

Global Pollution Does Not Create Global Jurisdiction: The Challenge of Regulating Carbon Dioxide and Climate Change

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The European Commission's (EC's) recent initiative to require the European Union (EU) airline industry, and, after 2012, all international flights into Europe (EU and non-EU carriers), to obtain allowances for greenhouse gas (GHG) emissions raises an interesting legal question: whether the EC, or any government, has the authority to extend its laws to regulate the release of carbon dioxide (CO₂) emissions – in this case, emissions from foreign aircraft – that occur largely outside of its legal jurisdiction because of their impact on climate change.

Among other things, proponents of regulating international flights argue that the flights emit CO₂ in European airspace and are thus appropriately subject to regulation (even though they are not covered by the Kyoto Protocol). To the extent that their emissions occur outside of European airspace, they contribute to the global emissions pool, which in turn, has adverse environmental impacts in the EU. This last argument should raise concerns because it could be applied equally to business operations well outside of the EU.

Regulating CO₂ as a pollutant is challenging because its impacts are primarily global, not local. Proponents of regulation argue that CO₂ emissions, regardless of where they occur, contribute to global temperature increases resulting in melting ice caps, more severe droughts, loss of habitat, etc. The mere fact that CO₂ has global impacts, however, cannot be the basis under international law to authorize a governing body to unilaterally regulate emissions that occur outside of its jurisdiction. It is surely evident that the EC could not assert regulatory jurisdiction over power plants in the United States simply because they emit CO₂ emissions that become part of the global pool. Yet, in seeking to regulate non-EU international flights, the EC is effectively doing the same thing, imposing requirements on activities that occur beyond its borders and thus impermissibly intruding upon the sovereignty of non-EU countries to make their own regulatory decisions with respect to their airline industry.

As environmental challenges become increasingly complex and cross-boundary in nature, regulators and litigants are increasingly resorting to such arguments to support the extraterritorial application of regulation, particularly in circumstances where they believe an industry is under-regulated. In the United States, for example, individual States are using federal and common law to seek damages and regulate the release of pollutants in neighboring and distant States, as well as, in one instance, Canada. Similarly, property owners have turned to the courts to recover monetary damages from companies across the United States that emit CO₂ on the grounds that the emissions cause global warming and, by extension, Hurricane Katrina.

To some degree, the actions of the EC are likely motivated by the perception that the United States has not taken sufficient steps to regulate GHG emissions. However, the dynamics of the climate change debate in the United States has shifted dramatically over the past six months. The question is no longer *if* the U.S. will regulate GHG emissions, but *when*.

In part, the shift is attributable to the new, Democratic-controlled Congress, which has made passage of climate change legislation a top priority and has already introduced several bills to reduce GHG emissions. The Administration also has signaled the beginnings of a new willingness to discuss climate change policy, starting with the President who, using the term for the first time in a major policy speech, announced in his State of the Union that his alternative and renewable fuel standards "will help us to confront the serious challenge of *global climate change*." Equally important is the growing pressure from the business community for action. Facing potentially inconsistent initiatives at the State level, as well as regulation in Kyoto countries, businesses are increasingly calling for Congress to pass national legislation that will provide regulatory certainty, consistency, and markets for "GHG-friendly" products and technologies. Most recently, a number of major U.S. corporations joined together with environmental organizations to form the U.S. Climate Action Partnership to urge Congress to enact as quickly as possible a mandatory GHG cap and trade program.

Environmental legislation, however, is notoriously difficult to pass, especially in the U.S. Senate where 60 votes are needed. Climate change is a complex issue that will require a complex, multi-faceted solution that may not be possible to craft on a rushed schedule. Compromise may be necessary, and the proponents of legislation may not yet be prepared to accept compromise, or an incremental approach. Even with the players currently lined up in support of a bill, the devilish details may make legislation impossible, at least in the next two years. The short term solution may be a regulatory one. Depending upon the outcome of the *Massachusetts v. EPA* case currently pending before the U.S. Supreme Court, which is expected to define the scope of the U.S. government's authority to regulate GHG emissions under *existing law*, the next President likely will not wait for Congress. He, or she, will likely simply issue regulations to control CO₂.

In the interim, the EC's airline initiative should serve as a wake up call. Whether or not the EC succeeds in enforcing its emissions cap against non-EU airlines, it is likely to be the harbinger of things to come – governments becoming more creative in their use of domestic laws and novel legal theories to reach global warming activities beyond their borders that they perceive to be inadequately regulated.

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