THE INCLUSION OF AVIATION IN THE EUROPEAN UNION CARBON EMISSIONS TRADING SCHEME

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Introduction

On 1st January 2012, a regulation was enforced which established that any commercial aircraft landing or taking off from any territory within a European Union country is subject to complying with obligations under the EU Emissions Trading Scheme (EU ETS). This was the first time that the EU ETS had a legal impact and imposed legal obligations on States that are not members of the European Union. These obligations have been questioned[i].

European Commission representatives claimed that unilateral measures were necessary due to the difficulties and the resistance of other countries in adopting joint measures within the International Civil Aviation Organization (ICAO) for reducing greenhouse gas emissions caused by aviation.

A number of countries and airlines questioned the inclusion of aviation within the EU ETS. For example, they claimed that the Directive goes against the principle of sovereignty by imposing obligations on third countries. Furthermore, by imposing similar obligations on airlines from countries both listed and not listed in Annex I of the Kyoto Protocol to the United Nations Framework Convention on Climate Change - that is, both countries which are obliged and not obliged to reduce carbon emissions - the directive goes against the principle of common but differentiated responsibilities.

Considering the above scenario, it is important to reflect on the questions around the admissibility of imposing unilateral obligations based on internationally recognized environmental concerns.

Within this context, it becomes important to study and analyze the international policy issues around legal disputes brought forward by the Air Transport Association of America (ATA) and *American Airlines, Continental Airlines* and *United Airlines* against certain directives of the European Carbon Trading Scheme (EU ETS) relating to aviation.

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The analysis of the inclusion of aviation within the EU ETS allows us to reflect on unilateral measures taken in relation to climate change adopted by States party to the United Nations Framework Convention on Climate Change. Furthermore, this case is particularly interesting because it allows us to reflect on the legal and political limitations of the use of "global" as a symbol for applying measures which are environmentally justified, but regulated unilaterally.

This particular approach, by means of a case study, is justified from a methodological point of view because it allows for a detailed analysis of a political and legal phenomenon. From this case study the role, motivation and arguments of the actors involved can be analyzed. Most importantly, however, is the fact that it allows for the assessment of the consequences of this particular case on international relations. Furthermore, the details of the case have been organized so as to make available a vast amount of material to further research on agreements relating to climate change and unilateral measures in relation to the environment.

In order to attain our objectives, this article is divided into three sections. In the first section, the EU Emissions Trading Scheme and the Aviation Directive are described. The main arguments around the legal dispute are presented in the second section. Finally, an analysis is carried out of the international political conflicts which resulted from the adoption of this directive.

The EU Emissions Trading Scheme

The EU Emissions Trading Scheme (EU ETS) was established by Directive 2003/87/CE, on 13th October, 2003. According to the recitals of the Directive, the greenhouse gas emissions allowance trading scheme was established in accordance with the international commitments signed by the European Union, most specifically, the United Nations Framework Convention on Climate Change[ii] and the Kyoto Protocol[iii], in order to reduce the economic impacts of combating global warming. Thus, according to item 5

> This regulation assists the European Union and its Member-States to more effectively comply with its obligations, through the implementation of an efficient European market of greenhouse gas emissions allowances which has the smallest impact on economic development and employment (EU, 2003).

Therefore, the EU ETS is a strategy employed by the European Union to reduce the emissions of gases that cause climate change, by fostering actions by Member-States whilst seeking equilibrium between actions at a national, community and international levels.

The objective of the Directive is stated in Article 1[iv]:

> The current directive establishes a scheme for greenhouse gas emissions trading within the Community, hereinafter referred to as the "Community Scheme", in order to promote reductions in greenhouse

> gas emissions in a cost-effective and economically efficient manner (EU, 2003).

The European Scheme referred to above is a set of regulations and actions with the objective of jointly reducing greenhouse gas emissions by accounting for these emissions and either complying with reduction or paying compensation. In this way, from January 2005, the Member-States must ensure that all operators of activities listed in Annex 1, whose activities fall within the categories covered by the Directive, hold a permit issued by a competent authority (certifying emission control, amongst other measures) in accordance to articles 5 and 6, except where it expressly states otherwise.

In January 2009, after years of negotiations, Directive 2008/101 was published, amending Directive 2003/87 and including the aviation sector within the EU ETS. This inclusion was justified by studies carried out on behalf of the European Commission showing that, despite a total reduction in greenhouse gas emissions by the European Union of around 5% in 2003, based on 1990 as reference year, emissions in carbon dioxide resulting from international aviation from Member-States increased by 63% during the same period.

Two points stand out from the 2008/101 Directive recitals: in international terms, the Member-States of the European Union had been seeking a system of aviation emissions trading at the International Civil Aviation Organization (ICAO) meetings, of which all EU Member-States are signatories. The International Civil Aviation Organization was established by the Convention on International Civil Aviation (Chicago Convention), signed in 1944, and is part of the United Nations System. However, in 2007 during a General Assembly of the ICAO, Resolution A36-22 was approved. According to item nine of the recitals, annex L of this Resolution "calls on Member-States not to apply a system of emissions trading on aircraft operators of other Member-States unless there is mutual agreement between these States" (EU, 2008, L 8/4).

Given that this position contravenes that held by the European Union, its Member--States, together with other European States, put forward a reservation to this provision (the possibility to present a reservation to certain articles is established within the ICAO treaties, allowing Member-States to present the possibility of not applying the provision themselves) in order to ensure the right to "adopt any non-discriminatory market measures to all aircraft operators of all States which provide services to, from or within their territory" according to item nine of the recitals (EU, 2008, L 8/4).

Thus, despite (or perhaps due to) the absence of a consensus in relation to an international agreement regulating greenhouse gas emissions, and despite the ban approved by the ICAO (except for the European Union and other European countries) on unilateral measures, the 2008/101 Directive established obligations to EU Member-States and non-Member-States.

According to item seventeen of the recitals of this Directive, it is the responsibility of Member-States to carry out any actions in order to reach an agreement on global measures, encouraging other States to establish similar measures to those applied in the EU: "the Community Scheme can serve as a model for using emissions trading worldwide"

(EU, 2008, L8/5). The Directive, therefore, seeks to encourage other States to approve similar measures, thus allowing for interaction between emission trading schemes:

> If a third country adopts measures which have environmental effects at least equivalent to the current Directive in order to reduce the impact on the climate of flights to the Community, the Commission should consider the available options in order to optimise interaction between the Community Scheme and that country's measures, after consulting with that country (EU 2008, L 8/5).

Thus, although there was no international consensus, the Directive establishes obligations to third parties and states very clearly that the EU model should serve as a guideline for establishing a worldwide agreement. It is therefore relevant to question the non-consensual interference in the activities of other States when establishing priority policies in order to reach the objective of reducing greenhouse gas emissions.

These guidelines can be relaxed by considering the possibility of equivalent legal schemes in other countries, thus placing obligations on an equal footing. In this case, a potential point of conflict could be found in defining what is to be considered an "equivalent environmental measure", and who would decide on this equivalence.

Directive 2008/101 adds paragraph "r" to Article 3 of Directive 2003/87 which establishes "attributed aviation emissions" as

> emissions from all flights falling within the aviation activities listed in Annex 1 as departing from an aerodrome in the territory of a Member-State and all flights arriving in such an aerodrome situated in the territory of a Member-State from a third country (EU, 2008).

Article 3-C is also incremented. It addresses the total amount of emission allowances attributed to aviation activities and establishes a differential between historical aviation emissions adopted as a base for controlling the reduction of emissions in relation to the year 2012 and the following:

> 1. For the period between 1st January 2012 and 31st December 2012, the total amount of emission allowances allocated to aircraft operators should be equivalent to 97% of historical aviation emissions.
> 2. For the period referred to in Article11 (2), starting on 1st January 2013, and in the absence of any amendments following the review referred to in Article 30(4), for each subsequent period, the total amount of emission allowances allocated to aircraft operators should be equivalent to 95% of historical aviation emissions multiplied by the number of years in the period (EU, 2008).

In Article 16 of Directive 2003/87 which refers to sanctions, item 5 is included, according to which failure to comply with the requirements of the Directive by aircraft

operators could lead a Member-State to request the Commission to impose an operating ban, if other measures do not ensure compliance.

The aim of describing the EU ETS and the directive which includes aviation within the Scheme is to briefly consider the *cap and trade* system. This system is a market mechanism which defines different emission limits according to economic sectors. It also sets out trading regulations for emission allowances. Thus, a sector can reach its targets for reducing emissions by changing its productive process or by acquiring allowances.

The market mechanism known as *cap and trade,* the most important example of which is the European Scheme, acclaimed as an example of a successful alliance between environmental protection (in this case, combating global warming) and economic development by means of a market mechanism, conceals effects which contradict the reasons behind its creation.

The scheme awards huge profits to the greatest polluters and has little actual impact, considering the incredibly large amount of subsidies granted and the potential for trading reduction "surpluses". Furthermore, the trading of surpluses establishes a mechanism that conceals the local impact produced by activities, facilitating the reduction of emissions in places where it is easier and cheaper to adopt policy measures which produce negative environmental, social and economic impacts. Thus, the expansion of this system to non-Members of the European Union which may not conform to explicit or implicit political options should be questioned.

The Legal Dispute

On 16th December 2009, *Air Transport Association of America* together with the airlines *American Airlines Inc.*, *Continental Airlines Inc.* and *United Airlines Inc.* filed a law suit before the High Court of England and Wales, (*Queen's Bench Division, Administrative Court*). The defendant was the United Kingdom's Minister of State for Energy and Climate Change, because he was the national authority responsible for applying Directive 2008/101.

Both parties received the support of other stakeholders, that is, those interested in providing technical assistance to the case. Two associations intervened in the process on behalf of the plaintiff: *International Air Transport Association* (IATA) and *The National Airlines Council of Canada* (NACC). Five environmental organizations supported the defendant: *Aviation Environment Federation* (AEF), World Wide Fund for Nature (WWF-UK), *The European Federation for Transport and Environment* (EFTE), *The Environmental Defense Fund* (EDF) and *Earthjustice.*

The Plaintiffs alleged that the inclusion of international aviation - and transatlantic aviation in particular - within EU ETS violates the principles of customary international law and various other international agreements. In short, they claimed that the obligations imposed on the companies broke the EU-US *Open Sky Agreement* (air transport agreement signed between the European Union and the United States in 2007 which establishes common tariffs and allows both parties involved to conduct domestic flights), the Kyoto Protocol and the International Civil Aviation Convention. The Directive also transcended the jurisdiction of the European Union. Furthermore, the defendants alleged

that establishing which solutions are to be adopted to contain global warming - an issue which also concerned the plaintiffs - should not be conducted unilaterally.

The provision which requires air transport companies to account for their emissions and acquire licenses in relation to the trajectories within the air space of third countries and over the high seas was also disputed. Thus, they claimed that the aviation emissions trading scheme, established unilaterally and outside the auspices of the ICAO, extending obligations to third parties, violates article 2.2 of the Kyoto Protocol. Finally, they alleged that the EU ETS established a tariff (or a tax) banned by international agreements.

In its defense, the United Kingdom claimed that the Aviation Directive does not constitute the extra-territorial exercise of the regulation's powers; rather it is a type of incentive encouraging other countries to adopt "equivalent measures" to reduce aviation carbon emissions. Furthermore, it claimed that the Directive is totally compatible with the international agreements in force.

In May 2010, the English Courts decided to refer some of the issues to the European Union Courts of Justice, as a preliminary ruling, considering that national courts were not competent to invalidate European Union norms. Thus, the Courts of Justice were called to decide on a preliminary decision concerning the validity of Directive 2008/101. The main function of the European Union Courts of Justice, with headquarters in Luxembourg, is to monitor the legality of the acts of European Union institutions, to ensure that Member-States comply with obligations inscribed in its Treaties and to interpret the law of the European Union when requested by national courts.

On 6th October 2011, the decision of Advocate General Dr. Juliane Kokott validated the Aviation Directive. Her opinion is expounded in item 240:

> (1) of the principles and provisions of international law mentioned during the first preliminary question, only Article 7 and the second sentence of article 15 (3) of the Air Transport Agreement concluded in April 2007 between the European Community and its Member-States, on the one hand, and the United States of America, on the other, may be put forward as a reference against the validity of the acts of the European Union which can be reviewed in legal processes filed by natural or legal persons.
> (2) the analysis of legal issues did not find any elements liable of invalidating Directive 2003/87/CE, amended by Directive 2008/101/CE (EU, 2012b).

The analysis of the European Union Courts of Justice (process C-366/10) focused on issues proposed by the English Courts, in particular on the assessment of potential incompatibility between the Aviation Directive and a) the *Open Sky Agreement* between the United States and the European Union, b) the Kyoto Protocol and c) the Chicago Convention, as well as whether private entities can dispute the validity of the EU ETS.

The decision of case C-366/10 was published on 21st December 2011. Initially, in relation to the Convention of Chicago, it was claimed that the European Union is not a signatory to this Convention, although its Member-States are. According to the

European Courts, therefore, it is not possible to analyze the validity of the Directive in light of the Chicago Convention, given that the European Union is not a signatory to that Convention and has not taken over the responsibilities of Member-States in relation to the application of the Chicago Convention.

With regard to the Kyoto Protocol, it is worth noting that the European Union approved the treaty and therefore internalized it in its judicial system. Certain regulations of the Kyoto Protocol establish that signatory parties can jointly comply with emissions reduction targets. It is the responsibility of the Conference of the Parties to decide whether the way targets are being met is incompatible with the treaty. The plaintiffs alleged that the Aviation Directive specifically contradicts Article 2.2 of the Kyoto Protocol which establishes:

> Parties included in Annex I should pursue the limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol and which originate from international air and maritime transport fuel, guiding the work carried out by the International Civil Aviation Organization and the International Maritime Organization respectively (BRASIL, 1998).

According to the European Courts, this article cannot be used as the basis for the argument to establish incompatibility between laws, given that it is not a conditioning factor or sufficiently precise to be legally relied upon by individuals. Thus, the Kyoto Protocol cannot be relied upon within the context of a preliminary decision on the validity of the Aviation Directive.

Finally, with regard to the *Open Sky Agreement* it is highlighted that the aim of the agreement is to promote the liberalization of the aviation sector between the parties, a precedent that is important worldwide:

> The object of the *Open Sky Agreement* is to allow contracting air companies to offer passengers and consignors competitive prices in the open market. The agreement also aims to bring the benefits of a free market to all sectors of the air transport industry, including airline employees (EU, 2012)[v].

Based on reciprocity, the agreement exempts taxes, rights, tariffs and charges from fuel provided in the territory of the European Union to be used in an aircraft of an air company based in the United States, even if the fuel is to be used during only part of the journey over the European Union territory.

From this decision it can be observed that the plaintiffs have the right to rely on the *Open Sky Agreement* given that it establishes rules which can be applied directly and immediately to air companies, providing them with rights and duties. Thus, it is possible to assess the validity of the Directive in light of the provisions of this agreement.

Given that the rules established by the Aviation Directive may be uniformly applied to aircrafts owned by companies with headquarters either in the United States or in

Member-States of the European Union, it does not breach the *Open Sky Agreement*. The Directive is not applicable to aircraft flying over the high seas or over Member-States of the European Union or third countries. However, if it decides to use a commercial air route that arrives or leaves an airport within the EU, they are subject to the scheme of emissions trading (EU, 2012).

Therefore, the application of the scheme to all flights that depart or arrive from a European airport, whether these are aircrafts owned by a European company or not, is consistent with the *Open Sky Agreement* whose purpose is to ban discriminatory treatment between American and European operators.

Therefore, the European Courts declared that, within the limits of reviewing manifest errors in matter of competence of the European Union, in light of the principles that each State has sovereignty over their own air space, and that no country can legitimately claim sovereignty over the high seas, and in view of the principle which ensures the freedom of flying over the high seas, and in accordance to the *Open Sky Agreement* between the United States and the European Union, the review of Directive 2008/101 did not find any elements liable of affecting its validity.

Political Ramifications of this Dispute

The airlines filing the legal action claimed that, subsequent to the decision of the European Union Courts of Justice which positively decided on the validity of the Aviation Directive, they would not be pursuing any further actions or appeals before the English Courts because they understood that the dispute involved States:

> Nicholas Calio, the CEO of Airlines for America, stated that 'Our legal action was crucial in bringing up the fact that the EU ETS is violating international law and is an exorbitant money grab. These are now key points in the unified dispute of governments against the scheme'.
> 'There is a clear path the United States can take to force the EU to suspend the scheme and protect American sovereignty, consumers, jobs and international law", he added (THE GUARDIAN, 2012)[vi]

Many countries have already declared their opposition to the regulations which include foreign airlines in the European carbon market, for example India, China, Brazil, Russia, Canada and the United States. In short, they claim that the European measure exceeds it legislative capacity, violating the sovereignty of other States and that the problem of emissions produced by the aviation sector should be solved together.

Since the approval of the Directive, the United States, for example, has been arguing that it violates international agreements signed by the European Union. "The European Union Emissions Trading Scheme Prohibition Act" was approved in November 2012, banning American companies from participating in the EU ETS.

During a speech addressing a Congress committee on 6th June 2012, the US Secretary of Transport, Ray Lahood, severely criticized the Aviation Directive as being the wrong

way to achieve the right objective. According to the Transport Secretary, both Lahood and Hillary Clinton, the American Secretary of State, have been seeking talks with the European Union in order to find a global, and not a unilateral solution, to this problem:

> 'The EU needs to engage constructively in order to find a global solution that works for the rest of the world and allows it to set aside ETS in relation to foreign companies', he said. 'We urge the EU to stop applying the ETS to international aviation so as to help us accelerate our efforts to forge a global solution. We need to see real signs of flexibility from the EU. The global community needs to believe that the EU is genuinely willing to work towards a global agreement to help us accomplish our shared environmental objectives.' (BAKER, 2012)[vii]

Krishna Urs, the US State Department representative, cited similar arguments. She stated that there are a number of measures that may be adopted to stop the Directive being effective beyond the European Union and the US government is analyzing which ones are more appropriate. She also claimed that:

> The path the EU has chosen hinders the development of a multilateral solution, which would probably be more fruitful in terms of reducing greenhouse gas emissions from aviation. We continue to have strong legal and policy objections to the inclusion of flights from foreign carriers to the EU. We do not believe that the court decision resolves these objections (LIPINSKI, 2011).

On 6th February 2012, the Chinese government banned its national companies from participating in the EU ETS, claiming that it would take all possible measures to protect individuals and airlines from the abuse resulting from the Directive (NEWS. XINHUANET, 2012).

One of the main arguments of the Chinese government is that because it does not belong to the group of countries which are obliged to comply with emissions reductions listed in Annex I of the Kyoto Protocol, and considering the principle of common but differentiated responsibilities, China is not obliged to have emission reduction targets. This is because the principle of common but differentiated responsibilities established in article 3 of the United Nations Framework Convention on Climate Change differentiates the responsibilities between developed and developing countries: "developed country parties should take the lead in combating climate change and its effects".

China is seeking to develop a scheme for limiting and trading emissions and has approved a law on this topic which establishes, amongst other matters, possible retaliations if Chinese airlines are charged in relation to EU ETS (MULLER, 2012)

Between 21st and 22nd February 2012, a meeting was held between 26 nations in order to debate the EU ETS, resulting in a joint declaration known as the Declaration of Moscow, which included the United States, China, Brazil, Japan, Saudi Arabia and Russia (Black, 2012). According to this Declaration, the inclusion of aviation within the

EU ETS is an arbitrary unilateral act which represents an obstacle to reaching a common agreement within the International Civil Aviation Organization, as well as producing market distortions and unfair competition. Thus, they argue for the non-application of the Aviation Directive to non-EU member countries.

Furthermore, the resistance of European airlines to the inclusion of aviation within the EU ETS is highlighted. *Airbus*, *British Airways*, *Virgin Atlantic*, *Lufthansa*, *Air France*, *Air Berlin* and *Iberia* delivered a document to the authorities in which they presented their concerns in relation to retaliation from third party countries, resulting in potentially irrecoverable losses to companies and the loss of thousands of jobs (AVILA, 2012).

The European Union claims in its statements since the inclusion of aviation in the Directive that its Member-States should pursue agreements on global measures to reduce greenhouse gas emissions from aviation and that the European Scheme could be used as a model for a global agreement.

During a meeting with the International Civil Aviation Organization, the European Commission stated its intention to sign a global treaty to reduce emissions from the air transport sector and if this agreement was obtained it could suspend the inclusion of airlines of other States within the EU ETS.

Furthermore, it claims that given that the objective of the measure is to reduce greenhouse gas emissions, it is possible that countries which prove that they are putting in place similar measures be exempted from participating in the European Scheme. The European Commission spokeswoman, Pia Ahrenkilde Hansen, stated that "the European Union is very committed, totally committed, in reaching an agreement which fully complies with the conditions presented. We have a very strong and clear objective and that is to work towards reaching a global treaty" (LIPINSKI, 2012).

In response to the retaliation threats, the Commission claimed that, if any airline, whether based in the European Union or not, stops complying with the obligations established in the Aviation Directive, it will be penalized in accordance with article 16 of the Directive. Thus, on 15th May 2012, it was announced that Chinese and Indian airlines would be penalized for violating the Directive by not complying with their obligations in delivering the emissions accounting report and a time-limit was set for these companies to fall in line (REUTERS, 2012).

In relation to the following dispute scenarios, there are three areas in which discussions can take place.

The first is within the International Civil Aviation Organization. Given that the countries disputing the Aviation Directive are signatory parties to the Chicago Convention and that all European Union countries are part of this treaty, some form of pressure can be organized so that the effects of the Directive are suspended in relation to third parties, or it is also possible that the European Union may be successful in their efforts to pressure for an agreement which foresees a global *cap and trade* scheme. In view of the last meeting of the ICAO and the declarations made by its parties, this may be a likely outcome.

Alternatively, States unhappy with the reach of the Directive may wish to question it in the Conference of the Parties of the United Nations Framework Convention on

Climate Change, by arguing that the Directive violates the principles of the Convention, such as the principle of common but differentiated responsibility.

Finally, States may seek to question the validity of the Directive under the auspices of the World Trade Organization (WTO). In order for this to happen, they would need to prove that the Scheme violates some of the WTO agreements, in particular, the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Services (GATS[viii]. Within this context, the European Union would need to prove the legitimacy of the adopted measure in order to dispel charges of distorted trade practices. This legitimacy would be based on the benefits of the measure from the point of view of environmental protection with cross-border effects. In order for it not to be considered an abusive trade practice, it would be necessary to prove, for example, that the treatment conferred to foreign companies is similar to that conferred to national companies. In short, in the view of the WTO, the perception of legitimacy of the unilateral measure would influence the recognition of its legality.

The aviation case can be understood as a successful case of unilateralism, regardless of whether the Directive is applied or not, given that the European Union drove the debate, *leading* a potential action, where a unilateral measure can be used as a parameter (BODANSKI, 2000).

Final considerations

Based on the analysis of the legal dispute and its political ramifications, it can be observed that the European Union was successful in reaffirming its image of being more concerned than other countries about the problem of global warming. Therefore, the reluctance of States and airlines in placing themselves in opposition to the European Union further strengthened the understanding that the EU is willing to adopt measures to fight climate change whilst others were not. For this reason, other States and airlines have made use of legal arguments to avoid effectively committing themselves to reductions.

The dispute, when presented in this way (between those who are, and those who are not, committed to tackling global warming), may prevent discussions on the political choices which led to the adoption of market instruments such as the *cap and trade* mechanism. There is no neutrality in this case. There are, however, clear interests and one is the legitimation of a particular development model.

The European Emissions Trading Scheme seeks to use a market mechanism to achieve a declared objective - combating global warming. The economic rationale of the regime of trading licenses is based on the argument that reducing greenhouse gas emissions should occur at the lowest possible cost. Thus, subsidies to those participating can be traded. For example, they can be acquired by those who have exceeded their quota of subsidized emissions. This is, therefore, *one way* in which the problem can be understood and solutions found.

The very fact that this phenomenon is recognized as a global problem means that solutions can be presented as benefitting the whole planet, even if, in the view of the actors involved, in reality their implementation may result in other environmental problems. In

practice, these problems are viewed as collateral effects of a necessary measure: guaranteeing the survival of the human species. The analysis of "global issues" makes it difficult to see environmental disputes from a local point of view, that is, from the perspective of the social and political context they are part of.

It must be highlighted that it is not the purpose of these reflections to deny the importance of considering cross-border environmental impacts[ix], but to stress that analysis carried out at global level is not neutral, just as the solutions to the problems at this level are also not *natural* or *evident*. It is also not the purpose of this article to equate the posture of the European Union to that of other countries who also participate (or not) in climate change negotiations. For many decades the European Union has been arguing for a more progressive agenda in relation to climate change, when compared to countries such as the United States, Russia and China. Nevertheless, European proposals are political proposals and the option brought to the table to tackle climate change by means of an incentive to technological development aims to create, strengthen and expand a new market.

Finally, it is worth pointing out that the legal action filed by the airlines managed to bring to the attention of States the fact that potential political and legal disputes can be caused by the lack of specific agreements in this matter. They may be an indication that other legal disputes might take place in other sectors.

A specific agreement involving climate change and aviation could be drafted in light of the United Nations Framework Agreement on Climate Change, in particular, in relation to the principle of common but differentiated responsibilities which has been ignored by the Aviation Directive.

Notes

i After this article had been sent for assessment to be included in this periodical, the Aviation Directive was suspended due to international pressure (analyzed in part 3 of this paper) and due to the progress within the International Civil Aviation Organization in relation to establishing targets for reducing carbon emissions.

ii The United Nations Framework Convention on Climate Change is an international treaty signed in 1992, in Rio de Janeiro. Its purpose was to join efforts in order to stabilize the concentrations of greenhouse gases in the atmosphere.

iii The Kyoto Protocol, which is linked to the Framework Convention, was signed in 1997 and established targets for reducing specific emissions by the Parties involved.

iv The parts of the Directives referred to in this study were taken from the official Portuguese version.

v Translated into Portuguese by the author

vi Translated into Portuguese by the author

vii Translated into Portuguese by the author

viii See BARTELS, 2012.

ix In relation to this issue, see: COLBORN, MYERS, DUMASOSKI, 2002.

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THE INCLUSION OF AVIATION IN THE EUROPEAN UNION CARBON EMISSIONS TRADING SCHEME

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Resumo: Em 2008, a atividade da aviação foi incluída no Esquema Europeu de Comércio de Emissões de Carbono (EU ETS), impondo obrigações legais a companhias aéreas do mundo, e não apenas da União Europeia. Considerando o referido cenário, busca-se refletir sobre a imposição unilateral de obrigações justificadas com base em preocupações ambientais. Nesse contexto, ganha importância o estudo da disputa judicial travada por empresas aéreas norte americanas em relação à inclusão da aviação no EU ETS. O recorte da abordagem por meio de um estudo de caso justifica-se por permitir extrair avaliações sobre os reflexos do litígio específico nas relações internacionais. Observa-se que a relutância das companhias aéreas e de outros Estados fortalece a compreensão de liderança da União Europeia em relação ao tema das mudanças climáticas.

Key words: Esquema Europeu de Comércio de Emissões de Carbono; Aviação; mudanças climáticas.

Abstract: In 2008, aviation activity was included in the European Union Emissions Trading Scheme (EU ETS), imposing legal obligations on all airlines around the world, not just those in the European Union. Considering this scenario, the aim of the article is to reflect on the admissibility of the unilateral imposition of obligations justified by environmental concerns. In this context, it is important to analyze the legal battle conducted by American airlines in relation to the inclusion of aviation within the EU ETS. This is accomplished by means of a case study which allows for an analysis of this specific dispute in international relations. It is observed that the reluctance of airlines and other states strengthens the view which regards the European Union as a leader on issues of climate change.

Keywords: European Union Emissions Trading Scheme; Aviation; Climate change.

Resumen: En 2008, la actividad de la aviación fue incluida en el Esquema de Comercio de Emisiones de Gases de Efecto Invernadero de la Unión Europea (ECE de la UE), y definió obligaciones legales a las compañías aéreas de todo el mundo. Teniendo en cuenta el escenario anterior, tratamos de reflexionar sobre la admisibilidad o no de la imposición

unilateral de obligaciones justificadas por preocupaciones ambientales. En este contexto, es importante estudiar la batalla legal emprendida por aerolíneas norteamericanas en relación con la inclusión de la aviación en el ECE de la UE. El esquema del enfoque a través de un estudio de caso se justifica por permitir revisiones de las reflexiones de la controversia concreta en las relaciones internacionales. Se observa que la renuencia de las compañías aéreas y otros Estados fortalece la comprensión del liderazgo de la Unión Europea sobre la cuestión del cambio climático.

Palabra clave: Esquema de Comercio de Emisiones de Gases de Efecto Invernadero de la Unión Europea; Aviación; Cambio climático.