

Summary: Aviation emissions are one of the fastest growing sources of climate pollution and have outsized climate consequences because they involve a potent mix of pollutants and because altitude magnifies their harmful impacts. Europe, spurred by a strong awareness of the threat of climate change, has grown impatient with the slow pace of international climate diplomacy and regulated emissions of all flights into and out of Europe. The United States and other nations see in Europe's move a naked power grab with dangerous consequences for non-European airlines. Many of the prevailing feelings about this recent transatlantic turbulence rests on myths and misconceptions. The persistence of these myths also explains why few policymakers understand the challenge and importance of bringing this dispute in for a safe landing. Failure to do so would pose enormous risks not only for transatlantic trade relations but also for the global climate and trade systems.

## Air Supremacy

### *The Surprisingly Important Dogfight over Climate Pollution from International Aviation*

by Nigel Purvis and Samuel Grausz

#### Introduction

Europe favors multilateralism, whereas the United States refuses to be tied down. Landmines, International Criminal Court, Kyoto, and so on — case closed. But wait, what's this? In the rapidly intensifying aerial dogfight over regulating climate pollution from international civilian aviation, Europe is flying alone while the United States is demanding a globally negotiated solution. What explains this unexpected role reversal?

Simply put, Europe, spurred by a strong awareness of the threat of climate change, has grown understandably impatient with the slow pace of international climate diplomacy and has taken matters into its own hands. The United States and other nations, in contrast, see in Europe's move a naked power grab with dangerous consequences for non-European airlines and are pushing for an international agreement to thwart European unilateral measures. While these perceptions are easy to summarize, many of the prevailing feelings about this recent transatlantic turbulence rests on myths and misconceptions. The persistence of these myths also explains why few policymakers understand the chal-

lenge and importance of bringing this dispute in for a safe landing. Failure to do so would pose enormous risks not only for transatlantic trade relations but also for the global climate and trade systems.

#### Essential Background

For 15 years, nations have been debating what to do about climate pollution from passenger aircraft in the International Civil Aviation Organization (ICAO), the relevant global standard-setting body. Aviation emissions are one of the fastest growing sources of climate pollution and have outsized climate consequences because they involve a potent mix of pollutants and because altitude magnifies their harmful impacts.<sup>1</sup> Globally, aviation emissions will grow by anywhere from 300 percent to 700 percent by 2050, absent new pollution limits.<sup>2</sup> Reducing climate pollution from international aviation, therefore, is a necessary step in avoiding the disastrous consequences of runaway climate change. And yet, prior to 2012, no country had

1 ICAO, "ICAO Environmental Report 2010" (2010), <http://www.icao.int/environmental-protection/Pages/EnvReport10.aspx>.

2 Growth relative to 2006 emissions.

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imposed binding limits on climate pollution from the aviation sector.

In the absence of progress at the global level, the European Union decided several years ago to regulate climate pollution from all flights to, from, and within its territory as of January 1, 2012.<sup>3</sup> The EU also encouraged member states to allocate revenue raised from airlines to climate assistance programs for developing nations. The EU hoped this decision would help Europe meet its international commitments to provide climate finance to developing nations and thus garner support for the new law from least developed nations.

Prior to this rule entering into force, U.S. airlines challenged the measure in European courts. The U.S. carriers claimed that the EU law had unlawful extraterritorial impacts because it covers emissions on the whole flight and not just over European airspace. The European Court of Justice upheld the EU law<sup>4</sup> and the United States cried foul, in a rare moment of bipartisan agreement between the Obama administration and his Republican opponents in Congress.<sup>5</sup>

Also shortly before the EU regulations went into effect this year, the United States and 25 other nations — a group dubbed the “coalition of the unwilling” — issued a public rebuke of Europe, describing the measure as “inconsistent with the international legal regimes.”<sup>6</sup> Reinforcing this, the U.S. House of Representatives passed a bill that would effectively prohibit U.S. airlines from complying with the EU law,<sup>7</sup> and a similar bill, giving the Secretary of Transportation the power to impose this prohibition, cleared the

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U.S. Senate with unanimous support.<sup>8</sup> The two bills must be squared (likely meaning that the House will pass the Senate version) and the final measure must be submitted to the president for his signature. China has banned its airlines from participating in the EU program without government approval, India is considering a similar ban on its airlines, and both countries have so far refused to allow their airlines to report their emissions to the European Union.<sup>9</sup>

As the United States has yet to enact or implement its bill, U.S. airlines continue to comply with the EU law under protest. If the United States enables non-compliance by U.S. carriers by implementing its law, then starting in April 2013 the EU will likely fine those companies €100 (approximately \$125) for every ton of CO<sub>2</sub> they emit on flights to and from Europe, totaling roughly \$22 billion over the next eight years. The bill passed by the Senate could require U.S. taxpayers to reimburse airlines for this and other costs.<sup>10</sup>

While this much is clear, much of what nations, industry, and climate advocates believe about the dispute in fact is inaccurate. Here are a few examples.

3 Directive 2008/101/EC of the European Parliament and of the Council, 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0003:0021:EN:PDF>.

4 European Court of Justice, “Judgment of the Court in the Matter of Air Transport Association of America Et Al v Secretary of State for Energy and Climate Change,” December 21, 2011, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=211542>.

5 Mark Atwood and Elizabeth Wadsworth, “President Signs 2012 FAA Reauthorization Act,” February 15, 2012, <http://www.aviationlawadvisor.com/2012/02/15/president-signs-2012-faa-reauthorization-act/>; “U.S. Rejects EU Airline Carbon Rule,” BBC, December 21, 2011, sec. Business, <http://www.bbc.co.uk/news/business-16282692>.

6 “International Meeting of ICAO Council and Non-EU Member States on Inclusion of Aviation in the EU ETS Held,” September 30, 2012, <http://pib.nic.in/newsite/erelease.aspx?relid=76388>.

7 John Mica, *H.R.2594 European Union Emissions Trading System Prohibition Act of 2011*, n.d., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.2594>.

8 John Thune, *The European Union Emissions Trading System Prohibition Act of 2011*, n.d., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01956>.

9 Bloomberg News, “10 Airlines Snub Europe’s Emissions Rule,” *The New York Times*, May 15, 2012, sec. Business Day / Global Business, <http://www.nytimes.com/2012/05/16/business/global/10-airlines-snub-europes-emissions-rule.html>; Chris Buckley, “China Bans Airlines from Joining EU Emissions Scheme,” *Reuters* (Beijing, February 6, 2012), <http://www.reuters.com/article/2012/02/06/us-china-eu-emissions-idUSTRE81500V20120206>.

10 Brad Plumer, “Are the U.S. and Europe headed for a trade war over airline carbon fees?” *The Washington Post*, September 25, 2012. <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/09/25/could-the-u-s-and-europe-start-a-trade-war-over-airline-carbon-fees/?print=1>.

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## Myth 1: This Is an Ordinary Trade Dispute

**Not at all.** At first glance the dispute over international aviation pollution may seem like the latest skirmish in the decades-old transatlantic tug-of-war over economic power and regulatory preeminence, not much different than prior disputes over EU import standards for bananas, hormone-treated beef, and genetically modified corn and soy. In fact, however, this conflict is more significant for several reasons. First, the aviation dispute is commercially larger. In 2010, airlines flew 55.9 million people across the Atlantic, with U.S. airlines generating revenues of \$13.82 billion on these flights.<sup>11</sup> In contrast, the United States was exporting \$0.01, \$1.2, and \$0.5 billion to Europe in beef, corn, and soy respectively a decade ago when those trade disputes arose.<sup>12</sup>

Second, the aviation dispute is a test case on a matter of truly historic importance. At stake is the principle of whether nations may adopt climate laws that have impacts on foreign companies offering goods or services in their territories. Why does this matter? Many policymakers and business leaders fear that the cost of complying with climate laws will be significant, particularly for energy-intensive industries such as aluminum and concrete. They fear that foreign companies that do not have to comply with domestic climate laws may have a significant advantage. Consumers may prefer lower-priced goods and services from unregulated companies, they argue, particularly since consumers may have difficulty determining which goods and services were made in a climate-friendly manner. This is why the ability to regulate foreign firms competing within one's territory — the ability to maintain a level playing field — is essential to success on climate change. Nations will have less political will to address climate pollution at home if by doing so they perceive themselves as placing their own companies and workers at a disadvantage compared to international competitors that do not have to bear the cost of climate action.

This is particularly true since the last 20 years of global climate diplomacy have made plain that nations have

11 Federal Aviation Administration, *FAA Aerospace Forecast Fiscal Years 2012-2032*, n.d., [http://www.faa.gov/about/office\\_org/headquarters\\_offices/apl/aviation\\_forecasts/aerospace\\_forecasts/2012-2032/media/2012%20FAA%20Aerospace%20Forecast.pdf](http://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_forecasts/aerospace_forecasts/2012-2032/media/2012%20FAA%20Aerospace%20Forecast.pdf).

12 Although the WTO permitted the United States to retaliate against the ban on beef exports at the level of \$116.8 million per year which was the value of the exports that the WTO found would have occurred had Europe not banned U.S. exports. Foreign Agricultural Service U.S. Department of Agriculture, "Global Agricultural Trade System Online," September 4, 2012, <http://www.fas.usda.gov/gats/default.aspx>.

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different levels of political will when it comes to adopting climate policies; there are leaders and laggards. Europe by 2010 had reduced its climate pollution approximately 15.4 percent below 1990 levels.<sup>13</sup> In contrast, U.S. emissions in 2010 were 10.4 percent higher than 1990 levels.<sup>14</sup> The response to the EU aviation law has the potential to prevent Europe and other nations from continuing to lead, with potentially disastrous climate consequences for the world.

When the United States gets serious about climate protection, moreover, it will be the first nation to insist on a level playing field. Indeed, every major climate bill considered in Congress since 2005 contemplated fees or border measures to protect U.S. manufacturers in energy-intensive industries from unfair competition from China and elsewhere. In protecting U.S. airlines, the United States risks establishing a trade principle it will deeply regret later when it tries to protect U.S. firms from unfair competition from major emerging economies.

## Myth 2: The EU Law will Harm U.S. Airlines and Passengers

**Not really.** EU regulators designed the aviation law to minimize costs for all airlines, domestic and foreign. The EU provides generous transition assistance to airlines, giving them 85 percent of pollution permits for free through 2020. Yet, because transatlantic passengers have few alternatives

13 Does not include emissions from land use, land-use change, and forestry. European Environment Agency, *Annual European Union Greenhouse Gas Inventory 1990-2010*, March 2012, <http://www.eea.europa.eu/publications/european-union-greenhouse-gas-inventory-2012>.

14 Includes emissions from land use, land-use change, and forestry. U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2010* (U.S. Environmental Protection Agency, April 15, 2012), <http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2012-Main-Text.pdf>.

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to air travel, economic models predict that airlines will pass on close to 100 percent of the costs of compliance as though Europe had provided no transition assistance at all.<sup>15</sup> Various economic studies predict that U.S. and European airlines will actually make between \$380 and \$570 million per year in additional profits thanks to the new law, a 20-30 percent increase on transatlantic routes.<sup>16</sup> The EU treated power companies similarly during the first phase of the EU Emissions Trading Scheme and those companies were able to make a windfall profit under the arrangement.<sup>17</sup>

Over time the EU may decrease the level of transition assistance provided to airlines, but the initial profits should enable airlines to invest in fuel-efficiency technologies in order to manage future costs. Even declining levels of transition assistance from the EU could more than offset compliance costs for years to come. Yes, transatlantic passengers will face higher fares, but those costs are expected to equal a mere \$3 per one-way ticket — a 0.4 percent increase.<sup>18</sup> Routine fluctuations in aviation fuel prices have a far bigger impact on ticket prices than the EU's climate policy will have over the entire decade.<sup>19</sup>

### Myth 3: A Global Solution is Imminent

**Unlikely.** Most nations, including the United States and in Europe, say they favor negotiating a global solution in ICAO. Europe has offered to repeal its aviation law if ICAO adopts a meaningful global approach. The United States is seeking to rally those opposed to the EU law to put forward a concrete alternative in ICAO, assembling non-European nations in a meeting for that purpose at the end of July

15 Samuel Grausz and Nigel Purvis, *Is the Sky Falling for Airline Profits in the European Union?*, February 2012, [http://www.climateadvisers.com/pdf/Grausz%20and%20Purvis\\_Is%20The%20Sky%20Falling.pdf](http://www.climateadvisers.com/pdf/Grausz%20and%20Purvis_Is%20The%20Sky%20Falling.pdf); Robert Malina et al., "The Impact of the European Union Emissions Trading Scheme on U.S. Aviation," *Journal of Air Transport Management* 19 (March 2012): 36–41; IATA, *Financial Impacts of Extending the EU ETS to Airlines* (International Air Transport Association, January 9, 2007).

16 Nigel Purvis and Samuel Grausz, *Is the Sky Falling for Airline Profits in the European Union?* (Blue Skies Project, February 2012), [http://www.climateadvisers.com/pdf/Grausz%20and%20Purvis\\_Is%20The%20Sky%20Falling.pdf](http://www.climateadvisers.com/pdf/Grausz%20and%20Purvis_Is%20The%20Sky%20Falling.pdf).

17 Jos Sijm et al., "The Impact of the EU ETS on Electricity Prices," *Environmental Protection*, no. December (2008); Jos Sijm, Karsten Neuhoff, and Yihsu Chen, "CO<sub>2</sub> Cost Pass-through and Windfall Profits in the Power Sector," *Climate Policy* 6, no. 1 (January 1, 2006): 49–72.

18 Grausz and Purvis, *Is the Sky Falling for Airline Profits in the European Union?*; SEC, *Impact Assessment of the Inclusion of Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community* (Commission of the European Communities, 2006).

19 Grausz and Purvis, *Is the Sky Falling for Airline Profits in the European Union?*

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2012.<sup>20</sup> The secretary general of ICAO, Raymond Benjamin, has set a deadline of April 2013 for a compromise plan.<sup>21</sup>

Despite this new deadline, ICAO may prove utterly unable to resolve the dispute anytime soon because nations remain far, far apart. Europe wants a global system that in environmental terms is comparable to the law it has in place now, which begins reducing emissions immediately. In contrast, the United States favors a U.S. industry-backed proposal to cap global aviation emissions starting in 2020. China, India, and other major emerging economies are unwilling to accept emission caps on their airlines now or in 2020, preferring instead non-binding goals and perhaps new fuel efficiency standards for aviation engines. So far there is no evidence that the differences that have impeded progress over the past decade will dissolve in favor of a global consensus solution any time soon. We should hope for the best but expect the worst.

### Myth 4: Europe is Acting for the Wrong Reasons

**No.** Some, including the U.S. airlines, have argued that Europe is seeking to protect domestic carriers from international competition.<sup>22</sup> In actuality, the EU measure is unlikely to benefit EU airlines relative to U.S. airlines because the new EU rules apply equally to all carriers flying a given route, regardless of national origin. If anything, the EU law

20 "Washington Meeting Rearrirms Opposition to EU ETS and Commits to ICAO Progress but a Global MBM Some Way Off," G, August 2, 2012, <http://www.greenaironline.com/news.php?viewStory=1584>.

21 Martell, Allison, "U.N. Aviation Body Says Will Have Emissions Plan by March," *Reuters*, June 19, 2012, <http://in.reuters.com/article/2012/06/18/us-airlines-emissions-idINBRE85H1M920120618>.

22 Benny Peiser, "EU Emissions Trading Could Escalate into 'First Green Trade War'," *Public Service Europe*, March 1, 2012, <http://www.publicserviceeurope.com/article/1578/eu-emissions-trading-could-escalate-into-first-green-trade-war>; Jean Pisani-Ferry, "Sky-high Protectionism?," *EuropeanVoice*, June 4, 2012, <http://www.european-voice.com/article/imported/sky-high-protectionism-/74066.aspx>.

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may harm EU airlines by forcing them to cover their emissions for all their flights, while non-EU airlines only have to cover flights to and from Europe. Further, the transitional assistance provided to industry by the European Union does not discriminate based on the nationality of an airline.

Others, especially the U.S. airlines and some members of the U.S. Congress, have argued that European countries are using this law to raise revenue to pay off their mounting debts.<sup>23</sup> Yet, the European law was adopted four years ago, well before the European debt crisis emerged. Moreover, the annual revenues garnered from the program by European governments pale in comparison to what Europe owes, representing less than 0.0021 percent of European public debt.<sup>24</sup> Further, the aviation provisions ask European nations to allocate all revenue from the program to help developing nations adapt to climate change and mitigate their own climate pollution, though at present only Germany has made clear how this will work in practice. One can criticize the EU move on other grounds, but not for false intentions.

## Myth 5: Europe is Infringing on U.S. Sovereignty

**Only in routine ways.** International aviation rules generally allow nations to regulate flights in and out of their territory, provided they don't discriminate against foreign carriers. The United States routinely regulates foreign carriers, along with domestic airlines, and so do other nations in and outside the European Union. As an example, the United States requires all planes going to and from the United States to have reinforced cockpit doors and to limit liquids and gels in carry-on luggage. The United States further requires foreign airports with flights to the United States to have security checkpoints that meet U.S. standards.

23 Nancy Young, "A4A Oral Testimony of Nancy Young, VP for Environmental Affairs Before the Senate Committee on Commerce, Sciences, and Transportation," June 6, 2012, <http://www.airlines.org/Pages/A4A-Oral-Testimony-of-Nancy-Young,-VP-for-Environmental-Affairs.aspx>.

24 Author calculations. EU law allows auctioning of approximately 30 million allowances each year. At the current allowances price of €7.76 (about \$10) per metric ton CO<sub>2</sub>e, this equals approximately \$300 million per year. European public debt in April 2012 was approximately 82.5% of GDP or approximately \$14.5 trillion. Jacob Werksman, "Accelerating Ambition in the Aviation Sector: The Role of the EU-ETS" (Bangkok, September 4, 2012), [http://eeas.europa.eu/delegations/thailand/documents/thailande\\_eu\\_coop/environment\\_energy/eu\\_ets\\_aviation\\_en.pdf](http://eeas.europa.eu/delegations/thailand/documents/thailande_eu_coop/environment_energy/eu_ets_aviation_en.pdf); International Monetary Fund, "World Economic Outlook Database," April 2012.

## What Europe is doing on aviation pollution is well within the practice pioneered by the United States.

Outside the aviation sector, the United States routinely adopts laws with extraterritorial implications. Many U.S. sanctions and anti-corruption and anti-terrorism laws, for instance, apply to all transactions globally by domestic and foreign companies that do business in the United States. In other words, a German bank doing business in the United States doesn't just have to comply with U.S. laws on all U.S. transactions; it needs to do so for all transactions in China, Kenya, or Russia, even when those transactions have no immediate connection to the United States. Similarly, U.S. laws against torture, genocide, and even piracy allow the United States government to criminally prosecute foreign nations for acts committed anywhere in the world, even for acts with no connection to the United States or a U.S. citizen.

The United States, in fact, is known globally as being more willing to regulate foreigners for actions originating outside its territory than any other country in the world. What Europe is doing on aviation pollution is well within the practice pioneered by the United States. Perhaps turnabout is fair play, as the old expression goes.

## Myth 6: The U.S. President is Powerless to Resolve this Dispute

**Not true.** Many policymakers seem to assume the United States would need to adopt a new climate pollution law applicable to aviation, much as Europe did, in order to bring U.S. airlines within the safe harbor provided for in the EU law. This is not the case. The U.S. Clean Air Act, as in effect today, provides sufficient authority for the Executive Branch to regulate climate pollution from flights into and out of the United States. These regulations could be both broad and flexible, allowing cost-effective emissions reductions and exempting flights from the United States from the EU aviation policy, as allowed by the EU law.<sup>25</sup>

25 Nathan Richardson and Samuel Grausz, *Domestic Action on Aviation Carbon*, July 2012, [http://www.climateadvisers.com/pdf/aviation\\_carbon.pdf](http://www.climateadvisers.com/pdf/aviation_carbon.pdf).

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President Obama, if reelected, could use this Clean Air Act authority to make peace with Europe in a number of ways. Should nations negotiate a compromise in ICAO, for example, the president could use the Clean Air Act to implement that compromise without the need for new domestic legislation. Alternatively, if ICAO remains stalemated, the United States and Europe could negotiate a bilateral agreement under which the United States would use the Clean Air Act to regulate climate pollution for flights into and out of the United States in exchange for Europe exempting those flights from its law.

Importantly, given today's political climate, neither of these agreements would require the advice and consent of the U.S. Senate. Contrary to popular conception, only a small fraction of international agreements negotiated by the United States are treaties that require Senate approval. U.S. courts have held that the president may enter into international agreements without Congressional action whenever the president has the authority to implement those agreements under existing law, as would be the case here.<sup>26</sup>

The president alone, however, could not obligate the United States to finance climate action in developing countries by in effect taxing U.S. airlines, as Europe intends to do. In the U.S. system, only the Congress has the power to tax and appropriate funds. Given strong opposition to climate policy and foreign aid in Congress, the prospects for U.S. participation in a revenue-raising climate and aviation agreement seem dim over the next few years. But the United States could at least adopt reasonable regulations to reduce climate pollution from U.S. airlines without seeking to raise new revenue.

## Myth 7: The WTO Should Resolve the Dispute

**Risky.** Unless Europe backs down or the United States blinks, the aviation dispute could end up in the dispute resolution system of the World Trade Organization (WTO), and that would be unwise for Europe, the United States, and other countries.

Politically, the odds are that little will change over the next year or two. Europe seems unlikely to flinch; the European

<sup>26</sup> Nigel Purvis, "The Case for Climate Protection Authority," *Virginia Journal of International Law* 50, no. 1 (2009): 1007.

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Commission and Parliament have shown steadfast resolve. European policymakers are enjoying a rare stand against U.S. climate inaction while also protecting European firms from perceived unfair foreign competition.<sup>27</sup> Undoing the EU law would require broad political support that simply does not exist today across Europe. In the United States, the next administration — potentially a Romney administration — may prove uninterested in negotiating a genuine compromise with Europe on climate pollution from airplanes. Even a second Obama administration might only endorse a compromise if China and India also participated, and those nations may refuse to do so. In the face of this standoff, opposing nations may decide to challenge Europe using ICAO dispute-resolution provisions.<sup>28</sup> If those provisions fail to produce an outcome that all sides find acceptable, the side that loses in ICAO might appeal using the dispute resolution process in the WTO, the final word on the legality of policies that affect international trade.

The rules of the WTO are complex. On one hand, nations may take actions to protect the global environment and to ensure that international trade does not undermine the effectiveness of legitimate environmental measures. On the other hand, nations may not discriminate against foreign companies and generally may not discriminate among products and services based on how they were made or offered. Allowing the WTO to resolve how those rules apply in this case would be risky, even dangerous, for several reasons.

First, if the United States backed such a challenge, it could lose, undercutting U.S. power on trade issues and other

<sup>27</sup> "European Parliament Gives Strong Support to EU Aviation Emissions Legislation," March 15, 2012, <http://www.eurunion.org/eu/EU-in-the-Media/European-Parliament-gives-strong-support-to-EU-aviation-emission-legislation.html>.

<sup>28</sup> International Civil Aviation Organization, "Convention on International Civil Aviation Ninth Edition," 2006, [http://www.icao.int/publications/Documents/7300\\_9ed.pdf](http://www.icao.int/publications/Documents/7300_9ed.pdf).

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U.S. trade interests. The United States has a long-standing practice of not taking cases to the WTO unless it believes it will prevail. WTO law on the question of what nations may do to protect the global environment in the face of a global impasse remains murky.<sup>29</sup> In some instances, the WTO has upheld the right of nations to adopt trade-related environmental measures. Indeed, several of these cases involved trade measures the United States adopted to protect endangered dolphins and sea turtles from harmful practices in other nations. The WTO might easily conclude that after 15 years of waiting in vain for a global solution, Europe has the right to act unilaterally. The U.S. Trade Representative, the White House office responsible for U.S. trade policy, has consistently taken the view that losing cases in the WTO weakens U.S. credibility and power, and thereby undercuts the United States' ability to expand trade opportunities for U.S. companies.

Second, Europe too could lose in the WTO. As stated above, international trade law is unsettled on this point and WTO disputes are unpredictable. A loss would undercut European regulatory authority generally and it would also set back the cause of climate protection, for the reason stated at the outset. One could argue that the aviation dispute represents a good test case for clarifying WTO law in favor of the global environment and thereby maintain a level playing field for climate leaders. Europe tried multilateral approaches before resorting to unilateral action and international aviation is a highly competitive global market with an affluent clientele that can afford to offset its climate pollution. Yet, the EU aviation law is not the ideal test case. Established WTO case law shows that WTO appellate bodies are more likely to rule that a country's environmental laws are WTO-consistent when those laws were adopted pursuant to a multilateral agreement.<sup>30</sup> (Although nations have sometimes won when they can show as Europe could in the aviation case that, while they acted unilaterally, they genuinely attempted to negotiate a multilateral solution.)

29 J. Meltzer, "Climate Change and Trade—The EU Aviation Directive and the WTO," *Journal of International Economic Law* 15, no. 1 (February 2, 2012): 111–156; Lorand Bartels, "The Inclusion of Aviation in the EU ETS: WTO Law Considerations," *SSRN eLibrary* (April 30, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1959981](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959981).

30 World Trade Organization, "United States - Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body," October 12, 1998, [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf); World Trade Organization, "Mexico Etc Versus U.S.: 'Tuna-dolphin,'" 2012, [http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm).

Unless Europe backs down or the United States blinks, the aviation dispute could end up in the dispute resolution system of the World Trade Organization, and that would be unwise for Europe, the United States, and other countries.

Finally, this would be a no-win case for the WTO. With dozens of nations siding against Europe, the WTO would face political pressure to criticize the EU law. Not doing so might undercut support for the WTO and further trade liberalization among major emerging nations such as China and India. Yet, ruling against Europe would also risk a major backlash against the WTO from European policy-makers and global climate activists. The legitimacy of the WTO depends in part on maintaining a delicate balance between the disciplines of free trade and respect for other global goals, including climate protection. The best way to preserve that balance would be for nations, rather than a small group of WTO appellate body judges, to come up with a meaningful solution.

## Conclusion

The global controversy with Europe over its aviation-related climate law is no ordinary commercial dispute. Rather, it's a test of whether international trade and aviation rules will seriously undermine efforts to prevent the disastrous consequences of unmanageable climate change. U.S. efforts to roll back the EU law may prove shortsighted since the United States may soon wish to adopt similar measures and since the European law does not harm U.S. airlines or transatlantic passengers. The United States' desire to secure a global solution in ICAO is understandable, but the odds are that major emerging economies will block a meaningful solution in ICAO for the next few years at a minimum.

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The United States and Europe need to take proactive steps to resolve the dispute. The U.S. president has the authority to negotiate a truce with Europe in ICAO or bilaterally, and to implement a comparable system domestically without further Congressional approval. He should use it. Europe, on the other hand, while insisting on meaningful action, must engage with the United States to work out an agreement in ICAO or bilaterally that can be implemented under the existing EU law. A full-fledged legal case in ICAO or the WTO would be risky for the transatlantic allies and for the world as a whole. Both sides could lose and, even more importantly, the outcome could jeopardize the global trade system and the global climate.

## About the Authors

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## About GMF

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