GR:EEN
Global Re-ordering:
Evolution through European Networks

GEM PhD SCHOOL
ERASMUS Mundus
Joint Doctorate
Globalisation, the EU
& Multilateralism

EUROPEAN COMMISSION
European Research Area
SEVENTH FRAMEWORK PROGRAMME
Funded under Socio-economic Sciences & Humanities

European Commission
ERASMUS
MUNDUS

GR:EEN-GEM DOCTORAL WORKING PAPERS SERIES

The EU Aviation ETS caught between Kyoto and Chicago: Unilateral Legal Entrepreneurship in the Multilateral Governance System

Coraline Goron

Abstract

The entry into force, on January 1st, 2012, of the European Union Directive 2008/101/EC extending the European Emission Trading System to domestic and international civil aviation has taken the dispute regarding its legitimacy to unprecedented heights. The choice of the EU legislator to include foreign air carriers and their CO2 emissions that occurred beyond EU airspace infuriated third countries, while the fact that the directive applies the same treatment to all airline operators whatever their nationality met vivid criticism from developing countries, in particular China and India.

This paper investigates the reasons why the environmental objective pursued by the EU Aviation ETS does not seem sufficient to render its unilateral adoption acceptable to the international community, despite staging multilateral negotiations and despite the flourishing national transplants of the ETS system in other jurisdictions. Thereby it provides a preliminary assessment of what the current row implies for the global governance of climate change. Devoting particular attention to the positions of the EU and China in this dispute, it argues that the opposition to EU endeavour finds its roots in the normative frictions between the climate change regime and the international aviation regime, while the lack of process legitimacy of EU unilateralism provoked third countries' claims to the infringement of their national sovereignty. Thus, it concludes that in the current international system, the harmonization of regimes' normative goals and principles must result from a political choice, the absence of which can effectively frustrate the achievement of multilateral cooperation goals. Moreover, in such context, the unilateral imposition of an alternative path involving the other regime members against their consent, to palliate multilateral norm-making, is likely to meet increasingly strong opposition from an increasing number of powerful countries.

GEM PhD student ULB (from 01-09-2012)

This research acknowledges the support of the FP7 large-scale integrated research project **GR:EEN - *Global Re-ordering: Evolution through European Networks*** European Commission Project Number: 266809 and the Erasmus Mundus Joint Doctorate GEM- Globalisation, the EU, and Multilateralism Project Number 2010-0010

The EU Aviation ETS Caught between Kyoto and Chicago: Unilateral Legal Entrepreneurship in the Multilateral Governance System[1]

Coraline Goron

Introduction

The entry into force, on January 1st, 2012, of the European Union Directive 2008/101/EC extending the European Emission Trading System to domestic and international civil aviation has taken the dispute between the European Union and major powers, including the US, China, Russia and India, regarding the legitimacy of this regional legislation to unprecedented heights. In essence, the ETS Aviation Directive imposes on all air carriers, irrespective of their nationality, landing or departing from a European airport, to surrender a certain number of 'allowances' corresponding to the quantity of CO2 emissions released by their planes during their journey to or from the EU. Because part of the allowances will have to be purchased by the airline operators, they represent a cost, which has been denounced as an 'unlawful carbon tax'. Furthermore, the choice of the EU legislator to include CO2 emissions that occurred beyond EU airspace in the calculation of the amount of allowances to be submitted infuriated third countries, while the fact that the directive applies the same treatment to all airline operators whatever their nationality met vivid criticism from developing countries, in particular China and India. Interestingly, whereas the 'battle' is "likely to be resolved by diplomatic parleys rather than in the courtroom[2]", arguments on all sides have been framed in legal terms and courts of law are being brought to the fore as new international actors in the process. In a judgment issued on 21 December 2011[3], the Court of Justice of the European Union concluded to the compatibility of the European directive with international law. Yet, 29 non-EU countries signed a "Moscow Declaration" on 22 February 2012, which, on the contrary, severely condemned the European Act as an unacceptable violation of international customary law -in particular the principle of territorial sovereignty- and of a number of legal principles which have been developed in diverse international legal systems or "regimes[4]", notably the 1944 Chicago Convention on International Aviation (Chicago Convention), the 1992 UN Framework Convention on Climate Change (UNFCCC) and its 1997 Kyoto Protocol, as well as WTO law. The Declaration threatened the EU of further

[1] This research paper beneficiated greatly from the support and inputs from Professor Elisa Baroncini from the University of Bologna, as well as several Chinese Scholars who accepted to devote some of their time to answering my questions, in particular Prof Cao Mingde, Director of the Climate Change and Natural Resources Law Research Center at CUPL, Dr. Li Bin, Associate Director of the Institute of Aviation Law at Beihang University School of Law and Mr. Philip Boxell whom I met in CUPL. I would also like to thank Huang Yue from CAAC research institute, Li Lina from Greenhub and Li Shuo from Greenpeace China for the rich discussions we had on the EU Aviation case and EU-China environmental, climate and energy policies. They allowed me to widen my perspective and reflectively construct my approach to this issue as developed in this paper.

[2] Havel, Bryan F, Mulligan, John Q, "The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme", *Air and Space Law,* vol 37, no 1, (2012), pp 3-33

[3] ECJ (Grand Chamber), Case C-366/10, "Air Transport Association of America and others", 21 December 2011

[4] Stephen Krasner was first to coin the term "international regimes" that he defines as "institutions possessing norms, decision rules, and procedures which facilitate a convergence of expectations." in his founding article: Krasner, Stephen D. 1982. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." *International Organization* 36/2 (Spring)

legal actions and various retaliatory measures[5]. Hence, the US Congress[6] and the Chinese government[7] have already taken steps to prohibit their domestic airline operators from complying with EU law, creating a direct bilateral confrontation between these national legal orders.

From an environmental perspective, such principled and virulent opposition seems out of keeping with the high stakes taken in climate change matters, since the EU ETS Directive is the first piece of legislation aiming at reducing emissions from international aviation ever adopted. Moreover, climate change mitigation has become the most symbolic expression of the wider principle of sustainable development. It is not only a major goal of the UNFCCC and the *raison d'être* of the Kyoto Protocol, but it has also been endorsed as a paramount development imperative by the EU, China[8] and an overwhelming majority of third countries and international organizations. Thus, this paper tries to provide an answer to the following question: why the environmental objective pursued by the EU Aviation ETS has not been able to convince the international community to tolerate its unilateral adoption, despite staging multilateral negotiations and despite the flourishing national transplants of the ETS system in other jurisdictions? Consequently, this paper will also give a preliminary assessment of what the current row implies for the global governance of climate change.

It is argued that the opposition to EU Directive finds its roots in the frictions between legal and other structural norms at the international level. The cross-sectorial nature of climate change regulation implies that it impacts several separate regimes concomitantly; thereby, it has revealed important horizontal normative incompatibilities between them. In the present case, the pillar norm of Common but Differentiated Responsibilities and Respective Capabilities (CBDR) in the climate change regime[9], clashes with the norm of non-discrimination, which is a cornerstone of the international aviation regime[10]. Similarly, the Chicago Convention's embedded tradition of tax exoneration arguably puts undue limitations on climate action by individual members to achieve their environmental goals in the climate regime. The question of how to accommodate these divergences is still hotly debated in the academic world[11] and no systematic answer is available to the diplomats charged with balancing them in the multilateral context.

Furthermore, although not yet definitely settled, the dispute generated by the EU Aviation ETS dispute has already revealed important limits to unilateral normative action in a global system structured on expectations of multilateral norm-making. In particular, the way the Kyoto Protocol delegated its 'multilateral norm-making' mandate to ICAO seems to impose a political limit on the actions that its members can take to fulfil their climate change mitigation commitments. Hence, a large part of the

[5] Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS", ICAO, 22 February 2012, Moscow, available at http://www.greenaironline.com/photos/Moscow_Declaration.pdf, consulted on 8-07-2012

[6] "European Union Emissions Trading Scheme Prohibition Act of 2011", HR2594, adopted in first session by the 12th Session of the United States Congress

[7] 中国政府禁止境内航空公司参与欧盟排放交易("The Chinese Government bans Domestic Airlines from participating in the EU Emissions Trading System"), Communication by CAAC, 2, June 2012, available at: http://www.caac.gov.cn/A1/201202/t20120206_45737.html, consulted on 8-07-2012

[8] See for the EU side, European Commission, "Winning the Battle against Global Climate Change", COM(2005) 35 final, Brussels, 9 February 2005; for China see China State Council White Paper, "China's Policies and Actions for Addressing Climate Change" (CPAACC), 2008

[9] Sands, Philippe, "The United Nations Framework Convention on Climate Change", *Review of European Community and International Environmental Law,* N°1, 1992, pp 270-277

[10] Chicago Convention on International Aviation, Article 11 "application of air regulations" and article 15(1)

[11] See Fisher-Lescano, Andreas, Teubner, Gunther, "Regime Collision: the vain search for legal unity in the fragmentation of global law", *Michigan Journal of International Law*, Vol 25:999, Summer 2004, pp 999-1045; International Law Commission, Report to the UN General Assembly finalized by MarttiKoskenniemi, "Fragmentation of International Law: Difficulties Arising from the diversification and expansion of international law", Geneva, Summer 2006

international opposition to EU's endeavour seems rooted in the fear of setting a precedent encouraging EU's normative unilateralism to prosper and 'spill over' to other fields, in particular maritime transportation and carbon taxation, whenever multilateral negotiations cannot keep pace with Europe's global governance ambitions[12]. In particular, the principled opposition by China to a legislation whose overall economic impact is relatively limited[13] seems primarily motivated by the will to curb EU's self confidence that it can palliate the absence of multilateral solutions with its own determination of the path to be followed. Indeed, in the face of a normative imbroglio at the international level, any unilateral attempt to impose one's own priorities or values is doomed to be perceived as illegitimate. In this regard, a linkage between national sovereignty and multilateralism underlines this dispute, whereby otherwise unacceptable encroachments to national sovereignty can only be legitimated through multilaterally agreed solutions.

Chapter I presents the dispute's background of procrastinating multilateral negotiations and its main actors, with a particular emphasis on China's reaction most dramatic and multifaceted response. Chapter II focuses on the horizontal conflict of norms which have continuously impeded progress in the multilateral frameworks, while putting a contradictory burden of international obligations and curtailing action by pro active individual members such as the EU. Subsequently, Chapter III explains why the EU's unilateral approach is perceived as disruptive and illegitimate in the context of multilateral governance. Finally, Chapter IV offers some concluding remarks as to the significance of these developments for the future decentralized global governance of climate change and the limits on 'EU Leadership by example in this field of 'high politics'[14].

Chapter I: The European Aviation Directive as substitute for multilateral action and its detractors

1) Sketching the background: International aviation GHG emissions left unregulated by staging negotiations in the UNFCCC and ICAO

Since 1992, global governance of climate change has developed within the multilateral framework established by the United Nations Framework Convention on Climate Change[15]. The Kyoto Protocol to the Convention, which was adopted by the Conference of the Parties (COPs) in 1997, for the first time assigned binding targets for the reduction of Greenhouse gases (GHG) emissions by industrialized countries (Annex I) within a specific commitment period (2008-2012). The Protocol entered into force after the EU secured participation from Russia but without the United States, in February 2005[16]. In December 2010, the Cancun Summit reached a global political agreement that in order to "prevent dangerous anthropogenic interference with the climate system" global temperature increase should be kept below 2 degrees Celsius[17]. And yet, according to the estimates published by the International Energy Agency, global CO2

[12] Cheng Shuaihua, « Is Europe Breaking the Law », *China Dialogue*, November 4, 2011

[13] Faber, Jasper, Brinke, Linda, "The Inclusion of Aviation in the EU Emissions Trading System, An Economic and Environmental Assessment", *ICTSD*, Issue Paper No. 5, September 2011, p 21

[14] Oberthur, Sebastian, "EU Leadership on Climate Change: Living up to the Challenge"

[15] United Nations Framework Convention on Climate Change, New York, 9 May 1992

[16] Oberthür, Sebastian, Pallemaerts, Marc, "The EU's Internal and External Climate Policies : An Historical Overview", in Oberthür, Sebastian, Pallemaerts, Marc (eds.), *The New Climate Policies of the European Union,* Brussels, VUB Press Brussels University Press, 2010, pp 27-63

[17] Cancun Agreements, COP16-CMP6 Decisions, UNFCCC Conference, Cancun, Mexico December 11, 2010

emissions reached a "record high" in 2010[18]", and last April, the Agency's Executive Director Maria Van Der Hoeven voiced concerns that "on current form, the world is on track for warming of 6 C by the end of the century[19]". Thus, when measured according to an ecological criterion, the "effectiveness" record of the international climate governance appears shockingly poor[20].

Moreover, the Kyoto Protocol's decade of dragged negotiations between 1995 and 2005 failed to achieve consensus on the inclusion of GHG emissions from international transportation, -international aviation and maritime transport-. The political and methodological difficulties for the allocation of such emissions and persistent disagreement on how to apply the CBDR principle have prevented such inclusion until now[21]. As a result, on the contrary with domestic aviation emissions, which are counted as part of Annex 1 countries emission reduction commitments, "international aviation emissions are essentially unregulated at the international level[22]". However, article 2.2 of the Kyoto Protocol foresees a multilaterally agreed solution by mandating the parties to negotiate through the specialized UN body dedicated to this sector, namely the International Civil Aviation Organization (ICAO). The binding force of this provision is one of the major points in the EU Aviation ETS dispute (see chapter III). Although climate change mitigation goals have been duly integrated by ICAO[23] in the international aviation regime built upon the 1944 Chicago Convention, progress under these auspices have been "exceedingly slow[24]", at least until very recently. And yet, pressures to address emissions from aviation have mounted in unison with worries about the impact of this sector's booming growth. Indeed, whereas estimates endorsed by ICAO state that, at present, GHG emissions from aviation represent only about 2% of global CO2 emissions and maximum 3% of the global anthropogenic GHG emissions[25], the projected exponential growth of the aviation sector activities, in particular in emerging economies such as China, represents an acknowledged challenge for climate change mitigation[26].

According to their mandate under the Kyoto Protocol, ICAO members have not remained entirely passive though and the 37th General Assembly in the fall of 2010 did succeed in adopting an aspirational

[18] International Energy Agency, "Prospect of limiting the global increase in temperature to 2°C is getting bleaker", 30 May 2011

[19] Maria Van Der Hoeven, reported in Fiona Harvey and Damian Carrington, "Governments failing to advert Catastrophic Climate Change, IEA warns", *The Guardian*, Wednesday 25 April 2012. The 6 C increase scenario is the worst scenario envisaged by the IPPC report and would yield catastrophic ecological and economic consequences across the globe.

[20] The UNEP "Emissions Gap Report" authoritatively concluded that even if the emissions reductions included in the pledges of the Copenhagen Accord were delivered, they would fulfil only 60% of the reductions advocated the scientists to keep global temperatures rise at 2°C. See UNEP, "The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2°C or 1.5°C?", November 2010

[21] Kati Kulovesi reports that the inclusion of GHG emissions from international aviation and bunker fuels has been put on the negotiation table of the post-Kyoto framework by the EU and other developed countries (namely Norway and Australia) as well as the group of least developed countries, but that the issue remains controversial and although several proposals have been put forward and discussed in UNFCCC institutions, no course of action has been adopted yet. See Kulovesi, Kati, "Make your own special song, even if nobody else sings along: International Aviation Emissions and the EU Emissions Trading Scheme", *Climate Law*, Vol 2, No4, 2011, *SSRN Paper No1,* 2011

[22] Scott Joanne, Rajamani, Lavanya, "EU Climate Change Unilateralism, International Aviation in the European Emissions Trading Scheme", *European Journal of International Law*, Vol 23, No2, 2012, SSRN Paper 1 November 2011

[23] ICAO has created a Committee on Aviation and Environmental Protection (CAEP) which has regularly convened since. Moreover, all recent ICAO Assembly resolutions have addressed the issue CO2 emissions from international aviation

[24] Scott Joanne, Rajamani, Lavanya, op cit, p 6

[25] Gossling, Stefan, Upham, Paul, "Introduction, Aviation and Climate Change in Context", in Gossling, Stefan, Upham, Paul (eds) *Climate Change and Aviation: Issues, Challenges and Solutions*, 2009, p 4; the same estimates were reiterated by ICAO Resolution A37-19 of the ICAO 37th General Assembly from 28 September 2010 to 8 October 2010

[26] ICAO submission to Rio+20, "Inputs and Contributions of the International Civil Aviation Organization to the United Nations Conference on Sustainable Development", 26 October 2011, p 4

goal of reaching an average annual fuel-efficiency improvement of 2% and capping Aviation emissions at 2020 levels[27]. However, such weak target unarguably lacks ambition and in any event falls short of EU goal to limit Aviation emissions to 2005 levels[28]. Remarkably, similarly to the divergences that have plagued the negotiations of the 'Post-Kyoto' climate change regime since the adoption of the Bali Roadmap of 2007, moving global cooperation forward in ICAO hinges upon resolving distributive issues that continuously divide the international community. However, this problem stands out even more sharply in the case of aviation because of the fact that the aviation regime, contrary to the climate regime, was built upon the principle of non-discrimination[29].

2) The EU Aviation Directive in context

Against the background of multilateral disarray described above, and meaningful both its binding commitments under the Kyoto Protocol[30] and of its ambition to take on a leadership role in global climate action[31], the European Union in 2009 adopted a landmark "EU Climate and Energy Package"[32]. This legislative breakthrough was aimed at implementing a self-imposed binding mitigation target known as "20-20 by 2020" -standing for a reduction of 20% of GHGs, an increase in the share of renewable energy from 8.5% to 20% and improving energy efficiency by 20% by the year 2020[33]-.

Among the regulatory instruments of the package, the EU Emissions Trading Scheme (ETS) Directive has been presented as a cornerstone of EU's climate policy, both internally and externally[34]. Following an evaluation of the first period (2005-2007), the ETS system initially established by Directive 2003/87/EC and in force since 2005 has been supplemented by a Directive extending the ETS to the domain of Aviation adopted in 2008[35], slightly earlier than the 'package' Directive 2009/29/EC of 23 April 2009, which refined and extended the ETS's 'cap and trade' system to more than 10 000 undertakings across a wider range of industrial sectors[36]. Under the aviation directive, in order to create scarcity the cap (total amount of allowances available) allocated to the aviation industry was set at 97% (in 2012) and 95% (from 2013) of the 'historical benchmark of aviation emissions (calculated between 2004 and 2006). However, concerns of the impact of the scheme on the industry's competitiveness led the European legislator to decide that 82% of the cap would be '*grandfathered*', thus allocated for free to each airline operators on the basis of their reported ton-kilometre data. A margin of 3% has been reserved to grant more emission rights to airlines entering the scheme after 2012 or developing very fast. The 15% left must be purchased at auction from

[27] ICAO Assembly Resolution A37-19 (2010), paragraphs 4-5

[28] See the written testimony delivered to the US Senate by Mr Jos Delbeke, Director General, Directorate General Climate Action in the European Commission, Delbeke, Jos, 6 June 2012

[29] Article 11 and 15(1) Chicago Convention

[30] Under the Kyoto Protocol of 1997, the EU-15 countries accepted the most ambitious GHG emissions reduction target among developed nations, with a total regional target of 8% reduction from baseline year 1990, redistributed among themselves through a "burden sharing agreement"

[31]Oberthur, Sebastian, Roche Kelly, Claire, "The EU Leadership in International Climate Change Policy; Achievements and Challenges", (2008), *The International Spectator*, pp 42-43

[32] For a comprehensive exegesis of the Package, see Kulovesi, Kati, Morgera, Elisa, Munoz, Miquel, "Environmental Integration and Multifaceted International Dimension of EU Law: Unpacking the EU's 2009 Climate and Energy Package", *Common Market Law Review*, 2011, Vol 48, pp 829-891

[33] Presidency Conclusions of the Brussels European Council, 7-8 March 2007, 7224/1/07

[34] For a recent reaffirmation, see Jos Delbeke, Op Cit

[35] Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community

[36] The sectors covered are listed in Annex I to the amended Directive 2003/87/EC and include, next to aviation: power production from combustion of fuels, production of iron and steel, production of cement, production of timber, production of hydrogen and synthesis gas, notably for transport of GHG by pipelines and CCS

the member states or on the integrated EU Carbon market[37].Hence, the whole amended text of the ETS directive forms an integrated system and an integrated market.

Notwithstanding this, there is one particular aspect of the aviation directive that creates a world of difference with the main bulk of the ETS scheme: its material scope of application. Contrary to the provisions related to stationary installations in Directive 2009/29, the Aviation ETS Directive does not confine itself to domestic flights or airline companies registered in the EU. Instead, it requires all air carriers, irrespective of the origin or destination of the flight and irrespective of their nationality, landing or departing from an aerodrome located in the territory of the member states, to surrender one allowance per ton of CO2 emitted over the entire flight[38]. The inclusion of foreign airlines illustrates the principle of non-discrimination in international aviation law and EU law. Yet, it has been challenged by developing countries, in particular China, as contrary to the CBDR principle. The inclusion of CO2 emissions that occurred over beyond EU territory has been justified with regard to the environmental efficiency of the scheme. Nevertheless, this choice has infuriated third countries' airlines and governments, who have argued that it amounts to having the EU regulating and extracting revenue from activities taking place over the high seas and in their own domestic air space, in violation of their territorial sovereignty[39] (chapter III).

Before coming to this, it is useful to give an account of the form and dimension that the opposition to the EU endeavour has taken. Not only it enlightens the concrete obstacles to the exercise of normative unilateralism that currently exist in the international system, but it also allows to speculate on its consequences for the effectiveness of the emerging global governance system.

3) International reactions and escalating bilateral row between the EU and China

The adoption of the EU Aviation ETS Directive has met radical political opposition from the international community. On September 29-30, 26 non-EU member states of the ICAO convened at New Delhi, India, and issued a Joint Declaration[40]which condemned the EU ETS as illegal under international law and called the approach of the EU under the directive "inacceptable". This Declaration was then formally adopted by majority by the ICAO Council at a meeting in Montreal on 2 November 2011[41], which "*urged* the EU and its Member States to refrain from including flights by non-EU carriers to/ from an airport in the territory of an EU Member State in its emissions trading system". Meanwhile, the United States Air Transport of America Association and several other American airlines supported by the US government have brought a lawsuit against the validity of the Directive in front of British national courts, which has then been referred for preliminary ruling to the European Court of Justice of the European Union (ECJ). However, after the judgment of the ECJ in December 2011 (hereafter 'the ATA case'[42]) declared the ETS directive compatible with international law and the latter entered into force on 1st January 2012,

[37] Typically airline operators can purchase emission allowances from other industries on the EU carbon market; even though this is a "one way street", as allowances allocated to the aviation sector cannot be purchased by other industries to fulfill their quotas under Directive 2009/29/EC. This specific treatment of Aviation allowances was conceived in order to prevent interferences with the member states' commitments under the Kyoto Protocol, which excludes emissions from international aviation. See recital 27 of the preamble of Directive 2008/101/EC

[38] Article 3d Directive 2008/101/EC

[39] Young, Nancy N, Vice President of Environmental Affairs, Air Transport Association of America (ATA) submission before the US Congress, "The European Union Trading Scheme, a Violation of International Law", 27 July 2011

[40] See the Press Release from the Indian Ministry of Civil Aviation, International Meeting of ICAO Council and Non-EU Member States on Inclusion of Aviation in EU ETS, available at http://pib.nic.in/newsite/erelease.aspx?relid=76388

[41] ICAO 194th Council meeting, see ICAO working paper C-WP/13790 of 17 October 2011 entitled "Inclusion of International Civil Aviation in the European Union Trading Scheme (EU ETS) and its Impact".

[42] ECJ, Case C-366/10, 21 December 2011

opponents to the scheme adopted a yet stronger stance at a meeting in Moscow held on 21-22 February 2012. There, 29 non-EU ICAO member states issued a second Joint Declaration threatening with the EU with legal actions in different forums, -notably in the ICAO and the WTO-, and diverse retaliatory measures[43].

Among the countries opposing the directive, China has taken the most advanced steps, escalating the dispute to the highest diplomatic levels. As expressed by Cai Haibo, deputy secretary-general of the China Air Transport Association (CATA), the Chinese reaction has been "walking on two legs[44]". The first 'leg' has been to work through legal means in order to see the directive declared illegal (a classic way of handling trade disputes with the EU, in particular with regard to trade defence instruments like anti-dumping and anti-subsidies proceedings, which are based on EU laws) in front of German national courts[45]. Yet, this course of action seems less attractive since the outcome ATA case, according to which both the Chicago Convention and article 2.2 of the Kyoto Protocol[46] have been found out of reach of the invocality by individuals for the review of EU Acts. Although this finding has been heavily criticized, it results that Chinese airlines could hardly rely on the Kyoto Protocol to claim the violation of the broad and vague CBDR principle[47]. Furthermore, contrary to the "Open Skies Agreement" between the EU and the US, which eventually offered an acceptable basis for most of the legal review of the directive, China only has concluded bilateral agreements with some EU member states. Yet, according to the jurisprudence of the ECJ in the case *Kadi* and *Interkanto[48],* bilateral agreements concluded between the member states and third countries cannot serve as ground for the review of EU acts. Whatever the shortcomings of this jurisprudence in terms of interactions between the EU and international law, it results that challenging the EU directive on this basis in front of EU courts is doomed to failure.

In front of these difficulties, the Chinese diplomatic efforts have reported to the legislative side in order to see the Aviation Directive amended or implemented in a manner that would accommodate its special needs as a developing country. Hence, the Civil Aviation Administration of China (CAAC) found the costs of participating in the scheme exceedingly high for developing countries aviation industry, based on calculations that paying the EU 'carbon tax' would cost China's aviation industry 790 million Yuan (US$124 million) in 2012 and up to 3.7 billion Yuan ($580 million) in 2020[49] . The EU, on the contrary, has repeatedly emphasized that the costs associated with the implementation of the ETS would be minimal and easily passed on to the consumers, -around 17,5 Yuan RMB per flight from Beijing to Brussels[50]-. In particular,

[43] Joint Declaration of the Moscow Meeting on the Inclusion of International Aviation in the EU-ETS, February 22, 2012

[44] CaiHaibo, quoted in Watts, Jonathan, "Chinese Airlines refuse to Pay EU Carbon Tax", *The Guardian Online*, 4 January 2012

[45] Germany is the 'Administering Country' for most Chinese airlines, in particular 'Air China', under directive 2008/101.EC. See Commission Regulation (EU) No 100/2012 of 3 February 2012 on the list of aircraft operators performing an aviation activity listed in Annex I to Directive 2003/87/EC and specifying the administrating member state for each aircraft operator

[46] ECJ, Case C-366/10, paragraphs 71 and 78, respectively

[47] ECJ, Case C-366/10, paragraphs 52-54: for International law to be invoked by individuals in proceedings aiming at the review of EU acts, the EU (1) must be bound by the international rules, (2) the nature and broad logic of the latter do not preclude it and (3) their content must "unconditional and sufficiently precise". The Court found that even though the EU was a party to the Kyoto Protocol and therefore bound by it, article 2.2 of the Kyoto Protocol did not meet the criteria of precision and unconditionally. In the light of the tremendous highly disputed scope of the CBDR principle, it seems very unlikely that it would meet such thresholds of unconditionally and precision.

[48] Case C-308/06, The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport [2008] ECR I-4057; Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission [2008]; for an analysis of the cases, see Van Rossem, Jan Willem, "Interaction between EU Law and International Law in the Light of Interkanto and Kadi: The Dilemna of Norms binding the Member States but not the Community", Netherlands Yearbook of International Law 2009, CEER working paper 2009/4

[49] LanLan, "China's Airline Talks with EU Stall", *China Daily online,* 23 July 2012

[50] Delegation of the Euopean Union to China, "Aviation in the EU Emissions Trading System Information Note"

China has pushed for a modification of the specific rules concerning the '*grandfathering*' of emissions allowances to each individual airline operator. Indeed, thus far the EU has failed to convince China that the 3% margin reserved for new market entrants was sufficient and that its nascent but fast growing air service activities in the EU market would not be more adversely affected by the scheme than 'already taped' EU and US air carriers. Another proposal has been that the EU could adopt differentiated delays in the implementation of the directive so as to give time for developing countries' aviation industry to 'catch up' and give consideration to the CBDR principle. Finally, experts have looked at the so-called 'flexibility clauses' of the Directive, which leaves room for amendment of its provisions if "equivalent measures" were adopted by third countries[51]. In this regard, one of the possibilities might be for the EU to consider China's newly created "civil aviation development fund", which lists among its purposes "civil aviation's energy conservation and emission reduction[52]" as an equivalent measure. Another optimistic view has been to look forward to the development of China's own ETS. However, the latter is still in infancy and is not expected to include the aviation sector before long[53]. In any case, although in practice bilateral negotiations are likely to play a critical role, ultimately what is to be considered "equivalent" according to the directive, is to be determined by the EU unilaterally[54]. This is yet another frustration for third countries which falls back into claims of sovereignty breach.

Indeed, the second leg of China's reaction, which may have taken precedence over the first one as measure as the dispute escalated, has expressed a hard diplomatic line based on the rhetoric of national sovereignty and calling on the EU to step back. This discourse, also expressed through China's leading role in the above-mentioned ICAO international meetings, has been supported by the use of 'power-politics' instruments, such as the reported Chinese government's withholding of up to $12 billion USD new Airbus deliveries to China Airlines in retaliation to the ETS[55]. More importantly, this foreign policy stance has also been backed by the adoption of a 'ban', published by the CAAC (中国民用航空局 CAAC) on 6 February 2012, prohibiting Chinese airlines from participating in the ETS and from raising fares or passenger charges to recover the cost of taking part in it[56]. Accordingly, a coalition of Chinese airlines companies led by *Air China* have refused to submit their CO2 emissions data to the European Commission by the deadline prescribed in the directive (16 June 2012) and exposed themselves to the pecuniary sanction of 100 EUR per ton of CO2 emissions not covered surrendered allowances and eventually an operating ban for EU airspace[57]. However, as enforcement would likely lead to dangerous trade retaliations from China, the EU has diplomatically 'postponed' the deadline in the hope that a solution can be found before 30 April 2013, date by which EU member states will start enforcing the scheme.

In such context, as Advocate General Kokott put forward in her Opinion delivered on 6 October 2011[58], there is not yet any objective ordering rule in international public law to solve the conflict. While it has been suggested that Chinese airlines could request EU national courts to put aside the application of EU

[51] Article 25a Directive 2008/101

[52] Article 23 (3) Notice of China Ministry of Finance on Issuing Interim Measures for the Collection, Use and Management of the Civil Aviation Development Fund [Effective], 17 March 2012

[53] See, among other, Wang, Tao, "China's Carbon Market Challenge", *China Dialogue*, 21 May 2012

[54] See article 25(a).1 Directive 2008/101/EC

[55] Bloomberg, "EADS Says A330 Boost Is Hostage to China Views on Carbon Tax," Bloomberg.com, March 8, 2012

[56] CAAC, notice "中国政府禁止境内航空公司参与欧盟排放交易体系" ("The Chinese government bans domestic airlines from participating in the EU emissions Trading Scheme"), published in Chinese on CAAC website http://www.caac.gov.cn/a1/201202/t20120206_45737.html and reported in English by the state official news agency Xinhua at http://news.xinhuanet.com/english/china/2012-02/06/c_131394306.htm

[57] See articles 15.3 and 15.5 Directive 2008/101.EC

[58] Kokott, Juliane, Opinio of the Advocate General, 6 October 2011, ECJ, Case C-366/10, paragraph 158

law under the excuse that it would force them to breach their own national law[59], the success of such claim is unlikely. This is even more so because the legal nature of the Chinese 'ban' remains fairly unclear. Whereas the CAAC claims to have received the approval from the State Council for imposing it, the latter has not taken any steps to adopt a formal regulation or present a text to the National People's Congress Standing Committee. In addition, like the US ''European Union Emissions Trading Scheme Prohibition Act of 2011'' passed by the Congress on 24 October 2012 and now pending for adoption in front of the Senate, the Chinese 'ban' does not foresee any penalties for the Chinese airlines in case of non compliance. This is likely to be interpreted by EU courts as giving precedence to the application of EU law.

However, ramifications of this dispute have found their way through the drafting of the upcoming first climate change law of China. Indeed, the first academic draft produced by the Chinese Academy of Social Sciences foresees that the Chinese government "shall take countermeasures" when other countries or international organizations adopt trade protection measures or unilateral carbon taxes on Chinese airliners and ships[60]. Although this draft has no legal or even political value until it is formally endorsed by the Chinese government[61], it still offers powerful evidence of the impact of the EU Aviation ETS case for future international cooperation on climate change.

Whether bilaterally or multilaterally, the opposition of China to the directive has brought to the fore challenging arguments grounded in its principled position as a developing country. Arguments based on CBDR must be devoted particular attention, if only because they have largely contributed to the deadlocks in the UNFCCC and ICAO.

Chapter II: From Kyoto to Chicago: Horizontal conflicts of regimes' norms

The EU unilateral move has brought to light the normative clashes which have prevented the ICAO from fulfilling its mandate under article 2.2 of the Kyoto Protocol[62], in particular because the issue of environmental fuel taxation and CBDR -two main avenues of the climate regime- seem to clash with the Chicago Convention's embedded principles of tax exoneration and non-discrimination.

1) Horizontal clashes of value-norms between the climate and International Aviation regimes: climate mitigation versus fuel taxation

Under the UNFCCC, countries have almost universally made commitments to combat climate change. According to the Stern Review[63], it has been widely recognized that 'carbon pricing' through market-based mechanisms, namely 'carbon taxation' and emissions trading, were the most cost-efficient climate mitigation instruments and thus also the most suitable for a 'sustainable' climate policy. On the other side, the Chicago Convention, adopted in the aftermath of World War II in 1944, unsurprisingly does not mention any environmental objective. Despite this, the ICAO has progressively assumed a role in the

[59] This concept is known as 'comparative impairment' the judge should apply the law that would be more impaired by non-application, see William A Baxter, 'Choice of Law and the Federal System' (1963) 16 *Stanford Law Review* 1

[60] Act on Addressing Climate Change (Draft Proposal), Chapter 8 "International Cooperation on Addressing Climate Change", article 101 entitled "International sanctions"

[61] In the present case, a formal proposal should be put forward by the National Development and Reform Commission (NDRC) which has been managing China's climate Change and energy policies and consequently has been charged by the State Council of drafting the first Climate Change law of China.

[62] Article 2.2 Kyoto Protocol provides: "The parties included in Annex I shall pursue limitations 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 Organization (IMO), respectively"

[63] Sir Stern Nicholas, "Stern Review: The Economics of Climate Change", Executive Summary, Cambridge University Press, 30 October 2006, p 18

development of environmental standards for aviation, which has recently undergone a rapid institutionalization, first with the creation of a Committee of Aviation Environmental Protection (CAEP) and the subsequent formation of a Group on International Aviation and Climate Change (GIACC) in 2007. Furthermore, ICAO's most recent Assembly Resolution A37-19 of October 2010 endorsed emissions limitation objectives and re-affirmed its ambition to develop a global framework for market based measures (MBMs).

Nevertheless, the primary goal of ICAO under the Chicago Convention remains the development and liberalization of international aviation. This goal is supported by two types of key provisions: the strict limitations on taxation affecting international aviation and the principle of non-discrimination. With growing concerns over the global environment, the aviation favourable tax treatment has come under the fires of environmentalists, who have denounced entrenched economic and industrial interests. As a result, arguably, "there is no more controversial issue that divides governments"[64] in ICAO than 'carbon pricing'. In the face of mounting pressure, the ICAO Council in 1996 adopted a "Resolution on Environmental Taxes and Charges[65]", which reluctantly 'noted' the desire of some members to impose environmental levies, but failed to provide strong guidance as to their application besides respect for the principle of non-discrimination and proportionality to the environmental objectives pursued in order to preserve the industry's competitiveness. However, this *soft law* resolution can hardly provide solid ground for an exception to the unequivocal prohibitions of charges enshrined in article 15 and 24(a) of the Chicago Convention. From then on it is not surprising that, CO2 emissions being intrinsically related to fuel consumption, "the concept of emissions charges and the extent to which such charges can be applied by States to foreign carriers has been the single most disputed issue at ICAO's meetings[66], as reflected in the language of Resolutions A35-5 and A36-22[67].

The status of 'Emissions Trading Schemes' in ICAO has proved even more ambiguous. Resolutions A35-5 and A36-22 both distinguished emissions trading from charges, but the most recent Resolution A37-19, on the contrary, adopted a single approach to all market based measures (MBMs). Moreover, it is highly disputed whether Resolution A37-19 overturned Resolution A36-22, which '*urged*' states not to implement an emissions trading system on third States' aircrafts, "except on the basis of mutual agreement[68]". Thus, it seems that absent a clear and binding multilateral system addressing emissions from aviation, the relationship between MBMs and the tax provisions of the Chicago convention is bound to remain controversial. From this it can be inferred that whereas ICAO, in order to withhold its leadership in the regulation of international aviation[69], has attempted to incorporate environmental objectives, it has also internalized the originally *inter-regime* normative contradictions between the necessity of carbon pricing for climate mitigation purposes and embedded charge exoneration privileges in the field of international aviation.

---

[64] Havel, Bryan F, Mulligan, John Q, *Loc Cit*, p 27

[65] ICAO Council "Resolution on Environmental Charges and Taxes", adopted at the 16th meeting of its 149th Session on 9 December 1996

[66] COM(2005) 459 final, *Op Cit*, p 9

[67] In both resolutions, ICAO council recognized that "existing ICAO guidance was not sufficient to implement GHG emissions charges internationally", yet "urged contracting states to refrain from imposing them unilaterally"

[68] All EU member states made a reservation on this resolution. See Reservations made to Assembly Resolutions A36-22 Consolidated statement of continuing ICAO policies and practices related to environmental protection) – Appendix L only (Market-based measures, including emissions trading), Extracts of A36 Min, P/9 (minutes of the 9th plenary meeting)

[69] Struxal, Stephen, "The ICAO Assembly Resolution on International Aviation and Climate Change: An Historic Agreement, a Breakthrough Deal, and the Cancun Effect", *Air and Space Law,* 36, no 3m 2011, pp 217-242

These tax prohibitions in the Chicago Convention have provided the one of the most serious challenge to the EU Directive. However, in the ATA case, the ECJ rejected the claim of American airlines that the ETS was an unlawful tax. On the contrary, it upheld the arguments of the European Commission and the Advocate General that the ETS was neither a tax nor a charge[70], and thus was immune from the prohibitions of international aviation law. And yet, from the arguments put forward by the industry and in the literature[71], notably that "by obliging air carriers to buy allowances, Directive 2008/101 affects the markets in the same way as taxes, levies, duties and charges", such determination is far from clear cut. On the other hand, the Court avoided taking side in the 'value debate' on whether the tax prohibitions of the Chicago Convention should be allowed derogation for the environmental purpose of reducing CO2 emissions[72].

The resulting perception in the international community that the ECJ was bought to domestic political and industrial interests reinforced all-sided opposition instead of offering a settlement of the normative struggle. Hence, headlines lambasting EU's 'illegal tax' have not rarefied since.

2) Horizontal clashes of distributive norms between the climate and International Aviation regimes: Non-discrimination versus CBDR

The principle of Common but Differentiated Responsibilities and Respective Capacities (CBDR) is undeniably the backbone "generalized principle of conduct[73]" of the climate change regime. Its most notorious expression is found in the Kyoto Protocol's formal division between, on the one hand, industrialised countries (Annex I) subjected to binding CO2 emissions reductions target and, on the other hand, developing countries (Annex II). It further underpins the parties' bargaining procedures in the UNFCCC (two tracks approach) [74] and alliances and has also become the reference scale along which what is "equitable" and thus acceptable in terms of regime's obligations is discussed at the multilateral level.

However, the lingering negotiations of the post-Kyoto climate regime have also revealed deep divergences as to what this principle entails in terms of attributing concrete responsibilities. China has been the loudest advocate of the relevance of this principle ever since it got involved in the UNFCCC process[75]and domestically, a large consensus exists among government, academics and the civil society as to its primary importance[76]. Yet, the concept is nowhere defined with precision, which leaves room for different interpretations among different sections of the Chinese society, the academic world and, last but

[70] ECJ, Case C-366/10, paragraphs 142-147

[71] Even before adoption of Directive 2008/101, the EU legal service had raised doubts that "the auctioning of allocations could be understood as conflicting with articles 15 and 24 of the Convention", see Opinion of the legal Service inter-institutional file 2006/0304(COD), 1 October 2007; see also Schwarz, "including Aviation into the European Union's Emissions Trading Scheme, *European Environmental Law Review* (2007), pp 10-13; See also the charge by Havel and Macmullan denouncing the reasoning of the Court as a "semantic dodge", p 30; as well as Mayer, Benoit, Case Law Court of Justice, *Common market Review*, 2012, vol 49, pp 1113-1140

[72] Mayer, Benoit, op cit, p 1137-1139

[73]Sands, Philippe, op cit, pp 270-277

[74] Negotiations under the UNFCCC are formally divided into two "tracks", -the Conference of the Parties to the Convention (COP) and its adjacent ad-hoc working group (AWG-LCA) on the one hand, and, since 2005, the Conference of the Parties to the Kyoto Protocol (CMP) and its working group (AWG-KP) focused on Annex I members' obligations under the Protocol-.

[75] The CBDR principle already featured predominantly on China's first submission to the Rio Earth Summit of 1992. For a review, see Bo, Yan, Chen Zhimin, "The European Union, China and the Climate Change", in de Sales Marques, Jose Luis, Seidelmann, Reimund, Vasilache, Andreas (eds.), *Asia and Europe, Dynamics of Inter and Intra-Regional Dialogues*, Baden, NomosVerlagsgesellschaft, 2009, pp 415-436

[76] This was stressed by all interviewees from the academic word and the civil society. Notably Prof. Cao Mingde and Prof Li Bin and Ms Li Lina from Greenhub.

not least, between the different governmental departments involved[77]. The EU also endorsed the CBDR principle in the climate regime. However, it has put into question the 'two tracks' approach and favoured a more flexible differentiation between countries in the post-Kyoto area, a move from the current *status quo* which has been continuously opposed by China and other BASIC[78] emerging countries.

With regards to CO2 emissions from international aviation, article 2.2 of the Kyoto protocol expressly addresses 'Annex I' countries to work through ICAO to reduce their international aviation emissions. Such 'transplant' of the CBDR principle has provoked a direct clash with the International aviation regime's own traditional distributive principle of non-discrimination based on nationality[79]. Hence, reconciling the two principles has been acknowledged by ICAO as one of its biggest challenge[80].

From this, industrialized countries, including the EU, have argued in favour of a 'regime isolation' approach confining the CBDR principle to the climate regime[81]. On the other side, developing countries led by China have repeatedly insisted on the continued validity of the CBDR principle[82]. The result of this confrontation is remarkably visible in the wording of ICAO resolutions A36-22 and A37-19 which refer to both principles successively, without ordering or prioritizing them[83]. Arguably though, A37-19 featured a net shift in favour of the developing countries 'inclusive' argument by putting large emphasis on the 'special needs of developing countries. Nevertheless, this evolution should not mask the fact that this remains a major bone of contention in the current negotiations[84]. Just like climate protection goals, the transplant of the CBDR principle into the international aviation regime has not resulted in an automatic re-ordering of the regime's normative goals. On the contrary, it emphasized their pre-existing incompatibilities by blocking the decision-making system of the organization.

This normative struggle at the multilateral level has nourished the claims against the EU Aviation ETS directive, which has been accused of violating *both* principles. Directive 2008/101 is premised upon the equal treatment to "all flights arriving and departing from Community aerodromes. Nevertheless, the Directive has still been denounced for its alleged discriminatory impacts[85]because of the calculation

[77] Notably the NDRC, the SEPA, the ministry of foreign affairs and, according to the issue, the ministry of taxation, the ministry of aviation, etc, may have different visions. The NDRC and the ministry of foreign affairs are arguably more conservative

[78] The BASIC group is a negotiating 'alliance' in the UNFCCC Framework composed of four emerging economies: Brazil, South Africa, India and China

[79] Article 11 Chicago convention and article 15(1) applies it to charges.

[80] ICAO submission to Rio+20, "Inputs and Contributions of the International Civil Aviation Organization to the United Nations Conference on Sustainable Development", 26 October 2011

[81] This can be inferred from Jos Delbeke insistence on the principle of non-discrimination as basic requirement in ICAO negotiations, see Delbeke, Jos, Director General, Directorate General Climate Action in the European Commission, written testimony delivered to the US Senate, 6 June 2012

[82]Greenair, "Concerns over CBDR fail to halt important ICAO council agreement to move forward on evaluating market-based measures", *Greenair online*, 13 March 2012

[83] ICAO council resolution A36-22 in several places, but notably the third recital of Appendix L on "Market-Based Measures, including Emissions Trading" and Resolution A37-19, recital 10 and 11

[84]Greenair, *Loc Cit*

[85] See the Moscow Joint Declaration of 22 February 2012, whose first and tenth recitals consider that "the inclusion of International Aviation in the EU-ETS leads to serious market distortions and unfair competition". In this regard, it should be noted that even if, according to the ECJ in the ATA case, the EU is not bound by the Chicago Convention's principle of non-discrimination by the fact that it is not a party to it, it is nevertheless bound by it through its as a fundamental principle of both the WTO and EU's own legal order. See Opinion of the Advocate General Kokott, paragraphs 185-201

method for the amount of allowances due, which is a function of the length of the flight. Such argument could found an action in front of the WTO[86].

More importantly for this discussion, though, is the accusation of China and India on behalf of developing countries that the directive violates the CBDR principle. They have argued that by imposing identical obligations on developing countries airlines and developed countries airlines, directive 2008/101 failed to recognize EU's duty under the Kyoto Protocol to "take the lead in combating climate change"; failed to "acknowledge developed countries aviation industry historic contribution to GHG emissions" and also put an unfair burden on developing countries aviation industry that still lags behind in aircraft manufacturing and technology[87]. Yet, for the EU, restricting the scope of the directive to developed countries airlines would be a violation of the principle of non-discrimination. In addition, the European Commission hinted that the principle of CBDR was not relevant for the EU directive as the CBDR principle would apply only to relations *between states*, whereas Directive 2008/101 mainly addresses private market actors[88]. Indirectly, if reported in the context of the ICAO described above, this could mean that in the elaboration by the ICAO of a global system for MBMs addressing businesses, only the latter should be taken into account, while concerns for CBDR would take other forms (such as provisions for financial support and technology transfers or in determining national caps for emissions). Needless to say, such position is not shared by a majority of developing countries, and notably China[89]. Moreover, Rajamani and Scott have put forward a convincing counter argument that distinguishing between, on the one hand, developing states that would fully beneficiate from the CBDR and, on the other hand, developing countries airlines that would be put on equal footing with developed countries' airlines, is artificial and unduly restricts its scope of application[90].

Taking that the EU Directive thus had to respect both the non-discrimination and CBDR principles simultaneously, inevitably it also had to strike its own 'balance' to accommodate them. Indeed, the EU has also maintained that Directive 2008/101 did comply with the CBDR principle[91]. First, the European Commission considered that, by taking the first step in tackling emissions from aviation, directive 2008/101 was in itself an expression of the EU "taking the lead" in combatting climate change. Secondly, it maintained that whereas the scheme was *in itself* non-discriminatory, differentiation in favour of developing countries occurred in the impact of the directive, first through its *de minimis rule*[92], which *de facto* excludes a large bulk of developing countries from the scope of the ETS and second, because its "compliance costs would naturally be borne by Annex I carriers as they generally have a higher market share on the routes covered[93]". Notwithstanding the challengeable accuracy of these findings[94], it remains

[86] For a comprehensive analysis of the compatibility of Directive 2008/101 with WTO law, including both a review of the GATS and GATT, Meltzer, Joshua, "Climate Change and Trade – the EU Aviation Directive and the WTO", *Journal of International Economic Law,* Vol 15(1), February 2012, pp 111-156

[87] See, among other Press reports, Chee Yoke Ling, "CBDR must guide work on International Transport Emissions, say Several Developing Countries", *Climate Justice Now*, Report from Durban Negotiations, 29 November 2011; China's Statement of Reservation on Resolution A37-19: http://legacy.icao.int/icao/en/assembl/A37/Docs/10_reservations_en.pdf

[88] See Arthur Runge-Metzer, European Commission DG Climate Action, "Aviation and Emissions Trading" presentation to the ICAO Council briefing, 29 September 2011.

[89] Greenair, "Concerns over CBDR fail to halt important ICAO council agreement to move forward on evaluating market-based measures", *Greenair online*, 13 March 2012

[90] Rajamani, Lavanya, Scott, Joanne, Op cit, p 15-18

[91] European Commission, COM (2006) 818 final; SEC(2006)1684, "Impact Assessment of the Inclusion of Aviation Activities in the Scheme for Greenhouse Gases Emission Allowance Trading within the Community", accompanying document to the Proposal of Directive 2008/101 to the European Parliament and the Council, p 52

[92] Directive 2003/87/EC amended text, Annex I paragraph j

[93] European Commission, COM (2006) 818 final; SEC(2006)1684, Op cit, p 52

that "evidence of incidentally disparate impact is not enough to demonstrate compatibility with the CBDR principle[95]". Furthermore, the 'flexibility clause' of the EU Aviation ETS Directive makes the revision of the ETS dependent on third states adopting "measures having an environmental effect *at least equivalent* to that of the directive[96]", which seems to require similar efforts from developing and developed countries in a manner "out of keeping[97]" with the CBDR principle. Here also, the European directive unilaterally decided its own, subjective determination of the appropriate balance between the normative principles of CBDR and non-discrimination.

3) Inter-regime normative fragmentation and the space for unilateral determination

The phenomenon of 'fragmentation of international law' from the emergence of specialized and relatively autonomous regimes has already been widely discussed in the literature and anxieties about its risks for the stability of the international system triggered the establishment, in 2002, of a special Study Group in the International Law Commission of the United Nations[98]'. In this framework, an important issue has revolved around how to resolve these "problems of contradictions between individual decisions, rule collisions, doctrinal inconsistency and conflict between different legal principles[99]. The legal research has identified two classical sets of rules for solving conflicts of norms. The 'conflict of norms' rules which have traditionally served the hierarchic ordering *within* legal system on the one hand (the classic hierarchy of norms enshrined in most domestic constitutional laws), and private international law rules of 'conflict of laws' developed to determine the applicable law in case of interaction *between* legal systems[100], on the other. The legal doctrine, which tends to favour a view of international law as one coherent system, has tended to look for hierarchical solutions to all normative conflicts at the international level. However, recent academic discussions nourished by International Relations' systemic anarchy theories have found "reductionist" this attempt to "reproduce the ideal of legal hierarchies of the nation-state"[101], as it failed to understand the political roots of inter-regimes' normative conflicts, grounded not only on a plurality of policies, but also a plurality of policy-makers[102]. Michaels and Joost have suggested that the logic of "conflict of laws" rules could be better suited for solving conflicts between specialized treaty regimes[103], even though it would require significant adaptation to be applied in an *inter-regime* instead of an *inter-state* context. Interestingly, these authors have hinted that functional, institutional or procedural connecting factors could be worked out, pointing toward one branch of international law rather than the other.

However, this discussion has not yet extended to analysing the impact of unresolved horizontal inter-regime normative conflicts on the regime members, required as they are to comply concomitantly with both (vertical dimension). Perhaps the reason why this aspect has been overlooked resides in the

[94] Notably by China, see chapter I
[95] Rajamani, Lavanya, Scott, Joanne, Loc cit, p 24
[96] See Directive 2008/101, recital 17. It should be noticed that the language has been changed in article 25a, which removes the "equivalence test" and cast further doubts concerning the criteria that will be used as basis by the commission for this test.
[97] Rajamani, Lavanya, Scott, Joanne, Loc cit , p 21
[98] ILC Report, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law". Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi' UN Doc A/CN.4/L.682 (13 April 2006)
[99] Fisher-Lescano, Andreas, Teubner, Gunther, *Loc cit*, p 1002
[100] Michaels, Ralf, Pauwelyn, Joost, "Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law"
[101] Fisher-Lescano, Andreas, Teubner, Gunther, *Loc cit*, p 1002
[102] Ibid, p 1003
[103] Michaels, Ralf, Pauwelyn, Joost, L*oc cit*, p 28

presumption that States are the ultimate responsible for ensuring consistency among the different international obligations they contract. Yet, this does not help solving conflicts that exist and impact outside national territories.

This is precisely the vertical twist that has been revealed by the EU Aviation ETS dispute. This case not only has brought to light two of these kinds of inter-regime normative conflicts in the field of climate change, it has also proved that the efforts of ICAO to integrate 'foreign' norms from the climate regime have not led to an automatic ordering, and instead emphasised their incompatibilities. The institutional decision-making deadlock that has resulted suggests that, indeed, expectations of an intuitive normative hierarchic ordering were presumptuous. In addition, whereas it is remarkable that article 2.2 of the Kyoto Protocol embodied an institutional connection between the two regimes, it has certainly fallen short of providing a direction as to how to accommodate their respective normative goals.

Secondly, the EU Aviation ETS is the first 'high profile' concrete example showing the political consequences of normative conflicts in the global context of interactions between multiple legal orders, *vertically* (domestic and regional versus global) as well as *horizontally* (between regimes). The unilateral move of the EU in the field of international aviation amounted to imposing its own 'balancing act' between the norms involved, which arguably favours, on the one hand, environmental objectives over international aviation freedom and, on the other hand, non-discrimination over CBDR. Ultimately though, the right of the EU for making such determination in its territory is an expression of its regulatory sovereignty and third states cannot interfere with it, as it was emphasized by the Advocate General Kokott in the ATA case. In fact, should the EU have chosen to apply the Directive only to its domestic aviation industry, it would likely have received the applause of the international community and the above-mentioned unilateral normative determinations would probably have gone unnoticed. Instead, the fact that the Directive includes foreign airlines and 'international' emissions has transformed EU domestic legislation into a provocative and illegitimate unilateral international act.

Chapter III: The procedural flaw, true hurdle for EU Aviation ETS directive's legitimacy: process legitimacy and multilateralism

What infuriated the international community is the perception that the EU has overlooked third countries' regulatory sovereign rights. This claim has covered two different but related aspects. The first aspect has related to the extraterritorial application of the directive and the second to the fact that it pre-empted multilateral negotiations in ICAO.

1) Legal wrangles over the extraterritorial dimension of Directive 2008/101

The illegal and unacceptable extraterritorial application of the EU directive was the first and most politically substantive issue raised in the ATA case. Whereas its opponents ascertained that the EU had exceeded the bounds of its jurisdiction under international law, Advocate General Kokott argued in favour of the EU arguments that this claim was unfounded and based on "an erroneous and highly superficial reading of the directive". She argued that the directive did not regulate activities outside the EU, as it was concerned only with *aircrafts' arrivals and departures* from European aerodromes, subject to EU territorial jurisdiction, and that including emissions from the whole length of the flight merely amounted to "taking into account" of events that occurred outside EU's territorial jurisdiction without imposing a "concrete" extraterritorial rule of conduct. The judgment of the Court of Justice broadly reflected this reasoning,

emphasising on the right of the EU to exercise its "unlimited jurisdiction"[104] over aircrafts present in its territory and sweeping away the arguments related to the emissions occurring outside the EU territory with a blunt statement that "whether the pollution (here supposedly GHG emissions) suffered in the EU originate in an event which occurs partly outside that territory" was not such as to call into question the full applicability of EU law.[105]

Havel and Mulligan have denounced these conclusions, calling a logical fallacy[106] the legal reasoning justifying the unbounded jurisdiction of EU law by the mere physical contact of the aircrafts with EU territory. They argued that, although without assuming it, both the Opinion and the Judgment of the Court's interpretation applied the so-called 'effect doctrine'; a contested doctrine of territorial jurisdiction developed in the context of US antitrust law, according to which "a State exercises jurisdiction over conducts occurring outside its territory that is intended to have or does have substantial cognizable effects inside its territory[107]". Eckhard Pache also estimated that the Aviation ETS Directive, indeed "represented a fundamentally problematic intervention in the sovereignty of third countries", but could nevertheless be justified under the 'effect doctrine', based on the fact that "GHG emissions from international aviation impact on climate change and climate change in turn impacts on the territory of the EU[108]". This argument, which echoed the concerns of the European Commission about carbon leakage[109], was also endorsed by the advocate general as primary justification for the extensive application of the directive.

Furthermore, it has been convincingly demonstrated that legislations having some extraterritorial effect have become quite common in States' practice[110]. Relevant to the current discussion, in the domain of environmental protection it is often the case that "environmental standards unilaterally adopted within a regulatory jurisdiction exercising market power" directly affect foreign producers who want to sell their goods or provide their services in that market, a phenomenon which has even been coined by the term "transnational environmental law[111]". A landmark precedent in this regard is the WTO Dispute Settlement Appellate Body Decision in the *US Shrimp* Case[112], which ultimately upheld the ban imposed by the US on imported shrimp products according to the fishing method (without the use a device preventing the incidental catch of protected sea turtles) and which affected fishers in South East Asia. The Appellate Body considered the nexus between the territorial waters of the United States and the migrating sea turtles was

[104] Judgment case C-366/10, paragraph 124
[105] Judgment case C-366/10, paragraph 129
[106] Havel, Bryan F, Mulligan, John Q, LocCi, p 19
[107] See Restatement 3rd of Foreign Relations Law, US ss 402-403
[108] PacheEckhard, "on the compatibility with International Legal Provisions of Including Greenhouse Gas Emissions from International Aviation in the EU Emission Allowance Trading Scheme as a Result of the Proposed Changes to the EU Emission Allowance Trading Directive", legal Opinion commissioned by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Zurwburg, 15 April 2008, section F, pp 67-81
[109] Carbon leakage arises when a carbon price leads domestic businesses to relocate in or purchase more goods from foreign jurisdictions where carbon is not priced, which may have two adverse consequences. The first one is economic and relates to loss of competitiveness, while the second concerns the risk of offsetting the carbon reduction efforts, resulting in no net reduction of global CO2 emissions. In the international aviation sector, this relates to the re-rooting of flights so as to avoid European soils, perhaps towards longer and thus more energy consuming journeys. See European Commission, COM (2006) 818 final; SEC(2006)1684, "Impact Assessment of the Inclusion of Aviation Activities in the Scheme for Greenhouse Gases Emission Allowance Trading within the Community"
[110] Mayer, Benoit, op cit, p 1130, Bodansky, Daniel, "What is so bad about Unilateral Action to Protect the Environment?", *European Journal of International Law,* Vol 11, No2, 2000, pp 339-347
[111] Bodansky, Daniel, Shaffer, Gregory, "Transnational, Unilateralism and International Law", Legal Studies Research Paper No 11-34, University of Minnesota Law School, *SSRN paper,* 31 August 2011
[112] Case *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, Report of the Appellate Body, on article 21.5, 22 October 2001

enough for the US to exercise jurisdiction over them. Thereby, considering the transboundary nature of the air and climate, it has been suggested that by analogy with this case could support EU extended jurisdiction[113].

According to this innovative approach to jurisdiction, extraterritorial laws entail a breach of sovereignty only where they becomes undesirable for the stability of international relations, notably because they unreasonably impedes on other states' sovereign right to exercise their own[114]. This was also the approach of the Advocate General, who argued that the directive did not infringe on other States' sovereignty because it did not prevent them from adopting their own climate change laws[115]. Hence, this approach has some merits, as it takes account of the increased interdependence of the globalized international system.

Yet, such flexible approach to sovereignty is far from undisputed. It is notably strongly opposed by emerging powers like China and also by the United States, who hold much more conservative views on the protection of their national sovereign rights. For instance, Havel and Macmullan rightly submitted that "at no point the Advocate General considers the possibility that exclusive sovereignty over a State's airspace might include the ability to decide whether a State's own carriers, flying over the State's airspace or over the high seas, should be subject to any emissions regulation whatsoever[116]". Moreover, dangers of conflicts of laws loom large under a widespread and self determined attribution of 'effect' jurisdiction, in particular in the broad and ramified field of climate change. Hence, in the words of Havel and Mulligan, "the boundary pushing use of the effect test… has wide-ranging implications for environmental law that should excite green activists and terrify businesses[117]".

In the light of these arguments, the decision of the ECJ has not sufficed to appease the tensions and settle the issue. On the contrary, third States have reportedly contemplated bringing the argument to other forums such as the ICAO council or the WTO Dispute Settlement Body. This could yield further complications for the consistency of international system if these forums issued diverging interpretations and outcomes.

2) Sovereignty Breach linked to the Action of the EU outside the ICAO framework

The claim of sovereignty breach was not exhausted by accusations of extraterritoriality. The unilateral action of the EU has also been blamed for bypassing the mandate given to ICAO by the Kyoto Protocol in article 2.2. Indeed, the fact that this article provides that "developed States *shall* pursue limitation or reduction of GHG…working through the ICAO and the IMO, respectively" has triggered important discussions as to whether it merely expressed a preference for multilateralism or instead imposed an obligation on the EU not to adopt unilateral measures. In the ATA case, although the ECJ denied the recevability of the claim, the Advocate General expressed the view that this provision did not attribute an exclusive competence to the ICAO for limiting GHG emissions from international aviation and that it did not entail a negative obligation for the EU to await a multilateral agreement[118]. Her conclusions were quite strong in that she argued that such interpretation would be contrary to the objectives of the UNFCCC and

[113] PacheEckhard, op cit, p 75
[114] See Ryngaert's concept of "Jurisdictional Reasonableness", in Ryngaert, Cedric, "*Jurisdiction in International Law*", Oxford University Press, Oxford, 2008
[115] Kokott, Juliane, Opinion, paragraphs 157-159
[116] Havel, Bryan F, Mulligan, John Q, Loc Cit, p 22
[117] *Ibid*
[118] Advocate General Opinion, paragraph 174-188

the Kyoto Protocol and that "the EU institutions could not reasonably be required to give the ICAO bodies unlimited time in which to develop a multilateral solution". Nonetheless, whereas article 2.2 KP could thus arguably not impose on the member states to refrain from adopting their own unilateral measures to reduce emissions from aviation, it can hardly be construed as giving a 'green light' to unilateral measures including other ICAO members' airlines and emissions. This interpretation is compounded by the fact that both ICAO resolutions A36-22 and A37-19 expressed extreme reluctance towards the unilateral implementation of MBMs. In this regard, it appears logical that whereas states may have agreed to possibly curtail their sovereignty by accepting international obligations from a multilateral agreement regulating emissions from aviation, this did not extend to them agreeing to be dragged along in the unilateral endeavors of one of their members. Thus, in response to the Advocate General's claim that "EU institutions could not reasonably be required to await a multilateral solution", it can be replied that other ICAO members can not be expected to have agreed that a failure to reach a global agreement would entail their aviation emissions be regulated by foreign jurisdictions[119].

Of course, "what is politically desirable is not necessarily the only authorized pathway[120]" and indeed, for one thing, ICAO Resolutions are mainly political documents with no legally binding force beyond "soft law" and furthermore, all EU member states placed reservations on these declarations, reserving their right to enact and apply MBMs *in their territory*[121]. Overall, the EU seems to have taken advantage of the absence of a strict negative obligation in international law "not to act unilaterally" to adopt the Aviation ETS directive.

From this standpoint, however, we can turn around the argument quoted above and remark that one of the lessons of this case might be that *what is not strictly prohibited is not necessarily legitimate, and thus enforceable,* in the international context where cooperation between independent states is based on subtitle compromises embodied in the concept of political regimes[122].

3) The political analysis of the Opposition to the Aviation directive in the light of process legitimation

Beyond reasoned divergences of interpretation of legal principles, understanding the roots of the unprecedented severe opposition to the EU directive necessitates to explore its political context of adoption. Without entering into 'power-politics' arguments, it must be recognized that political regimes are institutionally grounded in "norms and procedures around which the expectations of actors converge[123]". Arguably, the 'soft law' instruments expressed in article 2.2 of the Kyoto Protocol and the ICAO Assembly Resolutions embody expectations of conduct from the members of these regimes geared towards a multilateral norm-making process. Consequently, in my understanding, the fierce opposition to the EU Aviation Directive results mainly from its provocative nature, which contravened the expectations of other members of the international community. Indeed, beyond extraterritoriality, the EU Aviation directive undisputedly casts an international aura. First of all, the preamble of the Directive lists the EU's

[119] Havel, Bryan F, Mulligan, John Q, LocCit, p 24
[120] Meyer, Benoit, op cit, p 1131
[121] Directive 2008/101, recital 9, emphasis added by the author
[122] Keohane, Robert, O, *After Hegemony: Cooperation and Discord in the World Political Economy,* Princeton, Princeton University Press, 2005, 290 pages
[123] Krasner, Stephen D. 1982. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." *International Organization* 36/2 (Spring)

commitments under the UNFCCC and the unsatisfying results of the multilateral negotiations in ICAO as justifications for its adoption[124]. Secondly, as we have showed earlier, the application of the directive is made contingent to developments in foreign jurisdictions. This makes clear that this piece of legislation was intended as a provocation to a past record of international community's failure in this domain. Thirdly, as mentioned earlier, the directive's application to foreign carriers has been expressly justified by concerns of competitiveness and environmental effectiveness through carbon leakage, which make the most controversial aspects of the directive rely on considerations for events occurring in the wider international environment. All three aspects mentioned above enlighten the EU purposive unilateral legal entrepreneurship[125]. This policy choice can fit with EU's proclaimed preference for multilateral solution if interpreted in the light of EU "effective multilateralism[126]" approach to foreign policy. In this regard, it has been acknowledged that the EU has repeatedly pronounced its preference for a multilateral solution, which is consistent with the normative image it has of itself as an international actor[127]. This preference has been expressly enriched in the text of the Aviation ETS directive, which, on the one hand, pointed to the failure of ICAO to propose new legal instruments as justification, and on the other hand foresees its amendment in the event that a multilateral agreement was concluded[128]. On the other hand, one cannot help the feeling that EU's unilateral move displays some degree of 'power' political pressure on the international community. Hence, EU action can also be interpreted through the lens of multipolarity as the EU "seeking to use its market power to stimulate climate action and to substitute for climate inaction elsewhere"[129]. Such view is reflected by the critics often heard in the foreign press that the EU is trying to compensate its loss of international power by unilaterally imposing standards serving its interests to the detriment of others[130].

Notwithstanding the merits of these accusations, it has also been reasonably argued that if legitimacy must be viewed mainly in terms of process, "it is clearly not right for one state to make decisions that affect the entire community[131]", even more so, perhaps, when such decision aims to palliate a staged multilateral norm-making process. Thus, it is plausible that the extreme opposition to the EU ETS can be better analysed in connection with the political claim of the Union to impose its leadership role in this domain. Indeed, as illustrated by the Chinese reaction, above all, what is being fought against is the fear that this model will be extended to other sectors[132], and that "if the EU gets away with this unilateral scheme, what's to stop them from imposing all sorts of new 'eco-charges' on other activities outside the

[124] Recital 7 to 9 of Directive 2008/101/EC

[125] Here I refer to the definition of unilateralism by M. Reisman, 'Unilateral Actions and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention" (2000) 11 EJIL 3, cited in Rajamani, Lavanya, Scott, Joanne, Op cit, p 8

[126] European Commission, "The European Union and the United Nations: The Choice of Multilateralism" COM(2003) 256 final, Brussels, 10 September 2003

[127] Higgott, Richard, "Multipolarity and Transatlantic Relations: Normative Aspirations and Practical Limits of EU Foreign Policy", *Garnet Working Paper No 76/10,* April 2010

[128] Recital 9 and 5 of Directive 2008/101/EC respectively

[129] Rajamani, Lavanya, "European Union, Climate Action Hero?", *Indian Express Online,* 3 August 2011

[130] Holslag, Jonathan, "Europe's Normative Disconnect with the Emerging Power, BICCS Asia Papers Vol 5(4), BICCS, 2009

[131] Bodansky, Daniel, "What is so bad about Unilateral Action to Protect the Environment?", *European Journal of International Law,* Vol 11, No2, 2000, pp 339-347

[132] Quote by LuoRui, senior consutant at ICF international reported in an interview by Meng Si for China Dialogue, "The view from Chinese Airspace", *China Dialogue,* November 3, 2011; this concern was also expressed by Chai Haibo, deputy secretary general of the China Air Transport Association as reported in an article published on CAAC website, Wang Haiqi , "CAAC 运用策略得当:欧盟暂停部分碳税方案" ("CAAC to make good use its strategy: the EU to suspend part of the Carbon Tax Scheme"), 12 February 2012

EU[133]". This is compounded by the fact that the European Commission already launched consultation toward the inclusion of bunker fuels in the ETS, on pretty much the same grounds as for the Aviation ETS[134].

Chapter IV: Conclusive Remarks: Back to multilateralism, the EU Aviation directive crisis catalyzer for regime change?

The international dispute raised by the adoption of the EU Aviation ETS Directive has confirmed that norms do matter in international politics, and in particular they play an important role in the development of efficient multilateral frameworks of global governance. In particular, this case has revealed that distinct regimes built at different times towards the achievement of specific normative and political objectives and obeying to diverging principles do not harmonize automatically. Harmonization can only result from political choices. In the absence of a consensus in the political organs of these regimes, normative clashes can effectively frustrate the achievement of the cooperation goals. The ambiguous horizontal dynamics between ICAO and the UNFCCC offered a good illustration of such clash. In this regard, the relationship between "legal regimes" and "political regimes" deserves much closer attention from academic research, so that the nexus between inter-regime 'norms collision' and the phenomenon of regime institutional stagnation can be better understood.

The other important revelation of this case is that in such context, the unilateral imposition of an alternative path, away from the multilateral framework but nevertheless involving the other regime members against their will is unlikely to be received with indulgence by affected countries. Indeed, despite the claim by the EU that the adoption of the Aviation ETS directive "was developed in line with the approach endorsed by ICAO in 2004[135]", such assumption clearly overlooked the fact that the wording of Resolution A35-5 merely accounted for the absence of consensus in the international community at the time to build a global system of MBMs. The decision by the European Court of Justice has not been able to quiet down the claims as to the unlawfulness of the European move because the questions raised by the ATA case involved a balancing of different norms, a political determination which was bound to be controversial; especially because what was at stake was a pillar of EU climate and energy policy, together with a major element of "its attempt at leadership in international climate change negotiations[136]".

The political stalemate which has been reached in the spring this year, when it appeared that China would clearly not abide by the European rules and that economic retaliations alluded to a possible "trade war" has certainly clarified the political boundaries on the exercise by the EU of its self attributed 'leadership by example'. In particular, the capacity of an increasing number of emerging powers to resist normative imposition when they find that this does not serve their interest makes this way of action more and more adventurous for the EU. Instead of 'effective multilateralism', the unilateral act of the EU seems to have exercised 'negative leadership', as the directive has been described as "a polarizing obstacle that is

[133] Quote by Tom Petri, Chairman of the Aviation sub-committee of the Transportation and Infrastructure Committee of the United States House of Representatives which introduced the bill for a "European Union Emissions Trading Scheme Prohibition Act of 2011", reported by CAPA in the Press release, "U.S House Votes to Halt EU Air Tax", 25 October 2011

[134] Press Release, "Commission Launches Consultation to Address Greenhouse Gas Emissions from Ships", 19 January 2012

[135] Directive 2008/101, recital 9, and also recently, Jos Delbeke Keynote Speech "A New Flight Plan - Getting Global Aviation Climate Measures Off the Ground", 7 February 2012

[136] Christian Carey, "Battle of the skies", *China dialogue*, 3 November 2011

preventing real progress[137]". Although EU-China bilateral practical cooperation and China's efforts to bring about its own national ETS are unlikely to be affected by the row because their development relies more on the NDRC's own assessment of their merits[138], the political dialogue may be affected and spill over to the commercial sphere. Problematic is also the fact that the bilateral dispute meddles with the on going negotiations taking place in ICAO and the UNFCCC. Indeed, should the EU be willing compromise with China through a stretching of the "third country measures", it should consider the impact of this on the claims by other third countries[139]. Moreover, although ICAO President Roberto Kobeh Gonzalez said that bilateral disputes over the EU ETS were not in discussion at ICAO, a Chinese official reportedly said in July that the "Chinese government didn't think that a bilateral channel was an acceptable way[140]". Hence, China, with the large support of other powerful countries, the ICAO and a large part of the Aviation industry, may prefer to play the collective card to obtain a complete back down of the directive instead of relative 'equivalence' concessions from the EU.

However, recent developments in ICAO have come to somewhat temper such bleak scenario and have pointed towards a possible multilateral way out of the political crisis. Theories of regime construction and regime change have put forward, based notably on the successful precedent of the Montreal Convention on Ozone depletion[141], that external 'crisis' occurring in the wider socioeconomic or political environment could act as a catalyser for collective action[142]. In this regard, the EU Aviation ETS' propelled political crisis may have indirectly contributed to achieving EU's multilateral objectives, where the long-term and incremental environmental effects of climate change had failed to produce the necessary stress. Indeed, arguably, the impasse created by, on the one hand, the determination of the EU "not to cave[143]" under international pressure and hold on to 30 April 2013 deadline to collect aviation allowance fees, and, on the other hand, the threat of unhealthy normative competition and damaging trade retaliations seems to have renewed the momentum for multilateral negotiations in ICAO. Hence, since the New Delhi Declaration in the fall of 2011, the Ad-hoc Working Group on Market-based Measures created by ICAO's president Roberto Kobeh Gonzalez has made substantial progress. From initially six proposed alternatives for a global MBM system, four were adopted by the ICAO Council in March 2012, and were further narrowed down to three after a briefing in June 2012[144]. These three options, namely 1) a Global Mandatory Offsetting; 2) a Global mandatory Offsetting Complemented by a revenue generation mechanism and 3) a Global Emissions Trading (cap and Trade) are being diligently studied by all the actors involved in the dispute, including China[145] even though is not yet part to the Ad hoc group[146] . The group's final report is foreseen for the winter 2012. Furthermore, the recent summit of the "coalition of the unwilling" hosted by the

[137] Quoted from Tony Tyler, General Director of IATA at the Airlines AGM in Beijing in early June 2012, reported in Greenair, "Encouraging Progress at ICAO on Developing a Market-based Measure Should not be Undermined by Europe, says IATA", *Greenair online,* 15 June 2012

[138] Interview with Prof Cao Mingde, Beijing, 8 July 2012

[139] See statement by Peter Liese, Rapporteur MEP for Directive 2008/101, Press Release "The EU must not back down on aviation emission trading", 5 October 2011

[140] LanLan, "China's Airline Talks with EU Stall", *Op cit*

[141] Levy, Marc A, Haas, Peter M, Keohane, Robert O, "Institutions for the Earth, Promoting International Environmental Protection", *Environment*, Vol 34, N°4, 1992, pp 12-36

[142] Young, Oran R, "The Politics of International Regime Formation: Managing Natural Resources and The Environment", in *International Environmental Governance,* 2008, pp 89-115

[143] Quoted from Isaac Valero-Ladron, Spokesman for the European Commission Climate Action reported in Wiener, Aaron, "Airline Trade War? Global Opposition Grows Against EU Emissions Law", *Der Spiegel online*, February 2012

[144] ICAO Working Paper C-WP/13861, p 2

[145] Interview with personnel from CAAC legal research team in Beijing, 22 July 2012

[146] Since June 2012, the Ad hoc group is composed of: India, South Korea, Switzerland, Australia, Brazil, the EU, Japan, Mexico, Nigeria, the United States and the UAE

United States' department of Transportation on July 31st and August 1st 2012 did not result, like its predecessors of New Delhi and Moscow, in a collective bashing of the EU ETS and threats of retaliatory actions; On the contrary, it was reported that discussions focused on the ways to foster an alternative global plan that would replace the EU ETS.[147]

Of course, it would be unreasonable to draw premature conclusions, as the normative struggles we highlighted have not yet been solved and still bear significantly on the technical discussions concerning the precise design of the adopted MBM system model. Moreover, the time pressure imposed by the EU deadline is not to the taste of all participants, which put the latter on the constant diplomatic brink. Whatever the outcome, it is definitely a good exercise for the refinement of EU's distinctive identity as a foreign policy actor[148] and the constraints of its self-imposed devotion to multilateralism and a 'rule-based' international order.

[147] "What to expect from D.C Meeting on EU ETS", July 30, 2012
[148] Higgott, Richard, LocCit, p 21

Bibliography

Legislation

Cancun Agreements, COP16-CMP6 Decisions, UNFCCC Conference, Cancun, Mexico December 11, 2010

Convention on International Civil Aviation, signed in Chicago, on 7 December 1944

European Union, Directive 2003/87/EC of the European Parliament and the Council of 13 October 2003 establishing a scheme for greenhouse gases emission allowance trading within the Community amending Council Directive 96/61/EC

European Union, Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community

European Union, Directive 2009/29/EC of the European Parliament and the Council of 23 April 2009 European Union amending Directive 2003/87/EC as to improve and extend the greenhouse gas emission allowance trading system of the Community

European Commission Regulation (EU) No 100/2012 of 3 February 2012 amending Regulation (EC) No 748/2009 on the list of aircraft operators that performed an aviation activity listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council on or after 1 January 2006 specifying the administering Member State for each aircraft operator also taking into consideration the expansion of the Union emission trading scheme to EEA-EFTA countries

Kyoto Protocol to the United Nations Framework Convention on Climate Change, Adopted in Kyoto, Japan, December 11, 1997

'Open Skies Agreement', Air Transport Agreement between the EU and the United States, Washington, D.C, 30 April 2007, in force since March 2008

People's Republic of China, Notice of China Ministry of Finance on Issuing Interim Measures for the Collection, Use and Management of the Civil Aviation Development Fund [Effective], 17 March 2012

People's Republic of China,中国政府禁止境内航空公司参与欧盟排放交易("The Chinese Government bans Domestic Airlines from participating in the EU Emissions Trading System"), Communication by CAAC, 2, June 2012, available at: http://www.caac.gov.cn/A1/201202/t20120206_45737.html, consulted on 8-07-2012, Consulted on 07 August 2012

United Nations Framework Convention on Climate Change, New York, 9 May 1992

United States Congress, "European Union Emissions Trading Scheme Prohibition Act of 2011", HR2594, adopted in first session by the 12th Session of the United States Congress

Case Law

ECJ Case C-366/10 (Grand Chamber), *Air Transport Association of America and others*, 21 December 2011 ECR

ECJ Case C-188/07, *Commune de Mesquer,* (2008) ECR J-4501

ECJ Case C-127/07, *Arcelor v. Premier Ministre,* (2008) ECR I-9895

ECJ Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* (2008) ECR I-4057

ECJ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation (Kadi) v. Council and Commission*, (2008)

ECJ Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 ' Open skies' *Commission* v *United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany,* (2002)

ECJ Case 89/85,*Ahlstrom Osakeyhtio and others v Commission*, (1988)

WTO DSB Appellate Body, Case WT/DS58/AB/RW,*United States-Import Prohibition of Certain Shrimp and Shrimp Products*, , Report of the Appellate Body, on article 21.5, 22, October 2001

Opinion of Advocate General, JulianeKokott, case C-366/10, 6 October 2011

Political Documents

European Commission, Press Release, "Commission Launches Consultation to Address Greenhouse Gas Emissions from Ships", 19 January 2012

European Commission, Delbeke, Jos, Director General, Directorate General Climate Action in the European Commission, written testimony delivered to the US Senate, 6 June 2012

European Commission, Arthur Runge-Metzer, DG Climate Action, "Aviation and Emissions Trading", presentation to the ICAO Council briefing, 29 September 2011

European Commission, Opinion of the legal Service, inter-institutional file 2006/0304(COD), 1 October 2007

European Commission, COM (2006) 818 final; SEC(2006)1684, "Impact Assessment of the Inclusion of Aviation Activities in the Scheme for Greenhouse Gases Emission Allowance Trading within the Community", accompanying document to the Proposal of Directive 2008/101 to the European Parliament and the Council

European Commission, COM(2005) 459 final, "on Reducing the Climate Change Impact of Aviation", 27 September 2005

European Commission, "Winning the Battle against Global Climate Change", COM(2005) 35 final, Brussels, 9 February 2005

European Commission, "The European Union and the United Nations: The Choice of Multilateralism" COM(2003) 256 final, Brussels, 10 September 2003

European Council, Presidency Conclusions of the Brussels European Council, 7-8 March 2007, 7224/1/07

European Union External Action Service, Delegation of the European Union to China, "Aviation in the EU Emissions Trading System Information Note",& July 2011 available at:

http://eeas.europa.eu/delegations/china/documents/news/20110707_en.pdf

China State Council White Paper, "China's Policies and Actions for Addressing Climate Change" (CPAACC), 2008

China's Statement of Reservation on Resolution A37-19: http://legacy.icao.int/icao/en/assembl/A37/Docs/10_reservations_en.pdf

ICAO Assembly Resolution A37-18 of the ICAO 37th General Assembly of 28 September 2010 to 8 October 2010, Doc

ICAO Assembly Resolution A36-22, of the ICAO 36th General Assembly of 28 September 2007, Doc 9902

ICAO Assembly Resolution A35-5, of the ICAO 35th General Assembly of 8 October 2004, Doc 9848

ICAO Council "Resolution on Environmental Charges and Taxes", adopted at the 16th meeting of its 149th Session on 9 December 1996

ICAO Submission to Rio+20, "Inputs and Contributions of the International Civil Aviation Organization to the United Nations Conference on Sustainable Development", 26 October 2011

ICAO Reservations made to Assembly Resolutions A36-22 Consolidated statement of continuing ICAO policies and practices related to environmental protection) – Appendix L only (Market-based measures, including emissions trading), Extracts of A36 Min, P/9 (minutes of the 9th plenary meeting)

ICAO working paper C-WP/13790 of 17 October 2011 entitled "Inclusion of International Civil Aviation in the European Union Trading Scheme (EU ETS) and its Impact"

ICAO Working Paper C-WP/13861 presented by the Secretary General in the view of the 196th session of the Council, putting forward 4 proposals for a global scheme, which are being studied by the member states.

Indian Ministry of Civil Aviation, Press Release, Joint Declaration, International Meeting of ICAO Council and Non-EU Member States on Inclusion of Aviation in EU ETS, available at http://pib.nic.in/newsite/erelease.aspx?relid=76388

International Panel on Climate Change (IPCC) Fourth Assessment Report: Synthesis Report, Geneva, 2007

Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS", ICAO, 22 February 2012, Moscow, available at http://www.greenaironline.com/photos/Moscow_Declaration.pdf, consulted on 8-07-2012

UNEP, "The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2°C or 1.5°C?", November 2010

Academic articles and studies

Bo, Yan, Chen Zhimin, "The European Union, China and the Climate Change", in de Sales Marques, Jose Luis, Seidelmann, Reimund, Vasilache, Andreas (eds.), *Asia and Europe, Dynamics of Inter and Intra-Regional Dialogues*, Baden, NomosVerlagsgesellschaft, 2009, pp 415-436

Bodansky, Daniel, "What is so bad about Unilateral Action to Protect the Environment?",*European Journal of International Law,* Vol 11, No2, 2000, pp 339-347

Bodansky, Daniel, Shaffer, Gregory, "Transnational, Unilateralism and International Law", Legal Studies Research Paper No 11-34, University of Minnesota Law School, SSRN paper available at http.//ssrn.com/abstract=1920470, accessed on 8 August 2012

Chang Jiwen, "Act of the People's Republic of China on Addressing Climate Change" (Draft Proposal), Published for consultation on March 31, 2012, available at: http://www.china.org.cn/environment/2012-03/31/content_25035950.htm, accessed on 9 August 2012

Faber, Jasper, Brinke, Linda, "The Inclusion of Aviation in the EU Emissions Trading System, An Economic and Environmental Assessment", ICTSD Issue Paper No. 5, September 2011, p 21

Fisher-Lescano, Andreas, Teubner, Gunther, "Regime Collision: the vain search for legal unity in the fragmentation of global law", *Michigan Journal of International Law*, Vol 25:999, Summer 2004, pp 999-1045

Gossling, Stefan, Upham, Paul, *Introduction, Aviation and Climate Change in Context,* in Gossling, Stefan, Upham, Paul (eds) Climate Change and Aviation: Issues, Challenges and Solutions, 2009

Hardin, Garrett, "The tragedy of the Commons", *Science,* Vol 162, 13 December 1968, pp 1243-1248

Havel, Bryan F, Mulligan, John Q, "The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme", *Air and Space Law,* Vol 37, no 1, (2012), pp 3-33

Holslag, Jonathan, "Europe's Normative Disconnect with the Emerging Power, BICCS Asia Papers Vol 5(4), BICCS, 2009

International Law Commission, Report to the UN General Assembly finalized by Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the diversification and expansion of international law", Geneva, Summer 2006

Krasner, Stephen D. 1982. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." *International Organization* 36/2 (Spring)

Kulovesi, Kati, "Make your own special song, even if nobody else sings along: International Aviation Emissions and the EU Emissions Trading Scheme", *Climate Law*, Vol 2, No4, 2011, SSRN Paper No1 available at http://ssrn.com/abstract=1952555, accessed on 5 August 2012

Kulovesi, Kati, Morgera, Elisa, Munoz, Miquel, "Environmental Integration and Multifaceted International Dimension of EU Law: Unpacking the EU's 2009 Climate and Energy Package", *Common Market Law Review*, 2011, Vol 48, pp 829-891

Mayer, Benoit, Case Law Court of Justice, *Common market Review*, 2012, Vol 49, pp 1113-1140

Meltzer, Joshua, "Climate Change and Trade – the EU Aviation Directive and the WTO", *Journal of International Economic Law,* Vol 15(1), February 2012, pp 111-156

Oberthür, Sebastian, Pallemaerts, Marc, "The EU's Internal and External Climate Policies : An Historical Overview", in Oberthür, Sebastian, Pallemaerts, Marc (eds.), *The New Climate Policies of the European Union,* Brussels*,* VUB Press Brussels University Press, 2010, pp 27-63

Oberthur, Sebastian, Roche Kelly, Claire, "The EU Leadership in International Climate Change Policy; Achievements and Challenges", (2008), *The International Spectator*, pp 42-43

PacheEckhard, "on the compatibility with International Legal Provisions of Including Greenhouse Gas Emissions from International Aviation in the EU Emission Allowance Trading Scheme as a Result of the Proposed Changes to the EU Emission Allowance Trading Directive", legal Opinion commissioned by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Zurzburg, 15 April 2008

Rajamani, Lavanya, Scott, Joanne, "EU Climate Change Unilateralism, International Aviation in the European Emissions Trading Scheme", *SSRN Paper Series*, November 1st, 2011, available at www.ssrn.com/abstract=1952554, accessed on 5 August 2012

Ryngaert concept of "Jurisdictional Reasonableness", in Ryngaert, Cedric, "*Jurisdiction in International Law*", Oxford University Press, Oxford, 2008, 310 pp

Sands, Philippe, "The United Nations Framework Convention on Climate Change", *Review of European Community and International Environmental Law,* N°1, 1992, pp 270-277

Sir Stern Nicholas, "Stern Review: The Economics of Climate Change", Executive Summary, Cambridge University Press, 30 October 2006

Stone, Christopher D, "Common but Differentiated Responsibilities in International Law", *The American Journal of International Law,* Vol 98, No2, (April 2004),pp 276-301

Struxal, Stephen, "The ICAO Assembly Resolution on International Aviation and Climate Change: An Historic Agreement, a Breakthrough Deal, and the Cancun Effect", *Air and Space Law,* 36, no 3m 2011, pp 217-242

Schwarz, "including Aviation into the European Union's Emissions Trading Scheme, *European Environmental Law Review* (2007), pp 10-13

Van Rossem, Jan Willem, "Interaction between EU Law and International Law in the Light of Interkanto and Kadi: The Dilemna of Norms binding the Member States but not the Community", *Netherlands Yearbook of International Law 2009, CEER working paper 2009/4*

Young, Nancy N, Vice President of Environmental Affairs, Air Transport Association of America (ATA) submission before the US Congress, "The European Union Trading Scheme, a Violation of International Law", 27 July 2011

Press Articles

CAPA, Press release, "U.S House Votes to Halt EU Air Tax", 25 October 2011

Chee Yoke Ling, "CBDR must guide work on International Transport Emissions, say Several Developing Countries", *Climate Justice Now*, Report from Durban Negotiations, 29 November 2011, available at http://www.climate-justice-now.org/cbdr-must-guide-work-on-international-transport-emissions-say-several-developing-countries/, accessed on 9 August 2012

Cheng Shuaihua, « Is Europe Breaking the Law », China Dialogue, November 4, 2011, available at: http://www.chinadialogue.net/article/show/single/en/4611accessed on 9 August 2012

Greenair, "Concerns over CBDR fail to halt important ICAO council agreement to move forward on evaluating market-based measures", *Greenair online*, 13 March 2012, available at: http://www.greenaironline.com/news.php?viewStory=1438, accessed on 9 August 2012

Greenair, "Encouraging Progress at ICAO on Developing a Market-based Measure Should No be Undermined by Europe, says IATA", *Greenair online*, 15 June 2012, available at http://www.greenaironline.com/news.php?viewStory=1478, accessed on 9 August 2012

LanLan, "China's Airline Talks with EU Stall", *China Daily online,* 23 July 2012, available at http://www.chinadaily.com.cn/world/2012-07/23/content_15606761.htm, accessed on 9 August 2012

Harvey, Fiona and Carrington, Damian, "Governments failing to advert Catastrophic Climate Change, IEA warns", *The Guardian Online*, Wednesday 25 April 2012, available at: http://www.guardian.co.uk/environment/2012/apr/25/governments-catastrophic-climate-change-iea consulted on 25 July 2012

International Energy Agency, "Prospect of limiting the global increase in temperature to 2°C is getting bleaker", 30 May 2011, available at:

http://www.iea.org/index_info.asp?id=1959 visited on 6 August 2012

Meng Si for China Dialogue, "The view from Chinese Airspace", *China Dialogue,* November 3, 2011, available at http://www.chinadialogue.net/article/show/single/en/4608-The-view-from-Chinese-airspace, accessed on 9 August 2012

Petsonk, Annie, Peltz, Adam, "Analysis, Numerous National Aviation Measures reach beyond Sovereign Airspace", *Environmental Development Fund Blog*, 6 June 2012, available at: http://blogs.edf.org/climatetalks/2012/06/05/analysis-numerous-national-aviation-measures-reach-beyond-sovereign-airspace/, accessed on 9 August 2012

Rajamani, Lavanya, "European Union, Climate Action Hero?",*Indian Express,* 3 August 2011, available at: http://www.indianexpress.com/news/european-union-climate-action-hero/826290/, accessed on 9 August 2012

Wang, Tao, "China's Carbon Market Challenge", *China Dialogue*, 21 May 2012m available at: http://www.chinadialogue.net/article/summary/4936-China-s-carbon-market-challenge, accessed on 9 August 2012

Wang Haiqi , "CAAC 运用策略得当:欧盟暂停部分碳税方案" ("CAAC to make good use its strategy: the EU to suspend part of the Carbon Tax Scheme"), 12 February 2012, http://www.caacman.com/news/zixun_content.jsp?id=11631&s=32

Watts, Jonathan, "Chinese Airlines refuse to Pay EU Carbon Tax", *The Guardian Online*, 4 January 2012, available at: http://www.guardian.co.uk/environment/2012/jan/04/china-airlines-eu-carbon-tax, accessed on 9 August 2012