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The German Air Transport Tax: A Treaty Override of International Law

*Uwe M. Erling**

The German air transport tax significantly increases the ticket price of international and domestic flights from Germany. The tax was introduced in 2010 primarily to generate EUR 1 billion annually for the German general household. However, the tax is an interesting example on how governments during the financial crisis used air transport as a cash generator while ignoring long-established principles of international law. This article outlines and reviews the German air transport tax.

Part A provides a nutshell overview of the key features of the tax. Part B discusses why the tax is violating international (air transport) law, especially from the perspective of U.S. airlines. Part C will briefly outline the consequences of this multiple-treaty override on the national level.

A. THE GERMAN AIR TRANSPORT TAX

The German air transport tax, which was imposed beginning January 1, 2011,¹ is in principle a departure tax on every departure of a passenger from a German airport at the following rates, whereby the rates were slightly reduced in 2012:

	Distance	2011	2012
1.	Domestic flights and flights within the EU ²	EUR 8.00 ³	EUR 7.50 ⁴
2.	Medium-haul flights ⁵	EUR 25.00 ⁶	EUR 23.34 ⁷
3.	Long-haul flights, e.g., to the USA ⁸	EUR 45.00 ⁹	EUR 42.18 ¹⁰

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¹ On October 28, 2010, the Luftverkehrsteuergesetz [LuftVStG] [Air Travel Tax Act (ATTA)] was passed as article 1 of the Haushaltsbegleitgesetz 2011 [HBeglG 2011] [Budget Accompanying Act 2011] by the German Federal Parliament. The Act came into force on December 15, 2010. See BUNDESGESETZBLATT, Teil I [BGBl I] [Official Gazette] at 1885 (Ger.).

² LuftVStG, Dec. 14, 2010, BGBl I at 1888, art. 1, § 11, no. 1(1), annex 1 (Ger.) (third-party states with similar distances).

³ Tax rate in U.S. dollars: US\$8.93, exchange rate of May 26, 2015.

⁴ Tax rate in U.S. dollars: US\$8.37, exchange rate of May 26, 2015.

⁵ LuftVStG, Dec. 14, 2010, BGBl I at 1888, art. 1, § 11, no. 1(2) (Ger.).

⁶ Tax rate in U.S. dollars: US\$27.91, exchange rate of May 26, 2015.

⁷ Tax rate in U.S. dollars: US\$26.05, exchange rate of May 26, 2015.

⁸ LuftVStG, Dec. 14, 2010, BGBl I at 1888, art. 1, § 11, no. 1(3) (Ger.).

⁹ Tax rate in U.S. dollars: US\$50.23, exchange rate of May 26, 2015.

¹⁰ Tax rate in U.S. dollars: US\$47.09, exchange rate of May 26, 2015.

The decisive objective of the German Air Transport Tax Act (ATTA) is primarily to generate cash for the German household. However, at the same time it aims to encourage environmentally-friendly behavior by taxing air transport mobility.¹¹ This objective is also directly linked to the objective to reduce the emissions of air transport. Because under section 11 paragraph 2 of ATTA, the tax rate can be reduced by a certain percentage in relation to the respective receipts of the inclusion of air transport into the EU Emissions Trading Scheme.¹² Under this mechanism the tax rates were reduced in 2012.

The explicit objective of the ATTA is to set incentives for environmentally-friendly conduct by taxing air transport.¹³ This objective is directly connected with the objective of reducing the emissions from air transport because, according to section 11 subsection 2 of ATTA, the tax rates can be reduced by percentages depending on the income achieved from the inclusion of air transport in emissions trading.¹⁴ The intention inherent in the ATTA of reducing air traffic is also proved by the origins of the provisions. The ATTA goes back to the *Zukunftspaket* (“package for the future”) of the Federal Government on consolidating the budget. On June 7, 2010, the federal cabinet already adopted a paper on securing solid state financing with the title “Strengthening the Cornerstones of our Future—Our Eight-Point Plan to Assure Solid Finances, to Create Fresh Growth and Employment and to Prioritise Education.”¹⁵ This paper, which was the basis for the further drafting of the draft budget 2011 and the finance plan to 2014, also provided at that time for the introduction of an expressly described national ecological air transport tax. This intention is also reflected by the evaluation report on the air transport tax of the Federal Ministry of Finance in 2012. The Federal Ministry of Finance emphasizes therein that when considering the environmental effects of the air transport tax protection of the climate is the primary focus. The Ministry accordingly designed the graded tariff structure based on the averaged CO₂ emissions per passenger.¹⁶

¹¹ See Bundestagsdrucksache [BT-Drs.] [Government Explanatory Memorandum], 17/3030 at 23, 36 (Ger.).

¹² LuftVStG, Dec. 14, 2010, BGBl I at 1888, art. 1, § 11, no. 2 (Ger.).

¹³ BT-Drs., 17/3030 at 23, 36 (Ger.).

¹⁴ LuftVStG, Dec. 14, 2010, BGBl I at 1888, art. 1, § 11, no. 2 (Ger.).

¹⁵ Die Grundpfeiler unserer Zukunft stärken—Acht Punkte für solide Finanzen, neues Wachstum und Beschäftigung und Vorfahrt für Bildung [Strengthening the Cornerstones of our Future—Our Eight-Point Plan to Assure Solid Finances, to Create Fresh Growth and Employment and to Prioritise Education], Ergebnispapier der Sparklausur der Bundesregierung [German Federal Government], June 7, 2010 (Ger.).

¹⁶ See BT-Drs., 17/10225 at 58, 61, chart 33 (Ger.).

According to expert opinion submitted in the legislative procedure, the ATTA should lead to a reduction in passenger numbers of at least 6 to 7 million passengers.¹⁷ This prognosis has almost been fulfilled in 2011. According to a study of the effects of the air transport tax on traffic and the economy passenger reduction of at least 5 million.¹⁸

Originally the ATTA¹⁹ obliged all foreign airlines that do not have their registered offices in Germany to nominate a tax agent authorised in accordance with ATTA section 8. With the 2012 amendment of the ATTA,²⁰ the obligation to nominate a tax agent was repealed with effect on January 1, 2013, only for foreign airlines having their registered offices in a Member State of the European Union. That means that all non-EU airlines at present must still nominate a tax agent. An unreasonable burden results from this. The tax agent is liable individually as well as jointly and severally with the relevant foreign airline.²¹ This means that the tax agent is obliged to bear a considerable risk of liability although he has no knowledge of the financial situation of the airline. For this reason, only a few service providers are prepared to accept the task and function as tax agent. If they do accept this function, they demand exorbitant security fees. Service providers active on the market usually demand bank guarantees of two to three months air transport tax. Therefore the duty to nominate a tax agent is a particular burdensome obligation for non-EU airlines operating flights from Germany in comparison to their EU competitors.

B. THE ATTA BREACHES INTERNATIONAL AIR TRANSPORT LAW AND INTERNATIONAL TREATIES BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED STATES OF AMERICA

Contrary to a recent judgment of the German Fiscal Court of Hesse, the ATTA breaches international (air transport) law in several respects.²² The ATTA at first breaches the German and American Friendship, Commerce

¹⁷ See Hearing of the Budget Committee of the Federal Parliament, Oct. 4, 2010, protocol no. 17/30 at 43.

¹⁸ See Intraplan, *Untersuchung zur verkehrlichen und volkswirtschaftlichen Wirkung der Luftverkehrsteuer*, April 19, 2012 at 27, titled "Verkehrsverluste von mindestens 5 Mio. Passagieren" [Passenger Reduction of at least 5 Million].

¹⁹ See ATTA, Dec. 9, 2011, BGBl I at 1855, art. 1, § 7(2), sentence 3 (Ger.).

²⁰ See Gesetz zur Änderung des Energiesteuer- und des Stromsteuergesetzes sowie zur Änderung des Luftverkehrsteuergesetzes [Energie/Strom/LuftVStGÄndG] [Act Amending the Energy Tax and Electricity Tax Act and Amending the ATTA], Dec. 5, 2012, BGBl I at 2436 (Ger.).

²¹ ATTA, BGBl I § 6(1) (Ger.).

²² See Hessisches Finanzgericht, 3 June 2015, 7 K 631/12, available at https://fg-kassel-justiz.hessen.de/irj/FG_Kassel_Internet?rid=HMdJ_15/FG_Kassel_Internet/sub/4c4/4c460e4a-a021-bf41-79cd-aa2b417c0cf4,,,11111111-2222-3333-4444-10000005003%26overview=true.htm.

and Navigation Treaty of October 29, 1954 (TFCN).²³ Further, there is a breach of the Convention on International Civil Aviation of December 7, 1944 (Chicago Convention).²⁴ In addition, there is also a breach of the trilateral Air Transport Agreement between the European Union, their Member States and the United States of July 25, 2007.

I. German and American Treaty on Friendship, Commerce, and Navigation

The ATTA breaches article XI of the TFCN of October 29, 1954, between the Federal Republic of Germany and the United States of America in two respects. Firstly, the classification of the tax rates breaches the principle of most favoured status of article XI, section 3 of the TFCN,²⁵ secondly, the obligation to nominate a tax agent imposed on U.S. airlines breaches article XI, sections 1 and 3 of the TFCN.²⁶

1. Classification of the ATTA tax rates

The air transport tax breaches article XI, section 3 of the TFCN of October 29, 1954, between Germany and the USA, which was signed and ratified by Germany.²⁷ The introduction of the air transport tax leads to more intensive burdens of American airlines compared to the airlines of third countries under similar conditions and therefore breaches the most favored clause of article XI of the TFCN:

Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne in like situations by nationals, residents and companies of any third country.

Article XI, section 3 of the TFCN enshrines a most favoured principle, according to which, under similar conditions, no company of a contracting party may be treated for tax purposes less favorably than a company of a third country. Tax relief therefore also must benefit all contracting parties. The principle, therefore, prevents unfavourable treatment of the contracting party in comparison to other trading partners and therefore trading and tax reliefs in similar situations must be guaranteed to all equally.

²³ Treaty of Friendship, Commerce, and Navigation, Germany-U.S., Oct. 29, 1954, 7 U.S.T. 1839.

²⁴ Convention on International Civil Aviation, Dec. 7, 1944-Feb. 28, 1945, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*].

²⁵ See *infra* section 1.

²⁶ See *infra* section 2.

²⁷ Cf. Act of May 7, 1956, BGBL. II at 487 (Ger.).

This most favoured principle continues to apply because the EU/ U.S. Open Skies Agreement (Open Skies Agreement) contains no most favored clause and is restricted to regulating competition on the transatlantic market and/or the air transport between the EU and the U.S.

By the air transport tax U.S. carriers are obliged to pay taxes. The air transport tax, thereby facilitates, because of the setting of tax rates according to section 11, subsection 1 of the ATTA and annexes 1 and 2 of the ATTA, a more onerous burden on the airlines of the United States of America than under similar conditions on the companies of third countries outside the European Union according to annexes 1 and 2 of the ATTA.

For example, the ATTA places a greater burden on U.S. airlines for flights from Germany to the U.S., which are taxed in principle at EUR 45.00²⁸ (up from 2012 taxes at EUR 42.18²⁹) per passenger, than on Russian airlines which are taxed for all flights from Germany to Russia only at EUR 8.00³⁰ (up from EUR 7.50³¹ in 2012). A considerably different taxation therefore applies, although the situation on the basis of which tax is imposed is often comparable in the case of flights to the USA and to Russia. For example, the distance of flights of U.S. airlines from Frankfurt to New York at 3,860 miles and flights of a Russian airline from Frankfurt to Irkutsk at 3,850 miles or Vladivostok with 4,864 miles, is similar or takes even less time. The subject matter of the tax and the circumstances of the tax are also similar—both with a flight to the U.S. and a flight to Russia the departure from Germany is the link.³² However, the flights are significantly differently taxed.

The Fiscal Court of Hesse however, denied a violation of article XI by the classification of tax rates.³³ It argues that no “like situations” exist. U.S. airlines operating only in the intercontinental traffic would offer service in a “different market” compared to Russian airlines operating primarily in the European traffic, i.e., flights to Moscow. Furthermore, the quantity of flights to eastern Russia could be considered as very low. But this interpretation is not convincing as it conflicts with the wording and purpose of article XI (“in no case”).

By the more onerous burdening of U.S. airlines under similar conditions as Russian airlines, the ATTA therefore breaches the most-

²⁸ Tax rate in U.S. dollars: US\$50.23, exchange rate of May 26, 2015.

²⁹ Tax rate in U.S. dollars: US\$47.09, exchange rate of May 26, 2015.

³⁰ Tax rate in U.S. dollars: US\$8.93, exchange rate of May 26, 2015.

³¹ Tax rate in U.S. dollars: US\$8.37, exchange rate of May 26, 2015.

³² See ATTA, § 1(1), § 2, no. 3, § 4 (Ger.).

³³ See Hessisches Finanzgericht, 3 June 2015, 7 K 631/12, p. 28.

favoured principle according to article 11, section 3 of the TFCN between the Federal Republic of Germany and the USA.

2. Obligation to Nominate a Tax Agent

The obligation to nominate a tax agent according to section 7, subsection 2, sentence 3 and section 8 of the ATTA, which is only imposed on airlines that are not domiciled in Germany or another EU Member State, also constitutes an unjustified discrimination in the meaning of article XI, sections 1 and 3 of the TFCN. The obligation to nominate a tax agent results for non-EU airlines in many respects in tax disadvantages and additional costs as already outlined above.³⁴

The principle of equal treatment with nationals of the host state according to article XI, subsection 1 of the TFCN prohibits the imposition of additional burdens on companies of a contracting state with regard to tax relevant circumstances operating or doing business in the territory of the other contracting state (U.S. airlines doing business in Germany), in comparison to companies of the other contracting state (German airlines).

According to the principle of most favored status of article XI, subsection 3 of the TFCN, companies of a contracting state may in no case be subject to greater tax burdens than companies of a third state. Taking into account effective equal treatment with nationals of the host state and the object and purpose of the principle of most favored status any less favorable taxation or less favorable fiscal treatment of a contracting partner is prohibited.³⁵

For German, EU and airlines from the USA obviously the same conditions apply in relation to the transport of passengers from Germany to the USA (comparable subject matter of the tax, comparable circumstances of the tax, comparable distance). The sole difference for the obligation to nominate a tax agent is, according to section 7 subsection 2, sentence 3 of the ATTA, the domicile of the relevant airline. Unequal treatment based on the registered office of a company on purely fiscal grounds is, according to the wording, object, and purpose of article XI of the TFCN however, obviously inadmissible. The unequal treatment cannot be justified by the different possibilities of exchanging information and recovering tax claims against U.S. airlines on the one hand and German/EU airlines on the other hand.³⁶ Such an

³⁴ *Id.* at § A.

³⁵ See Bernütz/Loll, IStR 2012, 744, 745 (Ger.).

³⁶ *Contra* Hessisches Finanzgericht, 3 June 2015, 7 K 631/12, p. 40.

argument would ignore the wording and purpose of article XI.³⁷

Ultimately, the principle of equal treatment with nationals of the host state according to article XI, subsection 1 of the TFCN is breached, therefore, by the obligation (existing since January 2011 according to section 7, subsection 2, sentence 3 of the original version of the ATTA, dated December 9, 2010) to nominate a tax agent for airlines that do not have their registered offices in Germany. In addition from the time of the amendment of the ATTA entering into force on January 1, 2013 the obligation to nominate a tax agent for airlines without registered office in Germany or in other Member States of the EU also breaches the principle of most favored status of article XI, subsection 3 of the TFCN.

II. Violation of Article 15 of the Chicago Convention

The Air Transportation Tax Act cannot be reconciled with article 15 of the Chicago Convention, the last sentence of the last paragraph of which under the heading “Airport and similar charges” states:

No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

Article 15 of the Chicago Convention forbids contracting states to impose financial burdens in the form of fees, dues or other charges solely with respect to the right of transit over or entry into or exit of an aircraft if these burdens are not cost-based, i.e., are not connected to availing of airport services or infrastructure.

In addition, article 3, subsection 4, and article 15, subsection 3, of the EU/U.S. Open Skies Agreement require that charges in connection with the implementation of environmental measures must be in accordance with article 15 of the Chicago Convention.

In the present case, the airlines pay the tax solely to obtain the right to exit from the territory of the Federal Republic of Germany.³⁸ In the opinion of the ICAO, article 15 prohibits charging fees for the departure or arrival of international flights unless the fees are cost based and serve the provision of installations or services of civil aviation.

³⁷ Furthermore a new OECD-Convention on Mutual Administrative Assistance in tax Matters entered into force in Germany in July 2015 and differences in enforcement do no longer exist. See Übereinkommen über die gegenseitige Amtshilfe in Steuersachen, 23 July 2015 (BGBl. II S. 966).

³⁸ It is to be noted that German air transport tax affects approximately 269 foreign airlines. This compares to only 165 German airlines.

According to the ICAO Council Resolution on Environment Charges and Taxes of December 9, 1996, on article 15 of the Chicago Convention, the imposition of environmental charges is admissible only if the proceeds are used in mitigation of the environmental effects of aircraft emissions and the charges are related to these mitigation costs. The Air Transport Tax is not, however, apparently linked to any mitigation measures nor is the collected tax intended for financing a specific mitigation programme but benefits the general budget.

The Fiscal Court Hesse however has rejected a violation of article 15 by simply stating that the tax is not collected for the right of exit as this right is granted irrespective of the tax.³⁹ The judgment fails to explain in a convincing manner why an airline, that does not pay the tax and whose aircraft is therefore refused the right to departure by the German Aviation Authority shall still have an independent right of exit. The opposite is true. The right of departure is linked to the payment of taxes. The mere fact that it is not the Customs Office but the aviation authority refusing the right of departure does not justify a different legal assessment.

The Air Transport Tax is therefore an ultimately inadmissible fee or an inadmissible other charge solely for the right to exit from German territory in the meaning of article 15, subsection 2, sentence 3 of the Chicago Convention.

III. Conflict With EU/U.S. Open Skies Agreement

Article 2, article 3, subsection 4, together with article 15, subsection 3 of the EU/U.S. Open Skies Agreement, demand that charges in connection with the conduct of environmental measures must be reconcilable with article 15 of the Chicago Convention. Precisely in relation to European-American air transport, it is thereby clarified that the purpose of article 15 of the Chicago Convention cannot be placed in question by environmental measures. In fact, the reference to environmental protection as an objective of the Act does not provide any release from the provisions of the Chicago Convention. The latter is breached, however, as has been shown above, by the fact that the air transport tax constitutes an inadmissible charge for departures from Germany. A breach of article 15 of the Chicago Convention and article 3, subsection 4, together with article 15, subsection 3 of the EU/U.S. Open Skies Agreement is therefore established.

³⁹ See Hessisches Finanzgericht, 3 June 2015, 7 K 631/12, p. 21.

IV. Taxation Of Environmentally-Relevant Conduct Outside the Sovereign Territory of the Federal Republic of Germany in Violation of the Air Sovereignty of Other States

1. Sovereignty Is a Central Principle in International Law

The principle of sovereignty is a central principle in international law laid down in many international law treaties in the area of air transport and environment. In detail, Article 1 of the Chicago Convention states: “The contracting States recognize that every State has *complete and exclusive sovereignty* over the airspace above its territory.”⁴⁰

In chapter II of the Chicago Convention (“Flight over Territory of Contracting States”), article 11 states as follows under the heading “Applicability of Air Regulations”:

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.⁴¹

In addition, article 12 of the Chicago Convention on the “Rules of the Air” restricts the right to issue regulations regarding flight and navigation of aircraft to each state’s own sovereign territory and restricts the application of the regulations over the high seas with the exception of the airlines of the country itself:

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring 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 manoeuvre 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.⁴²

⁴⁰ *Chicago Convention*, Article 1 (emphasis added).

⁴¹ *Chicago Convention*, Chapter II, Article 11.

⁴² *Chicago Convention*, Article 12.

The EU/U.S. Open Skies Agreement, in article 7, specifies that the contracting states have agreed to restrict the application of their own laws and regulations on international air transport geographically.⁴³

2. Substantial Content of the Principle of Sovereignty under International Law

The principle of sovereignty under international law covers several aspects in the substantial content, which will be discussed in more detail below.

a) *Principle of Sovereignty over the Airspace*

The sovereignty over the airspace guaranteed by article 1 of the Chicago Convention corresponds to the territorial control that the State has on its own territory.⁴⁴

The territorial sovereignty grants the State the exclusive right to adopt acts over its own territory.⁴⁵

At the same time, the territorial sovereignty defines and limits the governmental power. It is generally accepted that, because of the territorial exclusivity, a State may only adopt sovereign acts relating to its own territory. The enactment of extra-territorial legal acts is, therefore, generally inadmissible without the approval of other states affected thereof.⁴⁶

b) *No Competence for Unilateral Extraterritorial Action According to International Air and Environmental Law*

The architecture of international air law is based on bilateral air service agreements between sovereign states. Any unilateral action of a single state interfering with the air space of other countries would be in

⁴³ Article 1, subsection 9 of the EU/U.S. Open Skies Agreement defines the sovereign territory of the EU and the USA. The wording of the provision is as follows:

“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 utilized 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.

While entering, within, or leaving the territory of one Party, the laws and regulations applicable within that territory relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party’s airlines.”

⁴⁴ Cf. SCHWENK, GIEMULLA, HANDBUCH DES LUFTRICHTS 2012 (2005).

⁴⁵ Cf. HERDEGEN, VÖLKERRECHT, sec. 23, marginal number 2 (12th ed., 2013); ARNAULD, VÖLKERRECHT, marginal number 334, 785 (2012).

⁴⁶ Cf. ARNAULD, VÖLKERRECHT, marginal number 642 (2012).

conflict with the principle of sovereignty.

But also, in international environmental law, it has been long acknowledged that States must respect one another sovereignty. This is convincingly proven by the principles of consideration and cooperation of the Stockholm declaration.⁴⁷ These principles are confirmed and concretized by principles 2 and 12 of the Rio Declaration of the United Nations Conference on Environment and Development in Rio de Janeiro in June 1992.⁴⁸

Moreover, the need of international co-operation is also emphasized in article 2, subsection 2 of the Kyoto Protocol with regard to the reduction of greenhouse gas emissions. There it is stated:

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 International Civil Aviation Organization and the International

⁴⁷ Already the Stockholm declaration of the United Nations of the year 1972 stipulates the international principle of consideration and cooperation in principles 21 and 24:

Principle 21:

States have, in accordance with the Charter of the United Nations and the principles of Environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Cf. Blätter für deutsche und internationale Politik 1972, 1007, 1010.

Principle 24:

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

See Blätter für deutsche und internationale Politik 1972, 1276, 1278.

⁴⁸ Principle 2:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

See Blätter für deutsche und internationale Politik 1992, 1276, 1278.

Principle 12:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.*

Cf. Blätter für deutsche und internationale Politik 1992, 1276, 1278 (emphasis added).

Maritime Organization, respectively.⁴⁹

Hence, it is imperative under international environmental law that the common interest in protecting the environment as such does not justify the enactment of unilateral extra-territorial measures by individual States. The importance of national sovereignty in the area of environment is, in fact, proven by the requirement to cooperate internationally. Unilateral measures taken by states as a preferred solution to environmental problems that are imposed unilateral to other States will cause conflicts. Such an approach clearly conflicts with the above outlined requirements of international environmental law.

3. The ATTA Breaches the Principle of Sovereignty

The ATTA breaches the air sovereignty of other states guaranteed in the above mentioned provisions by using environmentally-relevant acts, which take place outside the sovereign territory of Germany as a basis for taxation.⁵⁰ That is because the ATTA is designed as an ecological steering tax by which—apart from generating income for the federal budget—cross-border environmental effects of air transport shall decisively be taxed ecologically. This is emphasised in the legislative material, which stresses that the objective of the tax is to set incentives for environmentally-friendly behaviour in air transport.⁵¹

The extraterritorial area of application of the air transport tax is shown already by the fact that with regard to the ecological steering effect of the ATTA, climate protection in air transport is the priority. The subject matter of the regulation is therefore emission, which is obviously not restricted to the sovereign territory of Germany. The Federal Ministry of Finance itself emphasizes in its evaluation report on the air transport tax of June 29, 2012 that climate protection is in the foreground in the course of considering the qualitative environmental effects of the air transport tax.⁵² At the same time, the Federal Ministry of Finance emphasises in its evaluation report that the distance flown is

⁴⁹ Cf. Kyoto Protocol to the United Nations Framework Convention on Climate Change of Dec. 11, 1997, BGBl. II at 966 (2002).

⁵⁰ *Contra* Hessisches Finanzgericht, 3 June 2015, 7 K 631/12, p. 14 (stating that a state has the right to subject to taxation even facts that are realized outside its territory as long as the linkage point for the tax does not create effects outside its own territory affecting the territorial sovereignty of another state).

⁵¹ Cf. BT-Drs., 17/3030 at 23 (Ger.). At another place, it is stated: "With the ATTA, air transport is intended to be included in the taxation of mobility to provide incentives for environmentally-appropriate conduct. With the taxation, ecological interests are to be taken into account. While by the burden of a consumer-oriented energy tax an incentive to use fuels in an energy-saving manner is given to all participants in transport, commercial air transport is excluded therefrom." Cf. BT-Drs., 17/3030 at 36 (Ger.).

⁵² BT-Drs., 17/10225 at 58 (Ger.).

decisive for the climate effects of the air transport tax.⁵³

The extraterritorial area of application of the air transport tax is clearly illustrated finally by the tax-rate structure of the tax differentiated in accordance with the country of destination. For long-haul flights to destinations abroad, in particular, in the USA, the highest tax rate of EUR 45.00,⁵⁴ or, from January 1, 2012, EUR 42.18⁵⁵ applies.⁵⁶ In addition, even flights that neither take off nor land in Germany are subject to the German air transport tax. For example, a flight from London/Heathrow to the USA is subject to the air transport tax if previously, a feeder flight from a German airport precedes it, and if, in a complete flight reservation, the final destination is in the USA.⁵⁷

The tax rates also correspond to the average CO₂ emissions per passenger quantified by the Federal Ministry of Finance as follows:

CO ₂ emissions per passenger ⁵⁸		
	Avg. distance	CO ₂ per pass.
Domestic flights	435 km	49.9 kg
Other flights with air transport tax = EUR 8 ⁵⁹	1,380 km	110.3 kg
Flights with air transport tax = EUR 25 ⁶⁰	3,790 km	288.4 kg
Flights with air transport tax = EUR 45 ⁶¹	8,000 km	543.7 kg

The above CO₂ average emissions per passenger quantified by the Federal Ministry of Finance obviously take account of emissions over the high seas or over other sovereign territories and prove clearly the inclusion of extraterritorial emissions in the taxation. Such an extraterritorial approach blatantly contradicts the fundamental principle of sovereignty of the Chicago Convention and the EU/U.S. Open Skies Agreement.

In accordance with the above, the air transport tax breaches the principle of sovereignty and therefore the Chicago Convention and the EU/U.S. Open Skies Agreement.

⁵³ BT-Drs., 17/10225 at 60 (Ger.).

⁵⁴ Tax rate in U.S. dollars: US\$50.23, exchange rate of May 26, 2015.

⁵⁵ Tax rate in U.S. dollars: US\$47.09, exchange rate of May 26, 2015.

⁵⁶ Cf. ATTA, § 11(1), annexes 1, 2 (Ger.).

⁵⁷ Introductory Order of the BMF for the customs, III B 6, S 8010/10/10001, Dec. 23, 2010 and Jan. 11, 2011 at 6 (Ger.).

⁵⁸ BT-Drs., 17/10225 at 61, table 33 (Ger.).

⁵⁹ Tax rate in U.S. dollars: US\$8.93, exchange rate of May 26, 2015.

⁶⁰ Tax rate in U.S. dollars: US\$27.91, exchange rate of May 26, 2015.

⁶¹ Tax rate in U.S. dollars: US\$50.23, exchange rate of May 26, 2015.

Further, the ATTA has to be qualified as a measure of the Federal Republic of Germany which (also) pursues a reduction of greenhouse gases caused by aviation on a unilateral basis. Such unilateral action contradicts the co-operation that is necessary to protect the sovereignty under international environmental law.

In summary, the German government is taxing also the conduct of an airline that is occurring inside the airspace of the United States or other foreign states and infringes therefore on the sovereignty of these states. These emissions and the emissions over the high sea need either to be regulated by rules set forth through the Chicago Convention or a restriction to the German flag carriers is to be applied.⁶²

V. The ATTA Is Discriminatory Against Foreign Airlines and Therefore Breaches Article 11 of the Chicago Convention

Article 11 of the Chicago Convention (quoted above) also pursues the objective of preventing unequal treatment. Concretely, it concerns the prevention of discrimination because of different nationalities of airlines. The Convention demands expressly that the laws and regulations are applied to the aircraft of all contracting states without distinction as to nationality. Logically, it is therefore, according to article 11 of the Chicago Convention, prohibited for contracting states to differentiate between domestic and foreign airlines by means of rules about the departure from their sovereign territories.

While the air transport tax affects all airlines which operate departures from German airports, it applies irrespective of whether a German or foreign airline is concerned. Nevertheless, unequal treatment between domestic and foreign airlines arises in two respects. Details:

Discrimination arises if different regulations are applied to comparable situations or if the same regulation is applied to different situations without material justification.

The situation of domestic and foreign airlines with regard to intercontinental flights is quite comparable. Domestic just as foreign airlines offer transport of passengers departing from Germany. Not only is the departure point of the flights identical, but the routes offered are usually also the same. Domestic and foreign airlines are therefore in a comparable situation.

The ATTA, however, discriminates against foreign airlines, which do not have their registered offices in the European Union in that airlines of different nationalities are affected by obligations with different

⁶² Cf. ATTA, § 2(5) in conjunction with Chicago Convention, LuftVZO, art. 17, § 19 (Ger.).

administrative efforts and costs, and therefore breaches article 11 of the Chicago Convention.

1. Obligation to Nominate a Tax Agent

As outlined in the beginning non-EU carriers are faced with a competitive disadvantage, as they have to nominate a tax agent, who is jointly and severally liable for the monthly air transport tax together with the respective airline. This is obviously a considerably worse position for foreign airlines compared to domestic German and EU airlines.

The obligation on foreign airlines to nominate a tax agent constitutes a particular obstacle for starting passenger air transport in Germany. According to section 6, subsection 1, sentence 2 of the ATTA, the tax agent and the foreign airline are jointly and severally liable for the tax. This means that the tax agent is obliged to bear a considerable risk of liability although he has no knowledge of the financial situation of the airline. As a result, tax agents in practice demand high securities from airlines. In conclusion, this structure of the Act obliges the foreign airline to avail of a service, which is disproportionately expensive although the tax agent provides services, which do not require any particular tax expertise.⁶³ In practice, businesses acting as tax agents usually demand financially unacceptable security of 1 to 2 months' tax.

On the contrary domestic and EU airlines are able to file the tax return themselves and do not have to bear the high costs and burdens. The fact that neither securing the tax liability nor practicality considerations are in favor of the involvement of a tax agent arise in addition. Just as it is handled by domestic and EU airlines, the tax return could be filed by the foreign airlines own personnel using translated forms, which are basically already provided in English by the customs. Domestic and EU airlines and non-EU airlines are thereby treated differently although equal treatment is indicated because of the comparable basic factual situation.

This unequal treatment cannot be justified materially. The involvement of a tax agent does not contribute to increasing the effectiveness of taxation in the degree, which would be required to justify expensive and costly procedures. This is already shown by the wording of section 8, subsection 2, sentence 2 of the ATTA, according to which, the license to act as a tax agent for an airline is issued to persons with business headquarters in Germany, against whose tax reliability there are no reservations and which—if they are obliged

⁶³ See *Hoppe*, ATTA, 2012, § 8, marginal number 3 (Ger.).

according to the Commercial Code and the Fiscal Code—properly conduct commercial accountancy and punctually prepare annual financial statements. The tax agents can usually satisfy these requirements without a minimum capital being required in order to satisfy the tax liability. This means that, for example, a new GmbH with low capital—if the said conditions are satisfied—can be nominated as tax agent.⁶⁴

Such a low capital company, however, which—according to section 8, subsection 3, sentence 2 of the ATTA—is also expressly possible, would hardly be able to meet the high (and frequently six-figure) amounts for the air transport tax in the event of a claim. The link therefore intended by the legislator for the enforcement of the tax liability by means of the involvement of a tax agent is financially devoid of any effect. The obligation for foreign airlines to nominate a tax agent in the meaning of section 8 of the ATTA, would, in the event of a claim against the agent, usually not in the least, serve effective financial taxation.

Furthermore, the provision of security in the manner of section 9 of the ATTA, which can be deposited with the main customs office would be a clearly less drastic method in comparison to the expense-intensive and costly search for and involvement of a tax agent. Additionally such a security would be considerably more beneficial for an effective taxation than the mediation of a tax agent under the conditions stated. The obligation to nominate a tax agent is therefore neither effective nor the least burdensome measure by which to achieve the legislative purpose. The compulsion to appoint a tax agent for non-EU airlines, and therefore unequal treatment compared to domestic and EU airlines, is not justified on any material grounds.

2. Graduation of the Tax Rate

Discrimination also arises from the fact that the tax rate in the meaning of section 11 of the ATTA is not graduated, according to annexes 1 and 2, consistently in accordance with the geographical distance. In fact, each country is generally classified and taxed according to the distance of its largest airport from the largest German airport. The tax rate is thereby higher the further both main airports are from each other. The apportionment is based on three different tax rates. The actual flight distance is not considered. This generalisation leads therefore to clearly different tax liabilities in spite of comparable flight distances. A flight from Frankfurt 4,864 miles eastwards to Vladivostok

⁶⁴ Hoppe, ATTA, 2012, § 8, marginal number 3 (Ger.).

in Russia is taxed at EUR 8.00⁶⁵ while a flight of 4,025 miles westwards, for example to the USA is taxed at EUR 45.00.⁶⁶ Based on this, U.S. airlines suffer considerable discrimination compared to Russian airlines conducting flights of the same distance.

A classification is in principle possible in legislation if it corresponds to reality and does not otherwise violate the German Constitution and International Law. However, this does not relieve the legislator of the obligation to create materially justified categories and to take account of special cases at least in the form of possible exceptions. Otherwise, the same situations are generally and without exception treated differently without any material justification. The three grades of tax rates do not correspond to such a classification. Discrimination is therefore established.

A certain degree of classification appears to be unavoidable in view of the many routes possible throughout the world. Although the tax is invalid for other reason, graduation on the basis of distance and the equalisation of many routes within a category may in principle be thinkable as far as the other requirements are met. However, such a classification may not go so far that comparable constellations are subject to entirely different treatment and taxation.

The approach to set the tax rates only on the basis of the largest airports of a country exceeds the degree of admissible generalisation and classification. In fact, it must be differentiated and in addition to the frequency of flights other environmentally-relevant issues of the relevant flights must be taken into account. These may differ considerably. In particular, the actual route can, in the case of larger countries, be significantly longer than the generally applied distance to the main airport as illustrated by the above example. If the legislator, as in the present case, decides to assign a certain taxation classification to a route (with the associated unfavorable environmental effects), this classification may not be different for comparable routes. Otherwise, the classification would be irreconcilable with the legislative objective of climate protection purportedly pursued here. The same flight distances would be taxed higher or lower—in spite of actually equal environmental effects. Therefore, a classification is being applied which, due to extremely broad classification, does not pursue the objective of the legislation and therefore does not correspond with reality.

⁶⁵ Tax rate in U.S. dollars: US\$8.93, exchange rate of May 26, 2015. Since Jan. 1, 2012, EUR 7.50 equals US\$8.37. Cf. ATTA, § 11(1), no. 1 (Ger.).

⁶⁶ Tax rate in U.S. dollars: US\$50.23, exchange rate of May 26, 2015. Since Jan. 1, 2012, EUR 42.18 equals US\$47.09. Cf. ATTA, § 11(1), no. 3 (Ger.).

As a result foreign airlines suffer discrimination by the graduation of the tax rates on the basis of countries. This is, however, precisely forbidden by article 11 of the Chicago Convention according to which the contracting states must be treated equally without discrimination on the basis of nationality and national statutes are to be applied to foreign aircraft in a non-discriminatory manner on departure. A breach of article 11 of the Chicago Convention is therefore established.

VI. The Air Transport Tax Provides a Unilateral Restriction of Traffic

A breach of the prohibition of unilateral restriction according to the EU/U.S. Open Skies Agreement arises. According to article 3, subsection 4 of the EU/U.S. Open Skies Agreement, no contracting party is permitted to unilaterally restrict the volume of airline aircraft traffic of another contracting party unless required on environmental protection grounds and even then uniform conditions in conformity with article 15 of the Chicago Convention must be applied. Article 15 of the Chicago Convention is in any event not complied with. Nevertheless, an inadmissible unilateral restriction of traffic in the meaning of article 3, subsection 4 of the EU/U.S. Open Skies Agreement arises.

This prohibition is a core element of the Agreement and article 3, subsection 4 states:

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 Convention.

Such a restriction arises not only in the case of a direct restriction of numbers but also if it is deliberately accepted that the volume of passengers of the airlines of a contracting party will fall as a necessary consequence of the provision.

Although the German air transport tax is set up as a tax instrument and not as a means to directly restrict the volume of traffic, there are strong indications that such a unilateral restriction of the volume of traffic—as an expressly intended side effect—follows precisely and in fact from the new tax burden. This indication follows from the fact that the ATTA renders flying more expensive. An expert hearing prior to the introduction of the ATTA in the German parliament came to

precisely this conclusion. Experts foretold that the ATTA would lead to an annual reduction of passenger numbers of six to seven million.⁶⁷ The latest report of the German Federal Government to the Federal Parliament on the effects of the introduction of the ATTA on the airline industry proves that the introduction of the air transport tax resulted in a restriction of growth in 2011 in the range of approximately 2 million passengers.⁶⁸

According to a study commissioned by the Association of German Airlines (BDL), the reduction in passenger numbers in 2011 is said to have been up to five million.⁶⁹

The reduction is not restricted to 2011, the first year after the introduction of the air transport tax. In fact, the Federal Government, in an update of its report to the German Parliament, confirmed that the effect of the air transport tax continues at the level for 2012.⁷⁰ While the extent of the effect of the air transport tax is barely as drastic as originally feared, it nevertheless has a considerable negative effect on the volume of air transport.

The restrictive effects of the air transport tax on the volume of traffic is not an unintended effect of the act but is confirmed by the motives of the legislator. According to the legislative materials, the legislator with the air transport tax pursued the objective of “setting incentives for environmentally-friendly behaviour.”⁷¹ The legislator is of the opinion that the costs of the air transport tax would be added by the airlines directly to the fares and therefore passed on directly to the passengers.⁷²

It is the intention of the German government that the air transport

⁶⁷ See Hearing of the Budget Committee of the Federal Parliament of Oct. 4, 2010, protocol no. 17/30 at 43 (Ger.).

⁶⁸ See Report of the Federal Government to the Federal Parliament on the Effects of the Introduction of the ATTA on the Airline Industry and the Development of Tax Revenue from the Air Transport Tax, BT-Drs., 17/10225 at 21, table 12 (Ger.).

⁶⁹ See Intraplan, Untersuchung zur verkehrlichen und volkswirtschaftlichen Wirkung der Luftverkehrssteuer [Study of the Effects of the Air Transport Tax on Traffic and the Economy], Apr. 19, 2012 at 27, “Verkehrsverluste von mindestens 5 Mio. Passagieren” [Passenger Reduction of at least 5 Million] (Ger.).

⁷⁰ See Bericht der Bundesregierung an den deutschen Bundestag über die Auswirkungen der Einführung des Luftverkehrsteuergesetzes auf den Luftverkehrssektor und die Entwicklung der Steuereinnahmen aus der Luftverkehrssteuer—Fortschreibung, Aktualisierung und Ergänzung [Report of Federal Government about the Impact of the Implementation of the ATTA to the Aviation Sector and the Development of the Tax Revenue from the German Air Transport Tax—Perpetuation, Update and Amendment], BT-Drs., 17/10985 at 41 (Ger.).

⁷¹ See Explanatory Memorandum of the Federal Government, BT-Drs., 17/3030 at 23, 36 (Ger.).

⁷² See Explanatory Memorandum of the Federal Government, BT-Drs., 17/3030 at 4 (Ger.).

tax should create an incentive for passengers by higher fares to fly less frequently and therefore the emissions from aviation would be reduced because of fewer numbers of flights. This, however, means nothing more than that the objective of the statute is the reduction in air traffic; even if by means of the intermediate step of passing on the costs to the passengers. Unlike in the case of only indirect effects on the volume of traffic, a reduction of the numbers of flights is precisely intended. This distinguishes the air transport tax from cases of purely *de facto* effects on the volume of traffic which are neither foreseeable nor planned and which would not be covered by article 3, subsection 4 of the EU/U.S. Open Skies Agreement. A restriction of the volume of traffic within the meaning of article 3, subsection 4 of the EU/U.S. Open Skies Agreement is established.

The fact that the restriction is unilateral follows from the fact that the air transport tax is provided in a statute unilaterally passed by the legislator of the Federal Republic of Germany that leads to the described effects on the volume of air traffic. By this unilateral German provision, U.S. companies, which are active on the German air transport market as competitors, clearly lose numbers of passengers because passengers divert to foreign airports, do not travel or do not fly to or from Germany. According to expert calculations, in 2011 alone approximately 2 to 5 million passengers diverted to other means of transport, decided not to travel or switched to foreign airports.⁷³

This considerable reduction in passengers is proof of the direct effects of the air transport tax on the volume of traffic. Such an active restriction by a national statute is, however, precisely forbidden by article 3, subsection 4 of the EU/U.S. Open Skies Agreement. It cannot be justified by political-environmental objectives either because, even in that case, the provisions of article 15 of the Chicago Convention must be complied with. This is not, however as has been shown, the case. It is not required to establish a breach of article 3, subsection 4 of the EU/U.S. Open Skies Agreement that merely individual airlines are prejudiced. What is decisive is that one of the contracting parties—here the Federal Republic of Germany—restricts by a national statute the volume of traffic and that this restriction is unfavourable for the aircraft used by the other contracting party. Such a negative effect on American airlines is established by the proven reduction in passenger numbers.

A breach of the prohibition of unilateral restriction according to article 3, subsection 4 of the EU/U.S. Open Skies Agreement therefore

⁷³ BT-Drs. 17/10225 at 21; Intraplan, Untersuchung zur verkehrlichen und volkswirtschaftlichen Wirkung der Luftverkehrssteuer [Study of the Effects of the Air Transport Tax on Traffic and the Economy], Apr. 19, 2012 at 33 (Ger.).

exists.

VII. The Air Transport Tax Breaches the Fair and Equal Competition Conditions by Discriminating Against Foreign Airlines

The introduction of the air transport tax also leads to a distortion of the competitive conditions and therefore breaches article 2 of the EU/ U.S. Open Skies Agreement which states, “[e]ach 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.”

This principle of fair and equal competition is undermined by the ATTA deliberately. The ATTA provides specific obligations exclusively for foreign airlines, which can only be satisfied by them at high costs.

Section 8 together with section 7, subsection 2, sentence 3, together with section 6, subsection 1 of the ATTA, demands the nomination of a tax agent based in Germany who bears joint and several liability together with the airline and for whom the foreign airline must provide the necessary documents. This involves considerable costs for the foreign airlines although the tax assessment can, due to the division into three distance classes, be prepared comparatively simple. The ATTA discriminates by these obligations, which apply exclusively to foreign airlines not having their registered offices in Germany.

The competitive conditions for foreign airlines are therefore precisely not comparable with those for German airlines. In fact, cost-intensive additional obligations are imposed on foreign airlines. Higher costs for the conduct of flights from Germany lead, to the situation that foreign airlines have worse starting conditions. Since the costs for engaging the tax agent must usually be passed on to the fares they face a competitive disadvantage.

Precisely in the aviation sector, however, in which smaller price differences rapidly become decisive factors for customers when seeking the best airline, such higher costs can have negative effects on competition. Because of uncomplicated online reservations, it is possible to change rapidly to another airline, which can offer lower fares than the foreign airline because of the absence of additional costs. Since for most passengers, the price is also often the sole and most noticeable comparison criterion, a price increase on the part of foreign airlines is a disadvantage in attracting passengers. The additional obligations therefore have negative effects on the competitiveness of foreign airlines compared to domestic airlines.

The competition is not fair and equal as demanded by article 2 of

the Open Skies Agreement. Foreign airlines are discriminated against. Clear competitive disadvantages for foreign airlines arise. Thus, the requirement of article 2 of the Open Skies Agreement for fair and equal competitive conditions is not satisfied. A breach of article 2 of the Open Skies Agreement therefore arises.

VIII. The Air Transport Tax Is *De Facto* a Customs Duty on Fuel Used in International Air Transport

The air transport tax furthermore breaches article 24 of the Chicago Convention and article 11, subsection 2(c) of the Open Skies Agreement.⁷⁴ The air transport tax must be classified as a forbidden “de facto similar national charge” within the meaning of article 24(a), sentence 2 of the Chicago Convention and article 11, subsection 2(c) of the EU/U.S. Open Skies Agreement on fuel. Details:

1. Prohibition on Taxing Aircraft Fuel

The air transport tax must be classified as a “similar national charge” and is therefore subject to the regime of article 24(a), sentence 2 of the Chicago Convention. Contrary to the somewhat unclear wording, article 24(a), sentence 2 of the Chicago Convention forbids not only the taxation of fuel which is on board both at the time of arrival and also on departure from the starting territory (transit fuel) but also according to the decision of the council of the ICAO forbids the taxation of aircraft fuel used during the time in the territory of the relevant state and taken on board in the sovereign territory of the relevant state.⁷⁵

2. The Air Transport Tax Is *De Facto* a Tax on Fuel

The air transport tax must be classified as a tax on fuel. This classification is justified firstly by an analysis of the legislative material on which the ATTA is based since, according thereto, the legislator in specifying the area of application as commercial aviation and not

⁷⁴ Article 24(a), sentence 2 of the Chicago Convention reads as follows:

“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.”

Similarly, article 11(2)(c) of the EU/U.S. Open Skies Agreement provides for tax exemption for: “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.”

⁷⁵ Cf. ICAOs Policies on Taxation in the Field of International Air Transport, doc. 8632, Resolution 1(a).

including private flying, was crucially guided by the consideration that private flying is already subject to taxation on fuel.

For example, the legislative reasoning refers to the fact that the energy tax based on consumption charged for all other means of transport creates an incentive to save fuel.⁷⁶ Commercial aviation, however, is exempt therefrom due to European law and international conventions, for example the Energy Tax Directive 2003/96. It also refers to the fact that the introduction of a kerosene tax at international level within a short period appears to be unrealistic.

It is, thereby, clear that the legislator with the introduction of the air transport tax intended to apply a tax where none exists. Adding this tax allegedly provides the necessary incentive for commercial operators to deal with fuel in an energy-saving and therefore environmentally-friendly manner. In particular, the reference to the fact that at international level, at the time the ATTA was passed, it was the opinion of the German legislator that no agreement on a kerosene tax could be expected within a short time is revealing in this respect. This reference makes it clear that the German legislator believed there was no progress internationally and decided—in an illegal manner—to unilaterally set incentives for environmentally-friendly conduct. The legislator thereby revealed that the air transport tax by its nature is classified as a tax on fuel.

The division into distance classes supports this result because the legislator thereby graded the tax rates and provided higher tax rates for more distant countries.⁷⁷ Greater distance correlates directly with higher kerosene consumption.

The classification of the air transport tax as a *de facto* taxation on fuel is also clearly illustrated by a statement of the Federal Minister of Finance, Dr. Wolfgang Schäuble. In a speech before the German parliament on September 14, 2010, he described the air transport tax as a substitute for fuel tax, which could not be introduced at national level because of international and European law provisions.⁷⁸

⁷⁶ BT-Drs., 17/3030 at 36 (Ger.).

⁷⁷ Cf. ATTA, § 11(1) (Ger.).

⁷⁸ Literally, the Federal Minister of Finance said: “The abolition of the exemption of air traffic to pay a tax on mineral oil—in contrast to rail and road traffic—would find a broad acceptance within the general public and the parliament. However, we cannot abolish this exemption because of international and European law restrictions. One can regret this consequence, but it is a fact. Thus, we want to introduce an air transport tax instead of it. This is a substitute for the taxation of kerosene that cannot be introduced on national level. This is subsidy reduction. I believe this measure is well dosed, balanced and it can be justified on good grounds.” Cf. (Translated) speech of Dr. Wolfgang Schäuble, dated Sept. 14, 2010, before the German Parliament, minute of plenary proceedings, no. 17/57 at 5910 (Ger.).

The air transport tax, therefore, breaches article 24 of the Chicago Convention and article 11, subsection 2(c) of the EU/U.S. Open Skies Agreement.

C. CONSEQUENCES OF THE MULTIPLE TREATY OVERRIDE OF
INTERNATIONAL LAW ON THE NATIONAL LEVEL

Given the multiple unilateral breaches of international treaties by subsequent national tax legislation—so called treaty overriding—the crucial question is: What does this mean for the application of the ATTA on the national level?⁷⁹

The answer to this question is given in section 2, subsection 1 of the Fiscal Code. According to this provision, international law treaties take precedence over national tax law.

Section 2, subsection 1 of the Fiscal Code, headed “Primacy of International Agreements” provides thereon:

Agreements on taxation concluded with other countries within the meaning of article 59, subsection 2, sentence 1 of the Constitution shall take precedence over tax legislation insofar as they have become directly applicable domestic law.⁸⁰

The requirements for the precedence of international law agreements according to section 2, subsection 1 of the Fiscal Code are complied with in the constellation at hand as the relevant treaties have been implemented in national law and relate to taxation. Notably, section 2, subsection 1 of the Fiscal Code covers only agreements in the meaning of article 59, subsection 2, sentence 1 of the Constitution, which have become domestic law and are directly applicable. The domestic law application requires an incorporating sovereign act in the form of an implementation act of the legislator.⁸¹ The Chicago Convention was implemented into directly applicable domestic law by the Federal Act of April 7, 1956,⁸² and the TFCN between the Federal

⁷⁹ The fact that the breach of existing internationally-binding law in the absence of a formal reservation in the ATTA (“notwithstanding”-clause) is to be considered not as an “open” but as a “latent” treaty overriding does not change this classification as a treaty override. In the opinion of the German Federal Fiscal Court, a latent treaty overriding is, because of its content and effect, to be classified as such. BFH, referral decision of Dec. 11, 2013–IR 4/13, *Juris* marginal number 38 with further references.

⁸⁰ In the explanatory memorandum of 1975, the legislator states as follows: “The newly introduced section 2 clarifies that international law agreements, insofar as they have become domestic law, have precedence over domestic tax legislation and therefore cannot be amended alone by later domestic legislation.” *See* BT-Drs., 7/42/92 at 15 (Ger.).

⁸¹ *See* Musil in Hübschmann, Hepp, and Spitaler, AO/FGO, June 2013, § 2 AO marginal number 153 (Ger.).

⁸² BGBL. II at 411 (Ger.).

Republic of Germany and the United States of America by act of May 7, 1956.⁸³ Finally, the EU/U.S. Open Skies Agreement has been implemented just recently in national law.⁸⁴

The Chicago Convention, EU/U.S. Open Skies Agreement, and also the TFCN are agreements that relate to taxation since agreements on taxation are international treaties about the admissibility or the extent of tax intervention. The range of international agreements covered is wide.⁸⁵ This includes all agreements the subject matter of which effects questions of taxation or which at least regulate economic circumstances linked to taxation situations and their regulation has a direct influence on the distribution of the tax burden. In particular, all agreements are covered that are directed to restrict the legislator's taxation freedom.⁸⁶

According to the legal consequence provided in section 2, subsection 1 of the Fiscal Code, international agreements which have become directly applicable in domestic law have precedence over national tax legislation.⁸⁷ That means that, because of the precedence ordered by section 2, subsection 1 of the Fiscal Code, the TFCN, the Chicago Convention, and the EU/U.S. Open Skies Agreement, as international agreements incorporated at the level of national law, have precedence over the ATTA. This also involves on the part of the subordinated national ATTA, yielding to the extent that the international treaties with precedence supersede it. This has the result that the ATTA, (in any event) with regard to the order provided in section 4, together with section 6, subsection 1 of the ATTA to pay the Air Transport Tax on departure, is not applicable. The provision with priority is to be applied while the subordinate provision remains inapplicable on an individual basis without losing its validity (precedence of validity).⁸⁸

This precedence corresponds, with regard to its effect, to the primacy of Community Law,⁸⁹ and the priority application of (general) provisions of international law according to article 25, sentence 2 of the

⁸³ BGBL. II at 487 (Ger.).

⁸⁴ BGBL. II at 27 (Ger.).

⁸⁵ See Pahlke in Koenig and Pahlke, AO, § 2, marginal number 2 (2d ed., 2009) (Ger.).

⁸⁶ See Musil in Hübschmann, Hepp and Spitaler, AO/FGO, June 2013, § 2 AO, marginal number 36.

⁸⁷ See Gersch, in Klein, AO, § 2, marginal number 3 (12th ed., 2014) (Ger.).

⁸⁸ See Heckmann, *Geltungskraft und Geltungsverlust von Rechtsnormen*, 1997 at 333. With regard to the legal consequences of the precedence of application Heintschel von Heinegg in Epping and Hillgruber, *Beck'scher Online-Kommentar GG*, status, Sept. 1, 2014, art. 25, marginal number 28 (Ger.).

⁸⁹ See ECJ, judgment of Feb. 7, 1991, RS C-184/89, collection 1991, I-297 (321). BVerfG, judgment of Jan. 28, 1992, 1 BvR 1025/82, BVerfGE 85, 191, 204; BFH, decision of Mar. 21, 1995, XI R 33/94, *Juris* marginal number 15; Fiscal Court Munich, judgment of Dec. 13, 2010, 7 K 2662/09, *Juris* marginal number 34; Jarass, *NJW* 1990, 2420, 2421 (Ger.).

Constitution.⁹⁰ Therefore, the subordinate ATTA in the absence of a binding effect cannot be an appropriate legal basis for the taxation if challenged by airlines. As a consequence of the yielding of the conflicting national provision, the contested administrative acts and other implementing acts are to be rescinded.⁹¹

D. SUMMARY

On the basis of the above, the ATTA breaches elementary provisions of international (air transport) law. The imposition of the Air Transport Tax on foreign airlines is, therefore, unlawful. Due to the precedence of international law agreements over the ATTA as national law according to section 2, subsection 1 of the Fiscal Code, the ATTA cannot be an adequate legal basis for the air transport tax.

⁹⁰ See Herdegen in Maunz and Dürig, GG, Mar. 2014, art. 25, marginal number 43; Steinberger in Isensee and Kirchhof, Handbuch des Staatsrechts, vol. VII, § 173, marginal number 54 (3d ed., 2007); even in favor of an application by analogy of art. 25, sentence 2, Constitution to the TFCN as incorporated international treaty law Higher Administrative Court of Munich, judgment of July 28, 2006, 9 BV 05.1863, Juris marginal number 72 (Ger.).

⁹¹ See Herdegen in Maunz and Dürig, GG, Mar. 2014, art. 25, marginal number 43; Streinz in Sachs, GG, art. 25, marginal number 93 (6th ed., 2011).