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Aviation and International Emissions Trading

In 2008, the European Commission took the major step of including aviation in the European Union Emissions Trading Scheme (EU ETS) from 2012. This unprecedented action created controversy between the EU regulator, the aviation industry and states as to the legality of the extension of the EU ETS to aviation and the best approach to regulate aviation emissions. The International Civil Aviation Organization (ICAO), the United Nations agency responsible for international civil aviation, has led key aviation industry efforts to advocate coordinated actions against climate change.

At the Sixteenth Conference of the Parties of the United Nations Framework Convention on Climate Change (COP-16) held in Cancun from November 29, 2010 to December 10, 2010, the aviation industry put forward, through ICAO, the consolidated statement of continuing ICAO policies and practices related to environmental protection – climate change. The main thrusts of the ICAO submission at Cancun were (i) to reiterate the determination of ICAO member states to continue to play a leading role in global efforts to address climate change by working through ICAO to limit or reduce greenhouse gas (GHG) emissions from international aviation and (ii) to outline ICAO Assembly Resolution A37-19 of October 2010 (A37-19). Highlights of A37-19 include:

- the setting of aspirational global goals of annual average fuel efficiency improvement of 2 percent until 2020 and a fuel efficiency improvement rate of 2 percent per annum from 2021 to 2050;

- not to attribute specific obligations to individual states, allowing the different circumstances, respective capabilities and contribution of developing and developed states to the concentration of aviation GHG emissions in the atmosphere to determine how each state may voluntarily contribute to achieving the goals;
- encouraging states to submit their action plans outlining policies, actions and annual reporting on aviation CO₂ emissions to ICAO, preferably by the end of June 2012;
- establishing a *de minimis* threshold below which states are not expected to submit action plans towards achieving the global goals, in order to accommodate states which have low aviation activity or difficulty complying with standards or recommended practices;

- developing a framework for market-based measures in international aviation in accordance with specific guiding principles;
- encouraging operators wishing to take early action to use carbon offsetting, particularly through the use of credits generated from the Clean Development Mechanism (CDM) of the Kyoto Protocol;
- accelerating the development and implementation of fuel efficient routings and procedures to reduce aviation emissions;
- developing policy actions to accelerate the appropriate development, deployment and use of sustainable alternative fuels for aviation;
- developing a global CO₂ standard for aircraft emissions by 2013; and
- undertaking a study on the possible application of the CDM to international aviation.

A Global Sectoral Approach to Aviation CO₂ Emissions

ICAO advocates a global sectoral approach to tackle aviation CO₂ emissions and considers A37-19 to have established the first globally harmonized agreement for a sector to limit CO₂ emissions. While A37-19 does establish a common basis for action to reduce aviation emissions and the development of market-based measures, it falls short of expressly supporting the EU ETS as a possible building block for a global aviation emissions trading scheme. During the ICAO Assembly which adopted A37-19, the EU stated that EU ETS legislation made it clear that if there is agreement at ICAO on global



measures, the EU will consider adapting the EU ETS. The EU stressed that it was important for ICAO to develop a global framework for market-based measures that facilitated effective action. A future global framework could well develop through linking or mutual recognition of measures developed at a state or regional level.

Challenge to the EU ETS

Notwithstanding broad support in the aviation industry for a global emissions trading scheme and action to reduce GHG emissions, there has been considerable resistance from the U.S. aviation industry to the extension of the EU ETS to aviation. Indeed, in December 2009, the Air Transport Association of America and several U.S. airlines filed an application for judicial review in the English High Court against the United Kingdom Secretary of State for Energy and Climate Change in relation to the inclusion of international aviation in the EU ETS. The plaintiffs argue that the EU has no jurisdiction to regulate flights flying into and out of the EU and the unilateral application of the EU ETS to non-EU carriers is in breach of international law. In May 2010, the English High Court referred the matter to the European Court of Justice for a preliminary ruling. The key challenges are that inclusion of international aviation in the EU ETS:

- breaches Articles 1, 11, 12, 15 and 24 of the Chicago Convention (on the principal basis that ICAO, not the European Commission, is the proper authority to regulate international aviation);
 - breaches Articles 3(4), 7, 11 and 15 of the Open Skies Agreement between the EU and the United States (including the granting of rights, application of laws, charges and environmental measures);
 - contravenes Article 2(2) of the Kyoto Protocol (the reduction of aviation GHG emissions should be pursued through ICAO); and
 - breaches customary international law (including the right of states to complete and exclusive sovereignty over their air space).
- Some of the arguments against the challenges are:
- the Chicago Convention was not drafted to deal with climate change issues (it came into force in 1947);
 - both the United States and the EU have long-standing histories and case law exercising extra-territorial jurisdiction (such as in antitrust matters);
 - the extension of the EU ETS to aviation is not discriminatory as it applies to both EU and non-EU carriers;
 - the EU ETS is not a tax, customs duty or charge;
 - the EU ETS does not regulate flights originating and terminating outside the EU; and
 - reducing GHG emissions is not the province of any single state but in the common interests of the international community.

A ruling by the European Court of Justice is not expected until 2012.

What This Means for the Aviation Industry

Pressure will inevitably continue to be exerted on the aviation industry to reduce GHG emissions. As a highly competitive, investment-intensive and tight-margin sector, the aviation industry will need carefully designed and implemented policies and regulations from governments at international, regional and domestic levels. The industry has strong arguments to apply principles of common but differentiated responsibility and non-discrimination to measures that reduce GHG emissions (as opposed to more risky and complicated arguments based on the breach of international law and extra-territoriality outlined above). Policy makers and regulators will need to evaluate the nature and needs of the aviation industry so as to apply realistic measures while enabling sustainable growth. It may in reality be difficult to prevent a rise in absolute emissions in the short to medium term without posing a risk to growth in the aviation industry driven by increasing global economic activity and social mobility. All actors should be reminded of the fact that sustainable development principles require a balancing of economic, social and environmental priorities, where no one priority may outweigh the other to produce a sustainable outcome.

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