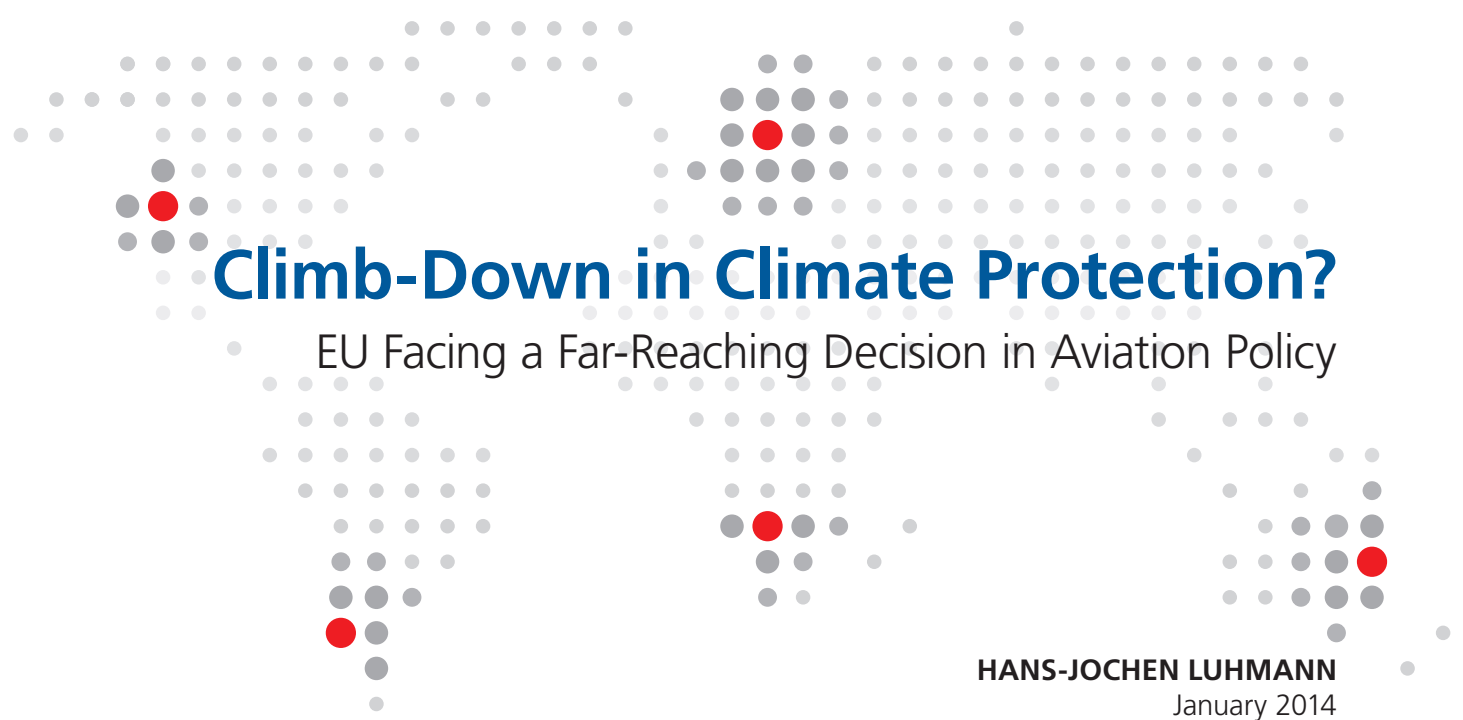


A stylized world map composed of grey dots of varying sizes, with several dots highlighted in red. The map is centered behind the title and subtitle.

Climb-Down in Climate Protection?

EU Facing a Far-Reaching Decision in Aviation Policy

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- The EU is facing a far-reaching decision concerning its climate policy: On February 2, 2014, the European Parliament will vote on whether emissions from the EU's international air traffic should no longer be covered by the European emissions trading scheme (EU ETS). This will determine the fate of an ambitious EU law according to which, beginning in 2012, emissions from international air traffic were included fully in the ETS.
- With this law the EU lived up to its pioneering role in climate policy by finally addressing the means of mass transportation that is most destructive of the climate; in addition, the EU provided a clear example of its claim of being an important player in shaping global policy because its innovative regulation also covers air routes outside the European territory.
- However, as a result of massive pressure exerted by other world powers, the law was suspended for one year. Subsequently an amendment was proposed to the effect that emission permits should only be required for emissions over Europe's »own airspace«. If this considerably less ambitious proposal is adopted nothing would be gained because the conflict would not be resolved. Instead, the EU would give up its pioneering role in climate policy and content itself with the status of a provincial power.

In the coming weeks, the European Union is facing a fundamental decision that will have far-reaching implications for the future role of the EU in international climate policy. Ostensibly it is a question of whether emissions from the EU's international air traffic, which accounts for approximately one third of the emissions from all international air traffic, should continue to be included in the European Union emissions trading scheme (EU ETS) or not. But there is more to this than meets the eye. The United States, together with China, Russia and other states, wants to prevent the EU from enacting legal regulations with extraterritorial effect.

The impending decision¹ is regarded as a precedent, which also explains the very decided opposition with which the original legislation has met among the world powers. On the one hand, it has major significance for the efforts of the European community of states to incorporate air and sea traffic also beyond all national territories into climate protection obligations; and, on the other, this will also decide whether the EU lives up to its pioneering role in climate policy not just in announcements but also through decisive action. In other words: the EU roared like a tiger; it remains to be seen whether it can also leap like a tiger.

Aircraft are the means of mass transportation most destructive of the climate, moreover the one with the highest growth rates. Yet, to date it has not proved possible to establish satisfactory regulatory mechanisms at the UN level. Should the EU manage to defend its ambitious legislation, this would affect one third of international air traffic – no small matter. Moreover, such a decision may induce the decision-making processes at the multi-lateral level to also include the remaining two-thirds in climate protection obligations. At the same time, the EU would live up to its claim to be a regional power with global responsibility. For the moment, however, it looks more likely that the EU will cave in under pressure from other world powers such as China, Russia, and the United States, and thereby forfeit the credibility of its whole approach to climate foreign policy. Were this to occur, the last glimmer of hope for solutions without a global consensus would be extinguished – and all that would

remain would be to wait and see what the real world powers, the United States and China, want for domestic political reasons.

Background: The integration of international air travel in European emissions trading

While the national air traffic of the industrialized countries is covered by the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC), the adoption of the Kyoto Protocol in 1997 left international aviation unregulated. The EU, like other developed countries, is only obliged to limit its national aviation emissions. International air traffic was handed over to the International Civil Aviation Organization (ICAO) for the purposes of regulation. However, the ICAO did not adopt any directives between 1997 and 2008. One may speculate as to the reasons for this, but it is no secret that the ICAO and its national representatives from the transportation ministries of the member states see themselves as more as exponents of the interests of their industry than as advocates of the common good. This is at once dubious and unfair, because the rising emissions in aviation nullify successes in climate protection in other economic sectors. Moreover, there is no good reason to privilege aviation over other sectors.

However, the regulation of national air traffic in the Kyoto Protocol led to incongruities because it had unjustifiably favored the EU. The European Union is a party to the climate change framework convention but, as a »confederation«, it is not a nation state. As a result, the »national air traffic« of the EU is merely the sum of the national air traffic of the member states of the EU, thus of flights within the member states. The so-called »intra-EU flights« – cross-border flights between member states – do not count as »national air traffic« of the EU, but are part of the international air traffic (of the EU). Up to now, the EU authorities have used this hair-splitting constitutional legal distinction to exclude the emissions from intra-EU flights from the self-imposed targets of the EU. This leads to an asymmetrical situation vis-à-vis other Kyoto contracting states. Thus in the United States, as a »federal state«, long-distance flights from the East Coast to the West Coast are treated as national air traffic, whereas in the EU even short flights, for example from London to Paris across the English Channel,

1. The decision over whether to change the directive covering international air traffic is due to be taken in the Committee on the Environment, Public Health and Food Safety (ENVI) on January 30, 2014; on February 2, the European Parliament will vote on it; following this, the proposal goes into the trialog between the European Commission, the European Parliament, and the Council of the European Union.

are treated as »international air traffic« and therefore are not deemed to fall under the EU limitation commitments under the Kyoto protocol.

At the latest when the United States is expected to participate in a multilateral climate regime, this objectively unfounded distinction is no longer tenable. Therefore in 2005, even before the Copenhagen climate conference in 2009 which proved to be a disappointing nadir in the history of climate diplomacy, the EU took the initiative itself. As a result, the EU agreed in 2008 on a law stipulating that, starting on January 1, 2012, emissions permits must be submitted for the entire CO₂ emissions of every flight that starts or lands in EU territory – the rule applied equally to intra-EU and extra-EU flights. The emissions permits are issued by the EU, unfortunately only in small part in exchange for payment. More than 80 per cent are given away for free to the airlines, which have already begun to price in emissions permits and skim off the wind-fall profits. Here politics has once again shown itself to be inappropriately and one-sidedly generous in how it deals with public monies. At the CO₂ prices expected during the conception phase (2008), we are talking for the period from 2012 to 2020 of a surplus of around 14 billion euros for the coffers of the EU and its member states. The idea was that the inclusion of international aviation should also contribute to stabilizing the EU emissions trade, which suffers from a chronic oversupply of permits.² In addition, the law included an offer to countries willing to cooperate in the best spirit of foreign policy: countries that regulate their air traffic in accordance with the ambitious EU climate policy guidelines are granted half of the authority to issue permits – namely, for one direction of flight – and thus half of the income.

With this approach, the EU had at least done its part to close a central gap in the global UN governance system. The UN is the sum of the governance of territorial states and of necessity leaves the airspace over the oceans, hence two thirds (!) of the earth's surface, ungoverned. Moreover, the initiative was designed in such a way that it not only put an end to privileges within the EU, but also shook things up at the level of ICAO, which is mired in conflicts of interest.

2. Aside from the fact that the Kyoto targets were pitched too low, the reasons are that some countries were accorded more emissions permits than they needed, which was exacerbated further by the financial crisis. A further reason is that, due to the Clean Development Mechanism (CDM), emissions permits from projects in developing countries could be credited in large numbers.

The entire approach exhibits in diverse facets a claim to global (co-)determination on the part of the European Union. The EU also followed the same pattern in other areas of climate policy activity. Thus, should its initiative in the aviation sector show any signs of success, it planned similar measures for international shipping, with its greenhouse gas emissions on the high seas.³ With the regulation of imported fuels from biomass or tar sands in the context of the 2009 20-20-20 package, the EU also enacted measures that are not to be implemented on its own territory, but on that of third countries with which the EU is connected by trade flows.

The resistance of the fellow world powers

Opposition developed to the EU's flagship project of integrating its international air traffic into its ETS, at first very gradually and within correct legal channels. The American air carriers initially called upon the European Court of Justice (ECJ). However, on December 21, 2011, following an examination of all principles of international law – Chicago Convention (ICAO), UNFCCC, and general international law – the ECJ confirmed the legality in all fields of the European regulation that had come into effect. Only in early 2012, when the measures for the start of the EU system had already been launched, did political actors become involved. The United States formed a coalition with China, Russia, India, and South Africa with the goal of preventing the unilateral extra-territorial reach of the Europeans. The members of this 'Coalition of the Unwilling' resistance group disregarded law of any kind and also refrained from appealing to international dispute settlement fora. Instead, they resorted to national »counter«-measures and thus opted

3. At present, the EU is processing the field of international shipping from the perspective of climate law, beginning with an approach to reporting. This includes all of the elements of extraterritorial reach on which the EU now wants to turn its back again in the field of aviation because of objections from third countries. The legislative proposal of the EU Commission contains the following provisions:

Art. 1: »This Regulation lays down rules for the accurate monitoring, reporting and verification of carbon dioxide (CO₂) emissions (...) from ships arriving at, within or departing from ports under the jurisdiction of a Member State (...)«

Art. 2 (1): »This Regulation applies to ships above 5000 gross tons in respect of emissions released during their voyages from the last port of call to a port under the jurisdiction of a Member State and from a port under the jurisdiction of a Member State to their next port of call, as well as within ports under the jurisdiction of a Member State.«



for pure confrontation.⁴ The United States enacted the European Union Emissions Trading Scheme Prohibition Act, China threatened to cancel Airbus orders – though not explicitly, for that would have been a clear legal violation – and the media, goaded by the airlines, invoked the specter of a looming trade war – and presumably not without reason.

This pressure proved to be effective. On November 12, 2012, the European Commission decided to introduce a bill that suspended for a year the obligation to submit greenhouse gas emissions permits for flights that crossed EU borders. The EU wanted to decide how to proceed further in the light of the results of the ICAO Conference to be held between September 24 and October 4, 2013 in Montreal. In a fast track legislative procedure similar to the one now pending, the Council and the Parliament confirmed the proposal of the EU Commission – just in the nick of time before the April 30, 2013 deadline on which foreign airlines, whether domiciled in China, India, or the United States, would have had to disclose (again) whether they respect European law.

The 38th Assembly of the ICAO – frantic movement in the run-up and (non-)result in the plenum

Prior to the ICAO conference there were indications that there could be a breakthrough, because the International Air Transport Association (IATA) had come to an agreement and called for a global market-based emission control system under the umbrella of the ICAO. This meant that the industry was on board. A stir was then created by the announcement made by the EU Director General for Climate Policy, Jos Delbeke, on September 5, 2013 from preliminary negotiations in Montreal: the EU had offered a compromise position. This provided that the EU would continue its established ETS until 2020, but with the change that it would only demand permits for emissions »over its own airspace«. Aside from revealing one's negotiating position even before the negotiations had begun, what was surprising about this compromise was that it had the effect of restricting the coverage of the existing regulation of air traffic by around 60 per

cent.⁵ On the one hand, this would have thrown the EU ETS even further out of balance;⁶ on the other hand, the EU is foregoing income from issuing emissions permits in the aviation sector. Yet, contrary to expectation, this »generosity« on the part of the EU (at the expense of the environment) was not rewarded. China, Russia, India, and South Africa refused to fall into line with the compromise worked out between the EU and – as this made clear – the United States. This meant that the announced compromise of Montreal had come to nothing.

Already on October 16, 2013, barely two weeks after the conference had ended, the European Commission presented a startling amendment to its ETS, in which the already failed ICAO compromise offer to confine itself to EU airspace is repeated. There are three unusual things about this proposal. **First**, with the proposal the Commission recommends that the Council and the Parliament implement a position that seems to make sense only if the EU gets something in return *unilaterally* – that is, without expecting any concessions from the negotiation partners. Moreover, in doing so it clings to a position concerning which it is not clear whether the United States, as author, will continue to abide by its informal agreement with the EU. **Second**, there are two possible definitions of one's »own airspace«: a small-scale definition valid only for the 12 nautical mile zone,⁷ or a large-scale definition that includes the exclusive economic zone (EEZ) extending to 200 nautical miles from the coast. In astonishing selflessness, the motion tabled by the EU Commission proposes the 12 nautical mile zone, and thus the smallest possible option and the one least advantageous to the EU. And, **third**, the proposal drops the existing regulation that the original legislation will automatically come back into full force in 2017. This sends a signal to the ICAO members that, if a (sufficiently ambitious) global treaty with effect from 2020 is not agreed upon at the next ICAO Assembly in 2016, the EU will first have to set its cumbersome testing and lawmak-

4. Even though the WTO rules are not generally valid for international aviation, American international lawyers have pointed out that in this particular conflict the WTO can indeed be called upon (e.g. Joshua Meltzer (2012): Climate Change and Trade—The EU Aviation Directive and the WTO, in: *Journal of International Economic Law* 15 (1): 111-156).

5. According to the declaration of the Commission to the European Council: Information Note on the latest developments at ICAO and the EU Emissions Trading System (ETS) for Aviation 17140/13, 3.12.2013, Annex p. 3 In the impact assessment, a reduction of 40 per cent is demonstrated (swd 2013 430 p. 69).

6. It involves a reduction in demand to the tune of almost 500 million tonnes by 2020.

7. According to the United Nations Convention on the Law of the Sea, coastal countries have the right to extend their territorial waters up to 12 nautical miles. Under climate law, they are also responsible for any emissions from an economic activity, e.g. from offshore oil and gas production, within the 200 nautical mile zone.



ing machinery into motion. And even if a valid decision were to be reached before 2020, the effectiveness of a new EU legislation for the time remaining until 2020 can be at best so marginal that no EU body will agree to it.

None of the three decisions in this legislative proposal put forward by the European Commission seems obvious for an institution that represents Europe's position and interests.

The decision facing the EU – schedule and content

The EU Commission's proposal has been referred to the Council and the Parliament and is being dealt with in the codecision procedure. This process is characterized structurally by the fact that the advocates of the status quo have the upper hand over the reformers (of the current legal position). This leads in the present case to an unusual but auspicious constellation.

The pending decision must be taken in an accelerated procedure on account of two approaching events at the EU level. On the one hand, the legislative period of the European Parliament ends in mid-April 2014; on the other hand, the legislation that remains valid (which has now come back into force following the one-year hiatus) stipulates that the affected air carriers from third countries have to submit reports on their emissions in the previous year by April 30, 2014. It will become apparent at this juncture which non-European airlines are unwilling to comply with their obligations under EU law, which may give rise to a new »casus belli«.

Germany, France, and the UK have already submitted their positions to the European Council. They want to restrict the coverage exclusively to intra-EU flights and thus no longer see »international air traffic« properly speaking as being covered by the legislation. Unlike the EU Commission, however, they want to regulate this in a time-limited manner for the years 2014 through 2016. This position is understandable in that the ICAO has only undertaken to provide an »outline« of a global market-like system for capping emissions from international air traffic by 2016. Whether the system – which, if it comes to pass, will be the product of a foreseeably laborious compromise – will contain a serious level of emission reduction and whether it will come into force

in 2020 is anybody's guess. Against this background, it would be unrealistic of the EU to simply trust that the ICAO will arrive at suitable results within the announced time frame and to relinquish its claims until 2020, and possibly even longer. On the other hand, it would be equally unrealistic not to be afraid when the »Big Three« – the United States, China, and Russia – disregard the law and make demands.

The roadmap for the impending decisions in the European Parliament is also tightly scheduled. The environmental committee ENVI, which makes the final decision on January 30, 2014, has overall responsibility; also involved in the consultations are the Committee on Industry, Research and Energy (ITRE) and the Committee on Transport and Tourism (TRAN). All of the rapporteurs have made their submissions, and hence the basic outlines of the resulting compromise in the parallelogram of forces are foreseeable. On February 2 the plenum of the European Parliament will vote, and then the motion goes behind closed doors into the trialog between the European Commission, the European Parliament, and the Council of the European Union. The outcome will presumably be a climb-down on the part of the Europeans, such as also initially appeared likely in the conflict with the United States over spying. A change in the submissive posture can be expected only if a scandal like the intercepted mobile phone of the German Chancellor is also found in this case.

Hence just two points of detail remain decisive and controversial: (1) the scale of the spatial extension (or its retraction), and (2) the automatism for restoring the status quo legislation on January 1, 2017. ENVI and the EU Commission support a permanent restriction to the EU's own airspace; ITRE and TRAN favor the time limit specified in the position of the three main EU member states. They are convinced that the pressure must be maintained and are willing to accept the consequence of another fast track legislative procedure in fall 2016/spring 2017.

- The conflict seems to be deadlocked, and with a little distance there are just two logical positions from a geopolitical perspective:
- Either the EU climbs down across the board, subjugates itself to China, Russia, India, etc. and limits itself to regulating intra-EU air traffic.



Or it recognizes that, even though it did not provoke the conflict with the other countries, it started it and now has to fight it through to the end. This means that it would have to defend its initial position to include international air traffic.

None of the involved parties in Brussels is prepared to see this in such fundamental terms, however, even though something fundamental is at stake: In the balance is the EU's claim to global (co-)determination as exemplified by its flagship project »climate policy«, a policy designed to protect a global commons. However, the EU seems to be set to content itself with the status of a provincial power.



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