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Sustainability & Climate Change Reporter

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Opinion Says U.S. and Canada Airlines Are Subject to EU Emissions Program

U.S. and Canadian airlines can be required to surrender greenhouse gas emissions allowances for their flights into and out of Europe according to an October 6 [opinion](#) by the Advocate General for the European Court of Justice. The opinion concluded that international laws and treaties do not bar application of the European Union's emissions trading scheme (EU ETS) to international air carriers. If foreign airlines are subject to the EU ETS, then starting January 1, 2012, they will have to buy and surrender emissions allowances for all their European flights, even those that originate or land outside of the EU.

Background

The EU ETS is a cap-and-trade program to limit and reduce greenhouse gas emissions through issuance, trading and surrender of allowances. The EU ETS initially did not include aviation emissions, but in Directive 2008/101 (Directive) the EU added airlines starting the first of next year.

The Directive applies to any air carrier flying into and out of an EU member state, and not just to European-based air carriers. The Air Transport Association of America (ATAA), together with American Airlines, Continental Airlines and United Airlines brought an action in the High Court of Justice of England and Wales against the United Kingdom's regulations implementing the Directive. The U.K. court referred the case to the [European Court of Justice](#), which was organized by the EU members to interpret and apply the EU treaties in a uniform manner. Numerous parties intervened in the case.

Challengers' Claims

The primary issue raised by the ATAA and airlines is whether customary international law, and various international agreements, such as the Convention on International Aviation (Chicago Convention), the Open Skies Agreement and Kyoto Protocol, invalidate application of the Directive to flights outside of the EU. The ATAA and airlines contend that (a) the EU exceeds its powers by failing to restrict the EU ETS only to flights within Europe, (b) the International Civil Aviation Organisation, and not the EU unilaterally, should negotiate and adopt an emissions trading scheme, and (c) the EU ETS amounts to a tax prohibited by international agreements.

Advocate General Opinion

In the October 6 opinion, the Advocate General rejects those arguments:

- EU is not a party to, and therefore, not bound by the various international agreements. The Advocate General also concludes that the EU is not the functional successor of the member states when it assumed some powers

in the air transport sector that were exercised by members states before joining the EU, although it may be bound by principles of good faith.

- There is no conflict between the Directive and the Chicago Convention, Open Skies Agreement or the Kyoto Protocol.
- The calculation of emissions allowances to be surrendered based on the total flight distance, including over the high seas outside of EU territory, does not improperly confer extraterritorial effect on the Directive;
- The Open Skies Agreement and Chicago Convention prohibitions on excise duties on fuel does not apply to the EU ETS because the purpose of the treaty provision is to protect airlines from having aircraft and stores treated as "imported" and subject to duty when they land versus the EU ETS objective of protecting the environment and climate by assessing allowances based on emissions, not merely fuel consumption.

Next Steps

The Advocate General's opinion is not the final word from the European Court. His opinion, while accorded weight by the judges, can be disregarded or modified in their final decision. [The Guardian](#) quotes the ATAA as downplaying the opinion, concluding "In complex cases such as this one, it would not be unusual for the full court's final opinion to vary from the preliminary opinion." However the full court decides, its decision must be unanimous and opinions are issued anonymously. If the ultimate ruling is adverse to the airlines, there may be few remaining options. Ultimately, should the ruling stand, the airlines' costs for emissions allowances are likely to be passed on to passengers.

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