

Unilateralism, Extraterritoriality and Climate Change

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Abstract

It is increasingly common for states to adopt climate change legislation that includes within its scope greenhouse gas emissions that occur outside of their territory. This legislation is frequently characterized as extraterritorial and its appropriateness and legality is cast in doubt. Drawing upon Simon Caney's distinction between first-order and second-order climate responsibilities, this chapter seeks to identify the circumstances in which it may be appropriate for states to extend the global reach of their climate change law. The chapter concludes by examining recent cases which shed light on the lawfulness of 'extraterritorial' climate legislation as a matter of domestic and international law.

Key Words

Extraterritoriality, Territorial Extension, First Order and Second Order Climate Responsibilities, Climate Change System Boundary, Common but Differentiated Responsibilities

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Bibliography

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1. Introduction

In 2005, the European Commission issued a communication on ‘reducing the climate change impact of aviation’ and recommended the inclusion of aviation in the European Union’s emissions trading scheme (ETS).¹ This communication emphasized the extent of the EU’s *responsibility* for international aviation emissions, pointing out that the EU’s international aviation emissions had increased by 73% between 1990 and 2004 and that on this growth trajectory, the EU’s international aviation emissions would offset more than one-quarter of the EU’s emission reduction commitment under the Kyoto Protocol. Given that the EU did not consider it to be ‘realistic’ for the International Civil Aviation Organization (ICAO) to take global decisions on uniform, specific measures to control aviation emissions, the EU decided to take unilateral action.²

The primary ethos underpinning the European Commission’s communication is an ethos of *responsibility*. Notwithstanding governance failures at the international level, the EU considered it incumbent on it to take responsibility for *its* international aviation emissions. The communication is slippery when it comes to identifying the appropriate indicator of environmental responsibility,³ but it is nonetheless adamant that it is ‘the EU’s’ international aviation emissions that the intervention is intended to address. This ethos of responsibility reflects a ‘logic of appropriateness’ which is concerned with how the EU *ought* to behave.⁴

Taking its lead from this ‘logic of appropriateness’, this chapter considers how far – geographically – a state’s climate change legislation ought to extend. The next part of the chapter sets out three key concepts upon which the analysis draws. The following part of the chapter identifies three situations in which unilateral, extraterritorial climate action may be justified. That discussion is *normative* and whilst the arguments

¹ COM(2005) 459 final.

² Ibid, p. 5.

³ On the idea of an ‘indicator of environmental responsibility’ see Rodrigues et al (2006).

⁴ On the logic of appropriateness and the logic of consequences see March, J. & Olsen, J. (1998)

made are deliberately respectful of the constraints imposed by international hard and soft law, they are not in any sense mandated by this. The final part of the chapter examines two key judgments laid down by courts in the EU and the US concerning the legality of ‘extraterritorial’ climate change legislation, and considers the attitude of the WTO to measures that seek to influence conduct outside of the territory of the regulating state.

2. Key Concepts

i) The Climate Change System Boundary

The concept of a climate change ‘system boundary’ is used to refer to the mode of apportioning GHG emissions between states.⁵ As will be discussed further below, the UNFCCC has endorsed a system boundary that is principally territorial in nature.⁶ This allocates GHG emissions to the state in which the emissions are generated. A territorial system boundary of this kind is in essence production rather than consumption based, because emissions are allocated to the country in which goods and services are produced rather than consumed.

The appropriateness of a territorial or production-based system boundary has formed the subject of considerable debate in both academic and policy circles.⁷ This is because ‘[a]round one-third of energy consumption and one-quarter of climate related emissions are from the production of goods and services which are consumed in a different country to where they were produced’.⁸ Annex I countries are a beneficiary of this because their in-territory emission reductions are reflected in their national emissions inventories whilst the increasing out-of-territory emissions that are ‘embodied’ in goods and services that are consumed within them are not.

⁵ Peters (2008).

⁶ IPCC (2006), p. 1.4. The IPCC’s reporting Guidelines have been endorsed by the Conference of the Parties to the UNFCCC. See, eg, Dec. 24/CP-10 providing that Annex I parties are to use these guidelines to estimate and report their emissions to the UNFCCC.

⁷ Peters, Hertwich, Edgar (2008), Rorigues (2006), Lenzen et al and Marques et al. (2012).

⁸ Peters, Andrews and Karstensen, (2012) p. 1.

Many commentators have argued that we should abandon a territorial system boundary in favour of some alternative approach. Some argue in favour of a consumption-based system boundary which would allocate the emissions embodied in the production and international transportation of goods and services to the country in which those goods or services are consumed. Others argue in favour of a system boundary that shares responsibility for GHG emissions between the producing and consuming state on the basis of an agreed ‘indicator of environmental responsibility’.⁹

ii) Extraterritoriality and Territorial Extension

Though the concept of extraterritoriality is much discussed and often used as a polemical device, its meaning is far from clear. A determination about whether a measure is extraterritorial requires a number of judgments to be made. Two in particular stand out.

First, it is necessary to decide whether the ‘nexus’ or connecting factor relied upon by a state to define the scope of application of its laws is territorial or not. While this will often be straightforward, there will be occasions when it will not. To give one example: if a state exercises prescriptive jurisdiction over extraterritorial GHG emissions on the basis that these emissions will cause effects that are felt within the territory of the regulating state, it is not clear whether this measure should be considered as extraterritorial.¹⁰

Second, it is common place for states to rely upon a ‘nexus’ or connecting factor which is territorial in nature whilst also framing the substantive obligations contained in legislation in such a way that conduct or circumstances abroad must be taken into account in assessing compliance with the legislation. The legislative trigger is territorial but still the legislation achieves an extended geographical scope.

The EU’s Aviation Directive in its original form offers a classic example of this.¹¹ The application of this measure was only triggered when a flight landed at or took off from an EU airport. However, the airlines responsible for operating these flights were

⁹ Rodrigues et al (2012).

¹⁰ Parrish (2011). For other examples drawn from EU law, see Scott (2014b).

¹¹ Dir. 2008/101.

required to surrender emission allowances to cover every tonne of CO₂ emitted during the course of the entire flight, including emissions generated outside the territory of Member States.

It is therefore important to draw a distinction between extraterritorial measures and measures which give rise to ‘territorial extension’. The distinction between ‘pure’ extraterritoriality and territorial extension may be summarized as follows:

A measure will be viewed as extraterritorial where its application is triggered by something other than a territorial connection with the regulating state. By contrast, a measure will be viewed as giving rise to territorial extension where its application is triggered by a territorial connection but the regulator, in assessing compliance with the measure, is required to take foreign conduct or circumstances into account.

Territorial extension may operate on a number of different levels. Compliance with legislation giving rise to territorial extension may be made to depend upon ‘foreign’ conduct relating to a particular transaction, for example the mode of production of a particular shipment of imported goods (transaction-level territorial extension).¹² Alternatively, compliance may be made to depend upon the content of the laws in force in the country in which a product is produced (country-level territorial extension).

iii) First Order and Second Order Climate Responsibilities

The analysis in this article draws upon a distinction elaborated by Simon Caney between first-order and second-order climate responsibilities.¹³ Caney views first-order climate responsibilities as consisting of an agent’s obligation to do its ‘fair share’ to address climate change according to the tenets of ‘burden-sharing justice’.¹⁴ However, he does not consider that an agent’s climate responsibilities stop there. Because it is inevitable that some agents will fail to comply with the first-order climate responsibilities, he argues that other agents have second-order climate

¹² See Scott (2014a) for a discussion of the different kinds of territorial extension.

¹³ S. Caney (2014).

¹⁴ Ibid, p. 125.

responsibilities to seek to induce these non-compliant agents to step into line. This might be summed up as ‘Do your share and encourage/induce others to do theirs to protect the potential victims of climate change.’

According to Caney, second-order climate responsibilities arise for two reasons. On the one hand, they arise because some agents have fail to fulfill their first-order climate responsibilities. These ‘non-compliant’ first-order agents have, as such, acted inappropriately. On the other hand, they arise because it is incumbent upon second-order agents to do what they can to minimize the threat of dangerous climate change. This (moral) obligation arises due to the severity of the negative consequences that would otherwise ensue for those who would suffer its destructive effects. It is because of the need to protect the entitlements of the potential victims of dangerous climate change that Caney characterizes second-order climate responsibilities as contributing to the realization of ‘harm-avoidance justice’.¹⁵

Caney appeals to human rights to justify his account of second-order climate responsibilities.¹⁶ He considers that persons have certain ‘fundamental interests’, ‘entitlements’ or rights which are sufficiently weighty to create corresponding obligations for others. In a climate change context:

People have fundamental interests in not suffering from (a) drought and crop failure; (b) heatstroke; (c) infectious diseases....; (d) flooding and the destruction of homes and infrastructure; (e) enforced relocation; and (f) rapid, unpredictable and dramatic changes to their natural, social and economic world.¹⁷

The nature and extent of the second-order climate responsibilities that these fundamental interests are capable of generating depends upon the nature and extent of an individual agent’s power. Caney invokes a power-responsibility nexus to attribute second-order climate responsibilities to agents who are in a position to make a ‘valuable difference’ in mitigating the threat of dangerous climate change.¹⁸ These

¹⁵ Ibid, p. 126.

¹⁶ This becomes clearer from an earlier article: S. Caney (2005).

¹⁷ Ibid, p. 768.

¹⁸ Caney (2014), p. 141.

agents incur a moral responsibility to exploit their power to ‘structure [social, economic and political] contexts in a way that may induce other agents to comply with their first-order responsibilities’.¹⁹ Caney conceives of power in a multi-faceted way, as encompassing ideational (knowledge shaping) and epistemic (knowledge creation) authority as well as material or structural power linked to the control and mobilization of military, economic and institutional resources (amongst others).

Caney offers us a relatively wide-ranging account of second-order climate responsibilities and ‘inducement’ modalities. However, this chapter explores a narrower normative claim, addressing the question of whether countries should be regarded as having second-order climate responsibilities which oblige them to use their market power in a effort to induce other agents to comply with their first-order climate responsibilities. The implications and contours of this normative claim are explored in detail below.

First though, it is important to acknowledge the difficulties and dangers inherent in Caney’s approach. Caney uses the term ‘compliance’ in assessing whether an agent has fulfilled its first-order climate responsibilities. This creates the impression that the answer to the question of who has done their ‘fair share’ to mitigate the threat of dangerous climate change is clear. But, as Caney accepts, the tenets of burden-sharing justice are deeply contested, leaving room for vigorous disagreement about which agents, including which states, have done ‘enough’.

Against this backdrop of contestation, there is a real danger that powerful agents will seek to use the concept of second-order climate responsibilities to ‘pass the buck’, by imposing the costs of mitigating climate change on agents other than themselves. It is because of this that Caney defends second-order climate responsibilities as part of a broader theory of climate justice which emphasizes the limits of what may be asked of first-order agents. In the context of the discussion in this chapter, there is a danger that countries may use the concept of second-order climate responsibilities, and the strength of their market power, to distribute first-order climate responsibilities in a manner that is skewed in its or others (e.g. all rich countries’) favour. This danger of abuse will be addressed below.

¹⁹ Ibid, p. 135.

3. How Far should a State's Climate Change Responsibilities Extend?

This chapter argues that there are three situations in which it is appropriate for states enact measures that give rise to territorial extension by including extraterritorial GHG emissions within the scope of their climate change laws. Typically, these measures will address extraterritorial GHG emissions that are 'embodied' in products imported into the market of the state adopting the measure. Whereas the first two situations involve the exercise of first-order climate responsibilities, the third involves the exercise of second-order climate responsibilities.

As a preliminary point, it is important to note that the following analysis attaches considerable weight to the (principally) territorial climate change system boundary that was set out in the IPCC's 2006 Guidelines and endorsed by the Conference of the Parties of the UNFCCC.²⁰ These Guidelines are binding upon Annex I Parties when they estimate and report their emissions to the UNFCCC. The UNFCCC does not state explicitly that Parties must use the same system boundary when adopting unilateral acts.²¹ Nonetheless, the IPCC's Guidelines have set out a system boundary that has been endorsed by 195 states (and the EU). These guidelines are considered by many to place too much emphasis upon territory, but they have been internationally agreed. States should therefore be required to give good reasons when they decide to depart from this internationally agreed system boundary, even when they adopt unilateral measures to combat climate change.

i) Unilateral Acts That Respect the IPCC's System Boundary

It has already been observed that the climate change system boundary constructed at the international level is principally *territorial* in nature. There are, however, some exceptions to this and within the confines of these exceptions, it is appropriate for states to include extraterritorial emissions within their national emissions inventories and for them to exercise *first-order* responsibilities in respect of the emissions concerned.

²⁰ IPCC (2006).

²¹ Article 3(5) UNFCCC acknowledges the right of Parties to adopt unilateral acts to combat climate change subject to the measure not constituting a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The exceptions to the principle of territoriality in the climate change system boundary are set out in the IPCC's 2006 Guidelines,²² and these exceptions are fairly limited in scope. To give just one example, carbon dioxide emissions from commercial road vehicles are not attributed to the state in which they are generated, but to the state in which the fuel is sold to the end user, even in relation to emissions that are generated outside of that state. So, for example, for a Russian registered lorry that fills up with diesel in the Ukraine before entering Belarus, the GHGs produced with this tank of diesel would all be apportioned to the Ukraine.

ii) System Boundary Gap-Filling

The IPCC's system boundary remains unsettled as far as international shipping and international aviation are concerned.²³ While the IPCC system boundary guidelines provide for the use of fuel consumption data or ship/flight movement data, they do not specify which consumed fuel or which ship/flight movements are to be attributed to which state. Hence they do not settle the question of which GHG emissions should be regarded as falling within the first-order climate responsibilities particular states. There is no agreement between states about how responsibility for GHG emissions from international shipping and aviation should be apportioned between them.²⁴ It can thus be said there is a 'system boundary gap'.

Where the international system boundary remains unsettled or unspecified in this way, states should be viewed as enjoying autonomy in determining how far their first-order climate responsibilities should geographically extend. They should, however, be required to exercise this autonomy in a manner that is respectful of the autonomy of other states. This is in keeping with the principle of sovereign equality in international law. To this end, the gap-filling system boundary that is endorsed by a state must be

²² IPCC (2006), Chapter 8.2.1.

²³ Ibid, para. 8.2.1, Volume 1 IPCC Guidelines and chapters 3.5 (water borne transportation) & 3.6 (civil aviation) of Volume 2 of the IPCC Guidelines.

²⁴ Gilbert P & Bows A. (2012).

susceptible to replication by all other states (or at an international level) without this resulting in the double counting of the GHG emissions concerned.²⁵

Taking the EU's Aviation Directive by way of example, it would be open to the EU to decide to exercise first-order climate responsibilities in relation to the worldwide emissions of either EU-departing or EU-arriving flights. However, where the EU settles upon a two-way option, including both EU-departing and EU-arriving flights, it must be viewed as exercising second-order climate responsibilities over either EU-departing or EU-arriving flights. That is, the measure becomes more than 'gap filling' to become an in pursuit of a second-order climate responsibility.

The design of the Aviation Directive implies a recognition of this on the part of EU. Whereas the Directive was emphatic in its inclusion of EU-departing flights, it was tentative in its inclusion of EU-arriving flights which could be exempted if they originated in a country that had taken steps to address the climate change impact of EU-destined flights.

iii) Second-Order Climate Responsibilities and Climate Change 'Extraterritoriality'

Drawing upon Caney's distinction between first-order and second-order climate responsibilities, it is the argument of this chapter that states are entitled to exercise second-order climate responsibilities even outside of the system boundary established by the IPCC Guidelines. They may do so in a bid to induce other states to comply with their first-order climate responsibilities.

Yet while this chapter defends the idea of second-order climate responsibilities, it acknowledges that there is a very real danger that the power that underpins the exercise of second-order climate responsibilities may be abused. It will therefore be important to articulate with some precision the conditions which ought to circumscribe the exercise of this power. While the task of elaborating these conditions necessarily goes beyond the limits of this short chapter, two conditions will be set out.

²⁵ This is not to say that no double-counting will occur because other states may adopt a different system boundary. It is simply to say that double-counting would not occur if all other states adopted the same system boundary.

First, in exercising second-order climate responsibilities, it should be incumbent on countries to explain the basis upon which they have selected the sectors in which to act. In so doing, they can refer to all relevant considerations, including the global importance of their domestic market for the product concerned, the overall volume of GHG emissions that are embodied in products (comprising goods and services) sold within their market and the proportion of these emissions that are generated in countries that may be deemed to have failed to fulfill their first-order climate responsibilities. This explanation would be intended to guard against the danger that countries might choose to exercise second-order climate responsibilities in sectors in which their industry suffers from competitive disadvantages rather than in sectors in which they enjoys significant market power.

Second, in exercising second-order climate responsibilities, countries should be required to take the principle of common but differentiated responsibilities and respective capabilities (CBDR) into account.²⁶ This is the most important consequence flowing from the distinction between first-order and second-order climate responsibilities. This is because when countries exercise second-order climate responsibilities, they are entering a jurisdictional space that ought, from the perspective of the IPCC system boundary guidelines, to be occupied by a different state. The adequacy of the mitigation effort that has been made by that state, and the answer to the question of whether that state has fulfilled its first-order climate responsibilities, will depend upon how that state is situated when viewed from the perspective of the principle of CBDR.

The task of operationalizing the CBDR principle in the context of unilateral action on climate change raises complex issues and states exercising second-order climate responsibilities will enjoy a considerable degree of autonomy in deciding how the principle of CBDR should be interpreted. While countries must exercise this autonomy in a manner that gives expression to the principle's two core elements of responsibility and capability, they may do so in a way that goes beyond a stark Annex I vs. non-Annex I approach.

²⁶ UNFCCC, Article 3. In its 2013 'airspace proposal' the Commission accepts that the principle of CBDR is relevant also in the context of unilateral action. This stands in contrast to its earlier position (see COM(2013) 722 final).

4. Climate Change ‘Extraterritoriality’ in the Courts

Courts in both the United States and the EU have been called upon to adjudicate upon the legality or constitutionality of climate change measures that give rise to territorial extension. So far, the contested measures have been upheld.

The Court of Justice of the European Union (CJEU) ruled that the EU’s decision to include aviation in its ETS was compatible with customary international law,²⁷ because it considered that the EU and its Member States enjoy ‘unlimited jurisdiction’ over aircraft which are present within the territory of a Member State.²⁸ Because of the physical presence within the EU of the aircraft subject to EU jurisdiction, the Aviation Directive was deemed ‘not [to] infringe the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory’.²⁹

According to the CJEU, this conclusion could not be called into question by the fact that the aircraft operators in question were required to surrender emission allowances in respect of emissions generated outside of the EU. The Court insisted that it is legitimate for the EU to make the carrying out of a commercial activity within the EU conditional upon compliance with EU environmental law, ‘in particular’ where the environmental objectives pursued by the EU ‘follow on from’ an international agreement to which the EU is party.³⁰ According to the Court, customary international law does not call into question the full applicability of EU law within the territory of the EU, even when the ‘event’ causing pollution within the EU occurs partly outside.³¹

The CJEU’s judgment does not distinguish between EU-departing and EU-arriving flights. It does not assess whether the EU’s choice of system boundary is reasonable or acknowledge the contingency inherent in the EU’s treatment of EU-arriving flights. It does not demonstrate any awareness of the existence of the principle of CBDR. It

²⁷ The CJEU also addressed many other questions in this important judgment.

²⁸ *Ibid*, paras. 124 & 125.

²⁹ *Ibid*, para. 125.

³⁰ *Ibid*, para. 128.

³¹ *Ibid*, para. 129.

does not reference the IPCC system boundary guidelines, consider the position of international aviation within these or reflect on how much authority, if any, these guidelines should enjoy. The Court's judgment is thinly reasoned and it hides behind the existence of a territorial nexus to downplay the novelty of the question relating to the legality of territorial extension that is being raised.³²

The EU aviation case is not the only case that has raised issues around the legality of territorial extension. In a federal context, in *Rocky Mountain Farmers Union*, the United States Court of Appeals for the 9th Circuit (the 9th Circuit) reversed the district court's finding that a California Fuel Standard is an impermissible extraterritorial regulation that is contrary to the dormant Commerce Clause.³³ The California Fuel Standard used a lifecycle analysis to determine the total carbon intensity of transportation fuel, including all emissions associated with production, refining and transportation of fuel, even when these activities took place outside of California.

The Court ruled that the California Fuel Standard only regulates the California market. While it may create an incentive for firms wishing to gain access to the market in California to alter their behaviour, it does not require any firm to comply with a particular carbon intensity standard or insist that a firm's home State adopts regulations comparable to those of California as a condition of Californian market access. The Court made clear that while transaction-territorial extension does not infringe the U.S. dormant commerce clause, country-level territorial extension would be a step too far.

The WTO 'courts' have still to rule in a dispute arising at the boundary between trade and climate change, despite the international opposition that the EU's Aviation Directive in its original form and the EU's Fuel Quality Directive as originally conceived have raised.

³² The Advocate General's Opinion also observes the worldwide effects of climate change including within the EU (para. 154).

³³ *Rocky Mountain Farmers Union & Others v. Richard W. Corey and Others*, judgment of United States Court of Appeals for the Ninth Circuit (No. 12-15131), p. 70. Petition for Certiorari was denied by the U.S. Supreme Court in this case on June 30, 2014 (Docket No. 13-1148).

Nonetheless, the WTO's Appellate Body (AB) has adopted a stance in relation to territorial extension that is encouraging for states that intend to use access to their domestic markets as a way of leveraging climate action elsewhere. Although the AB dodged the extraterritoriality bullet in the famous *Shrimp-Turtle* case,³⁴ a more recent AB report indicates that it considers that measures giving rise to territorial extension may, if carefully designed, be compatible with WTO law. Here, the AB appears to endorse the practice of territorial extension, albeit in relation to a measure concerning product labelling rather than an outright product ban. It is, however, important to emphasize that the AB's attitude to country-level as opposed to transaction-level territorial extension remains unclear.³⁵

6. Conclusion

The chapter has argued that there are at least three situations in which it is appropriate for states to include extraterritorial GHG emissions within the scope of their unilateral climate change laws. While two of these should be viewed as involving the exercise of first-order climate responsibilities,³⁶ the third should be viewed as involving the exercise of second-order climate responsibilities. By distinguishing between different kinds of measures that include extraterritorial GHG emissions within their scope, we are able to conceive of a spectrum of climate change 'extraterritoriality' or territorial extension. It is hoped that this spectrum and the other elements of the analysis included in this chapter can assist judicial and quasi-judicial bodies when they are confronted with the task of assessing the lawfulness of unilateral, 'extraterritorial' climate change measures.

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³⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R). See also *United States – Measures Concerning the Importation and Marketing and Sale of Tuna and Tuna Products* (WT/DS381/AB/R). See Shaffer (2013).

³⁵ See Regan (2009) and Scott (2014a) for a discussion of this issue.

³⁶ The paper has used the term responsibility to connote moral rather than legal responsibility.

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