The European Union’s Effort to Include Aviation in its Emissions Trading Scheme: Issues of Sovereignty and Jurisdiction

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Directive 2008/101/EC of the European Parliament (hereinafter the “Directive”) includes international aviation activities in the European Union’s (EU) emissions trading scheme.[[1]](#footnote-1) The Directive requires aviation emissions reporting and the acquisition of emission allowances for all flights regardless of nationality departing from each Member State and arriving in each Member State from a third country starting 1 January 2012.[[2]](#footnote-2) In the event that an aircraft operator fails to comply with the requirements of the Directive and other enforcement measures, the Directive states that Member States should act in solidarity and contemplates an operating ban at the Community level on the aircraft operator concerned.[[3]](#footnote-3)

Some of the issues associated with the Directive include its ability to mitigate climate change, its interaction with existing international agreements, its adherence to the Convention on International Civil Aviation (Chicago Convention), and its consistency with principles of international law. The intent of this research paper is to focus on the extraterritorial aspects of the Directive in relationship to principles of state sovereignty and international law. This aspect of the Directive is critical because while treaties can be re-negotiated and ineffective provisions of the Directive amended, the failure of the Directive to comport with principles of sovereignty and international law will render the Directive illegitimate in the international community. Such a finding, would likely result in retaliatory measures by other states, frustration of the Directive’s purpose in mitigating climate change, and greatly diminish the EU Community’s hope that the Directive would serve as a model of emissions trading worldwide.[[4]](#footnote-4)

A dispute has already erupted concerning the Directive’s adherence to principles of sovereignty and international law in the form of litigation before the Court of Justice for the European Union (CJEU). The dispute reached the CJEU after the United Kingdom (UK) drafted legislation implementing the Directive. On 16 December 2009, the Air Transport Association of America, American Airlines, Continental Airlines, and United Air Lines (hereinafter “Claimants”) brought an action challenging the 2009 UK Regulations in the High Court of Justice of England and Wales. The formal defendant is the United Kingdom Minister for Energy and Climate Change (hereinafter “Defendant”) who is the national authority primarily responsible for the implementation of the Directive. That court subsequently referred the action to the CJEU to provide guidance with respect to a number of questions relating the Directive. These questions include, *inter alia,* issues relating to customary international law and sovereignty.[[5]](#footnote-5) As of the writing of this paper the CJEU has not issued a formal opinion.

The Claimants are asserting that the Directive is an impermissible extension of the EU’s sovereignty by not confining its emissions trading scheme to wholly intra-European flights and by including within it those sections of international flights that take place over the high seas and third countries. The Claimants are contending that the application of Directive is impermissibly extraterritorial in that it seeks to regulate conduct over the high seas and third states.[[6]](#footnote-6) The specific extraterritorial conduct required by the Directive is 1) emissions reporting; and 2) the purchase of emissions allowances for all flights, which depart from or arrive in a Member State, irrespective of its nationality, state of origination, or destination.[[7]](#footnote-7)

The Defendant claims the Directive is not extraterritorial in that it is not regulating conduct that occurs beyond the EU’s territory. The Directive merely “takes account” of activities that have occurred outside of its sovereignty territory. The Defendant claims it is entirely permissible under international law to take into account activities that have occurred outside of one’s sovereign territory to determine the actions that can be taken inside a state’s sovereign territory.[[8]](#footnote-8)

In defining extraterritorial conduct, a task that is critical to this analysis, it is important to consider that which is extraterritorial. Extraterritorial is defined as beyond the geographic limits of a particular jurisdiction.[[9]](#footnote-9) With respect to airspace, each State exercises sovereignty over its airspace. This principle is codified in Article I of the Chicago Convention, to which 190 states are currently Contracting Parties, including all the Member States of the EU.[[10]](#footnote-10) The International Court of justice has also recognized, that the rule of international law expressed in Article I of the Chicago Convention merely expresses an established and longstanding principle of international law.[[11]](#footnote-11) Therefore, the regulation of conduct that occurs over the airspace over a third country is extraterritorial.

Similarly, freedom of the high seas is an internationally recognized principle. It is a principle has been recognized at least since the early 20th Century.[[12]](#footnote-12) The principle that no state may validly purpose to subject any part of the high seas to its sovereignty was codified in the first sentence of Article 2 of the Convention on the High Seas. It was later introduced into Article 89 of the Convention on the Law of the Sea. There are 162 Contracting Parties to the Convention on the Law of the Sea including all states in the EU. These conventions and their widespread ratification can be considered as codifying this principle of customary international law.[[13]](#footnote-13) In addition to this principle of customary international law, jurisdiction over the high seas, for the purposes of civil aviation, is the vested in the International Civil Aviation Organization (ICAO) under Article XII of the Chicago Convention. Although the EU is not a not a contracting party to the convention, all EU Member States are parties to the convention.[[14]](#footnote-14) Therefore, under international law, the only organization that can regulate conduct over the high seas is ICAO; and any regulation of conduct over the high seas by state would be extraterritorial.

The fact that a law or regulation regulates or takes account of conduct that occurs outside its territorial jurisdiction does not per se mean the law is contrary principles of international law and sovereignty. States routinely pass laws and engage conduct that impacts the behavior of others outside their sovereignty. Specifically, the US and EU have, on many occasions, applied economic laws and their antitrust laws in particular, to conduct occurring outside their borders but affecting their economies.[[15]](#footnote-15) In regulating extraterritorial acts, legal scholars have articulated the following principles that should be observed.

(i) that there should be a substantial and *bona fide* connection between the subject matter and the source of the jurisdiction;

(ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;

(iii) that a principle based on elements of accommodation, mutuality and proportionality should be applied . . .[[16]](#footnote-16)

Additionally, the Restatement of United States Foreign Relations Law (Third) also addresses the issue of when a state has jurisdiction to prescribe a law or regulation for conduct occurring outside of its territory. Section 403 of the Restatement provides a state has jurisdiction to prescribe law with respect to the following:

1. conduct that, wholly or in substantial part, takes place within its territory;
2. the status of persons, or interests in things, present within its territory;
3. conduct outside its territory that *has* *or is intended to have* substantial effect within its territory; (emphasis added).[[17]](#footnote-17)

The most significant aspect of the Restatement, for this discussion, is that a state is permitted to regulate conduct that has or is intended to have a substantial effect within its territory. Notably, this rule of law differs from prior jurisprudence, which required not only that the conduct had an effect in the territorial jurisdiction but also that there was an intended effect within the same jurisdiction.[[18]](#footnote-18) This is a substantial change that reflects less of an emphasis on territoriality. Instead, it focuses on elements such as the nature of the activity, the effect on the regulating state, the interests of both the regulating and territorial states, which interests are measured by the amount of regulation generally exercised. These factors are difficult to quantify and open the door to a substantially broader interpretation of extraterritorial jurisdiction.[[19]](#footnote-19)

This section of the Restatement is also referred to as the “effects principle.”[[20]](#footnote-20) The effects principle is generally accepted with respect to acts that have a direct consequence on the regulating jurisdiction. For example it is generally accepted with respect to liability for injury in the state from products made outside the state and introduced into its stream of commerce. Controversy has arisen as a result of economic regulation by the US and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out. The Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is “reasonable.” The Restatement articulates a non-exhaustive list of factors to consider when determining whether the exercise of jurisdiction is “reasonable.” In the case that the prescriptions by two or more states are both reasonable, a state has an obligation to evaluate, but “should” defer if the other State’s interest is “clearly” greater. [[21]](#footnote-21)

The “reasonableness test,” has been the subject of some criticism. Some courts have concluded that no rule of international law holds that a more reasonable assertion of jurisdiction mandatorily displaces a less reasonable assertion.[[22]](#footnote-22) However, a number of US Courts have applied extraterritorial jurisdiction based on the effects principle and applied the reasonableness standard.[[23]](#footnote-23)

Under the first standard stated above, in order for the Directive to comport with the principles of international law there must be a substantial and *bona fide* connection between the EU (the source of the jurisdiction) and the release of green house gases (GHG) by international air carriers over the high seas and third countries (the activity regulated). Under the Restatement, the same activity (the extraterritorial release of GHG) must have a *substantial effect* on EU territory. The Directive will first be analyzed under the principles of international law articulated by the Claimant interveners and Professor Ian Brownlie followed by an analysis under the Restatements.

The connection between the EU and international aviation emissions is revealed by the Directive’s primary purpose, which is to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the Community scheme.[[24]](#footnote-24) In addition to this primary purpose, the inclusion of international air carriers will also serve to avoid distortions in competition between EU and non-EU air carriers already subject to the scheme.[[25]](#footnote-25)

While a connection between the EU, international aviation emission, and mitigating climate change is difficult to quantify; as will be discussed below under the Restatement analysis, the connection between extending to the Directive to non-EU carriers to avoid market distortions is clear. This connection is *bona fide* and substantial because if this scheme only applied to EU air carriers, to the exclusion of international air carriers, the EU carriers would be placed at a competitive disadvantage. They would be forced to monitor emissions, purchase allowances, and become more efficient while their international rivals are allowed to continue polluting without the same restrictions and costs. The added burden to EU carriers would undermine the Directive’s purpose because the consumer would be drawn to the lower fair offered by the international competition. Therefore, in order for this Directive to succeed, it must apply to international carriers serving the EU.[[26]](#footnote-26)

In terms of non-intervention in the domestic or territorial jurisdiction of other states, the Directive only deals with flights to and from the EU and does not mandate any other action from international carriers. It does not tell other states that they must enact climate legislation or mandate the type of fuel that must be used or the type of aircraft that must be used. Nor does the Directive currently conflict with any other existing regulations from any other state.[[27]](#footnote-27) Although the Kyoto Protocol vested the responsibility of creating an emissions trading scheme in the International Civil Aviation Organization (ICAO); in the past 13 years ICAO has failed to mandate any such legislation or emissions scheme.[[28]](#footnote-28) Given ICAO’s failure to act it is entirely foreseeable and arguably appropriate that other states take some action.

Under the principles of mutuality and accommodation, the Directive has created an equivalency provision. In this provision the Directive proposes to accommodate non-existent but emerging foreign emissions trading schemes. If a State were to adopt measures, which have an environmental effect at least equivalent to that of the Directive, to reduce the climate impact of flights to the EU, the EU “should consider”options available for optimal interaction between the two schemes.[[29]](#footnote-29) This provision of the Directive further envisions bilateral arrangements on linking the EU scheme with other trading schemes to form a common scheme, which could constitute a step toward “global agreement.”[[30]](#footnote-30)

Therefore, under the principles articulated by Professor Brownlie, and contrary to the Claimants’ position, the Directive can be read in such a way that it comports with international law. Perhaps the strongest argument in favor of the Directive is that there is no real comparable legislation in place and the fact that the Directive is designed to accommodate new or emerging legislation. Finally, the international reach is limited. It does not apply to all international flights throughout the world. It only applies to those international carriers who desire to participate in the EU market.

Conversely, under the Restatement’s effect doctrine, the conclusion is different because the EU has not established that international aviation emissions alone have had a substantial effect on the EU’s territory. The Directive cites the United Nations Intergovernmental Panel on Climate Change (IPCC) and makes some general observations about aviation emissions; yet it fails to state the impact of international aviation emissions or any specific harm that has been suffered by the EU. The Directive merely states that the environment policy is to be based on the “precautionary principle.”[[31]](#footnote-31)

The specific impacts of climate change on the EU are more fully articulated in 2007 the IPCC Working Group Reports. As a result of climate change Europe is expected to suffer increased winter and coastal flooding. The predicted sea-level rise is likely to threaten up to 1.6 million additional people annually. Warmer, drier conditions are expected lead to more frequent and prolonged droughts, as well as to a longer fire season and increased fire risk, particularly in the Mediterranean region. During dry years, catastrophic fires are expected on drained peat lands in central Europe. Without adaptive measures, risks to health due to more frequent heat waves, particularly in central and southern Europe, and flooding, and greater exposure to vector and food-borne diseases are anticipated to increase.[[32]](#footnote-32)

However, the EU is not the only region of the world so affected by climate change. The report also cites significant consequences of climate change for all regions of the world. Other regions of the world, particularly islands in the Pacific, are projected to suffer more serious consequences through similar flooding, droughts, and displacements of their populations.[[33]](#footnote-33) Moreover, these consequences are not directly attributable to international aviation emissions alone, but rather they are attributable to global emissions of green house gases by all modes of transportation and energy production. The task of detecting climate change is difficult; the task of detecting the aircraft contribution to the overall change is more difficult because aircraft are only responsible for a small fraction of anthropogenic emissions. However, aircraft perturb the atmosphere in a specific way because their emissions occur in the free troposphere and lower stratosphere, and they trigger contrails, so the aircraft contribution to overall climate change may have a particular signature. At a minimum, the aircraft-induced climate change pattern is likely to be significantly different from the overall climate change pattern in order to be detected.[[34]](#footnote-34) While it is clear that global aviation is contributing to global climate change, it is unclear to what extent. As such the impact that global aviation emissions are having on Europe is even less clear.

This lack of demonstrated effect on the EU’s territory makes this situation similar to the *Tuna-Dolphin* case.[[35]](#footnote-35) In that case, portions of the US Marine Mammal Protection Act (MMPA) banned the importation of commercial fish or products from fish, which have been caught with commercial fishing technology, which results in the incidental kill, or incidental serious injury of ocean mammals in excess of US standards. Special provisions of the act provided that importation of yellow fin tuna harvested with certain nets and products therefrom was prohibited unless the Secretary of Commerce found that 1) the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the US, and 2) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by US vessels. [[36]](#footnote-36)

Mexico and other states challenged the law under existing trade agreements. The panel found that a country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production is under its jurisdiction.[[37]](#footnote-37) The panel found that the US did not have a unique interest in the decimation of worldwide dolphin populations in the high seas because the US could not point to a substantial effect on the US territory. In this case the same analysis applies to the Directive because the EU is not uniquely affected by climate change such that it can regulate emissions over the high seas or the sovereign airspace of third states.

The current situation is also distinguishable from another trade decision where the panel confirmed the requirement of some discernable or unique effect on the territorial jurisdiction. The panel held that US import regulations designed to encourage turtle-safe shrimping practices in the territorial water of third states was permissible because the US was able to point to a migrant turtle population in its territorial waters that was being decimated by foreign shrimping nets, thus demonstrating an effect or nexus between specific harms felt in the regulating state and the extraterritorial resources.[[38]](#footnote-38) Therefore, consistent with these examples, because the effects that international aviation emissions have on the EU’s territory have not been shown to be substantial or unique, the Directive does not comport with the “effects principle” under the Restatements.

Nevertheless, the Directive finds relief in another provision of the Restatement. As stated above, the Restatement allows for the regulation of extraterritorial acts when it either “wholly or in substantial part, takes place within its territory.”[[39]](#footnote-39) In this case, the departure and arrival of international aircraft clearly take place within the EU’s territorial jurisdiction; and notably it is only these acts that trigger the Directive’s requirements. The landing and departure of any flight constitute a substantial aspect thereof and in many cases is the reason for the flight in the first place. As such, it is this territorial nexus that provides the Directive a solid foundation.

In this sense, the Directive can be seen as only having an indirect impact on third countries. It only impacts those air carriers and individuals who desire to land in EU territory. There is no attempt to exercise sovereign authority over foreign over third countries or over the high seas. These aircraft are under no operating restrictions; however, once the aircraft operator decides to arrive or depart from EU territory the Directive will take effect. Therefore, the EU is exercising jurisdiction in its own territory for acts which have occurred on the high seas or over a third state.[[40]](#footnote-40)

Instances of similar conduct include the accelerated phasing-in of the double hull design requirements for single hull oil tankers. This act did not assert extraterritorial jurisdiction over oil takers when they were on the high seas or docked in ports of third countries. It merely imposes a requirement that they must comply with certain conditions if they are to dock in EU ports or terminals. Further instances of similar measure include regulations regarding the shipment of waste and the protection of wild fauna and flora. Both measures impose prohibitions on importing certain protected products into the EU, or stipulate that imports may be made only where certain conditions have been met. These regulations have an impact on operators that want to come to the EU, they do not assert extraterritorial jurisdiction over these products or actions when they are in third countries or being transported over the high seas.[[41]](#footnote-41)

The final part of the analysis is whether it is “reasonable” for the EU to enact the Directive; and overall the scale tips in the EU’s favor. The starting point is that the reach of the Directive is limited. It does not apply to all aspects of global aviation but rather only flights that arrive or depart in the EU. The EU has an interest in extending this regulation to international carriers because, as described above, applying this measure only to EU carriers would give international carriers a competitive advantage and undermine the Directive’s purpose. Notwithstanding the inability to quantify the exact impact that global aviation is having on the environment, given the consequences of climate change on the EU it is reasonable that the EU would enact some legislation to combat it. Notably, this Directive is part of a larger effort by the EU to mitigate climate change and is not an isolated piece of legislation impacting only foreign carriers.

In terms of a conflict with other climate legislation, in the 11 years that ICAO has been called upon by the Kyoto Protocol to develop a comprehensive plan to combat green house gas emissions related to aviation, nothing has been done; and thus the Directive does not conflict with any other existing regulations. This factor strongly cuts in favor of the Directive’s reasonableness. Moreover, and as described above, if a third country passes similar legislation, the Directive is designed to take such regulation into consideration in hopes of creating a global scheme for emissions trading. In a perfect world one might imagine that the last four years would have been spent by other states coming up with their own respective schemes in an effort to dovetail them with the EU Directive. Unfortunately, that has not been the case. In fact, in response to this measure, international airlines have filed a lawsuit attacking the Directive. Most indicative of the animosity toward the Directive is the action taken by the US Congress to make it illegal for US carriers to comply with the Directive.[[42]](#footnote-42) In light of these efforts to attack the Directive, it is unclear whether the Directive, *reasonable or not*, will actually take effect.

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2. EC, *Council Regulation* 417/2002 *of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94* [2002] O.J.L. 64/1.
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2. *United States v Aluminum Co. of America*, 148 F.2d 416 at 444 (2nd Cir. 1945).
3. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909 at 952 (D.C. Cir 1984).
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17. Restatement (Third) of United States Foreign Relation Law § 403 (1987) (The interveners for the Claimant rely to some extent on the Restatements but include an intent element that was included in past jurisprudence and under the Restatement (Second) of United States Foreign Relation Law.). [↑](#footnote-ref-17)
18. *United States v Aluminum Co. of America*, 148 F.2d 416 at 444 (2nd Cir. 1945) (In Alcoa, a corporation in Switzerland engaged in violations of US anti-trust law in which the impact of the violation would affect US imports. The court found that the defendants' actions were “unlawful, though made abroad, if they were intended to affect imports and did affect them.” This is the genesis of the the “effects test,” by affording extraterritorial reach to the Sherman Act if the defendant intended to affect commerce within the United States and was successful.). [↑](#footnote-ref-18)
19. Kathleen Hixon, “Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States” (1988) 12 Fordham International L.J. 127 at 137. [↑](#footnote-ref-19)
20. Ibid. at 134. (This is also referred to as the “effects principle” within the notes relating to the Restatement.). [↑](#footnote-ref-20)
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    1) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; the importance of the regulation to the international political, legal, or economic system; 2) the extent to which another state may have an interest in regulating the activity; and 3)the likelihood of conflict with regulation by another state.). [↑](#footnote-ref-21)
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35. Intervener IATA/NACC, *supra* note 7 at 61 citing GATT, *Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (16 June 1991). [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Ibid at 61-62. [↑](#footnote-ref-37)
38. Ibid at 62. (footnote 111 citing *US-Import Prohibition of Certain Shrimp and Shrimp Products* paragraph 133, WT/DS58/AB/R (12 Oct 1998). [↑](#footnote-ref-38)
39. *Air Transport Association of America and Others,* Advisory Opinion, *supra* note 5 at 44-45. (The Advocate General supports the Directive by relying on this concept although she does not specifically cite the Restatements.). [↑](#footnote-ref-39)
40. Second Intervener Defendant, *supra* note 8 at 10. (The Second Intervener for the Defendant relies upon the *Lotus* case to reach this conclusion, *supra* note 12.). [↑](#footnote-ref-40)
41. Ibid. at 10-11. See also EC, *Council Regulation* 417/2002 *of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94* [2002] O.J.L. 64/1. EC, *Council Regulation* 1013/2006 *of 14 June 2006 on shipments of waste;* [2006] O.J.L. 318/15. (The Defendant Interveners cite these cases in support of the position that because the effects are experienced by a third country does not mean the regulation is an impermissible exercise of extraterritorial jurisdiction.). [↑](#footnote-ref-41)
42. *Supra* note 27. (Describing a House measure to make compliance illegal). [↑](#footnote-ref-42)