Les mesures correctives des émissions aériennes de gaz à effet de serre : contribution à l'etude des interactions entre les ordres juridiques en droit international public

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Summary

(Résumé en anglais)

A Corrective Approach to Reduce Aircraft Greenhouse Gas Emissions. *Contribution to the Study of Interactions between Legal Orders of International Law*

All of the stakeholders seem nowadays to acknowledge the necessity of corrective measures, based on the environmental principle that the "polluter pays", in order to reduce greenhouse gas emissions from international civil aviation. In that sense, corrective measures must be implemented in addition to preventive ones including technical measures, operational measures and alternative fuels. The recent decision of the 39th session of the Assembly of the International Civil Aviation Organisation (ICAO) illustrates the necessity of corrective measures in the form of a global and market-based measure (GMBM).

More generally, climate change was under the spotlight during this Assembly held in Montréal from 27 September to 6 October 2016. The negotiation process under ICAO auspices may be qualified as a success story when one looks at the result. ICAO was indeed successful in deciding "*to implement a GMBM scheme in the form of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) to address any annual increase in total CO2 emissions from international civil aviation*".[1] The technical, environmental and economic aspects of such a global scheme have been and are extensively studied by ICAO and policy directions found their way in Resolutions adopted by the General Assembly. But the search for a GMBM to reduce greenhouse emissions gas emissions from international civil aviation has also faced legal obstacles.

The legal obstacles took the form of conflicts of norms linked to the general challenge of the interaction between international aviation law, climate change law and the law of the European Union (EU). The best solution that emerged was the evolutionary interpretation of the Chicago Convention in order to reconcile norms of a substantive and institutional nature. However, this method perpetuates legal uncertainty and poses the general challenge of flexibility and elasticity of the Chicago regime – that is: the Chicago Convention, Annexes

1 See ICAO, General Assembly Resolution A39-3, Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Global Market-Based Measure (MBM) Scheme, http://www.icao.int/Meetings/a39/Documents/Resolutions/a39_res_prov_en.pdf (accessed 9 May 2017).

thereto drawn up and updated from time to time by ICAO, and other instruments based on this convention – in response to the climate change challenge.

This study examines the above-mentioned issues of the interaction between legal regimes and provides recommendations to restore legal certainty needed to ensure the sustainable development of international civil aviation. More precisely, this study raises different questions. Knowing that evolutionary interpretation perpetuates legal uncertainty, is this method the only way to reconcile the norms in conflict? Applying another method, which does not lead to the adaption of the Chicago Convention, will indeed resolve the legal obstacles while eliminating the current legal uncertainty. If evolutionary interpretation should be considered as a necessary step in the legal justification of the current measure adopted by the Assembly of ICAO, one may ask whether the alleged flexibility of the Chicago Convention as the charter of international civil aviation permits to adapt itself without amendment.

After setting out the current agenda for the correction of aviation emissions, addressing policy factors, and clarifying the methodology employed in the study, the introduction sets out the main idea defended by the author: the underestimated relevance of the ongoing distinction between the legal regimes of air navigation and international air transport. From that perspective, the rigorous application of this distinction, combined with an adequate classification of the preferred corrective measure – the market-based measure – in light of such distinction, is a key process in the search for a global and corrective solution to the impact of international civil aviation on climate change. A preliminary chapter serves to explain the distinction and justify the classification of market-based measure under the legal regime of international air transport. Following this preliminary chapter, the study has been divided into two parts: the first one addresses substantive law applicable in the aviation legal order, while the other deals with the institutional specificities of international air law.

Concerning the substantive law applicable to international civil aviation, the first two chapters address the hypothesis of levies, in the form of taxes or charges, on aviation emissions. A distinction must be made between such hypothesis and the existing market-based measures. The initial preference of the air law community for adopting an emission levy justify this analysis, keeping in mind that such preference has been the source of a conflict of norms between the substantive law applicable in international air law and the legal basis of all measures willing to correct the emissions of greenhouse gases: the principle that the "polluter pays". This conflict of norms may be explained by underlining the progressive consolidation of what can be called the common legal regime of aviation levies. An evolutionary interpretation of different aspects of this common legal regime may appear as a solution to overcome the consolidation of conflicts of norms, but this solution involves legal uncertainty as it implies a whole range of divergent interpretations.

In order to restore legal certainty, this study criticises the existence of this common legal regime in order to operate a distinction between the category of levies linked to air navigation – strictly regulated under Article 15 and 24 of the Chicago Convention – and market-based measures, the latter being classified as a levy linked to the legal regime of international air transport. Following this proposition, and by choosing a market-based measure to correct aviation emissions, the conflict of norms between specifics provisions of the Chicago Convention and the "polluter pays" principle disappears.

The two other chapters of the first part address undergoing tensions between the principle of non-discrimination on the one hand and the concepts of *Common But Differentiated Responsibilities* coming from the UNFCCC/Kyoto Protocol regime and the *Special Circumstances and Respective Responsibilities* (SCRC) of ICAO on the other. Here again, the evolutionary interpretation has been proposed to overcome the conflict. Here again, this proposal entails legal uncertainty. By looking closer at the principle of non-discrimination under the Chicago Convention, I nevertheless conclude to the limited scope of this principle. There is no general principle prohibiting discrimination in international air law, because this principle may be limited to the legal regime of air navigation under the conditions set out in the Chicago Convention. As market-based measures have to be linked to the legal regime of international air transport, the conflict of norms disappears and there is no need for an evolutionary interpretation. It does not mean though, that market-based measures can be implemented without being subject to any legal constraints. Such measures are subject to the emerging principles of the legal regime of international air transport, i.e. level playing field. In that sense, ICAO, supported by many of its member States and IATA, pays due regard to the maintenance of a level playing field guaranteeing a high degree of equal treatment of the airlines operating their international air services.

This study leads also to the conclusion that SCRC may be interpreted as tantamount to the CBDR principle in order to take into account the specificities of the international aviation community. This is because the classification of States as developed or developing countries in the aviation legal order ought to be fine-tuned, as States classified as developing countries under the UNFCCC regime may not be classified the same way under the Chicago regime.

All in all, the choice of a market-based measure, combined with its adequate classification under the legal regime of international air transport, finds legal justification. To the contrary, stepping out from this framework would justify the evolutionary interpretation of international air law, which would likely involve, in the long run, the sensitive issue of the need to reform of the Chicago regime.

The second part of this study addresses institutional challenges faced by the aviation community while negotiating a market-based measure for international civil aviation. Uncertainty surrounding the appropriate institution to adopt the measure led to confrontation between the parties concerned, and

to conflicts of norms when these confrontations reflected divergence of points of view of these actors regarding their areas of competencies and their respective normative powers.

The two first chapters focus on the question of the area of competence of ICAO and the legal vehicles and institutional arrangements needed to ensure the successful implementation of a global market-based measure. The drafters of the Kyoto Protocol of 1997, implementing the provisions of the United Nations Framework Convention on Climate Change (UNFCCC), requested its Parties including in Annex 1 to pursue the limitation or reduction of greenhouse gas emissions 'working through' ICAO. I conclude, by applying the principle of implicit power, that ICAO became progressively competent in the domain of environmental protection and, by extension, in the domain of climate change. But taking into account the silence of the Chicago Convention on environmental issues, such conclusion could not avoid a justification based on evolutionary interpretation implying an inherent fragility of the current initiative of ICAO. Moreover, ICAO's current competence does not imply the lack of competence of its member States, a conclusion leaving open the question of unilateral action by these member States.

Before entering in the specific issue of extraterritoriality, and in view of the recent decision of the 39th session of the Assembly of ICAO, the analysis would nevertheless be incomplete without paying attention to the legal vehicles used to implement this global market-based measure. Different hypotheses had to be analysed. The first one, currently privileged by ICAO, is based on the "mixed approach", an option combining an ICAO "recommendatory" Resolution and a Standard adopted by the ICAO Council. This approach allows the separation between the technical elements of the measure – using standards adopted by ICAO for inclusion in an Annex to the Chicago Convention – and certain economic aspects of the measure – linked to the legal regime of international air transport – adopted through an ICAO Resolution. Using this "mixed approach", and knowing that ICAO's normative powers are limited for economic aspects of international air transport, the stakeholders avoid a manifest violation of the current distinction between the legal regimes of air navigation and international air transport.

To imagine a step further – i.e. adopting an ICAO Standard for economic aspects of the measure – will call into question the relevance of the distinction between the legal regimes of air navigation and international air transport. This cannot be envisaged without raising the question of an amendment of the Chicago Convention. So far, ICAO has excluded this hypothesis. And the organisation also excluded, for the time being and despite the obvious legal advantages of this legal vehicle, the adoption of new multilateral treaty to support the implementation of the global market-based measure. In conclusion, no revolution of the aviation legal order appears necessary in a short-term period, even if we can observe an incontestable adaption of its legal foundation. The complexity of the institutional arrangements, combined with well-founded

doubts on the overall success of the global initiative when one looks at the resolution adopted by the 39th session of the Assembly, strengthens the climate of legal uncertainty and gives an interesting nuance to the apparent success of such General Assembly.

The two last chapters are dedicated to the notorious unilateral action taken by the European Union (EU): the EU Emissions Trading Scheme (EU ETS). Environmental protection remains a principal objective of the policies conducted by the EU. The EU has often taken the lead in global efforts to mitigate climate change. This goal is laid down in article 191 of the Treaty on the Functioning of the European Union. A preliminary chapter is in fact dedicated to the justification of the current competence of the EU in the domains of civil aviation and climate change. On this basis, the distinction between the scopes of application of the measure – *ratione materiae* and *ratione loci*, often qualified as extraterritoriality – should be pointed out. Extraterritoriality is indeed not the only way to look at Directive 2008/101/CE, and lessons should also be learned from an analysis of its *ratione materiae* scope of application: its application to inbound and outbound international air services. From this perspective, we conclude to a violation of an essential requirement of the legal regime of international air transport based on article 6 of the Chicago Convention: the requirement of a "*special permission or other authorisation*" to operate "*over or into the territory of a contracting*" and the requirement to operate "*in accordance with the terms of such permission or authorization*". By adopting Directive 2008/101/CE without such permission or authorization, the EU did not respect what must be seen as a *lex speciali* under public international law. This conclusion leads to the identification of the relevance of air services agreements (ASA) in the context of market-based measures, and even to the hypothesis of "negotiated" unilateral measures in order to act outside the scope of ICAO while respecting the legal regime of international air transport.

Having analysed the *ratione materiae* scope of application of the unilateral action taken by the EU, one may finally look at the question of extraterritoriality in public international law. For that purpose, an adequate qualification of the Directive 2008/101/CE must be provided and this qualification does not deserve any nuance: the normative action taken by the EU in 2008 must be classified as an extraterritorial act. The arguments submitted by the European legislator and the Court of Justice of the European Union in the well-known *ATAA* case to defend such extraterritoriality should not be analysed on the same premises. If Directive 2008/101/CE may be justified when the action is qualified as an 'extraterritorial act of anticipation', the main argument must be linked to the growing influence of the issue of climate change to justify the reasonability of the unilateral action of the EU. This argument, implicitly derived from an evolutionary interpretation of the Chicago regime, can be subject to legitimate critics. Obviously, the 'stop the clock' strategy adopted by the EU to restore confidence in the ICAO process, a strategy extended right after the adoption of the CORSIA by the 39th session of the Assembly, diverts

attention from the question of extraterritoriality. But the analysis of the initial characteristics of EU Directive 2008/101/CE remains relevant for the future of international air law in the case of an undesirable failure of ICAO in its will to implement the CORSIA, or even outside the climate negotiation when ICAO will have to embrace a new challenge opening the door to unilateral initiatives by its member States.

As a general conclusion, the search for a global and market-based measure to reduce greenhouse gas emissions from international aviation illustrates several complex legal challenges linked to the general issue of the interaction between legal orders under public international law. Taking international air law as the principal source of analysis in study, I have attempted to stress the ongoing relevance of the distinction between the legal regimes of air navigation and international air transport to overcome these obstacles; articulating this distinction forms a key parameter for restoring legal certainty and ensuring the sustainable development of international aviation activities.