

# The Role of EU Law in the Global Green Economy

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# Overview

1. EU Sustainable Development Law
2. Global Green Economy
3. Measures relevant for a Green Economy
4. EU ETS and Aviation Case Study
5. Conclusions

# Sustainable Development Law

## Sustainable Development Law:

**International Environmental Law**  
*(atmosphere, water, biodiversity)*

**International Social Law**  
*(Human Rights, Social Development, Health Law)*

**International Economic Law**  
*(Trade, Investment, Competition, Natural Resources)*



# Introduction to EU Law

Union created by law – not federal state and not just federation – supranational institutions (?).

Foundational treaties: Treaty on European Union (TEU), Treaty on the Functioning of the European Union Treaty after Lisbon (TFEU).

Jurisprudence of the European Court of Justice, contributing to the *aquis communautaire*.

Institutions: Commission, Council, Court, Parliament, Cte of the Regions and Court of Auditors.

# Sustainable Development in the EU

Introduced as an objective of the Community in the Treaty of Amsterdam (Art. 2 EC).

EU's 2002 Council Decision on A Strategy for Sustainable Development, the well-known Brundtland definition for sustainable development was adopted: "Development that meets the needs of present generations without compromising the needs of future generations."

In Art. 3.3 TEU Lisbon Version, clear three pillar approach, where Members agree that the EU "shall work for the sustainable development of Europe - based on balanced economic growth and price stability, / a highly competitive social market economy, aiming at full employment and social progress,/ and a high level of protection and improvement of the quality of the environment."

Note: in Art. 191.1 TFEU combating climate change is now an objective of EU environmental policy in relation to third countries.

# Sustainable Development in the EU

Not a lot of case law yet: Arguments based on the sustainable development objective, (see AG Leger in *First Corporate Shipping* or trade unions in *Viking/Laval*). Very few judgments in which the ECJ actually relied on sustainable development (perhaps the *Cartagena Protocol Opinion* and *Small Arms Judgment*).

Slight legal uncertainty: Charter of Fundamental Rights; preamble “The Union contributes to the preservation and to the development of these common values [...]; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.” and under title Solidarity, Art. 37 then states “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

# The Global Green Economy

- “The Future We Want” Rio+20 Outcome: “We affirm that there are different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development in its three dimensions which is our overarching goal. In this regard, we consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules.” (para. 56)
- “We acknowledge that green economy in the context of sustainable development and poverty eradication will enhance our ability to manage natural resources sustainably and with lower negative environmental impacts, increase resource efficiency and reduce waste (para 60)”
- “We encourage each country to consider the implementation of green economy policies in the context of sustainable development and poverty eradication, in a manner that endeavours to drive sustained, inclusive and equitable economic growth and job creation, particularly for women, youth and the poor. (para 62)

# The Global Green Economy

- “There is no single approach to a “green economy” but similar with regards to sustainable development it will look different for every nation state.” See *Objectives and themes of the United nations conference on sustainable development - Report of the Secretary General*
- Green economy policies are grouped into seven clusters:
  - 1. Green stimulus packages
  - 2. Eco-efficiency
  - 3. Greening markets and public procurement
  - 4. Investment in sustainable infrastructure,
  - 5. Restoration and enhancement of natural capital
  - 6. Getting prices right
  - 7. Eco-Tax Reform



# EU laws for a green economy

1. Green stimulus packages
2. Eco-efficiency
3. Greening markets and public procurement
4. Investment in sustainable infrastructure
5. Restoration and enhancement of natural capital
6. Getting prices right
7. Eco-Tax Reform

1. 2012 Compact for Growth and Jobs
2. Energy Efficiency Directive (about to become law)
3. EU Emission Trading Directive
4. Discussion about the EU supergrid
5. EU Fuel Quality Directive
6. EU Natura 2000 Network
7. Member state reforms

# EU law for a green economy

## 1. Green stimulus packages

1. “Expressing their determination to stimulate smart, sustainable, inclusive, resource-efficient and jobcreating growth, in the context of the Europe 2020 Strategy”

## 2. Eco-efficiency

2. “Measures to step up Member States efforts to use energy more efficiently at all stages of the energy chain – from the transformation of energy and its distribution to its final consumption. Measures include the legal obligation to establish energy efficiency obligations schemes or policy measures in all member states.”

## 7. Eco-Tax Reform

7. Taxation is a very tricky issue in EU law because there is currently no competence for the EU to discuss direct taxation measures and indirect taxation is only restraint by EU law as it concerns trade in goods (for example through Art. 110 TFEU). As such most EU member states enacted their own eco-tax legislation with little or no input from the EU level (though with the energy competence some of that might change now)

# EU Emission Trading Scheme 2003 & 2008

- Slow endorsement of trading scheme (carbon-tax was favoured)
- EU ETS is not just Europe's most litigated piece of legislation; it is also a trailblazer for similar schemes in the rest of the world. It is also seen as the clearest example of a green economy measure, particularly when attempting to green a market.
- ETS sets a "cap", or limit, on the total harmful greenhouse gases that can be emitted by "sources" (factories, power plants, etc). Companies receive emission "allowances" they can buy or sell as needed, with the cap creating a value or "market" for them. The aim is to "internalize" social and environmental costs, so low-carbon goods and services can compete.
- EU ETS attempt to be effective is easy. Annually, each source must surrender allowances covering all its emissions to avoid steep fines. Companies which reduce emissions can keep their spare allowances for future needs or sell to others found short. Trading secures efficiencies, so that emissions are cut where it costs least to do so. Total allowances are reduced over time so that emission levels fall. In 2020, Europe's allowable emissions will be 21% lower than in 2005.

# Linking of the EU ETS

- Initially no linking was planned but then Linking Directive 2004 allowed linking with other scheme from Kyoto Parties.
- The EU ETS can be linked to other schemes on the basis of bilateral agreement for the mutual recognition of allowances.
- In 2008 Norway (as a member of the EEA) has been integrated into the EU ETS, now Iceland and Switzerland have also been integrated.
- Under the new ETS Directive linking with non-Kyoto countries is allowed as long as they share the level of EU ambition (including sub-federal entities).
- This could be hugely beneficial for Canadian provinces.
- While this provision has yet to be successfully used, Australia might become the first country with which the EU links its EU ETS, see press Aug 2012. The Commission negotiated with New Zealand and had reached a deal but then the conservatives won the election and rescinded the NZ ETS.

# EU ETS and Aviation

- EU Directive 2008/101/EC included emissions from aviation within the scope of the ETS. Flights are now a source, and each airline has to surrender allowances that equal the total GHG emissions of their EU bound flights. Objective: no export of carbon emissions and no off-set of reduction gains in other areas.
- Problem: Allowances for the entire flight will need to be surrendered.
- Flight from Ottawa to London, including flight over Canada and high seas.
- Canadian airlines complained. Dec 2011 the Court of Justice of the EU, the CJEU, had to decide on the legality of this expansion of the ETS in the case of *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* decision (ATAA Decision).
- Highly relevant for Canada, CJEU resoundingly confirmed legality of the measure.

# ATAA decision

- ATAA alleged that expansion of the ETS to aviation is extra-territorial, as the total allowances that airlines must surrender per flight are calculated on the basis of entire flights, not just EU air space. It alleged that the ETS amounts to an illegal charge on fuel and landings, contravening the 1944 Chicago Convention on International Aviation. The Court affirmed the measure, holding that the EU has jurisdiction, as only flights starting or landing in the EU are affected.
- The EU has the right to regulate matters, especially environmental problems that affect EU Member States, even when the problems are partially created outside the EU. The Court also found that the ETS does not amount to an illegal charge.
- Distinguishing the decision in *Braathens* (fuel tax), and relying on its findings in *Arcelor* (aluminum and ETS), the Court examined the EU ETS instrument design, differentiating its 'economic logic' from a 'tax, fee or charge' as defined by the Chicago Convention.

# ATAA decision – Implications for the green economy

- Concerning the territorial scope: The Court recognizes Europe's jurisdiction to address global problems, building on its findings in the 1988 *Ahlstroem* case (competition) and the 2008 *Commune de Mesquer* case (oil spills), and opening further regulatory space beyond EU borders for climate change. This finding sends a very powerful signal to EU legislators. Especially when contemplating the EU ETS expansion to shipping but also when discussion for example the reach of the Biofuels and the Fuels Standards.
- With regards to the global green economy: The Court provides guidance for future design of economic instruments in EU Law. In the short term, this decision facilitates inclusion of shipping in the EU ETS. In the longer term, emissions trading may prove useful for EU efforts to internalize environmental and social costs that currently remain external in other economic sectors, for example energy.
- And finally, this judgement also plays a leading role concerning the effect of international law in EU law. The *ATAA* judgment clarifies the test for direct effect of international agreements because direct effect of international law in the EU was shrouded in uncertainty after *Intertanko*. It also brings the application of international rules back into line with the familiar EU legal standard for direct effect – the rule must be sufficiently clear, precise and unconditional and binding upon the Union.

# Reactions by third countries

- China has adopted a blocking statute prohibiting its airlines from paying for ETS allowances. India was most vocal in its opposition to the unilateral inclusion in the Durban climate summit. It is also considering launching a WTO dispute.
- Russia hosted a meeting to coordinate counter-measures with representatives from at least 26 nations.
- BASIC environmental ministers: “Ministers noted with deep concern and reiterated their firm opposition to the inclusion of international aviation in the European Union Emissions Trading Scheme (EU-ETS) which violates international law including the principles and provisions of UNFCCC and runs counter to multilateralism. Ministers noted that the unilateral action by EU in the name of climate change was taken despite strong international opposition and would seriously jeopardize the international efforts to combat climate change. The Ministers recognized the threat of similar unilateral measures being considered by developed countries in the name of climate change in the area of international shipping and expressed their concern.”
- A WTO dispute is in preparation.



International Civil  
Aviation  
Organisation of  
which the EU is not  
a member



# Fuel Quality Directive

- Vital interest for Canada-EU relations is the question of fuel standards.
- Some commonalities on the standard for biofuel, they have diametrically opposed positions when it comes to conventional fuels.
- In February Alberta was celebrating a victory against the Fuel Directive of the European Union but as I commented on EUCANET, the European Studies Network in Canada, this joy might be very short-lived.
- The Fuel Directive (Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC (Text with EEA relevance)) has already been adopted in 2009 but requires a piece of implementation legislation that lays down the calculation methods and reporting requirements for the quality of petrol and diesel fuels.
- The purpose of this implementation legislation is to ensure that even in the process of fuel production Green House Gases (GHG) are reduced by 6%. While the comitology process, i.e. national experts working with the EU Commission to iron out the technical details did not yield a conclusive result in Feb 2012, it is not very likely that the calculation will be blocked in the long term.

# Conclusion

- Examples of many measures which could be useful for a smooth transition to a green economy are currently being tested in the European Union.
- The principle is simple: the EU feels it has come a long way in reducing carbon emissions and it is determined not to let other countries eradicate this reduction success by allowing carbon intensively produced products to enter the market without carbon cycle scrutiny.
- The EU is becoming more assertive also in relations to third countries.
- Current interpretations of EU jurisdiction and EU external relations allow for measures with global significance.
- Partner countries like Canada should aim to cooperate and reach multilateral solutions.
- A close understanding of the constitutional and legal structure of the EU is a precondition for such cooperation.

Many thanks, merci, gracias, danke

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