 applies without distinction to flights arriving in or departing from the territory of the European Union, including those from or to aerodromes situated outside that territory. This is indeed apparent from recital 16 in the preamble to Directive 2008/101.

117 Thus, that directive is not intended to apply as such to international flights flying over the territory of the Member States of the European Union or of third States when such flights do not arrive at or depart from an aerodrome situated in the territory of a Member State.

118 On the other hand, where a flight that departs from an aerodrome situated in the territory of a third State does arrive at an aerodrome situated in the territory of one of the Member States of the European Union, or where the destination of a flight departing from such an aerodrome is an aerodrome situated in a third State, it is clear from Part B of Annex IV to Directive 2003/87, as amended by Directive 2008/101, that the aircraft operators performing such flights must report their emissions, for the purpose of determining, in accordance with Article 12(2a) of Directive 2003/87, as inserted by Directive 2008/101, the number of allowances that they must surrender for the preceding calendar year, a number which corresponds to the verified emissions, which are calculated from data relating to all of those flights.

119 In particular, in order to calculate the 'tonne-kilometres', account is taken of fuel consumption, which is determined by means of a calculation formula intended to establish, wherever possible, the actual fuel consumption for flights falling within Directive 2008/101.

120 It is in the light of this aspect related to the taking into account of fuel consumption for all international flights which arrive at or depart from aerodromes situated in the territory of the Member States that the validity of Directive 2008/101 should be examined in the context of the main proceedings.

2. The competence of the European Union, in the light of the rules of customary international law capable of being relied upon in the context of the main proceedings, to adopt Directive 2008/101

121 As has been noted in paragraph 108 of the present judgment, the three principles of customary international law capable of being relied upon in the present case for the purposes of the Court's assessment of the validity of Directive 2008/101 are, to a large extent, connected with the territorial scope of Directive 2003/87 as amended by Directive 2008/101.

122 It is to be noted at the outset that European Union law and, in particular, Directive 2008/101 cannot render Directive 2003/87 applicable as such to aircraft registered in third States that are flying over third States or the high seas.

123 The European Union must respect international law in the exercise of its powers, and therefore Directive 2008/101 must be interpreted, and its scope delimited, in the light of the relevant rules of the international law of the sea and international law of the air (see, to this effect, *Poulsen and Diva Navigation*, paragraph 9).

124 On the other hand, European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union (see, by analogy, *Poulsen and Diva Navigation*, paragraph 28).

125 In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.

126 Nor can such application of European Union law affect the principle of freedom to fly over the high seas since an aircraft flying over the high seas is not subject, in so far as it does so, to the allowance trading scheme. Moreover, such an aircraft can, in certain circumstances, cross the airspace of one of the Member States without its operator thereby being subject to that scheme.

127 It is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme.

128 As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated in the light of the whole of the international flight that its aircraft has performed or is going to perform from or to such an aerodrome, it must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.

129 Furthermore, the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory (see to this effect, with regard to the application of competition law, *Ahlström Osakeyhtiö and Others* v *Commission*,

paragraphs 15 to 18, and, with regard to hydrocarbons accidentally spilled beyond a Member State's territorial sea, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraphs 60 to 62).

130 It follows that the European Union had competence, in the light of the principles of customary international law capable of being relied upon in the context of the main proceedings, to adopt Directive 2008/101, in so far as the latter extends the allowance trading scheme laid down by Directive 2003/87 to all flights which arrive at or depart from an aerodrome situated in the territory of a Member State.

3. The validity of Directive 2008/101 in the light of the Open Skies Agreement

(a) The validity of Directive 2008/101 in the light of Article 7 of the Open Skies Agreement

131 ATA and others contend, in essence, that Directive 2008/101 infringes Article 7 of the Open Skies Agreement since, so far as it concerns them, Article 7 requires aircraft engaged in international navigation to comply with the laws and regulations of the European Union only when the aircraft enter or depart from the territory of the Member States or, in the case of its laws and regulations relating to the operation and navigation of such aircraft, when their aircraft are within that territory. They maintain that Directive 2008/101 seeks to apply the allowance trading scheme laid down by Directive 2003/87 not only upon the entry of aircraft into the territory of the Member States or on their departure from that territory, but also to those parts of flights that are carried out above the high seas and the territory of third States.

132 In that regard, it need only be recalled that Directive 2008/101 does not render Directive 2003/87 applicable as such to aircraft registered in third States that are flying over third States or the high seas.

133 It is only if the operators of such aircraft choose to operate commercial air routes arriving at or departing from aerodromes situated in the territory of the Member States that, because their aircraft use such aerodromes, those operators are subject to the allowance trading scheme.

134 Directive 2008/101 provides that Directive 2003/87 is to apply to flights which arrive at or depart from an aerodrome situated in the territory of a Member State. Thus, since that legislation relates to the admission to or departure from the territory of the Member States of aircraft engaged in international air navigation, both European and transatlantic, it is clear from the very wording of Article 7(1) of the Open Skies Agreement that such legislation applies to any aircraft utilised by the airlines of the other party to that agreement and that such aircraft are required to comply with that legislation.

135 It follows that Article 7(1) of the Open Skies Agreement does not preclude the application of the allowance trading scheme set up by Directive 2003/87 to operators of aircraft, such as airlines established in the United States, when their aircraft engage in flights which arrive at or depart from an aerodrome situated in the territory of a Member State.

(b) The validity of Directive 2008/101 in the light of Article 11(1) and (2)(c) of the Open Skies Agreement

136 ATA and others and IATA contend in essence that, in extending the allowance trading scheme prescribed by Directive 2003/87 to international aviation, Directive 2008/101

infringes the obligation, laid down in Article 11(1) and (2)(c) of the Open Skies Agreement and owed by the European Union, to exempt the fuel load from taxes, duties, fees and charges. In particular, those parties to the main proceedings contend that only charges based on the cost of the service provided can be imposed by the European Union, but the scheme prescribed by Directive 2003/87 does not fall within that exception.

137 In that regard, it should be noted that those provisions of the Open Skies Agreement seek to regulate certain aspects relating to the economic costs of air transport, whilst ensuring equal conditions for airlines. Subject to reciprocity, those provisions prohibit, inter alia, certain forms of import customs duties, taxes, fees and charges on fuel.

138 The rules set out in Directive 2008/101 are intended to extend the allowance trading scheme established by Directive 2003/87 to aircraft operators. They thus pursue in particular the objective of improving environmental protection.

139 Furthermore, while the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction of greenhouse gas emissions, the scheme does not of itself reduce those emissions but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions. The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 31).

140 It also follows that the economic logic of the allowance trading scheme consists in ensuring that the reductions of greenhouse gas emissions required to achieve a predetermined environmental outcome take place at the lowest cost. In particular by

allowing the allowances that have been allocated to be sold, the scheme is intended to encourage every participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to him, in order to sell the surplus to another participant who has emitted more than his allowance (*Arcelor Atlantique et Lorraine and Others*, paragraph 32).

141 It is true that in the case of the aviation field the European Union legislature, as is apparent from Part B of Annex IV to Directive 2003/87 as amended by Directive 2008/101, chose to take the fuel consumption of the operators' aircraft as a basis for establishing a formula enabling calculation of those operators' emissions in connection with the flights falling within that annex performed by their aircraft. Aircraft operators must therefore surrender a number of allowances equal to their total emissions during the preceding calendar year, which are calculated on the basis of their fuel consumption for all their flights falling within that directive and an emission factor.

142 However, in contrast to the defining feature of obligatory levies on the possession and consumption of fuel, there is no direct and inseverable link between the quantity of fuel held or consumed by an aircraft and the pecuniary burden on the aircraft's operator in the context of the allowance trading scheme's operation. The actual cost for the operator, resulting from the number of allowances to be surrendered, a quantity which is calculated inter alia on the basis of fuel consumption, depends, inasmuch as a market-based measure is involved, not directly on the number of allowances that must be surrendered, but on the number of allowances initially allocated to the operator and their market price when the purchase of additional allowances proves necessary in order to cover the operator's emissions. Nor can it be ruled out that an aircraft operator, despite having held or consumed fuel, will bear no pecuniary burden resulting from its participation in the allowance trading scheme, or will even make a profit by assigning its surplus allowances for consideration.

143 It follows that, unlike a duty, tax, fee or charge on fuel consumption, the scheme introduced by Directive 2003/87 as amended by Directive 2008/101, apart from the fact that it is not intended to generate revenue for the public authorities, does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable per tonne of fuel consumed for all the flights carried out in a calendar year.

144 Thus, such a scheme is fundamentally different from the Swedish scheme at issue in Case C-346/97 *Braathens* [1999] ECR I-3419, where the Court held in paragraph 23 of its judgment, with regard to an environmental protection tax paid fully to the State, that such a tax was levied on fuel consumption itself, in particular because there was a direct and inseverable link between fuel consumption and the polluting substances covered by that tax, and that the tax thus constituted an excise duty on domestic commercial aviation in breach of the exemption laid down by the relevant directives.

145 In the light of all those considerations, it cannot be asserted that Directive 2008/101 involves a form of obligatory levy in favour of the public authorities that might be regarded as constituting a customs duty, tax, fee or charge on fuel held or consumed by aircraft operators.

146 The fact that aircraft operators may acquire additional allowances to cover their actual emissions not only from other operators but also from the public authorities when they auction 15 % of the total quantity of allowances is not in any way capable of casting doubt on that finding.

147 It is therefore clear that, in extending the application of Directive 2003/87 to aviation, Directive 2008/101 does not in any way infringe the obligation, applicable to the fuel load, to grant exemption, as laid down in Article 11(1) and (2)(c) of the Open Skies Agreement, given that the allowance trading scheme, by reason of its particular features, constitutes a market-based measure and not a duty, tax, fee or charge on the fuel load.

(c) The validity of Directive 2008/101 in the light of Article 15(3) of the Open Skies Agreement read in conjunction with Articles 2 and 3(4) thereof

148 ATA and others submit in essence that application of Directive 2003/87 to airlines established in the United States infringes Article 15(3) of the Open Skies Agreement, since such an environmental measure is incompatible with the relevant ICAO standards. Furthermore, in rendering the scheme laid down by Directive 2003/87 applicable to aviation, Directive 2008/101 constitutes a measure limiting in particular the volume of traffic and frequency of service, in breach of Article 3(4) of that agreement. Finally, application of such a scheme amounts to a charge incompatible with Article 15 of the Chicago Convention, a provision which the parties to the Open Skies Agreement undertook to comply with pursuant to Article 3(4) of that agreement.

149 First of all, it should be noted that, in any event, neither the referring court nor ATA and others have provided material indicating that the European Union, in adopting Directive 2008/101 which renders Directive 2003/87 applicable to aviation, infringed an aviation environmental standard adopted by the ICAO within the meaning of Article 15(3) of the Open Skies Agreement. Furthermore, inasmuch as ICAO Resolution A37-19 lays down in its annex guiding principles for the design and

implementation of market-based measures ('MBMs'), it does not indicate that MBMs, such as the European Union allowance trading scheme, would be contrary to the aviation environmental standards adopted by the ICAO.

150 That annex states, in points (b) and (f) respectively, that such MBMs should support the mitigation of greenhouse gas emissions from international aviation and that MBMs should not be duplicative, so that international aviation CO_2 emissions are accounted for only once under such schemes.

151 That corresponds precisely to the objective formulated in Article 25a of Directive 2003/87, as amended by Directive 2008/101, which seeks to ensure optimal interaction between the European Union allowance trading scheme and MBMs that may be adopted by third States, so that those schemes are not applied twice to aircraft operating on international routes, be they registered in a Member State or in a third State. Such an objective corresponds, moreover, to the objective underlying Article 15(7) of the Open Skies Agreement.

152 As regards the validity of Directive 2008/101 in the light of the second sentence of Article 15(3) of the Open Skies Agreement, it must be stated that that provision, read in conjunction with Article 3(4) of the agreement, does not prevent the parties thereto from adopting measures that would limit the volume of traffic, frequency or regularity of service, or the aircraft type operated by the airlines established in the territory of those parties, when such measures are linked to protection of the environment.

153 Article 3(4) of the Open Skies Agreement expressly provides that neither of the parties to the agreement may impose such limitations 'except as may be required for …

environmental … reasons'. Furthermore, it is to be noted that in any event, the allowance trading scheme does not set any limit on the emissions of aircraft which depart from or arrive at an aerodrome situated in the territory of a Member State and also does not limit frequency or regularity of service, as the fundamental obligation owed by aircraft operators is solely to surrender allowances corresponding to their actual emissions. Nor, for the reasons set out in paragraphs 141 to 147 of the present judgment, can such an obligation be regarded as an airport charge.

154 Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof, provides however that, when the parties to the Open Skies Agreement adopt such environmental measures, they must, as is apparent from paragraph 99 of the present judgment, be applied in a non-discriminatory manner to the airlines concerned.

155 In that regard, it must be stated that, as is indeed apparent from the express terms of recital 21 in the preamble to Directive 2008/101, the European Union has expressly provided for uniform application of the allowance trading scheme to all aircraft operators on routes which depart from or arrive at an aerodrome situated in the territory of a Member State and, in particular, it has sought to comply strictly with the non-discrimination provisions of bilateral air service agreements with third States, like the provisions in Articles 2 and 3(4) of the Open Skies Agreement.

156 Therefore, Directive 2008/101, inasmuch as it provides in particular for application of the allowance trading scheme in a non-discriminatory manner to aircraft operators established both in the European Union and in third States, is not invalid in the light of Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof.

157 Having regard to all of the foregoing, it must be concluded that examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.

IV — Costs

158 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. The only principles and provisions of international law, from among those mentioned by the referring court, that can be relied upon, in circumstances such as those of the main proceedings and for the purpose of assessing the validity of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, are:

— first, within the limits of review as to a manifest error of assessment attributable to the European Union regarding its competence, in the light of those principles, to adopt that directive:

— the principle that each State has complete and exclusive sovereignty over its airspace,

— **the principle that no State may validly purport to subject any part of the high seas to its sovereignty, and**

— **the principle which guarantees freedom to fly over the high seas,**

— **and second:**

— **Articles 7 and 11(1) and (2)(c) of the Air Transport Agreement concluded on 25 and 30 April 2007 between the United States of America, of the one part, and the European Community and its Member States, of the other part, as amended by the Protocol, and**

— **Article 15(3) of that agreement, read in conjunction with Articles 2 and 3(4) thereof.**

2. Examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.

[Signatures]