

The EU'S ETS and Global Aviation: Why 'Local Rules' Still Matter and May Matter Even More in the Future

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I. Overview

On January 1, 2012, the European Union ("EU") extended its Emission Trading System ("ETS")¹ to a significant part of the global aviation sector² notwithstanding the protests of numerous states³ and objections from some European businesses.⁴ With limited exception, aircraft departing from or landing at an aerodrome in an EU Member State, regardless of the state of registry, origin of flight, or actual time spent in EU airspace, will be subject to the ETS for the entire length of the flight.⁵ This has become known as the "Aviation Directive" and represents **a considerable step in the EU's efforts to promote its robust climate change agenda, efforts that are marked as much by unilateralism and extraterritoriality⁶ as they are by multilateral engagement.⁷ The EU's unilateral extension of its municipal law⁸ to the global aviation sector is unprecedented only in scale, not in originality, as other states have acted similarly in other areas of legal life.⁹ The ETS has, however, become one of the more aggressive and controversial examples of the unilateral use of municipal lawmaking power to affect a wide-range of activities, peoples, and states across the globe...**

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...II. THE EU'S AVIATION EMISSION TRADING SYSTEM

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...A. *Environmental and Economic Policy in the EU—Greening the Planet, Green Protectionism or Both?*

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...Some fourteen principles now drive EU environmental and economic policy including the polluter pays principle;⁷⁸ a focus on sustainable development;⁷⁹ a linking of environment, health, safety and consumer protection;⁸⁰ a requirement that environmental problems be rectified at the source;⁸¹ the integration of environmental and health concerns into all aspect of EU policy-making;⁸² and, **perhaps most influential, the notion of precaution to prevent problems and lower risk.⁸³** These principles impact a wide-range of industrial and economic interests such as construction,⁸⁴ transportation,⁸⁵ and energy,⁸⁶ and drive the EU's policies towards an interconnected environmental-economic regulation scheme within the Common Market that is increasingly transposed across the globe.⁸⁷

Directives on the use of renewable energies⁸⁸ and bio-mass fuels⁸⁹ serve the dual propose of promoting sustainability while propelling innovation and protecting established and nascent European industries by imposing standards that others must adjust to as a condition of market access.⁹⁰

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...The EU's use of the "precautionary principle" does not simply express its clean environment interests, it compels those in other states to alter their domestic practices as a condition of gaining access to the Common Market,⁹² while promoting environmental innovation as a core economic driver at home.⁹³

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The willingness of the EU to go forward with the Aviation Directive in the face of significant global opposition reflects (1) its unique character and market size; (2) its linkage of economic security with the environment; (3) its desire to be a global environmental regulator contributing to, if not outright commanding, the standards setting process; and (4) its willingness to use its collective political and economic clout to achieve the strategic policy objectives of the Member States and the Brussels' bureaucracy through the use of law and regulation.⁹⁴ It also reflects the keen economic interests of the EU, which originated as a trading bloc.⁹⁵ **By integrating and projecting its market and regulatory power, the EU can position itself to set environmental standards across a wide-range of industries, services, and technologies, which benefit its own economic interests.**⁹⁶ Although David Bederman notes that international organizations are essential in setting global standards, in part, because “[n]o single nation, or even group of countries, can unilaterally raise standards,”⁹⁷ this is true only to an extent. Notwithstanding growing economic integration and interdependency, the most influential states continue to possess significant capacity to dominate global regulatory systems⁹⁸ often by conditioning access to vast internal markets on compliance with domestically driven standards.⁹⁹

96. Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European “Fashion” Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. 491, 491-92 (2008); Constance E. Bagley, *What’s Law Got to Do With It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587, 587 (2010). See also STRAW et al., supra note 90, at 19-22 (making the following recommendations with respect to the European economy and the ETS: “[1] Expand the EU ETS to include imported energy-intensive goods. Serious consideration should be given to extending the ETS into imported goods from energy intensive sectors if binding emissions commitments for 2020 are not agreed by 2015. [2] Raise the carbon price. The EU should act to raise the price of carbon, which is worryingly low. [3] Focus the EU’s multiannual financial framework on innovation. In addition to the demand-side measures described above, the EU should develop a set of supply-side policies. [4] Protect ETS revenues for low-carbon projects. The ETS is partly undermined by concerns that it has become a fiscal policy to raise revenue rather than a climate policy to reduce emissions. [5] **Provide industry with greater regulatory certainty. Industry participants from France, Germany and the UK called for more stability in the EU’s regulatory setting process.** [6] **Maximise the EU’s role as a standard setter.** Vehicle emissions standards are a successful example of the EU generating a new market through standard setting.”). See also *Two Ways to Make a Car*, THE ECONOMIST (Mar. 10, 2012), available at <http://www.economist.com/node/21549950> (noting that currently Brazil builds automotive engines exclusively to EU standards). (pp. 436-437)

...As the Aviation Directive illustrates, the most influential states have immense lawmaking and law-projecting capabilities, often legitimized by their perceived democratic nature and/or backed by enormous economic strength as measured by the size of their internal markets and their global trading profiles. These states also have a remarkable aptitude for deploying their law projecting capabilities globally to achieve certain policy objectives through the use of municipal regulatory systems.¹⁰⁷ (p. 438)

When measured on the global scale, regulations set by the most influential states matter well beyond their borders; regulations set by small and developing states generally do not. **Consequently, this lawmaking and law-projecting capability enables some states to dominate the global legal order—and therefore global behavior—even outside of comprehensive multilateral frameworks or cooperation-based agreements.**¹⁰⁸ **If the EU can successfully use its municipal lawmaking capability to rework the landscape of global environmental law in its economic favor,**¹⁰⁹ it expands its global leadership,

encourages the development of new industries and technologies at home,¹¹⁰ forces other nations to adjust to its policy initiatives and standards, and plays a more dominant role in shaping global markets and behavior by pushing its standards ahead of others.¹¹¹ (pp. 438-439)

Basically, through the extraterritorial projection of its environmentally-focused municipal law, the EU can become a powerful global economic policy determiner. The EU's assertiveness in global environmental regulation is not, therefore, the product of happenstance¹¹² or the pursuit of purely laudatory objectives. It also reflects a keen and strategic effort to protect its long-range commercial interests as transnational ecological problems become prime considerations in economic development and economic innovation.¹¹³ This is precisely why some perceive the EU's ETS and other aggressive environmental undertakings as trade protectionism wrapped in a flag of law-based environmentalism—so-called “green protectionism.”¹¹⁴

114. See ERIXON, *supra* note 103; LAWRENCE A. KOGAN, ‘ENLIGHTENED’ ENVIRONMENTALISM OR DISGUISED PROTECTIONISM? ASSESSING THE IMPACT OF EU PRECAUTION-BASED STANDARDS ON DEVELOPING COUNTRIES (2004), available at http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_e.pdf. The EU is not alone in using its municipal regulatory power to shape global environmental behavior. See also Marine Mammal Protection Act, *supra* note 9; Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 387-402 (2005) (describing the recent growth in the extraterritorial application of law in the environmental context); *Avoiding Green Protectionism – A New Program of World Growth*, WORLD GROWTH (Dec. 6, 2010), <http://worldgrowth.org/2010/12/avoiding-green-protectionism-a-new-program-of-world-growth-december-2010/>. (p. 439)