Extraterritorial Application of EU Environmental Law – Implications of the ECJ’s Judgment in Air Transport Association of America.

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Introduction

Climate change has become one of the most hotly discussed topics in the fields of science, politics, and law. For lawyers, the problem of the changing climate poses particular difficulties due to its scientific nature and global dimension. As a result, preserving environmental equilibrium requires joint efforts on the international level and the involvement of major players. However, previous attempts to adopt multilateral measures, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change, have failed. The European Union (EU) has remained the only significant jurisdiction that has stuck to its commitments under the Kyoto Protocol, having established the Emissions Trading Scheme (ETS). In 2012, the EU made the airline industry part of this scheme. The ETS’s cap and trade system covered foreign airlines flying to the EU, which did not sit well with the foreign airline industry. Consequently, the industry called upon the European Court of Justice

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1 The views and opinions expressed in this article are strictly personal and should not be attributed to any entity with which the author is affiliated.
2 HELMUT BREITMEIER ET AL., ANALYZING INTERNATIONAL ENVIRONMENTAL REGIMES: FROM CASE STUDY TO DATABASE 104 (2006).
(ECJ) to rule on the legality of the scheme. Among other matters, the ECJ had to rule on the EU’s jurisdiction to regulate the emission of greenhouse gases (GHG) over a foreign territory. The ECJ’s approach to the question of extraterritoriality in the context of the ETS Directive is thus worth noting. It may have far-reaching implications for extraterritorial application of EU environmental laws in the future.

1. Conceptual Framework of Extraterritorial Jurisdiction

Extraterritoriality is characterized by the application of national provisions to events occurring outside a state’s territory. However, to regulate the legal situation of a given person, object, or event, there must exist sufficient linkage with the jurisdiction. The existence of that connection can be established in accordance with different principles: objective territoriality, effects doctrine, nationality, passive nationality, universal jurisdiction, and the protective principle. Admittedly, it is for the state to determine the extent to which domestic laws should apply to facts occurring abroad. This conclusion follows from the case law of the Permanent Court of International Justice (PCIJ), which held in *Lotus* that, with respect to “the application of laws and the jurisdiction of their courts to persons, property and acts outside their territory,” international law leaves states “a wide measure of discretion.” Since then,
extraterritorial jurisdiction has been exercised in various areas of law, most notably antitrust,\textsuperscript{11} securities law, and criminal law in general.\textsuperscript{12} Due to its cross-border nature, environmental legislation is likely to become a frequent subject of extraterritorial application.\textsuperscript{13} In this light, the extraterritorial reach of the ETS Directive should not be seen as something special.\textsuperscript{14}

2. The ETS Directive and the Judgment of the ECJ

The Drafters of the ETS Directive were aware that applying the Emission Trading Scheme only to EU airlines would disadvantage them \textit{vis à vis} foreign competitors. Therefore, in order to provide a level playing field, the directive was made equally applicable to all airlines flying to the EU airports from abroad.\textsuperscript{15} Accordingly, the emission allowances were calculated for the duration of the whole flight, including non-EU territories.\textsuperscript{16} One of the arguments raised against that approach was its incompatibility with international customary law. Specifically, argued US-based airlines, the EU had violated international law by extending its jurisdiction over the high seas, as well as encroaching on other countries’ sovereignty. The ECJ dismissed that argument on the grounds that the ETS Directive did not regulate conduct beyond Member States’ territories. Instead, it held that the legislation constituted a regulation of air transport, applicable upon landing in one of the EU airports.\textsuperscript{17} Consequently, for the ECJ, the EU, 

\begin{footnotesize}
\textsuperscript{14} On extraterritorial jurisdiction of the EU in general, see Michel Bazex, \textit{L’Affirmation de Compétence Extraterritoriale des Communautés Européennes} in \textit{L’APPLICATION EXTRATERRITORIALE DU DROIT ÉCONOMIQUE} 51-66 (Michel Bazex et al. eds., 1986).
\textsuperscript{15} Recital 16 of the ETS Directive.
\textsuperscript{16} Id.
\textsuperscript{17} See \textit{Air Transport}, supra note 6, ¶¶ 124-125.
\end{footnotesize}
having based its jurisdiction on the principle of territoriality, did not contravene principles of international law.\textsuperscript{18}

3. Extraterritorial Application of the ETS Scheme

The ruling of the ECJ is somewhat confusing, as it seems to conflate the test for extraterritorial application of national regulation with the assessment of its compatibility with international law. For the Advocate General, the existence of a link between the conduct and the territory of an EU Member State solves the problem of extraterritoriality.\textsuperscript{19} However, a sufficient link between the relevant fact and the jurisdiction is required to assert jurisdiction at all. That jurisdiction may still have an extraterritorial character, if it relates to events occurring beyond a country’s territory. This is the case with regard to foreign airlines flying to the EU. Landing in an EU airport provides the necessary link to apply the ETS Directive to the part of the flight that took place outside of the Member State’s territory. Accordingly, pursuant to the theory of objective territoriality, the EU may regulate acts that partially occur beyond the territory of its Member States.\textsuperscript{20}

More interestingly, the ECJ backs up its findings by referring to the trans-boundary character of air pollution.\textsuperscript{21} The Court thus appears to apply the effects test. This controversial doctrine allows extraterritorial application of domestic laws if a given conduct produces effects on the

\textsuperscript{18} \textit{Id.} For more comprehensive reasoning in that regard, see opinion of Advocate General Juliane Kokott delivered in \textit{Air Transport Association of America and Others} ¶ 150-155.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} See Lewis, \textit{supra} note 9.

\textsuperscript{21} See \textit{Air Transport, supra} note 6, ¶ 129: “[T]he fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question […] the full applicability of European Union law in that territory.”
state’s territory.\textsuperscript{22} Even in the field of antitrust law, to which the ECJ refers by citing the landmark ruling in \textit{Woodpulp},\textsuperscript{23} the effects test has not been expressly endorsed in EU jurisprudence.\textsuperscript{24} Yet, given the global dimension of GHG emissions, basing jurisdiction on its effects could have broad implications. Arguably, following the ECJ’s approach may justify the application of EU environmental laws to products and services shipped to Europe. This might strike some as a manifestation of the EU’s environmental imperialism.\textsuperscript{25}

4. Compatibility of the ETS Directive with Customary International Law

Assuming jurisdiction over events occurring abroad does not necessarily deserve criticism. It should be condemned only if it exceeds the boundaries drawn by (1) national or (2) international law. (1) Domestic limits on extraterritorial jurisdiction may follow from national legislation or jurisprudence. Such principles may have a constitutional nature, e.g. due process,\textsuperscript{26} or be dictated by reasons of international comity.\textsuperscript{27} (2) In addition, the extraterritorial application of legal provisions may be limited by international law. In that regard, the PCIJ held in \textit{Lotus} that customary international law did not contain a general prohibition on extending jurisdiction beyond a state’s territory.\textsuperscript{28}


\textsuperscript{23} See \textit{Woodpulp}, supra note 11.

\textsuperscript{24} In \textit{Woodpulp}, the ECJ took a slightly different line, pointing out that conduct by non-EU companies was implemented in the internal market. See \textit{Woodpulp}, ¶¶ 14-18. The only proposition to apply the effects doctrine in the field of antitrust came from Advocate General Mayras, but was ultimately not followed by the ECJ. See \textit{ICI}, supra note 11 for Opinion of Advocate General Henri Mayras.

\textsuperscript{25} Jon M. Truby, \textit{Towards Overcoming the Conflict Between Environmental Tax Leakage and Border Tax Adjustment Concessions for Developing Countries}, 12 \textit{VT. J. ENVTL. L.} 149, 162.


Court of Justice tried to trim the expansive rule announced by its predecessor in *Lotus*, the core of PICJ’s *dictum* is still valid. The permissibility of an extraterritorial application needs to be assessed in light of the existing conventional framework, as well as prevailing custom. Consequently, the ECJ should not only have checked if norms of international law prohibit extraterritorial application of the ETS Directive, but also whether the Directive respected other countries’ sovereignty over their airspace. In that regard, the Court would need to look at the relevant legal framework, including the Chicago Convention or the Kyoto Protocol. Even if these instruments are not directly binding on the EU, or cannot be invoked by individuals, they reflect customary international law that draws boundaries around the EU’s jurisdiction. In addition, the ECJ could consider and compare developments in similar fields, such as regulation of GHG emissions in maritime transport. Some authors argue that legislation such as the ETS Directive may be compatible with international law insofar as it aims to protect a common good that is recognized by international agreement or custom. The global climate can be regarded as such a common good protected, *inter alia*, under the Kyoto Protocol. Likewise, extraterritorial application of the ETS does not seem to be precluded by the soft formulation of Principle 12 of the Rio Declaration on Environment and

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33 *Id.*
Development, which disfavors unilateral measures as a means to protect the natural environment.\textsuperscript{34}

Conclusion

When adding the foreign airline industry to the Emissions Trading Scheme, the European Commission intelligently emphasized the territorial nature of the regulation. However, that maneuver should not allow the Commission to ignore the international law aspects of the regulation, in particular its extraterritorial aspects. Attention should be paid to existing conventional and customary norms when analyzing the compatibility of the ETS Directive with international law. The degree of interference with other countries’ sovereign rights is another important consideration. In view of the scarce regulation in the field and the relatively limited impact on other countries’ sovereignty, it is likely that the ETS Directive is compatible with the principles of international law. Nevertheless, it is the task of the ECJ to take up and rule on this issue.