CHAPTER 4

The EU Emission Trading Scheme as Applied to Aviation: Extraterritorial Measure Justified under GATT Article XX

Daniela Gómez-Altamirano

1 Introduction

In response to environmental concerns and due to the absence of any effective international agreement, countries have unilaterally undertaken climate change policies. An example of a unilateral policy measure is the Emission Trading Scheme (ETS) developed by the European Union in light of its obligations under the Kyoto Protocol.2

Under its ETS, the EU has developed a market-based instrument that encourages a specific behaviour through market signals rather than through explicit directives regarding pollution control levels, including instruments such as tradable allowances and pollution charges.3

This system, however, places the EU and countries applying ETSs at a competitive disadvantage when compared with foreign energy-intensive industries facing uneven greenhouse gas constraints. The competitive disadvantage causes an increase in the level of emissions generated outside the region applying the system, the so called ‘carbon leakage’, which tends to undermine the effectiveness of a domestic climate mitigation policy.

As a result, countries have been put under increased pressure to develop some form of ‘border adjustment’ that will complement ETSs, thereby levelling the playing field and avoiding carbon leakage. Arguments justifying such trade measures generally refer to competitive concerns, weakening of environmental

---

1 E-mail: dgomez.altamirano@gmail.com. The author would like to thank participants at the 2012 Society of International Economic Law (SIEL) Biennial Conference at National University of Singapore for their insights and comments on this work.


efficiency, and further incentives for countries to join an international environmental agreement.\(^4\)

In 2008, as part of its policy on climate change and in an effort to address the growing impact of aircraft emissions on global warming, the EU included aviation activities in its greenhouse gas emissions allowance-trading scheme.\(^5\)

As of January 2012, all airlines, including those from third countries, are required to acquire and surrender emission allowances for the carbon emissions generated by their flights departing from and arriving to airports located in the EU, \(ie\) between EU airports and between EU and non-EU airports.\(^6\)

The inclusion of the aviation industry in the EU’s ETS has sparked a global debate among the EU Member States, other countries including India, China,\(^7\) the United States,\(^8\) the aviation industry and environmentalists. In this regard, the International Civil Aviation Organization (ICAO) has adopted resolutions urging contracting states not to implement emission trading systems on aircraft operators except on the basis of mutual agreement between those states.\(^9\)

Litigation has also been initiated. A consortium of US airlines, supported by the International Air Transport Association (IATA) lodged a complaint claiming that the EU is in breach of a number of principles of customary international law and of various international agreements including the Chicago

---


7 China, opposing to the EU scheme, has already blocked the order of Airbus A230s from Hong Kong Airlines.

8 The US House of Representatives has voted to make it illegal for US airlines to comply with the EU carbon cap on aviation.