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OF SHRIMPS AND PLANES OR HOW THE CJEU JUSTIFIES UNILATERAL ENVIRONMENTAL MEASURES WITH EXTRA-TERRITORIAL EFFECTS.

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On December 21, 2011, the Court of Justice of the European Union (the Court) handed down the preliminary ruling in case C-366/10, on the request of the High Court of Justice of England and Wales. The preliminary questions aimed at assessing whether EU Directive 2008/101 was valid, in light of the international obligations of the European Union (EU), in the part imposing environmental measures on flights that are carried out, at least in part, outside the EU airspace. The Court ultimately confirmed the validity of the Directive.

In this decision, the Court took the chance to elaborate on the relationship between the law of the EU and international norms, both of conventional and customary nature. In this post, I will summarize the background of the case and the legal reasoning of the Court. Whereas I will try to provide a comprehensive account of the Court's decision, I will limit my analysis to a specific issue – the understanding of extraterritorial jurisdiction. For further and wider comments and reflections, see this and this recent posts.

Background

In the main proceedings, some US-incorporated airlines and the Air Transport Association of America, the main trade and service association of US airline industry (collectively, the Claimants), brought a claim against the UK Secretary of State for Energy and Climate Change, challenging the validity of the UK measures implementing a EU Directive (2008/101/EC).

The Directive, as well as the domestic measure implementing it, subjects all airlines, including non-EU ones, to the EU Emissions Trading Scheme (ETS), and obliges them to surrender (costly) emissions allowances to compensate the emissions produced during each flight taking off from an airport located in the EU, or landing thereat. This system runs on the principle of "cap and trade" that inspire also the Kyoto Protocol, which establishes a market for greenhouse emissions allowances. Companies are given a certain amount of allowances every year and can buy or sell them to match their actual emission performance, under pain of facing heavy fines if their emissions exceed their allowances. The monetary value of these allowances is guaranteed by their overall scarcity; in fact, a "cap" is set on the total number of allowances existing on the market: in principle, they can only be purchased from other businesses.

The Claimants argued that such obligation is incompatible with some EU's international obligations, insomuch as it applies to non-EU companies operating flights that are not taking place exclusively within the EU air-space, and because it is tantamount to a forbidden tax on fuel loads, and a discriminatory one at that. The international norms invoked are a set of customary norms variously relating to the principle that States are presumed not to have extra-territorial jurisdiction, as well as a spate of provisions of three conventional instruments (the Chicago Convention, the Open Skies Agreement and the Kyoto Protocol).

The possibility to review EU acts under international law

Taking cues from an established doctrine, the Court firstly referred to the *Foto-Frost* jurisprudence to remark that the EU judiciary alone has the power to determine the invalidity of an act of the EU: national courts have no such power, and must refer a preliminary question when in doubt (paras. 47-48). Recalling the so called black-box principle (see an overview

of this theory), the Court noted that – unless otherwise agreed – EU's international commitments are only binding on the Union and can be invoked by the other parties to the relevant treaties, but cannot confer enforceable rights on private citizens: EU's international obligations have no direct effect, and can be used by individuals in national proceedings only with a view to trigger a preliminary reference (para. 51).

Nevertheless, Art. 216(2) TFUE provides indirectly that international agreements binding on the EU prevail over acts of the Union, hence the Court has the power to assess the validity of EU acts under international law in the context of a preliminary reference. At the outset, the Court enounced the cumulative conditions under which it is possible to review EU law under international norms, and possibly declare its invalidity for breach thereof.

Notably, the international norm at issue must be binding on the EU, its "nature and broad logic" must not preclude the possibility that it serve as a standard of review for the validity of a EU act and, finally, it must appear to be unconditional and sufficiently precise to warrant such review (paras. 52-54). On this last requirement, the Court declared (para. 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* ECR 3719, paragraph 14; Case C□213/03 *Pêcheurs de l'étang de Berre* ECR I□7357, paragraph 39; and Case C□240/09 *Lesoochranárske zoskupenie* ECR I□0000, paragraph 44 and the case-law cited).

In light of these requirements, the Court then turned to the international instruments and customs invoked by the Claimants.

The compatibility of the Directive with conventional norms

(a) The Chicago Convention

Since the EU is not a party to the Chicago Convention, this agreement cannot bind directly the EU, but only its parties, the EU Member States. An instrument of this kind could bind the EU nevertheless, under Art. 351 TFEU (whereby the EU commits not to impede the performance of

Member States' obligations under their pre-1958 agreements) or if the EU has substituted itself to the Member States in the exercise of all the powers falling under the international instrument.

Under Art. 351, the Union must only allow its Members' performance of their international obligations, but it is not bound by them directly. In addition, the Court acknowledged that the EU has assumed a wide range of competences relating to the field of application of the Convention, but noted that Members States retained certain competences falling under that (such as the award of traffic rights, the setting of airport charges and the identification of no-fly areas on their territory). Accordingly, the Chicago Convention could not be used by the Court as a standard of validity of the Directive (para. 72).

(b) The Kyoto Protocol

On the contrary, the EU has approved the Kyoto Protocol in its own right, and this therefore forms an "integral part of the legal order of the European Union" (se *Haegeman*, para. 5). However, the Court noted that the parties to the Protocol "may comply with their obligations in the manner and at the speed upon which they agree" in the Conference of the Parties, and that in particular Art. 2(2) of the Protocol, which calls the Parties to reduce the emission of greenhouse gases from aviation fuels "working through the International Civil Aviation Organization", is not unconditional and precise enough to serve as a standard of validity for the Directive (para. 78).

(c) The Open Skies Agreement

The Open Skies Agreement, concluded by the US, the EU and its Member States, is directly binding on EU institutions. It contains various provisions directly and immediately applicable to air carriers established in the parties to the Agreement and conferring rights or imposing obligations thereon. Consequently, the Court concluded that the nature and broad logic of this instrument do not preclude its use as a standard of legality of EU acts (para. 85).

As to the "unconditional and sufficiently precise" nature of the provisions

invoked, the Court reviews in succession Art. 7, 11 and 15(3) of the Agreement. It concludes that these norms meet the applicable test, as they set clear and precise obligations, relating respectively to: the application to the activities of an air carrier entering or departing from the territory of a Party of the law of such Party (Art. 7); the exemption from taxes, duties, fees and charges of fuel used by US airlines engaged in international air transportation over the EU (Art. 11(1) and (2)); and the non-discriminatory nature of environmental measures adopted by the EU (Art. 15(3) in conjunction with Articles 2 and 3(4)).

The Court found no issue with these norms. The Directive applies only to flights arriving at or departing from an aerodrome of a Member States, and therefore echoes, rather than violates, the obligation of Art. 7 (para. 135). Furthermore, the Court acknowledged that the emissions count on which the allowance scheme relies depends *inter alia* on fuel consumption, but noted that, unlike other obligatory levies, the scheme sets "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." (para. 142). Since the ETS is a "market-based measure" and not a levy-like one, the Directive is not in violation of Art. 11, in the Court's view (para. 147). Finally, the Court considered that the ETS represents a legitimate environmental measure under Art. 15(3), and that its application does not raise doubts of discrimination, since it expressly targets all airlines alike, irrespective of their nationality (para. 155).

Customary Law

Given that "the Union shall uphold and promote ... the strict observance and the development of international law" (Art. 3(5) TEU), customary law can in principle be used to challenge the validity of EU acts.

The Claimants invoked four customs, providing respectively for the exclusive jurisdiction of each State over its air space; the impossibility for States to exercise jurisdiction on the high seas; the freedom to fly over the high seas and the rule – contested by the EU institution – whereby an aircraft flying over the high seas is under the exclusive jurisdiction of the

State of registration.

The Court at first recognized the existence of the first three customs, referring extensively to the case-law of the International Court of Justice, its predecessor the Permanent Court of International Justice, and to the treaty provisions that confirmed the existence of such customary norms (para. 104). As to the fourth principle, the Court laconically noted that there was insufficient evidence that such principle, established as regards navigation on the high seas, would extend to aerial transportation (para. 106). Resultantly, the Court limited its review to the principles of exclusive State sovereignty over its airspace, the freedom to fly over the high seas and the impossibility to subject them to State sovereignty.

For a custom to affect the validity of a EU act it must be "capable of calling into question the competence of the European Union to adopt that act." Besides, for an individual to be able to invoke it in court and ask the judge to use Art. 267 TFUE, such EU act must be "liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard" (para. 107). Only in such two-step way can a custom, which typically governs inter-state relations only, affect the rights of a private party (who is therefore entitled to invoke it, to escape EU-derived obligations). It is to be noted, however, that customs are usually less precise than treaty norms, therefore EU institutions can be found to violate them only when they make "manifest errors of assessment concerning the conditions for applying " (see *Racke*, para. 52).

The Court immediately clarified that it did not agree *prima facie* with the allegations of extra-territoriality: the Directive does not apply to flights carried out exclusively over non-EU States or the high seas. Moreover, under a doctrine reminiscent of the *Charming Betsy* one (see for reference this note), EU law must be interpreted and its scope delimited, to the extent possible, consistently with the relevant rules of international law (paras. 122 and 123).

The requirement that flights must either depart from, or land at, an airport located in the EU is a sufficient territorial link for the Court to confirm the EU's "jurisdiction to prescribe", and therefore its competence

to adopt the Directive. As the Court notes in para. 125:

since those aircraft are physically in the territory of one of the Member States of the European Union subject on that basis to the unlimited jurisdiction of the European Union.

In conclusion, the customs invoked were not capable of putting into question the validity of the Directive.

A Maritime Comparison

The conclusion reached by the Court echoes the reasoning of a precedent decision, Poulsen and Diva, relating to the applicability of an EC Regulation aimed at the conservation of fishery resources. In that decision, the Court found that such act "may in principle be applied to a vessel registered in a non-member country only when that vessel is in the inland waters or in the port of a Member State" (para. 29).

This requirement of a minimum territorial (better, maritime) link, in turn, brings to mind the reasoning of the GATT and WTO quasi-judiciaries bodies in the proceedings *Tuna-Dolphin* and *Shrimps-Turtles* that took place in the '90s. In these cases, the complaining States challenged some US measures, restricting the imports of tuna or shrimps fished (or harvested) without using the devices designed to prevent unnecessary harm to dolphins and sea turtles. These measures, indirectly, had the effect of influencing the behaviour of non-US subjects outside the US territorial jurisdiction, and were therefore attacked by the aggrieved States for conflicting with the principle of sovereignty, and its corollary whereby States have jurisdiction only on their territory or, residually, on their nationals.

In its report of the Shrimps case, the Appellate Body took a curious path to examine the legality of the measures at stake, *ratione loci*:

The sea turtle species here at stake … are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive

ownership over the sea turtles, at least not while they are swimming freely in their natural habitat – the oceans (para. 133).

This rather inconclusive statement led to the conclusion that "there is a sufficient nexus between the migratory and endangered marine populations involved and the United States" (ibid.), and that therefore the "external" effect of these unilateral environmental measures did not give rise to particular issues.

The rationale of this reasoning, if there is one, is probably that endangered species are a shared resource, and therefore it is comparatively more acceptable to allow effective regulation for their protection regardless of whence it comes from. The same would arguably apply for human rights (see L. Bartels, Article XX of GATT and the problem of extraterritorial jurisdiction: the case of trade measures for the protection of human rights (2002) *Journal of World Trade* 353), and has definitely proven true in justifying the exercise of universal jurisdiction on international crimes, quite irrespective of any links between the crime and the prosecuting State.

Could a similar rationale (somehow moulded *a contrario* on the concept of obligations *erga omnes*) be used to strengthen the Court's laconic ruling regarding environmental unilateralism? If one thing is sure, is that the US and other aggrieved parties will respond to fire (always for the sake of the environment, it goes without saying), and we can only hope that the price of plane tickets will not skyrocket accordingly as a result of this emissions-related war.