欧盟航空排放交易体系在东京和芝加哥受阻：多方治理体系中的单方法律主导

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[摘　要] 2012年1月1日，欧盟指令2008/101/EC正式生效，它将欧盟排放交易体系（ETS）适用范围扩展到国内和国际民用航空，这将争议由合法性层面上升到空前的高度。尽管事实上这项指令不论国籍应用于所有航空公司，但欧盟立法者将外国航空公司及其发生在欧盟航空之外的二氧化碳排放也纳入其法律适用，这就激怒了第三国，遭到发展中国家的严厉批评，尤其是中国和印度。本文写作目的是探究尽管存在多边谈判，并且ETS体系在其他法律管辖权中也进行了国际法律移植，为何欧盟ETS所追求的环境目标并未使国际社会认同其单边行为。因此，本文旨在对气候变化全球治理的当前形势进行初步评估。本文重点关注了该争议中欧盟和中国的立场，讨论了欧盟反对方探寻气候变化制度和国际航空制度之间的规范性冲突，并且欧盟单边行为由于缺乏程序合法性激怒了第三国，他们认为这是对自己国家主权的侵犯。因此推断在现行国际体系中，制度目标和原则的和谐性源自政治决定，该政治决定的缺失将会阻碍多方合作目标的实现。此外，在这个背景下，违反其他制度成员的意愿，单方实施另一种解决方法企图取代多边规则制定，很可能会遭到越来越多的强国日趋激烈的反对。

[关键词] 欧盟排放交易体系　多边谈判　规范性冲突

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概　述

2012年1月1日，欧盟指令2008/101/EC号文件正式实施，将欧洲排放交易系统扩展到国内和国际民航，这导致欧盟和包括美国、中国、俄罗斯和印度主要大国之间发生争议，并将区域立法的合法性争议上升到不可预知的高度。事实上，航空排放交易系统指令强加于所有航空运输者，而不管他们的国籍，只要从欧洲机场落地或出发，都要根据他们的飞机在到达欧盟或者从欧盟出发的旅程中产生的二氧化碳排放量缴纳一个特定数目的“限额”。鉴于这项配额的大部分将必须由飞机运营

者购买，这就产生了一笔被称作“不合法的碳税”的花费。再者，欧盟立法者决定将欧盟上空产生的二氧化碳排放量纳入配额数量的举措激怒了第三国，同时指令对所有航空运营者不论国籍采取相同对待的决定遭遇了来自发展中国家的强烈反对，尤其是中国和印度。有趣的是，尽管“战斗”是“可能通过外交谈判而不是在法庭解决”，但是各方争论已经被纳入法律期限，法院作为程序的新国际参与者被优先采用。在 2011 年 12 月 21 日发布的判决中，欧盟法院得出该欧洲指令与国际法一致的结论。但是，2012 年 2 月 22 日，29 个非欧盟国家签署了“墨西哥声明”，从反面的角度，严厉谴责了该法令是一部不被接受的违背国际习惯法——尤其是领土主权原则的法律，还有很多在多方国际法律体系或制度中已经形成的法律原则，尤其是 1944 年关于国际航空的《芝加哥公约》，1992 年《联合国气候变化框架公约 (UNFCCC)》及其 1997 年《京都议定书》，还有 WTO 规则。这项声明牵制着欧盟进一步的法律行动，并给欧盟施加报复性措施的压力。之后，美国国会和中国政府已经采取了禁止他们国家的航空运营者遵从欧盟法律的行动，这就形成了在这些国际法律规范中的直接双边冲突。

从环境视角看，尽管欧盟排放交易体系指令是第一部针对减少国际航空排放的立法，但这种原则性和致命性的反对看起来没有与气候变化问题的高风险性相一致。再者，气候变化减缓最能体现可持续性发展原则。这不仅仅是《联合国气候变化框架公约》和《京都议定书》最主要的目标，而且它已经成为欧盟、中国和绝大部分第三国以及国际组织确立的势在必行的最高目标。因此，本文试图回答以下问题：为什么尽管多边谈判一直在进行，而且主权国家也纷纷将欧盟 ETS 移植到本国的法律中，但欧盟 ETS 所追求的环境目标却无法促使国际社会认可它的单方法律呢？本文将对目前气候变化的全球治理中暗含的势力较量进行初步分析。

有人认为，欧盟指令的反对者找到了该法令与国际层面的其他结构规范之间的冲突。气候变化立法的交叉特性意味着它同时影响着数项制度；因而，该法令显示出制度之间的不兼容。当前的案例是，气候变化制度中的核心规范——共同但有区别责任与国际航空制度的基础——非歧视原则产生冲突。相同的是，《芝加哥公约》的免税传统过度限制了其成员国为了实现气候制度下的环境目标而采取的行动。如何解决这些分歧目前在学术界尚存在激烈的争议。至今，在多方背景下负责平衡这些分歧的外交官们还没有得出结论。

此外，尽管还没有完全解决，在全球系统崇尚多方规则制定的背景下，这项由欧盟航空排放交易系统引发的争论已经揭示了对单边规则制定进行的重要限制。尤其是《京都议定书》将其“多边规则制定”授权给国际民用航空组织 (ICAO) 看起来是对行动的政治限制，它限制了其成员为了完成气候变化减缓目标而采取的行动。因此，很大一部分欧盟指令的国际反对者担心建立起纵容欧盟单边规则的先例，担心在多边谈判不能与欧洲全球治理野心步伐一致的时候，其单边规则会扩展到其他领域，尤其是海事运输和碳税。特别是中国坚定地反对一部对自身整体经济影响有限的法律，其目的是打击欧盟在多边解决方式缺失的情况下推行单边行动的自信。实际上，在国际层面上，面对规则的错综复杂局面，任何施加自身优先权或价值观的单边企图都将被认定为非法而失败。在这种情况下，国家主权和多边主义之间的联系加强了该争议，由此，对国家主权的侵犯是不可接受的，合法的解决办法只能是通过多边认可的方式。

本文第一部分阐述了该争论在多边谈判未达成的背景下出现以及它的主要参与者，重点是中国的强烈反应以及多边反应。第二部分重点是规则的水平冲突不断阻碍多方进程，以及由积极倡导国际义务和推行减排活动的独立成员欧盟带来的矛盾。第三部分解释了为什么欧盟单边行为在多边治理中被认为是破坏性的和非法的。最后，第四部分作出了总结性的评论，针对未来气候变化全球治

理发展的重要性，以及对欧盟在该“高政治”领域践行领导行为的限制。

一、欧洲航空指令替代多边行动及它的反对者

（一）背景概况：国际航空温室气体排放在UNFCCC和ICAO的谈判中未被规制

从 1992 年起，气候变化的全球治理已经在《联合国气候变化框架公约（UNFCCC)》建立的多方框架中发展。公约下的《京都议定书》在 1997 年 COPS 会议中被通过，第一次规定了在一个特别的履约期内 (2008 年—2012 年) 工业化国家（附件一）的温室气体减排目标。2005 年 2 月，该议定书在欧盟获得俄罗斯参与支持但美国并未参与的情况下正式生效。2010 年 12 月，坎昆峰会达成了一项全球政治协定，目的是为了“避免对气候系统危险的人为干扰”，全球温度上升应当被控制在 2 摄氏度。但是，根据国际能源机构发布的估算，全球二氧化碳排放量在 2010 年达到一个“最高纪录”，另外去年 4 月份，该机构的执行董事 Maria Van Der Hoeven 对“据目前形势，到本世纪末世界温度将会上升 6 摄氏度”表示了关注。因此，通过一个生态标准衡量，国际气候治理的“有效性”显得异常匮乏。

再者，《京都议定书》经过 1995 年至 2005 年十年间拖沓的谈判，并没有在国际运输、国际航空和海事运输的温室气体排放方面达成一致。排放分配产生的政治和方法上的困难，以及在如何适用共同但有区别的责任原则（CBDR）持久的不一致，致使迄今为止仍未达成相关结论。结果是，与附件一国家减排目标涵盖国内航空排放相反的是，“在国际层面上，国际航空排放根本没有被规制”。但是，《京都议定书》第 2.2 款想授权各方通过专门致力于该领域的 UN 机构——国际民航组织机构 (ICAO) 谈判。该条款的约束力成为欧盟航空排放交易体系中最受争议的内容之一 (参见第三部分)。尽管气候变化减缓目标已经被 ICAO 完善到了 1944 年《芝加哥公约》中的国际航空制度中，但是这些支持者的前进步伐已经“极其缓慢”，至少目前的情况是这样。但是，来自航空减排的压力与担心温室气体排放快速增长的影响已经同步。事实上，尽管 ICAO 的估算认为，在目前情况下，来自航空的温室气体排放只占全球二氧化碳排放量的 2%，最多占全球人为温室气体排放的 3%，但是随着航空业的快速发展，尤其像中国这样的新兴经济体，正面临气候变化减缓带来的挑战。

根据《京都议定书》对他们的授权，ICAO 的成员们并没有采取完全漠视的态度，2010 年秋季的第三十七届会员大会成功地通过了一项振奋人心的目标，将年均能源效率提高 2%，并使航空排放上限达到 2020 年的水平。但是，这项无力度的目标毫无疑问不够远大，无论如何都达不到欧盟 2005 年限制航空排放的目标。需要注意的是，与 2007 年巴厘路线图确立之后的后京都议定书气候谈判受阻相似，ICAO 推动全球合作以解决争端的行为不断加大国际社会分歧。然而，这个难题在航空案例中更加突出，因为航空制度不同于气候制度，它是在无歧视原则基础上建立的。

（二）在该背景下的欧盟指令

针对上文描述的多方混乱的背景，为了履行它在《京都议定书》下的承诺和实现它在全球气候行动中扮演领导角色的野心，欧盟于 2009 年通过了一项里程碑意义的“欧盟气候能源一揽子计划”。这个立法层面的突破旨在实施一个自我约束的减排目标，被称作“20−20 by 2020”，意思是温室气体排放减少 20%，可再生能源的所占比重由 8.5% 上升至 20%，在 2020 年前提高 20% 的能源效率。

在这项计划中，不论国内还是国外，欧盟排放交易计划 (ETS) 指令已经作为欧盟气候政策的奠基石出现。伴随着第一阶段（2005 年—2007 年）的评估，ETS 系统初步建立了 2003/87/EC 指令，并于 2005 年开始实施，2008 年进行的修订使 ETS 扩展到了航空领域，这早于 2009 年 4 月 23 日的

2009/29/EC“一揽子计划”。这次扩展涉及更大范围的工业部门，将“总量管制和排放交易”系统增加到1万个。根据这一指令，为了填补总量（配额允许的总量）的不足，分配给航空工业的总量为历史参考数据的97%（2012年）和95%（从2013年，历史数据是根据2004年至2006年的排放量计算得出）。但是，由于担心这项计划对工业竞争力的影响，欧洲立法者决定将总量的82%“作为规则的例外”，因此，在吨公里的数据基础上免费分配给各个航空运营者，并给2012年后进入计划或者发展太快的航空公司预留了3%，以保证他们更多的排放权。另外剩余的15%必须从成员国或者整合的欧盟碳交易市场被拍卖购买。从此，修改后的ETS指令形成了一个完整的系统和市场。

尽管如此，航空指令有一点不同于ETS一揽子计划，即适用范围。与2009/29号指令中的核心条款相反，航空排放交易系统指令并没有局限于国内航空公司或在欧盟注册的航空公司。取而代之的是，它要求所有航空公司，不管飞行的出发点或者目的地，也不管他们的国籍，只要降落或者从位于成员国领土之内的飞机场出发，均对整个航程排放的二氧化碳按照一吨一个配额进行征税。受这一指令影响的外国航空公司强调国际航空法和欧盟法中的非歧视待遇原则。之后，鉴于与共同但有区别的责任原则相悖，这受到发展中国家的质疑，尤其是中国。鉴于环境效益因素，该指令涉及欧盟国家领空中产生的二氧化碳排放被欧盟认为是理所应当的。但是，这项决定激怒了第三国的航空公司和政府，他们提出，欧盟对发生在公海与他国航空范围的行为进行规制并获取收益，这侵犯了他们的领土主权（第三部分）。

在论及此之前，我们先要了解欧盟反对方是以何种形式和角度展开的。这不仅可以明晰现阶段国际体系中单边规则实施的障碍，也能预测它对新兴全球治理系统有效性的影响。

（三）国际反应以及在欧盟和中国之间逐步升级的双边竞争

欧盟航空ETS指令遭遇到国际社会政治上彻底的反对。9月29日至30日，ICAO的26个非欧盟成员国家在印度新德里召集并发表了一项联合声明，谴责欧盟ETS在国际法下是非法的，认为欧盟指令的举措是“不可接受”的。在2011年11月1日召开的蒙特利尔大会上，该声明被大多数ICAO委员会成员正式接受，该声明“敦促欧盟及其成员国在其排放交易系统内排除在其成员国领土内机场出发或降落的非欧盟飞机”。同时，在美国政府的支持下，美国航空运输协会以及数个其他美国航空公司已经在英国法院对指令的合法性提起诉讼，欧盟法院(ECJ)对此进行了初步判决。但是，在2011年12月ECJ判决宣布ETS指令是合乎国际法的。该计划于2012年1月1日正式实施以后，2012年2月21日至22日莫斯科会议上该计划的反对者采取了更加强硬的态度。在那里，29个非欧盟的ICAO成员国发表了第二项联合声明，威胁欧盟他们将会在不同的论坛中采取法律行动，尤其是在ICAO和WTO会议上，并施加多种报复手段。

在反对这项指令的国家中，中国是最激烈的，它将这场争论上升至最高级的外交级别。正如中国航空运输协会（CATA）副秘书长蔡海波所讲，中国的应对措施是“两条腿走路”，第一条“腿”是在德国联邦法院通过法律途径宣布这项指令非法（这是处理与欧盟贸易争端中一个传统的方式，尤其是考虑到在欧盟法基础上的贸易防卫手段比如反倾销和反补贴程序）。但是，该行动的过程自ATA案件结果出来后看起来并不乐观，因为根据《芝加哥公约》以及《京都议定书》第2.2条规定，对欧盟行动的审查不应该由个人发起，虽然这项规定被猛烈抨击，但是这使得中国航空公司恐怕很难依靠《京都议定书》主张欧盟对宽泛而模糊的CBDR原则的违反。而且，中国仅仅与部分欧盟成员国达成了双边协定，这违背了与欧盟和美国之间的“开放领空协定”——最终提供该指令法律审查的基础。并且，根据ECJ的判例kadi和Interkanto的法理，成员国和第三国缔结的双边协定不

能作为审查欧盟行动的理由。无论这一判例对欧盟与国际法的相互影响产生什么弊端，它的结果是，在欧盟法院以双方协定为基础质疑欧盟指令注定失败。

面前这些困难，中国通过外交途径敦促欧盟立法方以考虑发展中国家特别需要的方式修改或者实施该指令。因为中国民用航空局（CAAC）发现参与这项计划的花费对发展中国家航空工业来说非常高，按照这个计算，2012 年给付欧盟“碳税”将会花费中国航空工业 790 百万元（124 百万美元），在 2020 年将会攀升至 37 亿元（580 百万美元）。相反，欧盟反复强调这项与 ETS 实施相关的花费将会很小，也很容易转嫁到消费者身上，从北京到布鲁塞尔的每个航程的花费大概是人民币 17.5 元。特别是考虑到该指令会“追溯”到任何一个航空公司，中国已经推动指令中具体规则的修正。的确，目前为止，欧盟已经无法让中国相信给予新航空公司 3% 的保留是足够的，也无法让中国相信中国初生但发展快速的航空服务业受这项计划的负面影响比“已经捆绑”的欧盟和美国航空公司少。另一项建议就是欧盟在实施该指令时采取不同的期限要求，给予发展中国家航空工业足够的时间去“赶上”和兼顾 CBDR 原则。最后，专家们研究了欧盟指令中所谓的“弹性条款”，如果第三国采用“等价措施”，他们就有修改条款的空间。鉴于此，其中一个可能将会是欧盟考虑中国新创设的“民航发展基金”，该基金的目的是将“民用航空的节能和排放削减”作为一项等价措施。另一个乐观的展望是中国自己 ETS 的发展。但是，后者发展仍然在初期阶段，无法期望它在短时间内涵盖航空领域。不管怎样，虽然现实中双方谈判起着重要的作用，但是根据这项指令认定什么是“等价”最终是由欧盟单方决定的。这种强制的单方解释权迫使第三国落回到对主权侵犯的申诉。

事实上，随着争端的升级，中国应对措施的“第二条腿”已经优先于“第一条腿”，即基于国家主权的维护采取强硬的外交路线，要求欧盟退一步。中国已经以带头者的身份在 ICAO 国际会议上提出，并且这种“强权政治”的手段得到了支持。比如，报道称中国政府限制价值 120 亿美元的新空客飞机进入中国航空市场作为对 ETS 的报复。更重要的是，这项外交政策的立场得到一个“禁令”的支持，该禁令在 2012 年 2 月 6 日由中国民航局颁布，内容是禁止中国航空公司参加排放交易系统和通过增加乘客的费用支付参加该系统产生的费用。因此，由中国国际航空公司领导的中国航空公司联合体拒绝在指令规定的最后期限（2012 年 6 月 16 日）前向欧盟委员会提交他们的二氧化碳排放数据，这个数据的暴露将会导致他们支付超出规定配额后每吨二氧化碳排放 100 欧元的金钱制裁，并最终被禁止在欧盟领空飞行。因此，鉴于实施计划将会导致来自中国的贸易报复，欧盟已经外交性地“拖延”该计划的最终期限，以期望在 2014 年 4 月 30 日欧盟成员国开始实施该计划前找出解决分歧的措施。

在这个背景下，2011 年 10 月 6 日，欧盟法院法律总顾问 KOKOTT 女士提出，迄今为止在国际公法中没有一个客观的规范解决这场冲突，中国航空公司以法令的实施将会侵犯他们自己国家法律为由，实现欧盟法院搁置实施该计划是不太可能的。再者，中国“禁令”的法律性质非常不清晰。尽管中国民用航空局（CAAC）声称得到了国务院的政府批文，但接下来该“禁令”并没有正式立法或者向全国人民代表大会提交报告，而 2012 年 10 月 24 日美国国会通过的“2011 欧盟排放交易计划禁止法令”已交参议院待定通过。并且，中国的“禁令”没有规定如果中国航空公司不遵守应给予何种惩罚，这就意味着欧盟法院可以优先适用欧盟法令。

但是，中国与欧盟之间的这次争端可能在中国出台第一部气候变化法律草案后落下帷幕。实际上，由中国社会科学院制订的这部草案预测，当其他国家或国际组织采取贸易保护措施或者对中国客机和船舶征收单边碳税时，中国政府“会采取对抗措施”。虽然这部草案在中国政府官方签署前没有任

何法律或者政治价值，但在未来气候变化国际合作过程中，它必将对欧盟航空 ETS 法案造成影响。

无论通过双边协定还是多边协定，基于本国是发展中国家的原则，中国对欧盟指令的反对引起了广泛的争议和质疑。因为 CBDR 原则在很大程度上造成了联合国国际框架公约和国际民航组织的僵局，因此，基于其的争论应给予高度重视。

二、从东京到芝加哥：规则的水平冲突

欧盟单边行动引发的规则冲突，使 ICAO 无法完成《京都议定书》第 2.2 条对它的授权，主要因为环境燃料税的发布和 CBDR（气候制度的两个主要手段），与《芝加哥公约》免税原则和非歧视原则相冲突。

（一）气候制度和国际航空制度中价值规范的水平冲突：气候减缓对抗燃油税

在 UNFCCC 中，各国已经尽最大可能地对应对气候变化作出承诺。根据斯特恩报告，通过市场机制“碳税”和排放交易“定碳价”已经达成广泛共识，这是最有效的气候减缓手段，因此，也最符合“可持续”气候政策的要求。另一个方面，《芝加哥公约》是在 1944 年第二次世界大战将要结束时签订的，当时并未涉及任何环境目标。尽管如此，ICAO 已经逐步在航空环境标准的发展过程中发挥越来越重要的作用，它在近期快速实现了制度化：首先是创立了航空环境保护协会，随后在 2007 年又组建了国际航空和气候变化组。再者，2010 年 10 月，ICAO 的 A37−19 号大会决议通过了限制排放的目标，再次证实它想采用以市场为基础的举措（MBMs）建立一个全球框架的野心。

尽管如此，在《芝加哥公约》下，ICAO 的主要目标仍然是国际航空的发展和自由化。这项目标被两项关键条款所支持：对影响国际航空的税收严格的限制和非歧视原则。随着对全球环境的持续关注，航空税收享受的优待已经被环境保护主义者所诟病，他们谴责这种根深蒂固的经济和工业利益。最终无疑在 ICAO 中产生一个结果，“碳定价”措施更加能够引起政府间的争议。面对不断上升的压力，ICAO 委员会于 1996 年通过了一项“环境税和定价的决议”，它勉强“标记”了一些成员对环境征税的需求，但是这项决议除了表达对非歧视原则和为维持工业的竞争性而对追求环境目标的尊重外，并未给组织成员提供实施细则。然而，这部软法决议很难给《芝加哥公约》中的第 15 条和第 24 条 (a) 款明确禁止定价的例外提供坚实的基础。从那时开始，二氧化碳排放与燃料消耗相挂钩得到公认，根据决议 A35−5 和 A36−22 传达的意思，“排放定价的构想和一国给外国航空公司定价的具体范围成为 ICAO 会议上争议的焦点”。

ICAO“排放交易计划”的地位更加不明确。决议 A35−5 和 A36−22 都将排放交易和定价分开，但是相反的是，最近的决议 A37−19 给所有以市场为基础的措施（MBMs）通过了一种单一的方法。更进一步的是，决议 A37−19 是否推翻了决议 A36−22 引发了激烈的争论，这“推动”一国不对第三国航空公司实施排放交易体系，“基于相互协议的除外”。因此，缺乏一个明确和有约束力的多边系统对航空排放进行规制，在 MBMs 和《芝加哥公约》涉税条款的关系之间势必会存在争议。由此看来，ICAO 为了在国际航空规范中保持它的领导地位，已经尽力使环境目标具体化，它还将气候减缓目标中碳定价的重要性和在国际航空领域免税特权之间的制度间矛盾内在化。

《芝加哥公约》的这些免税政策已经成为欧盟指令最严重的挑战之一。但是，在 ATA 案件中，欧洲法院驳回了美国航空公司声称航空排放交易体系是一个非法税的申诉。相反，法院支持欧盟委员会和法律总顾问的观点，即航空排放交易体系既不是税也不是定价，因此可以不受国际航空法限税的影响。但是，从工业和文化角度的争论，尤其是“通过给空中运营者施加责任去购买配额，指

令 2008/101 与税、征收、关税、定价一样对市场产生了同样的影响”，这种定义并不明确。从另一个方面来讲，是否为了环境目的的二氧化碳减排可以被允许减损《芝加哥公约》中的限税规定，法院在这场“价值辩论”中并未作出表态。

国际社会最终觉察，欧洲法院是为国内政治和工业利益服务，这个事实加强了各方的反对，而不是去寻求规则冲突的解决方案。从此，公开严厉斥责欧盟的“非法税收”成为主流。

（二）气候制度和国际航空制度之间规则的水平冲突：非歧视原则对抗共同但有区别的责任（CBDR）

不可否认，CBDR 原则是气候制度中“广义指导原则”的基石。它最著名的表述是在《京都议定书》正式的部分中，一方面，工业国家（附件一）要遵守二氧化碳减排目标，另一方面，是对发展中国家的要求（附件二）。它加强了 UNFCCC（双轨制）各方讨价还价的过程和联盟的形成，同时它也是“公平”的判断标准，因而在多方层面的制度责任谈判中被倡导。

但是，后京都议定书气候制度迂回不前的谈判揭示了该原则下责任承担的深层分歧。中国是 CBDR 原则被纳入 UNFCCC 程序以来最拥护这项原则的国家，鉴于它的重要性，国内的政府、学术界以及社会上存在很大的一致性。但是，这个概念并没有被明确解读，这就给不同的领域留有不同解释的空间，包括中国社会、学术界以及最重要的不同政府部门之间。欧盟也在气候制度中纳入了 CBDR 原则。但是，它质疑“双轨”方式，在后京都议定书领域更倾向国家之间更加灵活的分类，这遭到了中国和其他基础新兴国家持续的反对。

对于国际航空的二氧化碳排放，《京都议定书》第 2.2 条明确规定了“附件一”国家要通过 ICAO 减少他们的国际航空排放。CBDR 原则的这种“移植”与国际航空制度传统的基于国籍的非歧视性原则产生了直接冲突。因此，ICAO 承认协调这两项原则成为最大的挑战之一。

据此，包括欧盟的工业国家主张采取“制度隔离”的方式限制气候制度的 CBDR 原则。另一个方面，由中国领导的发展中国家已经重申坚持 CBDR 原则的持续有效性。这次冲突的结果在 ICAO 决议 A36−33 和 A37−19 中是显而易见的，决议涉及这两项原则的持续性，不涉及优先适用问题。但是可以说，A37−19 条款通过强调“发展中国家的特殊需要”而向有利于发展中国家“专有”的争论转移。尽管如此，这项进化不能掩盖这在目前谈判中仍然是最大争论点的事实。正如气候保护目标，CBDR 原则向国际航空制度的移植仍然不能产生制度规则目标的一个自动规范秩序。相反，它阻碍了组织的决策体系，突出了已经存在的不协调。

这场多边层面的规范冲突，加强了对欧盟航空排放交易系统指令的争论，该指令被指控违反了这两项原则。指令 2008/101 的前提是给予“所有到达或者从成员国机场出发的飞机”相同的待遇。尽管如此，这项指令根据航程长短计算配额的方法已经被指责为它具有歧视性的影响。这场争论可以在 WTO 指导下找到行动方式。

但是，这场争论更重要的是中国和印度代表发展中国家对指令违反 CBDR 原则的指控。他们声称给发展中国家和发达国家航空公司施加相同的责任，指令 2008/101 没有认识到欧盟在《京都议定书》下要承担“应对气候变化的带头作用”；没有“承认发达国家航空工业历史上是温室气体排放的罪魁祸首”，此外给飞机制造和技术均落后的发展中国家航空工业施加不公平的负担。但是，对欧盟来说，指令将适用范围限制在发达国家航空器会导致违反非歧视原则。另外，欧盟委员会暗示 CBDR 原则与欧盟指令没有关联，因为 CBDR 原则仅仅适用于国家之间，而指令 2008/101 主要针对本国市场参与者。间接地，如果置于 ICAO 背景下看，这可能意味着作为全球体系的 ICAO 在涉

及 MBMs 解决方案时，仅仅后者被考虑在内，而对于 CBDR 的关注会采取其他方式（比如经济支持和技术转让条款或者确定国家排放上限）。显然，这种立场并不被大多数发展中国家所支持，尤其是中国。此外，Rajamani 和 Scott 已经提出了一个有说服力的反击主张来区分，一方面，发展中国家可以从 CBDR 中获得利益，另外，另一方面，发展中国家航空将会被放在与发达国家航空相同的地位，是人为和过分地限制它适用的范围。

欧盟法令需要同时遵守非歧视原则和 CBDR 原则，它就不得不触及自己的“平衡”去容纳它们。实际上，欧盟认为指令 2008/101 是与 CBDR 原则相协调的。首先，欧盟委员会认为，为解决航空排放而采取的第一步行动，欧盟指令 2008/101 是欧盟在对抗气候变化中“起带头作用”的表现。其次，虽然该计划自身是非歧视性的，但是发展中国家主张的不同待遇会在指令的影响中发生，一是通过它的“小额补贴规定”，事实上将很大一部分发展中国家排除在航空排放交易系统范围外；二是因为它“税务执行费用将会自然地产生于附件一运营者，因为他们普遍在航线覆盖上占有更高的市场份额”。尽管这些发现的精确性值得推敲，它意味着“偶然的不同影响的证据不足以证明与 CBDR 原则的一致性”。更进一步的是，欧盟航空排放交易系统指令的“弹性条款”使得 ETS 的修正依赖于第三国“采取至少与该指令相对等的有环境影响的措施”，这意味着发展中国家和发达国家要以与 CBDR 原则“不协调”的方式进行相同的努力。另外，欧盟指令单方地在 CBDR 原则和非歧视原则之间作出了适当平衡的主观决定。

（三）制度间的规则分裂和单方决定的空间

在专门和相对自主制度中出现的“国际法的分裂”现象已经在各类文献中被广泛讨论，出于对它影响国际体系稳定的担心，2002 年，联合国国际法委员会专门建立了一个特殊研究小组。在这个领域里，一个重要的问题是围绕怎样解决这些“单个决定、规则冲突、学说不一致和不同法律原则的冲突之间的矛盾”。法律研究已经确定了两种解决规则冲突的传统方法。一方面，“规则冲突”规范，通常被应用于法律体系的等级规范（传统等级规范多存在于国内宪法）；另一方面，“法律冲突”的国际私法规则在法律体系碰撞中决定可适用的法律。法律学说，倾向于将国际法看作一个整合的体系，倾向于给所有规则冲突在国际层面上寻找等级解决方法。但是，最近的学术讨论受国际关系的系统无秩序理论影响，已经“还原”这个努力为“重建民族——国家法律等级的理想”，但它没有指出内部制度规范冲突的政治根源，这以政策多元化和政策制定者多元化为基础。Michaels 和 Joost 建议“法律冲突”规范的逻辑可以被更好地适用于解决专门条约制度的冲突，即使它需要被更多地应用到制度之间而不是国家之间的背景下。有趣的是，这些作者已经暗示那些功能性的、机构性的和程序性的连接因素会被解决，这是指向国际法的一个分支而不是其他。

但是，这个讨论的范围仍然没有扩展到分析水平规范冲突对制度成员的影响，这需要他们同时遵守这两者（纵向）。这方面为什么被忽略？推测是国家最终会为他们签订的不同国际责任的一致性负责。但是，这并不能解决在领土范围外存在和产生影响的冲突。

这实际上是被欧盟航空排放交易系统争论揭示的纵向冲突。该案例不仅仅是在气候变化领域引发了两种制度之间的规则冲突，它还证明 ICAO 整合气候制度“国外”规则的努力未达到自动规制的程度，反而更突出了它们的不相容。由来已久的决策制定僵局的出现意味着，实际上，擅自对规范等级高低进行排序的做法是自以为是的。此外，尽管《京都议定书》第 2.2 条包含着两种制度之间的惯有联系是值得肯定的，但是它还是不能给如何调解各制度的规制冲突指明方向。

欧盟航空排放交易体系是第一个表现出在全球背景下多方法律规则冲突的政治后果的鲜明实例，

包括纵向的（国内和区域对抗全球）以及横向的（制度之间）。欧盟在国际航空领域的单方行为相当于在制度之间施加它自己的“平衡行为”，一方面倾向于将环境目标凌驾于国际航空自由之上，另一方面，将非歧视性原则凌驾于 CBDR 原则之上。最终，欧盟在其领土范围内作出该决定是固有主权的表现，第三国无法干预，如同 Kokott 女士在 ATA 案件中强调的一样。实际上，如果欧盟将指令应用到它自己的国内航空业，它将可能赢得国际社会的赞许，以上争议就不会出现。相反，指令适用于国外航空和国际排放，这将欧盟国内立法演变为一个具有挑衅性和非法性的单边国际行为。

三、程序缺陷，欧盟航空ETS指令合法性的真正障碍：过程合法和多边主义

令国际社会不满的是欧盟忽视第三世界国家主权的观点。这个观点包含两方面内容：一是该指令在领土外的适用；二是在 ICAO 框架下它取代了多方谈判。

（一）对指令2008/101规定的领土范围外的法律争议

欧盟指令中的境外适用被认为是非法的和不能接受的，这是 ATA 案件里最有政治性的争端。尽管它的反对者认为欧盟已经超出了国际法管辖权的范围，但是 Kokott 女士支持欧盟的主张，她指出反对者的判断是没有事实依据的，并且建立在“对指令错误和极肤浅的解读”的基础之上。她认为指令没有对欧盟领土以外的行为进行限制，因为它只是侧重于在欧盟机场到达和出发的航空器，这受欧盟领土管辖权的规制，而对发生在欧盟领土管辖权范围外的整个航程的排放仅仅是“纳入考虑”，并没有强加一个“具体的”领土范围外的行为规范。法院的判决大体上反映了这个论断，侧重于给予欧盟在其领土范围对航空器“无限制管辖”的权利，并用一个生硬的声明“是否污染（这里指温室气体排放）发生于欧盟但部分发生在领土范围外的排放 ”不能用来质疑欧盟法的适用，以此来扫清与发生在欧盟领土外的排放相关的争议。

Havel 和 Mulligan 公开指责这些结论，指出这是个逻辑谬误，即用法律推理与欧盟领土仅仅进行自然接触的飞机证明欧盟法律无限制管辖的合理性。他们指出，虽然没有臆断，但是法院解释的观点和判决应用了“效果理论”；这是产生于美国反托拉斯法背景下关于领土管辖争论的一项原则，根据是“一个国家对于其领土范围外已经或者将要对其领土产生实质影响的行为拥有管辖权”。Eckhard Pache 也预计航空 ETS 指令实际上“象征着对第三国根本的不确定的干涉”，但是基于“从国际航班产生的温室气体排放对气候变化的影响和气候变化反过来对欧盟领土产生影响”的事实，仍然被“效果理论”证明其合法性。这场争论反映了欧盟委员会对二氧化碳排放的关注，Kokott 女士也认可该指令有扩展适用的正当性。

再者，一些有境外影响的国家立法已经成为很常见的实践。与近期争论相关，在环境保护管辖范围的案件是“规范市场力量的监管引入的单方环境标准”直接影响了在市场上想卖给他们商品或者提供服务的国外生产者，这个现象被称作“跨国环境法”。关于这种情况，有一个著名的先例是 WTO 争端解决机制上诉机构裁决的“美国虾”案，该案最终支持了美国根据水产法（捕虾时没有使用防止海龟入网的装置）施加给进口虾产品的禁令，这影响到了东南亚的渔业。上诉机构认为美国领水和迁徙的海龟之间的联系足以使美国拥有管辖权。因此，鉴于空气和气候无边界的性质，建议参考这个案件，支持欧盟管辖权的扩展。

根据对管辖权创新的应用，境外法律对主权的侵犯仅仅发生在它们对国际关系的稳定造成影响的情况下，尤其是它们无理由地侵犯其他国家主权实现自己的目的。这也是 Kokott 女士提出的方

法，她认为该指令没有侵犯其他国家的主权，因为它没有阻止这些国家通过自己的气候变化法。自此，这种方法有了一些价值，因为它考虑到全球化国际体系愈加互相依赖。

但是，这种对主权灵活界定的方式的争论远远没有停止。它被新兴力量比如中国强烈地反对，也遭受到对本国主权保护持更加保守观点的美国的反对。比如，Havel 和 Macmullan 认为："Kokott 女士从未考虑过这种可能性，即一国领空专属主权包括本国自己的航空器飞越领空或公海是否收到排放规定的限制。"此外，在一个应用广泛且自主决定的"有效"管辖权下，法律冲突危险更加突出，特别是在范围宽广且存在分歧的气候变化领域。由此看来，Havel 和 Mulligan 认为："效果理论的推广使用……对环境法产生的广泛影响，这令环保人士兴奋，却令商界惊恐。"

在这些争论的曙光下，欧洲法院的判决还没有充分地缓和紧张局势和解决事端。相反，第三国已经声称考虑将这个争论带到其他论坛中，比如 ICAO 委员会或者 WTO 争端解决机制。如果这些论坛产生分歧性的解释和结果，这将给国际体系的和谐带来更加复杂的局面。

（二）在ICAO框架外与欧盟行动相关的主权侵犯

主权侵犯的主张没有因为法外治权而停止。欧盟单边行为也因为忽视《京都议定书》第 2.2 条对 ICAO 的授权被谴责。实际上，该条款规定"发达国家应该实现温室气体的限制或削减……分别通过 ICAO 和 IMO 来实现"，该条款引发了激烈讨论，即是否它仅仅表达了对多边主义的倾向，抑或是施加给欧盟禁止采取单边行动的义务。在 ATA 案件中，尽管欧盟法院否决了这项主张，但是 Kokott 女士认为这项条款没有赋予 ICAO 专有的限制国际航空温室气体排放的权利，也没有使欧盟承担等待多边协议出台的消极义务。她坚持认为这种解释与 UNFCCC 和《京都议定书》的目标是相悖的，并且"欧盟没有理由需要给予 ICAO 无限期时间以产生一个多边解决方案"。尽管《京都议定书》第 2.2 条没有限制成员国采取单边行动应对航空减排，但是这并不意味着给 ICAO 成员国的航空排放单边行动开"绿灯"。这项解释与 ICAO 的两项决议 A36−22 和 A37−19 都对 MBMs 的单边实施采取了勉强的态度。鉴于此，尽管一国可能认为承担航空排放多边协议义务导致主权受损是合理的，但这不意味着他们同意被他国的单边行动所管制。因此，针对 Kokott 女士主张的"欧盟没有理由去等待一个多边解决方案"，本文作者认为，如果未达成全球协议，其他 ICAO 成员们不能被要求去接受自己的航空排放被外国管辖权规制的后果。

当然，"政治需要不是唯一被授权的途径"，实际上，一方面，ICAO 决议大都是没有法律约束力超出"软法"的政治文件，另一方面，所有欧盟成员国对这些声明均持保留态度，在其领土范围内保留制定和适用 MBMs 的权利。总体上，欧盟 ETS 指令看起来是利用了国际法中缺少"勿实施单边行动"的严格消极义务的规定。

从这个立场看，我们可以转回到上面所援引的争论，这个案例的教训或许是，国际背景下独立国家间的合作是基于政治因素的妥协达成的，即"不被严格禁止的行为，并不是必然合法和有实施性的"。

（三）对航空指令程序合法性反对意见的政治分析

通过法律原则解释的分歧，理解对欧盟指令激烈反对的根源，使得挖掘指令出台的政治背景成为必要。不进行"强权政治"的争论，通常认为政治制度由来已久的基础是"参与者的集中围饶着的规则和秩序"。可以认为，《京都议定书》第 2.2 条表达的"软法"手段和 ICAO 集会决议包含的来自这些制度成员的预期行为指向一个多方规则制定程序。结果是，基于我的理解，对欧盟航空指令激烈的反对主要起因于它的挑衅性质，这违背了国际社会其他成员的期望。实际上，除了治外法权，欧盟航空指令毫无争议地铸造了一个国际气氛。首先，指令的序言列举了欧盟在 UNFCCC 下的努

力和对ICAO多边谈判不令人满意的结果作为它出台法令的合理性。其次，我们在前面所述，指令的适用在外国管辖权内产生作用。很明显，该立法是对以往国际社会在该领域规制失败的挑衅。再次，如前所述，从基于市场竞争力和碳排放引起的环境影响的考虑，指令适用于国外飞机是明确合理的。同时也产生了对指令广泛的争议，那就是碳排放引起的环境影响发生在更为广阔的国际空间环境。如上所述的这三个方面展现了欧盟蓄意性的单方法律行为。这项政策选择与欧盟采用的倾向性的解决方法相适应，该方法由欧盟的“有效多边主义”解释得出。鉴于此，已知的是欧盟已经重复宣称它偏向于多边解决方式，这与它将自己视作标准象征的国际主导者相一致。这个倾向性已经在航空排放交易指令背景下被明显加重，一方面，以ICAO出台新法律的失败作为其合法理由，也预示了它在多边协议达成的大事上的修正。另一方面，这不禁让人感觉欧盟单边行动在某种程度上显示了给国际社会带来的“强权”政治压力。因此，欧盟行动可以通过多极化视角解释，鉴于欧盟“试图利用它的市场权力促进气候行动和取代别国气候行动的不作为”。这种观点经常见诸于国外媒体的指责，即欧盟试图建立一个通过单方行为致他方损害而获益的标准，以此来弥补自己国际权力的丧失。

尽管这些指责是有价值的，但是合法性是否来自对程序的审查尚存争议。“很明显的是，对于一个国家来说做一个影响整个全球的决定是不正确的”，更进一步的可能是，这种决定的目的是减缓多边规则制定程序的出台。因此，对欧盟排放交易体系的强烈反对，可以与一国为了达到政治诉求而践行领导角色相关而得出分析结果。

综上所述，中国的反应说明，反对实际上是担心这种模式将来会扩展到其他领域，“如果欧盟这个单边计划侥幸成功，如何制止欧盟给欧盟以外的其他国家施加各种各样的新‘节能收费’”。反对因欧盟委员会针对欧盟ETS列入船用燃料进行磋商的事实而加剧，这与航空排放交易系统有相似的背景。

四、总结性评论：回到多边主义，欧盟航空指令危机是制度变更的催化剂吗？

由欧盟航空ETS指令的出台引发的国际争论已经证实规则在国际政治中的重要性，尤其是它们在全球治理的有效多边框架发展中起到了重要的作用。特别是该案例已经揭示为了实现某种规则和政治目标以及遵守不同的原则而建立在不同时间的不同制度很难自动协调。协调一致只能来源于政治选择。在这些制度的政治元素中出现不一致，规则冲突就会很容易阻碍合作目标的实现。在ICAO和UNFCCC之间不明确的水平较量给这种冲突一个很好的解释。鉴于此，“法律制度”和“政治制度”之间的关系需要学术研究更密切的关注，以使跨制度“规则冲突”和制度停滞现象之间的联系可以被更好地理解。

这个案例另一个重要的启发是，在这个背景下，单边施加的脱离多边框架却涉及其他制度成员背弃他们自己信念的另类路线，是不可能被相关国家照单全收的。实际上，尽管欧盟声称航空ETS指令的出台是“遵守2004年ICAO批准的方式而产生的”，这种推定很明显忽略了决议A35−5表达的仅仅是指在构建MBMs全球体系时国际社会出现不一致的情况下的事实。欧盟法院的决定仍然没有平息对欧洲行动非法性的争议，这是因为由ATA案件引发的问题涉及不同规则的平衡问题，这项政治决定注定会引发争议，尤其是因为欧盟气候和能源政策的支柱，以及“它试图在国际气候变化谈判中取得领导地位”的重要因素均处于成败的关键。

当中国明确不遵守欧盟法令，此外经济报复暗含的“贸易战争”在欧盟践行“领导示范”情况

下扫清了政治界限，这使得今年春天出现了政治僵局。尤其当不断增加的新生力量发现这不符合他们的利益时对强加规则的抵制，这令欧盟的推行道路越来越艰难。鉴于欧盟指令被称为“一个阻止真正进步的极端障碍”，欧盟单方行动而不是“有效多边主义”看起来是在践行“负面领导”。尽管欧盟与中国双边合作和中国要出台自己的国际 ETS 的努力不可能受此影响，因为他们的发展主要依靠国家发展与改革委员会自己对价值的评估，但是政治对话可能会受影响，并扩展影响到商业领域。出现问题的仍然是双边争端妨碍了 ICAO 和 UNFCCC 正在进行的谈判的事实。再者，尽管 ICAO 的主席 Roberto Kobeh Gonzalez 称对欧盟 ETS 的双边争论不在 ICAO 上被讨论，但是据 7 月份一个中国官员报道称“中国政府认为双边渠道并不是一个可被接受的方式”。因此，基于中国和其他强大国家的大力支持，ICAO 和大部分航空公司也许会倾向去打集合牌达到该指令完全废止，从而取代欧盟相对“均等”的让步。

但是，ICAO 最近的动向已经趋向于缓和这种停滞不前的状况，已经指出一条可能解决政治危机的多边路线。基于《蒙特利尔条约》关于臭氧耗竭成功先例的基础上，制度构建和制度变更理论已经提上日程，那就是发生在广阔的社会经济或政治环境的外部“危机”会成为集合行动的催化剂。鉴于此，在气候变化长期并加重的环境影响并没有产生必需压力的情况下，欧盟航空 ETS 推动的政治危机可能会间接地为达到欧盟的多边目标做出贡献。实际上有争议的是，一方面，僵局的产生是欧盟在国际压力下“不倒塌”的信念并坚持到 2013 年 4 月 30 日的截止日期以收缴航空配额费用，另一方面，不健康的规则竞争威胁和破坏性贸易报复看起来为 ICAO 多边谈判提供了新的契机。因此，自 2011 年秋季《新德里宣言》以后，以 ICAO 主席 Roberto Kobeh Gonzalez 创造的 MBMs（以市场为基础的措施）为研究对象的特设工作组已经取得了很大的成绩。之前为全球 MBMs 系统提交的 6 个选择中，2012 年 3 月 ICAO 委员会已经通过了 4 个，并且在 2012 年 6 月的一个简要报告后被进一步减少至 3 个。这三个选择为：(1) 全球强制性补偿；(2) 由一个税收产生机制补充的全球强制性补偿；(3) 被所有涉及该争端的参与者全力研究的全球排放交易（总量管制与排放交易），包括中国，虽然它现在还不是特设工作组的一部分。工作组将会在 2012 年冬季产生最终报告。此外，由美国交通部在 2012 年 7 月 31 日主持的“不情愿联盟”的近期峰会，至 2012 年 8 月 1 日仍然没有达成结果，正如新德里和莫斯科的先例，会议是在集体抨击欧盟排放交易体系和进行报复行动威胁。相反，报道称讨论集中于寻找一个可选择的全球计划代替欧盟排放交易体系。

当然，由于我们强调的规则冲突还没有被解决，并且这一冲突支撑着 MBMs 系统模型精确设计的一系列技术性讨论，因此得出一个草率的结论是不合理的。再者，欧盟截止期限强加的时间压力并未受到所有参与者的支持，这将以后的事情置于持续的外交危险边缘。但不管结果如何，这的确是个很好的实践，既进一步改善了欧盟特有的外交政策执行者身份，又限制了它致力于单方建立多边主义和“基于规则”国际秩序的努力。

（责任编辑 朱 芸）

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

By Coraline Goron, PhD Student, ULB, Brussels, August 2012

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 endeavor 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

[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.

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.

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

〔2〕 Havel, Bryan F, Mulligan, John Q, "The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the Europe an 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).

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 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 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

[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] "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).

puts undue limitations 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 international opposition to EU's endeavor 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 proactive 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

〔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.

〔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.

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 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

〔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.

〔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

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 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

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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 ow n special song, even if nobody else sings along: International Aviation Emissions and the EU Emissions Tra ding 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.

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

〔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

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 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 endeavor 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

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CCS.

〔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 fulfil 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",

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 1stJanuary 2012, 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〕

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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.

〔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

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 invalidity 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, 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

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 Dilemma 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

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 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)

Note".

〔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 "The Chinese government bans domestic airlines from participating in the E U 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.

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 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

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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.

〔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

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 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

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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.

〔64〕 Havel, Bryan F, Mulligan, John Q, Loc Cit, p.27.

〔65〕 ICAO Council "Resolution on Environmental Charges and Taxes", adopted at the 16thmeeting of its

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 Resolution 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.

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

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.

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

〔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.

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 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

〔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.

〔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

regime has not resulted in an automatic re- ordering of the regime's normative goals. On thecontrary, it emphasized heir 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 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).

"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.

〔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.

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 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

[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, pp.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.

[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

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 presumption that States are the ultimate responsible for ensuring consistency among the different international obligations they contract. Yet, this

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.

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.

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〔102〕 Ibid, p.1003.

〔103〕 Michaels, Ralf, Pauwelyn, Joost, *Loc cit*, p.28.

〔104〕 Judgment case C-366/10, paragraph 124.

〔105〕 Judgment case C-366/10, paragraph 129.

〔106〕 Havel, Bryan F, Mulligan, John Q, *Loc Cit*, p.19.

〔107〕 See Restatement 3rd of Foreign Relations Law, US ss 402-403.

〔108〕 Pache Eckhard, "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

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 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

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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.

〔113〕 Pache Eckhard, *op cit*, p.75.

〔114〕 See Ryngaert's concept of "Jurisdictional Reasonableness", in Ryngaert, Cedric, "Jurisdiction in International Law", Oxford University Press, Oxford, 2008.

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 recevabilite 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 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

〔115〕 Kokott, Juliane, Opinion, paragraphs 157-159.

〔116〕 Havel, Bryan F, Mulligan, John Q, *Loc Cit*, p.22.

solution”, it can be replied that other ICAO members cannot 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 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

〔117〕 Ibid.

〔118〕 Kokott, Juliane, Opinion, paragraph 174-188.

〔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 Variab

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

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les." *International Organization* 36/2 (Spring).

〔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.

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 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 catalyser 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

〔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 to Make Good Use its Strategy: the EU to Suspend Part of the Carbon Tax Scheme", 12 February 2012.

〔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.

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 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.

〔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.

〔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*.

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 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.

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〔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.

〔147〕 "What to expect from D.C Meeting on EU ETS", July 30, 2012.

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.

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 th e 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, "The Chinese Government bans Domestic Airlines from participating in the EU Emissions Trading System", Communication by CAAC, 2, June

〔148〕 Higgott, Richard, LocCit, p.21.

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 CJ 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 ResearchPaper 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.

O berthür, 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.

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 Dilema 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.

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ABSTRACTS

Wang Ping & An Wenxia／China University of Political Science and Law.

Abstract: The concept of evidence-based correction is deprived from evidence-based medicine and make progress in evidence-based practice. It emphasizes that the basis of correction is to acquire the optimum evidences through criminogenic needs. Evidence-based corrections adopted by US, UK and other western countries focus on the effectiveness of the correction programs. They evaluate the positive and negative values through a variety of empirical methods. As a new form of corrections, evidence-based corrections are not only the innovation of correctional methods, but also promoting the transformation of correctional concept. The effect of the linkage of prison and community corrections and the advocation of diversified and lenient correction methods are the sublations of traditional correction mode which are characterized as simplification, centralization and sternness.

Sun Jiahong／ doctor of law, assistant researcher of Law Institute, Chinese Academy of Social Science.

Abstract: The thought of 'Harmony between Man and Nature' has long and deep effect on the progress of Chinese traditional legal system, which significantly marks the Chinese law with its typical characteristics. Moreover, a particular death penalty term, Jianhou Death Penalty (death penalty detained in imprisonment) was written and labeled in the dynastic Code of Ming and Qing as the legislation of "Qiu Dong Xingxing" (execution in autumn) came to its maturity. In the judicial practice, the judiciary was guided not only by but also beyond the codified law to achieve a higher substantive justice for better social governance. Such a special and ancient legal thought and practice stopped abruptly along with the collapse of autocratic monarchy in late Qing. It indicates that an important vein of Chinese traditional law formally vanished from the stage of history.

Ma Chengyuan／Doctor of law, professor, Center of Cooperative Innovation for Judicial Civilization (CCIJC), China University of Political Science and Law, Jinlin University, Wuhan University.

Abstract: Universal jurisdiction is one form of the state criminal jurisdiction. The diversity of its definition is due to scholars' disagreement on its significance which is further generalized and discussed in this paper. After analyzing the provisions of international conventions and domestic law and scholars' perspectives, this paper divides universal jurisdiction into three categories according to its legal origins: the one based on common international law, the one on international conventions and the one on domestic law. Each of them has its own definition, characteristics and scope of application. Generally speaking, universal jurisdiction refers to the right of having jurisdiction over the foreigners in foreign territories by a state in accordance with the agency clauses of international law and domestic criminal law. It is not for a crime committed by the nationals in their own countries.

Coraline Goron, trans. by Dong Xuemin／PhD Student, ULB; Graduate Student of China University of Political Science and Law.

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 endeavor 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.

Wang Guangbin/ doctor of law, associate professor of Social Law Institute, School of Civil, Commercial and Economic Law, China University of Political Science and Law.

Abstract: Key words build and explain the basic categories of subjects. The key words of social law includes society, individual standard and society standard, socialization, public law and private law, labor and labor law, social security and etc.. Correct understanding of the key words determines the correct understanding of social law. But the key words can properly interpret social law only based on the proper mastery of the fundamental concepts of human society such as independence, equality, freedom and liberty.

Zhou Changling/doctor of law, associate professor, School of Civil, Commercial and Economic Law, China University of Political Science and Law.

Abstract: With human society development and especially the biological technology development, the issue of new plant varieties development and protection has become a concern and a focus by global society. In the selection of ways of protecting new plants varieties, we need to consider not only the incentive goal of new plants varieties research and development, but also the development level of relative biological technology in China, and especially the adverse effect on ecological environment and biodiversity. This paper points out that on the request of ecology of patent law China should not enact patent protection for new plants varieties but insist on the protection through granting breeders' rights in new varieties.

Hou Jiaru/ Associate Professor, China University of Political Science and Law.

Abstract: Current theory in fundamental principles of civil law was mainly developed by professor Xu Guodong in his book, *Interpretation of Fundamental Principles of Civil Law*, which holds that fundamental principles of civil law only include the principle of good faith and the principle of public order and good custom, and the two principles' basic function is to enlarge the right of discretion for the court to overcome the limits of codified law. After a deep reflection on the theory and systematic analysis of Xu's book, this article points out that the current theory breaches the basic idea of party autonomy of civil law and has misled the legal practices. The issue of fundamental principles of civil law is that of how to construct civil law system and civil law theory, and it needs to be re-established in China's unique context.