ZOOM IN

The Question:

The inclusion of emissions from aviation in the EU ETS: unilateralism vs multilateralism in international environmental governance

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When drafting the Kyoto Protocol, Parties to the UN Framework Convention on Climate Change deferred the issue of emissions from aviation to the International Civil Aviation Organisation (ICAO), a specialised UN agency with global responsibility for various aspects of international civil aviation. Over the years, the debate on emissions from aviation within ICAO made no significant progress. Disappointed with the limited progress within ICAO, the European Union (EU) decided to act unilaterally. Its Directive 2008/101/EC controversially included the aviation sector in the EU Emission Trading Scheme. As a result, starting with 2012, all large operators whose aircraft take off from or land at EU airports are required to acquire emission allowances.

The inclusion of emissions from aviation in the ETS has raised numerous objections. Among others, China, India, Russia and the US have vehemently opposed the unilateral initiative by the EU as inconsistent with international law. A group of leading US airlines and their trade association even brought a case before British courts, arguing that UK measures implementing Directive 2008/101/EC infringed third States' sovereign rights, the 1944 Chicago Convention, the Kyoto Protocol and the 'Open Skies' bilateral agreement between the US and the EU (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).

The Court of Justice of the European Union (CJEU), however, upheld the validity of the Directive, finding no incompatibility with international law (Case C-366/10 *Air Transport Association of America and*

Others v Secretary of State for Energy and Climate, Judgment 21 December 2011). The CJEU's findings did not end all controversies. Against the threat of retaliatory measures and the risk of a 'trade war', in April 2013 the EU decided to suspend the implementation of Directive 2008/101/EC for flights from or to non-European countries, in anticipation of the outcome of ICAO negotiations in Autumn 2013.

In October 2013, the ICAO Assembly agreed to develop a global market-based mechanism addressing international aviation emissions by 2016, to be applied from 2020. In light of the agreement reached within ICAO, the European Commission proposed that, until the implementation of the global market-based mechanism, all emissions from flights taking place within the EU be included in the EU ETS, regardless of the country of origin.

The ICAO Assembly's Resolution and the proposal by the European Commission are unlikely to be the final words in this long-lasting *saga*. From the perspective of international law, this sequence of events raises a series of interesting questions:

When and how can a State (or regional organization) legitimately take unilateral measures to protect the environment? Does multilateralism represent the only 'way', even when it brings to inaction? How do we define 'inaction'? Is a declaration of intents (such as that made in the context of ICAO) enough to constitute 'action'?

How does the CJEU judgment compare with decisions concerning questions of unilateralism related to the protection of the environment, such as the GATT and WTO Appellate Body decisions in *Tuna-Dolphin* and *Shrimp-Turtle*?

QIL has invited two authors renowned for their work on the debate on emissions from aviation, Kati Kulovesi and Jacques Hartmann, to provide a response to these intricate questions.