This post, by Vera Pardee of the Center for Biological Diversity, is part of an occasional series by guest bloggers.

In the absence of international agreements on climate change, important state, regional and national efforts are forging ahead on their own to tackle greenhouse gas pollution. Despite the urgent need to reduce carbon emissions, the business-as-usual fossil fuel industry mounts legal challenges to these efforts wherever possible, focusing on claims of lack of jurisdiction, infringement of sovereignty, preemption, or illegal taxation, among many others. In a key victory for the climate, the European Court of Justice, the highest court of the European Union, defeated just such an attack last month and upheld the first binding legislation intended to curb carbon pollution from aviation. The law is a cap-and-trade scheme, subject to market manipulation and problematic "offset" programs, and as such is neither the only nor the best or fastest way to address climate change. But it is a significant step forward, and as of January 1, 2012, those traveling to Europe by air can feel slightly better about their carbon footprint.

Until the ECJ's decision, the airline industry had successfully sabotaged all efforts to control aviation carbon pollution. Emissions from airplanes account for some 3% of global CO_2 emissions and are expected to triple by 2050. Yet, negotiations at the UN-sponsored International Civil Aviation Organization (ICAO) – specifically tasked with curbing greenhouse gas emissions from airplanes – have dragged on for the last 14 years without producing results – not even agreement on what metric to employ to formulate an emission standard.

In light of this interminable delay, the EU in 2008 issued a directive to fold aviation pollution into its own Emission Trading Scheme. Notably, the law requires permits for all carbon pollution emitted by all airplanes flying into, out of, or within the European Union, including emissions that occur while flying abroad or over the high seas to or from EU destinations. Initially, airlines are given 85% of their pollution permits for free; they must purchase up to the remaining 15%, depending on their emissions, for the first time at the end of 2012. The short- to medium-term monetary effect on the airlines is forecast to range from a windfall profit to a few dollars per long-distance flight. Nonetheless, the adoption of the directive drew the predictable result: a lawsuit by United/Continental and American Airlines, and their trade association Air Transport Association for America (now Airlines for America), in the High Court of Justice of England and Wales. A European-American coalition of environmental groups intervened in support of the directive. To settle questions of EU law, the U.K. court referred the case to the ECJ.

The airlines raised two principal claims: that the EU's trading scheme violated the

sovereignty of non-EU countries by requiring permits for pollution emitted while flying over the high seas or beyond EU territory; and that it constituted an illegal tax or charge on fuel consumption. To support its position, the airlines cited principles of international law as well as the Chicago Convention, the Kyoto Protocol and the Open Skies Agreement.

The ECJ upheld the European law in every respect. First, noting that the EU is not bound by the Chicago Convention and that the provisions of the Kyoto Protocol are insufficiently precise to come into play, it found only certain provisions of the Open Skies Agreement and international law relevant in deciding the issue. Specifically, the court determined that:

The directive does not infringe the sovereignty or territoriality of other countries because it applies only to aircraft that arrive at or depart from airports within the EU. Because permitting is required only when airplanes are physically within EU territory and thus subject to its jurisdiction, nothing prohibits the EU from calculating emissions requiring permits based on the whole of the airplanes' flights, including portions occurring outside EU boundaries. Non-EU states are not subject to the EU law unless they land or take off from EU airports, and thus retain exclusive sovereignty over their airspace and the ability to fly over the high seas without infringement. Notably, the court found that "the fact that . . . certain matters contributing to the pollution of the air, sea or land territory of the [EU] 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."

The directive is not a tax, fee or charge on fuel in breach of the Open Skies Agreement. There is no direct or inseverable link between the amount of fuel consumed by an aircraft and the monetary burden on its operator, and thus no tax, because permitting costs, if any, depend on the number of permits initially allocated and their market price should additional permit purchases become necessary. Indeed, the scheme is "intended to encourage every participant . . . to emit quantities of greenhouse gases that are less than the allowances originally allocated to him," and thus allows those airlines actually reducing their carbon pollution to generate a profit rather than pay a charge. The ECJ also dismissed the airlines' complaints that the directive is incompatible with relevant ICAO standards, observing succinctly that, to the contrary, the EU law "corresponds precisely" to ICAO's objective to employ market-based mechanisms to reduce carbon pollution from international aviation.

The ECJ decision was a clear victory for climate change legislation, and some of its reasoning may well apply in other contexts where political bodies other than the international community seek to reduce the global problem of carbon pollution in a local context. Indeed, in a lawsuit currently pending in a federal court in New York,

environmental groups seek a judgment compelling EPA to issue a so-called "endangerment finding" for greenhouse gases emitted by aircraft engines, a first step to setting US national carbon standards for the industry under the Clean Air Act. Principles elucidated by the ECJ may come into play should those standards be challenged by non-US entities.

From the political perspective, it is more than ironic that US interests – airlines and the Obama administration alike – should attack the EU for implementing the very cap-and-trade approach to carbon pollution reduction that the US itself has long insisted on, despite its many shortcomings. Even before the ECJ decision was issued, Secretaries Clinton and Ray LaHood rattled sabers in a letter to EU ministers threatening to take "appropriate action" – an ill-disguised threat of a trade war – if the directive is implemented. Making good on those threats would disregard both the rules of international law and principles of comity between political allies – never mind the will of 27 European nations, their citizens, and their highest court. Moreover, the US position is a bait-and-switch on its pronouncements at the international climate change negotiations in Durban, where the US tried to justify delaying an international treaty on climate change through 2020 by championing action at the local and national levels. Surely the US should not simultaneously attack precisely that kind of regional action now.

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