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THE EUROPEAN UNION'S EMISSIONS TRADING SCHEME: A VIOLATION OF INTERNATIONAL LAW

(112–49)

HEARING

BEFORE THE

SUBCOMMITTEE ON
AVIATION

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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U.S. House of Representatives
Committee on Transportation and Infrastructure

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Washington, DC 20515
July 25, 2011

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MEMORANDUM

TO: Members, Subcommittee on Aviation

FROM: The Honorable Thomas E. Petri, Chairman, Subcommittee on Aviation

SUBJECT: Hearing on the European Union's Emissions Trading Scheme: A Violation of International Law
Wednesday, July 27, 2011, 9 a.m. in room 2167 Rayburn House Office Building.

PURPOSE

The Subcommittee on Aviation will receive testimony from Federal government and industry witnesses regarding the European Union's Emissions Trading Scheme. The discussion will focus on the unilateral actions of the European Union ('EU") in applying their Emissions Trading Scheme ("ETS") to all civil aviation operations; the EU's actions and international law; and the impact of the EU's ETS on U.S. operators, the competitiveness of the U.S. aviation industry, and U.S. aviation jobs.

BACKGROUND

European Union's Emissions Trading Scheme

The European Union's Emissions Trading Scheme ("EU ETS") began in 2005 with the capping of emissions of carbon dioxide ("CO_2") from more than 10,000 stationary sources within the EU (covered sectors included: power plants; petroleum refining; iron and steel production; coke ovens; pulp and paper; and cement, glass, lime, brick, and ceramics production).[1] Under the ETS, the EU auctions a specified number of emissions allowances for each multi-year period, and distributes a certain number of allowances for free. A covered emitter is required to submit

[1] CRS Report RL34150, *Climate Change and the EU Emissions Trading Scheme (ETS): Kyoto and Beyond*, by Larry Parker (February 2008).

to regulatory authorities one allowance for each ton of CO_2 emitted during the period. There is an active market for allowance trading, in which the emitter may sell unneeded allowances to others or purchase whatever additional allowances it requires.[2]

Starting in January 2012, civil aviation operators landing in or departing from the EU will be included in the ETS.[3] This means that all segments of international flights to, within, and from the EU by U.S. air carriers would be subject to the ETS, including those portions over the United States, Canada, and international waters.

In 2012, the total quantity of emissions allowances would be equivalent to 97% of the aviation sector's average 2004-2006 emissions. In allocating the emissions allowed under the cap, 85% of the sector's 2012 allowances are to be given to aircraft operators at no cost, and 15% of the allowances are auctioned. In 2012, according to the International Air Transport Association (IATA), 212.9 million credits will be issued directly to airlines, 85%, or 181 million, for free, and 15% or 31.9 million will have to be purchased through auction. IATA also indicates that in 2012, airlines will have to purchase an additional 35.5 million allowances in the open market, assuming they are available, to cover growth. With the price of carbon in the EU currently € 13[4], the total cost to airlines in 2012 is estimated to be nearly $1.3 billion. The 2012 price of carbon in the EU is depressed due to the current economic crisis and is expected to rise. By 2020, the price is anticipated to reach € 50. Therefore, according to IATA, the EU ETS is estimated to cost airlines almost $1.3 billion in 2012 alone.

In 2013, the cap would be reduced to 95% of the aviation sector's average 2004-2006 emissions, with further reductions to be agreed on as part of the ongoing review of the ETS. The EU Commission has proposed that 80% of the aviation sector's allowances be distributed free of charge in 2013, with 20% being auctioned. The percentage of free allowances is expected to continue declining with a goal of auctioning all allowances in 2020. According to IATA, the cost estimate for the EU ETS goes up to $3.5 billion in 2020.

Operators emitting more than their allowed cap would need to buy additional allowances on the carbon market and the directive provides sanctions for failure to comply with the scheme. Sanctions include the possibility that a non-complying airline might be banned from operating in the EU.[5] Airlines will purchase allowances and pay penalties to the EU Member State to which they most frequently fly; the United Kingdom will be the Member State for most U.S. carriers.

Finally, under the EU ETS, if a country can show "equivalent measures" on CO_2 reduction from its airlines, then those airlines would not have to pay the carbon charge for one leg of their European roundtrip. However, the EU has provided no guidance on how to establish "equivalence" or what "equivalent measures" means.

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[2] CRS Report *European Aviation Policy Issues*, by Bart Elias (June 2011).

[3] ETS provides an exception for military aircraft, some small carriers, emergency services, research, and humanitarian flights.

[4] € = Euros

[5] CRS Report *European Aviation Policy Issues*, by Bart Elias (June 2011).

U.S. Government Position on ETS:

According to the Department of Transportation ("DOT"), the Department of State, and the Federal Aviation Administration "(FAA"), the U.S. is committed to addressing global climate change and believes that the International Civil Aviation Organization ("ICAO") policies, standards and recommended practices should provide the framework for measures to address international Greenhouse Gas ("GHG") emissions from international civil aviation. The U.S. Government ("USG") has made clear to its European counterparts, that it is the USG's responsibility and authority to determine the U.S. response to climate change. Currently, the USG is developing its response to climate change in conjunction with work being done in ICAO.

In June 2011, the United States presented its formal objection to the EU ETS at a half-yearly meeting in Oslo of the U.S.-EU Joint Committee created under the 2007 Air Transport Agreement on the liberalization of air service between the United States and Europe (commonly known as the "Open Skies agreement"), and which meets regularly for discussions on implementation of the agreement. The Open Skies agreement liberalized air service between the United States and Europe by, among other things, permitting U.S. and European air carriers to fly between any point in the European Union and any point in the United States.

USG objects to U.S. operators being subject to the EU ETS without the explicit agreement of the USG for any portion of their flights between airports of Member States of the EU and the U.S., as well as for other flights covered by the U.S.-EU Air Transport Agreement. This includes all preliminary impositions on U.S. operators such as monitoring, reporting and verification of emissions, not just surrendering of permits for such emissions.

According to the FAA, in response to the ICAO Assembly resolution with respect to aviation and climate change challenges, the USG is undertaking a set of initiatives under the U.S. Next Generation Air Transportation System ("NextGen"), as well as working at ICAO on such initiatives as the development of a meaningful CO_2 standard. According to FAA, the full implementation of NextGen could reduce greenhouse gas emissions from aircraft by up to 12 percent by 2025.[6] The USG also points out that the U.S. aviation sector has a strong record of fuel efficiency improvements and greenhouse gas emissions savings and continues to work with the government to advance technological, operational, infrastructure and alternative fuel opportunities for further improvements.

Based on system wide operations (both domestic and international) U.S. aviation fuel consumption and CO2 emissions have declined 15% between 2000 and 2010.[7] By comparison, based upon European greenhouse gas inventories submitted to the United Nations, the annual aviation CO_2 emissions for operations within the 27 European Union Member States were 12%

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[6] GAO report number GAO-08-706T, "Aviation And The Environment: NextGen and Research and Development Are Keys to Reducing Emissions and Their Impact on Health and Climate" (May 7, 2008).

[7] U.S. aviation emissions statistics for 2000 through 2010 were generated from FAA modeled data using the Aviation Environmental Design Tool (AEDT).

lower in 2009 compared to 2000, while CO_2 emissions for flights departing the 27 European Union Member States grew by 15%.[8]

Industry Lawsuit

In 2009, American, United, and Continental airlines, along with the Air Transport Association of America, filed a legal challenge to the EU ETS in the United Kingdom. The lawsuit was transferred to the European Court of Justice and arguments in the case began on July 5, 2011.

The U.S. airline industry has requested that the European Court of Justice ("ECJ") dismiss the European Union's application of an ETS on international civil aviation. The U.S. air carriers argue that aviation greenhouse gas emissions should be regulated on a global sectoral basis (i.e. only civil aviation sector of industry), and unilateral action by any country or group of countries violates international law. It is the air carriers' position that the EU is violating international law and several treaty provisions in the Chicago Convention. Pursuant to the Chicago Convention, countries have authority over airlines in their own airspace. Therefore, the air carriers argue that the EU ETS cannot regulate flights to and from Europe when they are not over Europe. The U.S. air carriers also dispute whether Europe can, under the Chicago Convention, regulate U.S. airlines as they fly over the high seas, or if Europe can levy charges on other country's airlines. Finally, air carriers argue that the levies imposed by the ETS violate the Kyoto Protocol which confirms that ICAO has the authority to establish greenhouse gas policy for international aviation. [9]

In its testimony before the ECJ, the ATA provided an example of the application of the EU ETS to a flight from San Francisco to London Heathrow. According to ATA, as a percentage of total emissions from this flight, 29% take place in US airspace, including those on the ground at the airport. Another 37% take place in Canadian airspace and a further 25% take place over the high seas. Only 9% of emissions take place in EU airspace (Attachment A provides a visual of this flight). But, the ATA pointed out that the ETS will impose a levy on the air carrier, and may also impose an excess emissions penalty, based on emissions for the entire flight from gate-to-gate.

The EU is defending its ETS and its interpretation of international law. The European Court of Justice is expected to rule at the end of 2011 or in early 2012.

EU Position on ETS

The EU indicates that it is leading global efforts to reduce greenhouse gas emissions from human activities and the ETS is the cornerstone of its strategy for cutting its own greenhouse gas

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[8] The European Environment Agency (EEA) submits greenhouse gas inventories to the United Nations in accordance with the Framework Convention on Climate Change (UNFCCC). The EU27 aviation statistics are from EEA. (see:http://dataservice.eea.europa.eu/pivotapp/pivot.aspx?pivotid=475) .

[9] *ATA Calls EU ETS Application to U.S. Airlines Illegal*," http://www.airlines.org/News/Releases/Pages/news_07-05-11.aspx (July 5, 2011).

emissions cost-effectively.[10] The European Commission believes using emissions trading to tackle emissions from the aviation sector is fully in line with the EU's international obligations and decisions taken by ICAO.[11] The European Commission created the Directorate-General for Climate Action ("DG CLIMA") in February 2010. DG CLIMA leads international negotiations on climate, helps the EU to deal with the consequences of climate change and to meet its targets for 2020, and develops and implements the EU ETS.[12] The European Commission would like to build a global carbon market and hopes to link up the ETS with compatible systems around the world to form the backbone of such a carbon market.[13]

The European Commission has estimated that auctioning could raise an EU-wide total of € 30-50 billion depending on the carbon price.[14] EU Member States have agreed that they should use at least 50% of this income to combat climate change, in both Europe and developing countries.[15]

ICAO Actions on Climate Change

Over the past few years, the international aviation community has agreed to the following measures to address the challenge of climate change through ICAO:[16] [17]

- A global goal of 2 percent annual improvement in fuel efficiency through 2050, and further exploration of the feasibility of more ambitious medium and long-term goals, including carbon-neutral growth and emissions reductions.
- The development of a global CO_2 standard for aircraft and facilitation of further operational changes to reduce aviation emissions.
- The development of a framework for market-based measures in international aviation.
- Elaboration on measures to assist developing States and to facilitate access to financial resources, technology transfer and capacity building.
- The submission of States' action plans, outlining their policies and actions, and annual reporting of data to ICAO on their aviation fuel consumption. ICAO is currently undertaking work in both these areas to assist ICAO Member States in fulfilling these requirements. This is the first case where a global industry has adopted mandatory emissions reporting requirements across both Annex-1 and non-Annex 1 countries.[18]

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[10] *EU action against climate change. The EU Emissions Trading Scheme*, European Commission (2009 edition).
[11] Id.
[12] European Commission Climate Action website, http://ec.europa.eu/clima/policies/ets/index_en.htm (November 2010).
[13] Id.
[14] *EU action against climate change. The EU Emissions Trading Scheme*, European Commission (2009 edition).
[15] Id.
[16] Source: Federal Aviation Administration.
[17] With the exception of efforts to address fuel burn reporting, these are aspirational, non-binding measures.

[18] Annex I countries are industrialized countries and economies in transition; Annex II countries are developed countries which pay for costs of developing countries; and Non Annex I countries are developing countries.

Other EU ETS Issues

The USG and U.S. aviation industry have pointed to a number of EU ETS-related issues including:

- *ETS violates international law*: ETS enforcement by EU Member States on U.S. operators without U.S. consent raises serious legal concerns under international law, including the Chicago Convention and the U.S.-EU Air Transport Agreement.

- *ETS lacks transparency and clarity*: For example, under the EU ETS, if another country can show "equivalent measures" on CO_2 reduction from its airlines, then those airlines would not have to pay the carbon charge for one leg of their European roundtrip. However, the EU has no objective way to measure "equivalence" and has provided no guidance to date.

- *ETS is nothing more than a revenue-raiser for EU Member States*: There is no guidance on how the funds should be used and some Member States intend to use the funds for whatever they want as opposed to investing in research and development efforts with the goal to reduce CO_2 production by the civil aviation sector.

- *ETS actually harms efforts to reduce civil aviation CO_2 production*: The EU ETS limits airlines' ability to have capital to invest in efforts to develop alternative fuels, new fuel-efficient aircraft, or equipment needed to operate in a more efficient and environmentally-friendly satellite-based air traffic control system.

- *ETS could result in a trade war*: The U.S., China, Australia, Canada, and numerous other countries have expressed objections to the application of ETS to their air carriers. China has threatened to cancel airplanes orders from Airbus, and others in the aviation industry have warned that a trade war scenario is real. Both Airbus and the Association of European Airlines (AEA) expressed their concerns that ETS might result in a political situation that would negatively impact European carriers and manufacturers.[19]

- *ETS could negatively impact U.S. competitiveness*: Requiring U.S. operators to meet regional goals and targets of the EU ETS could lead to a less than optimal allocation of schedules and aircraft compared to that which might be achieved through allocations based on system-wide (domestic and international) approach. Additionally, if another country, such as China, is granted a waiver and the U.S. is not, the U.S. air carriers will also be put at a competitive disadvantage. In the end, either scenario could result in job losses in the U.S. aviation industry.

- *The proliferation of "eco-charges" by EU Member States*: There are growing concerns about whether "eco-charges" or "eco-taxes" are consistent with EU Member States' obligations under international law, and whether some of these charges may, in effect, double charge for the same emissions the EU intends to regulate under the ETS.

[19] Concerns were shared with EU climate change commissioner Connie Hedegaard in a joint letter sent in June 2011.

Witnesses:

Panel I:

The Honorable Susan Kurland
Assistant Secretary for Aviation and International Affairs
U.S. Department of Transportation

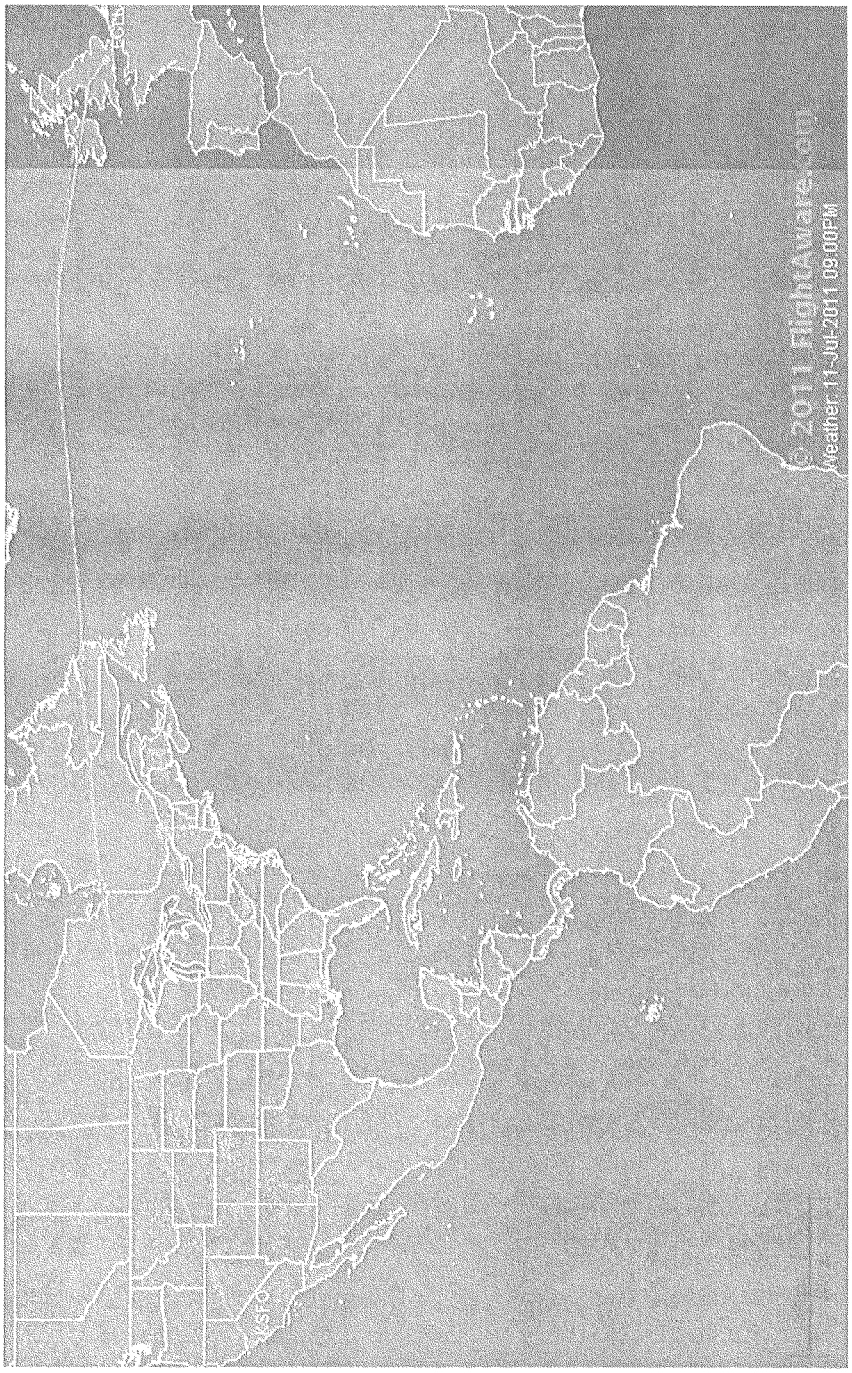
Accompanied by:
The Honorable Julie Oettinger
Assistant Administrator for Policy, International Affairs and Environment
U.S. Federal Aviation Administration

The Honorable Krishna R. Urs
Deputy Assistant Secretary for Transportation Affairs
U.S. Department of State

Panel II:

The Honorable Nancy Young
Vice President, Environmental Affairs
Air Transport Association

Captain Lee Moak
President
Air Line Pilots Association International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THE EUROPEAN UNION'S EMISSIONS TRADING SCHEME: A VIOLATION OF INTERNATIONAL LAW

WEDNESDAY, JULY 27, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON AVIATION,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2167, Rayburn House Office Building, Hon. Thomas Petri (Chairman of the subcommittee) presiding.

Mr. PETRI. The hearing will come to order. Today we will hear testimony on the European Union's Emissions Trading Scheme. This hearing is both timely as well as incredibly important, and I would ask unanimous consent that a statement from the European Union be submitted for the record.

[The information follows:]

EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Acting Head of Delegation

Washington, 26 July 2011
PSD/LV/BW/ip D(2011) 2183

The Honorable
Thomas E. Petri
Chairman
Subcommittee on Aviation
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman,

On behalf of the European Union I would like thank you in advance for the privilege of submitting the attached text, for the official record of the Subcommittee hearing you will chair on 27 July 2011 regarding the European Union Emission Trading Scheme. I hope that the statement will correct some of the misperceptions about the EU scheme's goals and its relationship to both the International Civil Aviation Organization (ICAO) and its relationship to US national air carriers servicing EU airports.

You will understand that the EU disagrees with the legislation under consideration at by the committee. I don't propose to comment extensively on this proposed legislation except to point out that for more than 15 years, the EU has been seeking global agreement on tackling aviation's increasing contribution to greenhouse gas emissions, in particular through ICAO. The EU continues to be committed to reaching global agreement in ICAO, the UNFCCC or other UN fora. We believe that the necessary steps for reducing the growth of aviation emissions must be addressed, including through market-based measures. To date, no breakthrough has been achieved in ICAO to this end but the EU strongly urges work to resume.

In the meantime, ICAO recognises that some States may take actions to tackle aviation emissions prior to 2020, and the EU has put in place legislation to address emission of flights operating through airports located in EU territory, in accordance with its sovereign right to do so under the Chicago Convention. We would recall that the EU's legislation contains non-discriminatory provisions to recognise the actions of other nations to reduce the growth of aviation emissions (the so-called "equivalent measures"). The EU's action involves 30 States acting together on a common approach to aviation emissions and is aimed to serve as a building block towards global action to reduce these emissions.

2175 K Street NW, Washington, DC 20037-1831 Telephone: (202) 862.9500. Telefax: (202) 429.1766.
E-Mail Address: delegation-washington@eeas.europa.eu

I assure you that the European Union Delegation in Washington is prepared to discuss this matter with you and all of the members of the committee and anyone else in the Congress who has concerns on this matter.

Sincerely,

François Rivasseau
Chargé d'Affaires a.i.

cc: Rep. John Mica
Rep. Nick Rahall
Rep. Jerry Costello

European Commission Information note for House of Representatives Aviation Subcommittee hearing on the EU Emissions Trading System (EU ETS)

This submission provides factual information relating to the inclusion of aircraft emissions in the EU's Greenhouse Gas Emissions Trading System (EU ETS), focusing in particular on the concerns set out as findings in the draft "European Union Emissions Trading Scheme Prohibition Act of 2011"

1. "Unilateral" measure - or implementation of a policy approach endorsed at global level?
For more than 15 years, the EU has been seeking global agreement through the United Nations to tackle aviation's increasing contribution to greenhouse gas emissions, in particular through the International Civil Aviation Organisation (ICAO). Globally, carbon dioxide emissions from international aviation are expected to grow by at least 60% from 2006 levels by 2020 and by at least 300% by 2050[1]. The EU remains committed to reaching global agreement and to supporting work within ICAO. To date, a breakthrough has not been achieved in ICAO and the States represented there have been unable to agree on binding global goals and measures for international aviation[2].

ICAO first endorsed the use of "open emissions trading" for international aviation in 2001. Following this, ICAO studied three options for implementation. In 2004, this work led ICAO (with United States' backing) to conclude that implementation of a unified global system based on a new legal instrument under ICAO auspices should *not* be pursued further. Instead, ICAO agreed to pursue implementation through other avenues, one of which was "*to incorporate emissions from international aviation into Contracting States' emissions trading schemes*". This is precisely the avenue that the EU followed. Legislation to include aviation in the EU ETS was passed and entered into force in 2009. This legislation was developed, negotiated and adopted with complete transparency. The latest (2010) ICAO Assembly Resolution recognises that market based measures such as emissions trading are part of a basket of measures that States may choose to implement to limit the climate impacts of aviation. Additional study on the feasibility of a global market based measure is also envisaged.

The EU ETS legislation states explicitly that, in the event of an agreement on global measures to reduce greenhouse gas emissions from aviation, the EU will consider whether amendments to its legislation should be made. In the interim, the EU Emissions Trading System is applied by 30 sovereign states, with a combined population of over 500 million people, coming together to implement a common approach to reduce aviation emissions as part of a comprehensive package of policy measures. Such a mechanism could serve as a building block for future global action.

2. US aircraft operators "paying" for flights outside the EU territory?
The EU ETS is a market-based approach to incentivise cuts in greenhouse gas emissions; it is not a tax nor a charge. Rather, it establishes an emissions ceiling. The system has been operating since 2005, covering more than 10,000 industrial plants – power plants, oil refineries, steel mills, technology companies, pharmaceuticals etc. Aircraft operators will receive free allowances to cover most of their emissions. If they choose to emit more than their free allocation, they can source allowances from any other participant, from Member States via auctions or they can use international credits from emissions reduction projects in third countries. From 2012, aviation will also be covered by the EU ETS, involving aircraft operators active in the EU market. The legislation will apply to flights landing at or departing from any European airport[3].

The EU ETS system applies to all aircraft operators without distinction as to nationality so as to be non-discriminatory and to minimise risks of market distortions. It is clear that applying differential requirements between aircraft operators would distort competition between those operating on the same routes.

Under the EU ETS, aircraft operators have been monitoring their emissions since 2010, and reported them for the first time in March 2011. Airlines are required to surrender allowances in respect of their reported CO_2 emissions on an annual basis, with the first compliance to take place by 30 April 2013.

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[1] Source: ICAO GIACC/4-IP/1
[2] See http://www.icao.int/icao/en/assembl/A37/Docs/10_reservations_en.pdf
[3] 27 EU Member States plus Iceland, Liechtenstein and Norway.

The large majority (85%) of allowances are being allocated to individual aircraft operators free of charge. This level of free allocation is fixed in the legislation for all future years up to 2020 and cannot be reduced without the enactment of additional primary legislation. All commercial airlines with significant operations to or from EU airports have submitted applications for free allocation. Airlines that have made such applications, including U.S. airlines, will receive their free allocation by 28 February 2012. Allocations to aircraft operators are based on their respective output in 2010 (measured in terms of the total distance travelled and the total mass of passengers and freight carried). Allocations are, therefore, based on activity and not emissions, and thus reward those that are more efficient and those that have already invested in fuel efficiency. Free allocation also means that the costs for the aircraft operators should be modest and these costs are expected to be passed on to passengers. For example, using the ICAO carbon calculator[4], 448 kg of CO_2 is emitted in respect of a passenger on a typical flight from Brussels to Washington DC. As airlines will receive the majority of their allowances for free, the cost per passenger would be less than two dollars each way at current carbon prices.

3. Infringement of sovereignty?

The only operators subject to the rules are those choosing to operate to or from EU airports. The Chicago Convention clearly states that Contracting States have the sovereign right to determine the conditions for admission to or departure from their territory. The legislation contains no regulation of how aircraft operate, neither within or outside EU airspace, and no constraints on such activities are imposed except for flights that arrive at or depart from EU airports.

In terms of the scope, ICAO has never achieved consensus on how to define which aircraft emissions can or should be subject to each contracting State's measures. ICAO has however clearly identified an airspace approach as "impracticable"[5], a conclusion also reached by the United Nations Framework Convention on Climate Change (UNFCCC) as early as 1998[6]. This approach has not been proposed by any country in ICAO or the UNFCCC. In contrast, an approach based on coverage of all emissions along a given flight route has been identified by ICAO as one of the options States may consider. The EU legislation is consistent with this approach. The legislation allows for the scope to be adapted to take into account any future agreement adopted at global level and the legislation contains provisions to recognise the actions of other States to reduce the growth of aviation emissions (sometimes referred to as "equivalent measures"). This would allow for the exemption of all incoming flights operating from those countries to the EU on a non-discriminatory basis. The EU emphasises its willingness to engage in constructive consultations with the United States, consistent with the 2010 ICAO Assembly Resolution, including in relation to the exemption of all incoming flights to the EU from the United States.

4. Undermining efforts to adopt global approaches?

As explained under point 1, the EU has worked tirelessly in ICAO and elsewhere for the adoption of global action to address emissions from international aviation. By way of example, the vast majority of ICAO guidance on emissions trading was based on experience gained from the development of the EU legislation. Covering close to one third of global aviation emissions and put into law by 29 ICAO Contracting States[7], the EU ETS can be a stepping stone towards truly global action rather than an impediment. The EU remains committed to seeking agreement on global measures to reduce aviation emissions and would like to work both bilaterally and multilaterally with the U.S. to develop robust and concrete policies and mechanisms.

5. Consistent with International Law

The application of the EU ETS to aviation is fully consistent with international law. The legislation applies only to flights operating to or from airports located in EU territory, in accordance with the

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[4] http://www2.icao.int/en/carbonoffset/Pages/default.aspx

[5] ICAO Doc 9885, para 3.2.34: "...delimitation of geographical scope based on national airspace appears impracticable."

[6] Report of the Subsidiary Body for Scientific and Technological Advice on the work of its fourth session, Geneva 16-18 December 1996, Item IV.B.2. – conclusions

[7] Liechtenstein is represented in ICAO by Switzerland.

sovereign rights of Member States under the Chicago Convention. Aircraft operators are not required to account for emissions relating to any other flight.

The legislation respects principles of equal treatment and non-discrimination between aircraft operators that are fundamental to the Chicago Convention and bilateral air services agreements. Matters of law are subject to judicial oversight and, on the basis of a challenge by certain airlines and their trade associations, the legality of the EU system, and its compatibility with international law, is currently being considered by the European Court of Justice, the EU's highest court. A non-binding opinion by an Advocate-General of the Court (an independent judicial officer) is expected on 6 October 2011, and the Court's judgment is expected shortly thereafter.

6. Use of revenues

Member States have agreed that all revenue from auctions of aviation allowances should be used to tackle climate change, including funding research and development in the fields of aeronautics and air transport. To enshrine this in EU law was unprecedented. The legislation requires Member States to report to Commission on the use of revenues, and the intention is that these reports will be made public.

It should be added that the European Commission is responsible for the earmarking of more than €5 billion worth of allowances for incentivising the deployment of innovative technologies including carbon capture and storage and second generation biofuels. In addition the EU ETS is a strong incentive for the demonstration of sustainable biofuels for aviation, giving a long term, predictable price incentive for take-up of these fuels because they count as zero emissions.

7. Unsatisfactory EU answers to US objections?

The EU is always ready to discuss with partners their views and concerns. The EU recently met with representatives from the United States to discuss aviation aspects of the EU ETS in the context of the Joint Committee under the EU-US Air Transport Agreement. In advance of this meeting the United States forwarded a number of questions related to the EU ETS. The European Commission also forwarded a number of written questions to the United States authorities. The European Commission provided answers to many of the questions from the United States and remains available to elaborate further on these replies if need be. The EU believes it important to continue an open and productive dialogue with the United States on this issue, and looks forward to continuing constructive consultations, including to receive answers to the questions provided by the European Commission.

Mr. PETRI. Starting in January 2012, the European Union will begin to unilaterally apply its Emissions Trading Scheme to civil aviation operations landing in or departing from one of the EU member states. Under the Emissions Trading Scheme, EU member states will require international air carriers and operators to pay emission allowances and in some cases penalties. The Emissions Trading Scheme will apply to the entire length of the flight, including those parts of the flight outside of the EU.

The EU is pressing ahead with its plans despite serious legal issues and objections by not just the United States, but by the international community. The United States presented its formal objections to the Emissions Trading Scheme in Oslo just last month. Airlines, manufacturers and general aviation operators around the world have also expressed strong objects to the Emissions Trading Scheme, and, in fact, several U.S. airlines and the Air Transport Association have filed a lawsuit.

Unilateral enforcement of the Emissions Trading Scheme by EU member states on U.S. operators without the consent of the United States raises significant legal concerns under international law, including the Chicago Convention and the U.S.-EU Air Transport Agreement. There are also concerns that the Emissions Trading Scheme is nothing more than a revenue raiser for EU member states.

Lack of transparency is a growing problem. The European Commission has provided no guidance on how the Emissions Trading Scheme funds should be used. Some EU member states intend to use the funds for whatever they want as opposed to investing in research and development efforts with the goal of reducing carbon dioxide production by the civil aviation sector.

U.S. air carriers and their employees have also pointed out that the Emissions Trading Scheme actually harms efforts to reduce civil aviation CO2 production. If airlines are forced to pay these allowances, they will not have the capital to invest in efforts to develop alternative fuels, new fuel-efficient aircraft, or equipment needed to operate in a more efficient and environmentally friendly, satellite-based air traffic control system.

Finally, there are considerable concerns about the proliferation of EU member states' eco charges being put in place on top of the Emissions Trading Scheme. Questions have arisen as to whether the eco charges are consistent with EU member states' obligations under international law, and whether some of these charges may, in effect, double charge for the same emissions the EU intends to regulate under its Emissions Trading Scheme.

Given all these concerns, we believe that the EU needs to slow down, carefully weigh their plans to include international civil aviation in its scheme. We believe a better approach to the work within the international civil aviation community is to work with the international civil aviation community through the U.N. International Civil Aviation Organization.

Since EU shows no interest in working with the international community to address their concerns and objections and to seek a global approach to civil aviation emissions, we believe that the United States should not participate in their unilateral and questionable Emissions Trading Scheme program. Therefore, last week,

we introduced H.R. 2594, the European Union Emissions Trading Scheme Prohibition Act of 2011, with bipartisan support. We intend to move this legislation in the near future to make clear to the EU and the international community that the United States does not intend to participate in the unilaterally imposed process.

And to thank the witnesses for their participation today, we look forward to your testimony. I know my colleagues will be joining us. There are caucuses going on as we started this hearing. And I also invite all other interested parties to submit written testimony for the record.

[The information follows:]

ALLIED PILOTS ASSOCIATION

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Statement for the Hearing Record

Captain David J. Bates, President
Allied Pilots Association

U.S. House of Representatives Committee on Transportation and Infrastructure,
Subcommittee on Aviation

Hearing: The European Union's Emissions Trading Scheme:
A Violation of International Law

July 27, 2011

On behalf of the 11,000 American Airlines pilots represented by the Allied Pilots Association (APA), we want to thank Transportation and Infrastructure Committee Chairman Mica, Aviation Subcommittee Chairman Petri, Ranking Member Costello and the other members of this subcommittee for the opportunity to submit written testimony on the issue of the European Union's Emissions Trading Scheme.

APA strongly agrees with the bipartisan contingent of U.S. House of Representatives members and other concerned parties opposed to requiring U.S. airlines to participate in the European Union's Emissions Trading Scheme.

APA's opposition centers on the adverse economic impact the ETS would have on our nation's airline industry. Airlines already face significant financial pressure from increased fuel prices, the continued sluggish economy, and the broad range of taxes and fees that are levied on the industry. As one of the major trans-Atlantic operators, American Airlines would pay a heavy price under the ETS. According to some estimates, the ETS could cost U.S. carriers $1.3 billion in the first year alone, and potentially rise to an annual cost of $3.5 billion by 2020. Also, as the Air Transport Association has noted, the ETS could have the unintended consequence of harming the environment by impeding the ability of American Airlines and other U.S. flag carriers to invest in new, environmentally beneficial technology.

Accordingly, APA supports the European Union Emissions Trading Scheme Prohibition Act of 2011. We are encouraged that this legislation has bipartisan support and optimistic that the fact-finding efforts of this subcommittee will help prevent significant economic harm to our nation's airline industry.

Thank you again.

July 29, 2011

Simone Perez
House Subcommittee on Aviation
House Transportation & Infrastructure Committee
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Ms. Perez,

Please include the following three documents in the written record of the hearing *The European Union's Emissions Trading Scheme: A Violation of International Law,* which the House Subcommittee on Aviation held on Wednesday, July 27 2011:

- EDF memo: Aviation and the European Union Emissions Trading System
- EDF timeline: The Long Road Toward Reducing Greenhouse Gas Emissions from Aviation
- Letter to Representatives from major environmental and development organizations

Thank you.

Respectfully,

Jenny Cooper
Environmental Defense Fund

Aviation and the European Union Emissions Trading System
Hearing of the Subcommittee on Aviation,
House Committee on Transportation & Infrastructure - July 27, 2011
Submission by Environmental Defense Fund

Beginning January 1, 2012, under the Aviation Directive, an amendment to the European Union Emissions Trading System ("EU ETS"), all civil aviation flights using airports in Europe will need to account for their global warming pollution. Flights to Europe from a third country can be exempted from the law's requirements if the third country adopts an equivalent measure.

The EU law is carefully designed to respect sovereignty and recognize other countries' actions. It is consistent with treaty-based requirements. Some U.S. airlines are challenging the EU law in foreign courts and lobbying the U.S. Congress and the Obama Administration to declare the law invalid. This submission addresses the EU law, the airlines' claims, and H.R. 2594 - the proposed bill regarding the EU law.

1. U.S. aviation industry and proposed House bill (H.R. 2594) on the EU Aviation Directive

- The proposed House bill's prohibition on U.S. air carriers' compliance with the EU law is per se discriminatory on the basis of citizenship of carrier. Discrimination on the basis of the citizenship of the carrier is expressly prohibited under the Chicago Convention, to which the United States is a Party. Thus, by purporting to create an exemption for U.S. aircraft operators, H.R. 2594 places the U.S. in violation of the very international agreements that it claims to protect.
- The U.S. Congress should not be encouraging countries to forbid their companies from complying with U.S. health, safety, and environmental laws. But by prohibiting U.S. carriers from complying with the EU Aviation Directive, the proposed House bill sets exactly such a precedent.
- After improving fuel efficiency for a number of decades, there has been little improvement in fuel efficiency of aircraft in the last 20 years, with virtually no improvement over the last 10 years. The improvements in fuel use per passenger-mile travelled since 2000 come from a 10% increase in the utilization of places – merely by the airlines packing more passengers onto the same plane. While such gains have environmental benefit, they are not sufficient to drive the new technologies, and systems and management improvements necessary to see significant future reductions in emissions.

2. What the EU law does

The EU law limits the global warming pollution of all civil aviation flights - large airlines, discount carriers, freight, and business jets – within, from, and to the EU.

- The law applies to all carriers without discriminating on the basis of nationality.
- The law sets a modest 3% reduction in emissions in the first year (2012) and a 5% reduction in the years 2013-2020, from a baseline of carriers' annual average emissions in 2004-2006.
- The law establishes a pool of emissions allowances. Starting in 2013, each air carrier covered by the law must tender allowances equal to its total emissions in the prior year.

- The law gives airlines approximately 82% of the allowances for free. All U.S. airlines have applied for free allowances. Innovative, proactive carriers that reduce emissions below the amount of their free allowances can make money selling their surplus allowances.
- The law gives airlines broad flexibility to determine how to reduce their pollution. It doesn't dictate the use of any particular technology or operation. It allows airlines to purchase allowances from an auction, from other airlines (emissions trading), and from pollution credits outside the aviation sector.
- The law explicitly allows the EU to exempt flights from nations with equivalent measures, and to amend its law to provide for optimal interaction between its program and other nations' emissions trading systems for reducing emissions from aviation.

3. The airlines and their claims

In 2010, United Airlines (UAL), Continental (becoming part of UnitedContinental Holdings (UCH)), and American Airlines (AMR) filed suit in British court against the UK government, seeking to declare the EU law illegal under international law and therefore inapplicable to them. The case was transferred to the European Court of Justice (ECJ), which has jurisdiction over challenges to European laws. **The case was heard in the ECJ on July 5, 2011; a preliminary, non-binding opinion is expected in October 2011.**

The airlines claim that the EU law is illegal under the 1947 Chicago Convention on Civil Aviation ("the Chicago Convention"), the U.S.-EU Open Skies agreement, and customary international law.

The claim: It's a tax. The airlines claim the EU law is a fuel charge or tax, prohibited under Articles 11 and 12 of the Chicago Convention and Article 7 of the Open Skies Agreement.

- **In fact, the EU law is not a charge or tax on fuel. It is a market-based mechanism for reducing emissions.** Unlike a fuel charge or tax, which is based solely on the amount of fuel used or consumed, the EU law uses fuel consumption as one of a number of calculation parameters to determine how many allowances to allocate to each aircraft operator and how many allowances each operator must surrender at the end of each year. Airlines only have to pay money to purchase more allowances (or pollution credits from other sectors) if the airlines choose not to reduce pollution below the number of allowances they hold. If the airlines' claims that they are reducing their global warming pollution are accurate, then the airlines will not need to purchase allowances or credits. In fact, by using sustainably produced biofuels with accurately accounted for emissions, or by using more efficient engines or operating procedures, an airline could drastically reduce the number of allowances or credits they have to purchase, or even avoid having to purchase allowances altogether. In fact, United, American, Frontier, Alaska Airlines, JetBlue, US Airlines, Southwest, and FedEx have announced agreements to use biofuels on flights from Bay Area airports beginning in 2015 and Lufthansa is already using biofuels regularly on selected flights within Europe. Further, airlines could make a profit by selling unneeded allowances allocated to it for free. And many pollution reduction measures allow the airlines to operate more efficiently – so they can make money in two ways, from more efficient operation and from selling surplus allowances. An industry association, the International Air Transport Association, has predicted that the EU law has a "net impact [that] is slightly positive for [both] the profitability of airlines operating extra-EU flights and the overall profitability of flights arriving and departing the EU." A law that helps airlines boost profits by cutting pollution cannot be considered a tax or charge.
- The governing body of the Chicago Convention, the International Civil Aviation Organization (ICAO), has consistently distinguished – often at the request of the airlines themselves –

between taxes/charges, on the one hand, and "market-based measures," including emissions trading, on the other. See, for example, the Report of the Executive Committee on Agenda Item 15 of the ICAO's 35th Assembly of 2004, A35-WP/352, P/84, 12/10/04, at page 15-30, in which the Executive Committee explicitly endorsed the development of "open" emissions trading (i.e., emissions trading in which airlines can purchase reductions from other sectors).[1]

The claim: It's an invasion of sovereignty. The airlines claim that addressing the total global warming pollution emitted by flights between the U.S. and the EU, including pollution emitted in U.S. airspace, is an invasion of sovereignty and illegal under Article 1 of the Chicago Convention and customary international law.

- **In fact, the EU law respects other nations' sovereignty.** The law does not mandate any specific action outside of the EU. It simply holds flights that land in the EU accountable for their total emissions of pollution that affects the territory of European countries. The EU law is thus similar to many U.S. laws that set requirements for aircraft and ships coming into, and departing from, U.S. territory, and to other laws with similar reach.
    - For example, legislation enacted by Congress after the Exxon Valdez oil spill requires all oil tankers in U.S. waters to have double hulls. The effect of the law is to require the ships to have double hulls when they depart from their ports of origin.
    - The U.S. charges every air traveler $16.30 tax each time the traveler departs - or arrives in - the U.S.[2]
    - The U.S. Department of Transportation requires all flights departing from and landing in the United States to comply with security regulations, even though the effect of these regulations is to require specific actions – including expensive and burdensome actions - at the airports of origin of the flights, in foreign territory.
    - The U.S. Foreign Account Tax Compliance Act, which enters into force in 2013, requires foreign banks to report their American clients to the U.S. Internal Revenue Service.[3]
- In addition, a methodology under which nations may only regulate aviation pollution that occurs within their sovereign airspace, as the airlines demand, would be inconsistent with decisions of the ICAO and the UN Climate Treaty, and lead to "orphan" emissions and perverse results.
    - If every nation could only regulate airplane global warming pollution emitted in its sovereign airspace, then a substantial portion of airplane pollution – that which occurs while planes are flying over the high seas – would be "orphan" pollution, the responsibility of no one.
    - Moreover, applying a sovereign-airspace methodology would mean, in the case of a plane flying from the U.S. to Europe and traversing Canadian airspace, that a significant portion of the flight's pollution would be the exclusive responsibility of Canada, even though the flight didn't touch down anywhere in Canadian territory. The pollution from a flight from Europe to Asia that traverses Russian airspace would be the exclusive responsibility of Russia even though the flight never touched down in Russian territory.
    - The prospect of such "orphan" emissions and perverse results led the Parties to the UN Climate Treaty (the UN Framework Convention on Climate Change or UNFCCC) – including the United States – to reject the methodology of accounting for aviation pollution based on the airspace where the pollution occurred. In 1996, the UNFCCC's Subsidiary Body for Scientific and Technological Advice (SBSTA), in which all UNFCCC Parties, including the U.S. and the EU, participate, considered eight different

methodologies for accounting for the emissions of flights traveling between different countries.[4] SBSTA formally dropped from consideration the eighth – i.e., the airspace-based methodology – precisely because of the "orphan emissions" and perverse results problems. In 1998 the Conference of the Parties to the UNFCCC endorsed SBSTA's decision,[5] thus rejecting the airspace-based methodology.

- The ICAO has also effectively rejected the airspace-based methodology. In 2004, the ICAO Executive Committee asked ICAO to provide guidance to countries that are members of ICAO on incorporating emissions from international aviation into the States' emissions trading programs. In so doing, the ICAO Executive Committee specified that the guidance be "consistent with the UNFCCC process."[6] Since the UNFCCC process specifically rejected the airspace methodology, resuscitating that methodology would contravene decisions of both the UNFCCC and ICAO.

- **In fact, the EU law explicitly accommodates other countries' sovereignty concerns by providing that if any nation adopts an equivalent measure to limit the pollution of flights coming from its territory to Europe, those flights can be exempted from the EU law.** The exemption is quite broad, and in no way dictates any specific steps countries would need to take in order to achieve equivalent outcomes.

The claim: Any regulation of aviation emissions should be done through a consensus-based approach under ICAO, not by individual nations or groups of nations.

- **In fact, as the attached timeline indicates, nations have sought for nearly 15 years to obtain a consensus in ICAO on regulating emissions from international aviation.** ICAO has failed to deliver any meaningful progress toward an agreement on how to reduce emissions from the aviation sector.

- Moreover, ICAO has already specifically rejected the creation of an emissions trading system under ICAO auspices. At the sixth meeting of the ICAO Committee on Aviation Environmental Protection (CAEP) in 2004, the CAEP agreed that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices "...seemed sufficiently unattractive that it should not be pursued further."

- Instead, the ICAO 35th Assembly in 2004 explicitly requested the ICAO Council "in its further work on this subject, to focus on two approaches. Under one approach, ICAO would support the development of a voluntary trading system that interested Contracting States and international organizations might propose. Under the other approach, ICAO would provide guidance for use by Contracting States, as appropriate, **to incorporate emissions from international aviation** into Contracting States' emissions trading schemes consistent with the UNFCCC process. Under both approaches, the Council should ensure the guidelines for an open emissions trading system address the structural and legal basis for aviation's participation in an open emissions trading system, including key elements such as reporting, monitoring and compliance."[7] (Emphasis added.)

- In 2010, ICAO adopted guidance for Contracting States to incorporate emissions from international aviation into their emissions trading schemes.[8] Although many nations, including the EU and the US, registered reservations to that guidance,[9] the design of the EU Aviation Directive (which was enacted prior to 2010) generally follows that guidance.

The claim: The EU is imposing a one-size-fits-all system on airlines.

- **In fact, nothing in the EU law dictates how an airline shall reduce its pollution.** The EU could have adopted a one-size-fits-all technology mandate for flights landing in the EU, akin to the US double-hull tanker requirement. It did not. Instead, the law gives airlines

extremely broad flexibility to decide where and how to reduce pollution and even allows an airline to make no reductions but instead to submit additional allowances. The exemption for nations that adopt equivalent measures is extremely broad, affording each nation the opportunity to tailor domestic measures to its particular circumstances.

The claim: The EU's system is objectionable because moneys spent by U.S. airlines to purchase allowances at auction from the EU would stay in Europe.

- Insofar as the EU retains the prerogative to determine how to spend auction revenues collected on flights arriving in Europe from abroad, **the EU is exercising the same kind of sovereign prerogative that the U.S. exercises when it collects taxes on flights arriving in the U.S. from points abroad.**
- Moreover, any airline that does not wish to have the EU decide how auction revenues will be spent, can reduce its aviation pollution to allowable levels, or purchase pollution credits.
- And, any nation that wishes to assert its sovereign prerogative over how auction revenues are spent can establish its own equivalent measure that entails an auction of emissions allowances, and retain the revenue generated from the auction.

The claim: The EU is trying to disadvantage US airlines and favor its own carriers.

- **In fact, the EU law applies to all flights within the EU and between the EU and any other place in the world – whether from Paris to Nice, New York to London, or Beijing to Brussels.** It applies regardless of the citizenship of an airline or of its passengers. It is non-discriminatory. Its application both to internal flights and flights between Europe and other countries makes clear that it is not a charge for entry to or exit from the European Union and thus does not violate Article 15 of the Chicago Convention or Articles 3(4) and 15(3) of the US-EU Open Skies Agreement.
- Moreover, the proposed bill's prohibition of compliance with the EU law is per se discriminatory on the basis of citizenship of carrier. Discrimination on the basis of the citizenship of the carrier is expressly prohibited under the Chicago Convention, to which the United States is a Party, so the bill would place the United States in breach of its obligations under international law.

The claim: The law will generate more pollution, since airlines will re-route via Dubai and other ports in order to escape the additional costs entailed in flying into Europe.

- **Fact: Most airlines fly between the U.S. and Europe because that's where their passengers want to go.** So re-routing via Dubai will not serve their passengers.
- **Fact: Sophisticated modeling estimates of the cost of compliance with the EU ETS range from roughly $6 to $50 per long-haul seat.** The low end of that range is less than the $10/ticket charge that the United States unilaterally instituted last year under the 2010 US Travel Promotion Act, which imposes the fee on foreign travelers from the 35 countries with which the U.S. currently has a visa-waiver agreement (the money is used to promote foreign travel to the United States). The high end is comparable to the travel promotion fee plus the $16.30 unilaterally instituted departure tax per ticket that all departing passengers must pay when leaving the United States.[10]

[1] See www.icao.int/icao/en/assembl/a35/wp/wp352_en.pdf at page 15-30.

[2] "US International Departure Tax - $16.30 – This tax applies to any transportation beginning in the US (including Alaska or Hawaii) and ending outside the US, with the exception of transportation from the US to a port or station within the Buffer Zone. The US International Departure Tax also applies to passengers who stop over in the US for more than 12 hours while traveling to an international destination....US International Arrival Tax - $16.30 – This tax applies to any transportation beginning outside the US and ending in the US (including Alaska or Hawaii), with the exception of transportation from a port or station within the Buffer Zone to the US. The US International Arrival Tax also applies to passengers who stop over in the US for more than 12 hours while traveling from an international destination. Any such passenger is treated as having traveled to such Stopover port or station and begun a new trip from such Stopover port or station." Airline Industry Agents' Handbook Section 7.0 (2007).

[3] "Banks in desperate battle over US tax law," Financial Times, Monday June 13, 2011, page 1.

[4] See FCCC/SBSTA/1996/9/Add.1, paras. 27-30.

[5] See Report of the Subsidiary Body for Scientific and Technological Advice on the work of its Fourth Session, Geneva, 16-18 December 1996, Item IV B.2 Conclusions, Endorsed by the UNFCCC Conference of the Parties at its Third Session, see UNFCCC COP Decision 2/CP.3, reprinted in FCCC/CP/1997/7/Add.1 (25 March 1998) at page 31.

[6] See www.icao.int/icao/en/assembl/a35/wp/wp352_en.pdf at page 15-30.

[7] See www.icao.int/icao/en/assembl/a35/wp/wp352_en.pdf at page 15-30.

[8] See "Guiding Principles for the Design and Implementation of Market-Based Mechanisms (MBMs) For International Aviation," Annex to Resolution 17/2: "Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change," ICAO A37-WP/402, P/66, at 17-17, http://www.icao.int/icao/en/assembl/a37/wp/wp402_en.pdf.

[9] See http://www.icao.int/icao/en/assembl/A37/Docs/10_reservations_en.pdf for text of reservations.

[10] Note: This tax just expired as the FAA Reauthorization bill has not yet been passed.

The Long Road Toward Reducing Greenhouse Gas Emissions from Aviation

1994 - Publication of "Aviation and Global Warming" begins public debate on aviation and climate change.

1995 – First Conference of the Parties to the UNFCCC. SBSTA initiates discussion on aviation & marine "bunker fuels."

1996 – UNFCCC SBSTA considers accounting methods for emissions of flights traveling between different countries. SBSTA explicitly rejects accounting on the basis of the sovereign airspace where the emissions occurred, because doing so would yield "orphan emissions" and perverse results.

1997 – Kyoto Protocol Article 2.2 states that Parties included in Annex I of the UNFCCC "shall pursue limitation or reduction of emissions...from aviation and marine bunker fuels, working through ICAO and IMO, respectively."

1998 – UNFCCC COP endorses SBSTA's accounting decision, rejecting the airspace-based methodology for accounting for emissions from aviation.

2002 – After five years of pursuit in ICAO, European Parliament and Council direct European Commission to propose aviation emission reductions if ICAO does not act.

2003, 2004 – European Council repeats its directive to European Commission. ICAO does not act.

2004 – CAEP announces that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices seems sufficiently unattractive that it should not be pursued further. ICAO Executive Committee asks ICAO to provide, "consistent with the UNFCCC process," guidance to Contracting States on incorporating international aviation emissions into national emissions trading programs. ICAO General Assembly Resolution A35-5 endorses this approach.

2005 – European Council concludes that including aviation in EU emissions trading system seems best way forward. EU launches stakeholder dialogue.

2007 – EU places formal reservation on Appendix L to ICAO Resolution A36-22 which urges Contracting States not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States. EU member states reserve right under Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators providing services to, from or within their territories.

2009 – After four years of stakeholder dialogue and 11 years of ICAO inaction, EU enacts Aviation Emissions Trading Directive in February. The Directive's pollution cuts will take effect from January 1, 2012. US airlines file suit in UK High Court to try to block the EU aviation directive.

2010 – With many reservations, ICAO adopts guidance for international aviation in Contracting States' emissions trading system. The UK High Court refers the airlines' case to the European Court of Justice.

2011 – On July 5, the European Court of Justice will hear the airlines' case.

CAEP – ICAO Committee on Aviation & Environmental Protection
COP – Conference of the Parties
EU – European Union
ICAO – International Civil Aviation Organization
IMO – International Maritime Organization
SBSTA - UNFCCC Subsidiary Body on Scientific & Technological Advice
UNFCCC – United Nations Framework Convention on Climate Change

ActionAid USA · Earthjustice · Environment America · Environmental Defense Fund
Greenpeace USA · League of Conservation Voters · Natural Resources Defense Council
Oxfam America · Sierra Club· World Wildlife Fund

July 27, 2011

Dear Representative,

We strongly urge you to oppose the European Union Emissions Trading Scheme Prohibition Act of 2011, which would force U.S.-based airlines to violate a European anti-pollution law. By making it illegal for airlines to comply with the European law, the bill would not only worsen air pollution, but would also make it impossible for U.S.-based airlines to provide service to and from Europe. As a result, foreign-based carriers would be the only option for Americans flying to Europe.

The bill is premised on fundamentally erroneous legal and policy assumptions. Contrary to the bill's assumptions, the Aviation Directive is carefully crafted to fall well within the requirements of international law. It is non-discriminatory and applies even-handedly to all flights landing in or departing from EU airports regardless of origin or destination, and to the operators of those flights regardless of the airline's home country. The program requires a 3% emissions reduction (compared to a 2004-2006 baseline) by 2013, and a 5% reduction by 2020; it is flexible in design, giving airlines multiple compliance options to meet these emissions control obligations. Moreover, flights arriving from countries with programs equivalent to the EU's are exempted altogether.

Although some of the bill's sponsors have claimed that they support carbon reductions but believe the sole appropriate forum for addressing these issues is the UN's International Civil Aviation Organization (ICAO), that assertion is unrealistic to the point of irresponsibility. ICAO has attempted through a dozen years of international negotiations to address aviation pollution, and has yet to develop – much less adopt – standards to control these emissions. In the absence of a global agreement on reducing carbon pollution from the aviation industry, action by the EU on flights arriving in or departing from Europe is a sensible first step. It gives airlines complete flexibility in deciding when, where and how to reduce their carbon pollution. Furthermore, U.S.-based airlines have already requested a substantial amount of free permits from the EU, which would cover the vast majority of their compliance obligations.

In addition, since increased efficiency is one of the principle ways of achieving reductions, the EU law sends an important signal to airlines that investments in more fuel-efficient aircraft will be rewarded now and into the future – including aircraft such as

the Boeing 787, which its producer characterizes as having "unmatched fuel efficiency" and using "20 percent less fuel for comparable missions than today's similarly sized airplane."[1] Undercutting such incentives is bad for airlines, aircraft makers, air passengers and effective emission reduction efforts alike.

Sincerely,

ActionAid USA
Earthjustice
Environment America
Environmental Defense Fund
Greenpeace USA
League of Conservation Voters
Natural Resources Defense Council
Oxfam America
Sierra Club
World Wildlife Fund

[1] http://www.boeing.com/commercial/787family/background.html

STATEMENT OF

CAPTAIN CARL KUWITZKY, PRESIDENT

COALITION OF AIRLINE PILOTS ASSOCIATIONS

BEFORE THE

SUBCOMMITTEE ON AVIATION

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, DC

July 27, 2011

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ON

"The European Union's Emissions Trading Scheme: A Violation of International Law"

July 27, 2011

Chairman Mica, Ranking Member Petri, and members of the Subcommittee, on behalf of the Coalition of Airline Pilots Associations (CAPA) and our 28,000 professional pilots I would like to thank you for the opportunity to provide you with a statement for the hearing record.

I am Captain Carl Kuwitzky, president of the Coalition of Airline Pilots Associations (CAPA), a trade association representing pilots at carriers including American Airlines, Southwest Airlines, US Airways, UPS Airlines, ABX Air, Horizon Air, Southern Air, Polar Air Cargo, Atlas Air Cargo, Cape Air, Gulfstream Air, Miami Air, USA 3000 and Kalitta Air.

We applaud the Committee for holding this hearing and appreciate this opportunity to provide written testimony on Emission Trading Scheme (ETS) prohibition.

Members of CAPA have been closely monitoring the issue of ETS for some time and we unequivocally support the prohibition of United States air carriers' participation in the ETS. The European Union has missed the mark on this critical issue. The participation of U.S. air carriers in an ETS will have a significantly negative effect on the financial operation of flights operating to/from the EU. Further, the fees derived from the ETS do not go towards environmental improvements at all but rather to the coffers of the destination country. Thus, the ETS is but another tax on an already overtaxed business.

The negative consequences of imposing an ETS are significant. The unilateral implementation of the ETS will ultimately cost U.S. aviation jobs, as flights to/from EU member nations will be less profitable due to lower "load factors" driven by increased fares. The U.S. carriers will ultimately reduce service or not increase frequency due to these lower margins. And, as previously mentioned, any fees from the ETS will do nothing to improve the environment.

CAPA strongly believes that the implementation of the NextGen ATC system in the United States, which will allow our nations' pilots to employ more efficient en-route navigation and instrument approaches, is the ultimate solution to lowering green house emissions. The use of these efficiencies will not only lower fuel consumption, thereby lowering the carbon footprint of the flight, but increase the profitability of U.S. carriers which will create growth and *ultimately jobs for the U.S. aviation industry.*

Finally, CAPA fully supports Chairman Mica and the "European Union Emission Trading Scheme Prohibition Act of 2011" to prohibit U.S. carriers' participation in the ETS. We stand ready to offer our support and hard work to aide in the passage of this important legislation.

Chairman Mica, Ranking Member Petri and members of the Subcommittee, I would like to thank you again for the opportunity to provide a statement of the hearing record. I am happy to respond to any questions that the subcommittee may have.

Respectfully submitted,

Captain Carl Kuwitzky
President
Coalition of Airline Pilots Associations
Washington, DC
www.capapilots.org

DECLARATION OF CARTAGENA OF THE INDIES

The member States of the Latin American Civil Aviation Commission (LACAC), gathered in Cartagena of the Indies, Colombia, on 28 July 2011, aware of the importance and transcendence of environmental issues, which led to the inclusion of this topic in its strategic work plan, and concerned about the inclusion of international civil aviation in the emission rights trading regime of the European Union, as established in the European Parliament and Council Directive 2008/101/EC,

DECLARE:

1. That the issue of climate change is of critical importance and the search for means to mitigate the impact of CO2 emissions into the atmosphere is a priority.

2. Their concern for the unilateral and extraterritorial application of Directive 2008/101/EC to third-country airlines flying to and from the European Union, given the volume of space they have to cross over sovereign airspace of third countries and high seas.

3. That Directive 2008/101/EC and the domestic laws by virtue of which it is implemented are contrary to the various provisions of the Convention on International Civil Aviation, the United Nations Framework Convention on Climate Change, its Kyoto Protocol, and other international law provisions, including those of the World Trade Organization (WTO).

4. That the International Civil Aviation Organization (ICAO) is the organization that governs international civil aviation and must pursue its work on the issue of climate change, taking into account that stipulated in Article 2.2 of the Kyoto Protocol that provides the following: "*The Parties included in Annex 1 shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively*".

Accordingly, the member States of the Latin American Civil Aviation Commission (LACAC):

1. Urge member States of the European Union not to apply Directive 2008/101/EC to airlines registered in third States without the prior agreement of the States involved; and

2. Request the International Civil Aviation Organization (ICAO) to continue working in the development of a framework for market-based measures, taking into account the principles established in the Convention on International Civil Aviation and the United Nations Framework Convention on Climate Change.

Mr. PETRI. Finally, before I recognize Mr. Costello for his opening statement, I would ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks and include extraneous material in the record in this hearing. Without objection, so ordered.

And I now recognize Mr. Costello for his opening statement.

Mr. COSTELLO. Mr. Chairman, thank you. And as you pointed out, we have a conference going on your side of the aisle and a caucus going on on our side of the aisle concerning a little issue called the debt ceiling, but I think other Members will join us as the hearing gets under way.

As you noted, climate change is a global problem that requires a global solution. Working through the International Civil Aviation Organization, the United States is committed to finding a global solution to address aviation emissions based on consensus. However, the EU has decided to move forward with a "go it alone" approach that is contrary to international law and violates U.S. sovereignty by charging U.S. airlines for all emissions for flights between the United States and Europe, even the portions of flights over our own airspace, and returning the revenue to European countries.

Last week I was pleased to join Chairman Mica and Chairman Petri, Ranking Member Mr. Rahall, and several of our colleagues to introduce a strong bipartisan bill, H.R. 2594, that would prevent U.S. airlines from taking part in the EU emissions trading program. As Chairman Petri indicated, we intend to move that bill very quickly in a bipartisan manner. The legislation will send a strong message from Congress that we do not support what the EU is doing for a variety of reasons.

In the meantime, the U.S. airline industry and the Federal Government are making progress to reduce aviation's carbon footprint with the implementation of NextGen, which will help aircraft operators save more than 1.4 billion gallons of fuel, cutting carbon emissions by more than 14 million tons by 2018.

Again, I thank Chairman Petri for calling today's hearing, and I look forward to hearing the testimony of our witnesses.

Mr. PETRI. I now recognize for an opening statement the chairman of the full committee, John Mica from Florida.

Mr. MICA. Well, thank you, Chairman Petri and Ranking Member Costello. And I don't see Mr. Rahall here, but all the Members that are here, I think, are united in moving on an expedited basis legislation that basically prohibits U.S. carriers from participating in what is appropriately named a scheme, the trading emission scheme that is crafted by the European Union. And we will take the legislation up, and it will be marked up as soon as we get confirmation of our schedule. But it will be at the first markup, that is my intention, and we will consult with—continued consultations on a bipartisan manner, and we will not only pass it out of committee, but we will take it to the floor as soon as possible, other minor things standing in our way right now like keeping the creditworthiness of the United States intact and little issues with FAA, but we will get beyond those, hopefully.

Let see me say that we have done everything possible to have a positive and productive exchange with our European counterparts, both parliamentary members and the Commission and even some

of the authors of this legislation. Unfortunately, even after meetings here in Washington, one that Mr. Holden was with us, we had a bipartisan delegation that met recently in Brussels, we did everything possible, I think, to try to work with them to find some solution. Quite frankly, we don't know the details of what they will impose because they aren't sure of it themselves. We have coordinated this effort with the Department of State, and I thank the administration, others, FAA and others for working with us in a cooperative effort to protect U.S. interests.

But right now the clock is ticking. They plan to impose this arbitrary fee, or scheme, and you heard Mr. Costello speak to the revenues of this that they collect are just a cash grab by the European Union. It does not go into, we think, advancing getting even cleaner, more emissions-free technology, nor is the money directed towards protecting, preserving the environment after it is collected, not to mention the fact that this is probably contrary to international agreements and treaties that are in place.

So we will move forward. We want to send this message loud and clear that the current road that the European Union is following is not one we are going to—we are not going to support, and we want a positive outcome in the best interests of not only the United States, but others who will be taxed or burdened by the European Emissions Trading Scheme.

So with that, again, thank you. I look forward to the testimony, and we will work with all parties to resolve this matter.

Mr. PETRI. Thank you. The first panel consists of Susan Kurland, who is the Assistant Secretary for Aviation and International Affairs at the U.S. Department of Transportation, who is accompanied by Julie Oettinger, who is Assistant Administrator for Policy, International Affairs and Environment at the Federal Aviation Administration. And also testifying is the Honorable Krishna R. Urs, who is Deputy Assistant Secretary for Transportation Affairs at the United States Department of State.

Welcome, both of you. Thank you for the efforts that went into your prepared statements, and we invite you to do your best to summarize them in 5 minutes or so, starting with Susan Kurland.

TESTIMONY OF HON. SUSAN KURLAND, ASSISTANT SECRETARY FOR AVIATION AND INTERNATIONAL AFFAIRS, U.S. DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY HON. JULIE OETTINGER, ASSISTANT ADMINISTRATOR FOR POLICY, INTERNATIONAL AFFAIRS, AND ENVIRONMENT, U.S. FEDERAL AVIATION ADMINISTRATION; AND HON. KRISHNA R. URS, DEPUTY ASSISTANT SECRETARY FOR TRANSPORTATION AFFAIRS, U.S. DEPARTMENT OF STATE

Ms. KURLAND. Good morning, Chairman Mica, Chairman Petri, Ranking Member Costello and members of the subcommittee. Thank you for inviting me and my colleague Julie Oettinger from the FAA to testify this morning on the European Union's Emissions Trading Scheme, or ETS.

I want to begin by commending your leadership on this very important issue. Opposition to the unilateral imposition of ETS by the EU is shared across the United States political spectrum and around the globe. We strongly object on both legal and policy

grounds to the unilateral imposition of ETS on U.S. operators. This is the wrong way to pursue the right objective.

I want to make it very clear that the administration strongly supports reductions in greenhouse gas emissions, and it is also important to note that U.S. aviation greenhouse gas emissions have declined by 15 percent since 2000, even though passenger and cargo traffic have increased.

Under the U.S. Next Generation Air Transportation System Plan, known as NextGen, we will continue to build on this record by using a combination of innovative air traffic management, more fuel-efficient aircraft, and alternative fuels in order to meet aviation's energy and environmental challenges. And we are working to improve aviation emissions performance by 2 percent a year and to achieve carbon-neutral aviation growth by 2020. We are also working with our international partners at ICAO in order to develop a meaningful CO2 standard.

Unfortunately, the unilateral imposition of the EU ETS on the world community is undermining efforts to build international consensus on reducing aviation's greenhouse gas emissions.

In addition, our specific concerns with the EU ETS include, first, the application of the EU ETS to U.S. operators is inconsistent with international aviation law and practice.

Second, since the EU has no transparent methodology or standard for exempting countries from ETS, discrimination and competitive distortions in the industry can result.

Third, any money that U.S. airlines pay to European treasuries is not available to invest in new aircraft or equipage that is required under NextGen.

Despite public statements pledging ETS revenues to climate mitigation funding, the EU ETS directive imposes no such requirement, nor are we aware of any commitments by any EU member state to dedicate ETS revenue for climate change purposes.

We have discussed these and other concerns with our European counterparts at the Joint Committee of the U.S.-EU Air Transport Agreement last month in Oslo, Norway. Unfortunately, the EU's ambiguous responses to our questions have only heightened our concerns.

We applaud this committee's bipartisan focus on the ETS issue, and we hope that it will encourage our European colleagues to work for a collaborative global solution.

With that, we look forward to responding to your questions. Thank you very much.

Mr. PETRI. Thank you.

Mr. Urs.

Mr. URS. Mr. Chairman, Ranking Member Costello and members of the subcommittee, thank you very much for inviting me to testify this morning. I will keep my remarks brief. I have submitted a more detailed statement for the record.

I will focus on our diplomatic efforts to prevent the unilateral inclusion of U.S. air operators in the European Union Emissions Trading Scheme. The Department of State has worked closely with the Department of Transportation, the Federal Aviation Administration, the Environmental Protection Agency and the Department of Commerce to advance this goal.

First, let me state upfront that we support the goal of addressing greenhouse gas emissions, including from the aviation sector. However, unilaterally including our carriers in an emissions trading scheme is the wrong way to achieve the right objective. We believe the right way is to work with our international partners to develop a multilateral solution through the international aviation organization—International Civil Aviation Organization, excuse me.

We have made progress in developing a solution at the global level through ICAO, and we are eager to continue this progress. At the last ICAO Assembly in 2010, the United States worked with our international partners to achieve an agreement on a number of measures to limit or reduce aviation's impact on the environment. They included for the first time ever an ambitious medium-term global goal of carbon-neutral growth from 2020, agreement to develop a CO2 standard, mandatory reporting by all countries of fuel consumption, an agreement that States would submit to ICAO action plans listing the measures they plan to take to contribute to the global goal.

Further, at the Assembly, a majority of ICAO member states acknowledged that the application of market-based measures to international aviation should be done following good-faith negotiations to reach an agreed way forward and not unilaterally.

In the United States we have a strong record of success in reducing emissions from aviation. Over the past decade we have seen U.S. aviation emissions shrink by 15 percent through greater efficiencies and improved technology. Europe, as our largest aviation market, is one of our closest partners. In 2007, the United States signed an air transport agreement with the European Union and its member states. We signed a protocol to amend the agreement in 2010. That was the so-called second-stage agreement. This agreement led to great benefits on both sides of the Atlantic.

Recognizing that the environment is taking on more significance in international aviation, Article 15 of the agreement, as amended, underscores the parties' intent to work together to reduce the impact of aviation on the environment, and the commitment of both parties to address questions raised concerning new environmental measures that might affect the exercise of rights.

On June 22, in Oslo, Norway, we met with EU officials and delivered this administration's formal objection to the EU's unilateral inclusion of U.S. air carriers in the ETS. I led the delegation to the meeting, which included representatives of FAA, DOT, EPA, Commerce, the U.S. aviation industry and U.S. environmental organizations.

We objected to the unilateral imposition of the EU ETS on U.S. air carriers on both legal and policy grounds. We emphasized that unilateral imposition was the wrong way to pursue the right objective. We asked a number of questions about how the Emissions Trading Scheme is expected to work and, frankly, were disappointed with the answers. In fact, our concerns about the lack of transparency surrounding the EU's plans to determine equivalency of other countries' measures and the potential for discrimination in that process were only heightened.

While this is the first time this administration has rendered a formal objection, the United States and other members of the inter-

national community have been expressing our concern about the prospect of the European Union unilaterally extending its ETS to international aviation for years. It is therefore disappointing to hear statements from European officials that our objections have been raised too late, and that because application of the EU ETS to all air carriers is a matter of law and not policy, the European Commission is not in a position to delay or modify its implementation or application.

We will continue to strongly oppose the unilateral application of the EU's ETS to our airlines and will work with the international community to find a constructive and collaborative way to tackle the important issue of aviation and climate change.

Thank you for your attention. I would be happy to take any questions you may have.

Mr. PETRI. Thank you, and we appreciate your summarizing your full remarks as you have.

Some of us have had reservations about the whole EU approach. As I indicated in my opening statement, to the extent that they extract funds through this scheme from the international aviation community and use it for nonaviation-related purposes, there are going to be less funds for the airlines to reequip themselves, buy the latest generation of engines and planes which are significantly more efficient, and it will, in fact, retard the goal of all of this, which leads me to ask you if you think there might be some merit in trying to use a more of a carrot approach than a stick approach, because airlines are very eager to save money on fuel and reduce carbon emissions. They don't have to be ordered by governments to do it. It is in their economic interest to do it. So to the extent we can figure out ways to help them within their means more quickly reequip themselves and become more efficient, we can reduce carbon emissions, and achieve their goals, and help the traveling public.

And the United States has been the leader in investing in all these efforts both in new engine technology—the Boeing Dreamliner is much more efficient than others, and this is spreading through the whole next generation of airlines. Further, our Government is very aggressively working now to reequip the air traffic control system, which shows the potential of reducing carbon emissions by 25 percent or more throughout the system.

So I don't think we need to apologize in any way for failing to address the goal of all of this, but I think we do need to very aggressively work with other countries in the world to try to come up with a more sensible approach than that that the Europeans are attempting to unilaterally apply. It doesn't seem to have worked very well so far, it does not seem to be very well thought through, and it is really rather counterproductive and arbitrary.

Would you care to comment on that at all, especially Mr. Urs, because you had to deal with this?

Mr. URS. Sure. Perhaps I can say a few words, and if Assistant Secretary Kurland or Assistant Administrator Oettinger would like to add some additional comments.

We had a very good record in terms of addressing emissions from our aviation sector, and we made that very clear to the European Union, the European Commission. When we met with them in

Oslo, we pointed out, as Assistant Secretary Kurland had pointed out, there has been a 15-percent reduction in aviation emissions in the United States in the last decade, and that is at a time when we have seen an increase in traffic, and we have had a decrease in emissions. The same is not true for the European Union. They have seen an increase in their emissions at a time during that same time period.

And we did, in fact, also discuss our commitment in the sense of a number of activities that we have going forward, biofuels—perhaps Julie is better situated to comment on that—but regarding biofuels, and new technologies, and NextGen, and a whole series of things that we are doing that are oriented at reducing our emissions footprint.

So, absolutely, we are committed to the goal. And I don't think we have anything to apologize for in terms of being committed to the goal. And we did very much lay out very clearly to the European Union our objections on legal and policy grounds, and specifically we have, in other venues, accepted the concept of market-based measures to deal with emissions. But very clearly we have stated that those market-based measures, before they are applied on any other country's carriers, they need to be the result of constructive negotiation and mutual agreement. And we don't have that stage here in terms of the European Union's negotiations with us.

So let me just leave it there and perhaps——

Ms. KURLAND. Thank you, Mr. Chairman.

The U.S. Government, and particularly the FAA, has been very, very active in this arena, and I would like to ask Associate Administrator Oettinger to comment on that.

Ms. OETTINGER. Thank you. Thank you, Mr. Chairman for your question and your comments. I appreciate the opportunity to talk about what the FAA is doing in this area.

As has been noted, the FAA is very committed, as is the U.S. Government generally, to addressing the impacts of aviation on the environment generally, and in terms of emissions—of greenhouse gas emissions in particular. We have a very robust program domestically focused on air traffic management, operations and procedures improvement; focused on development and deployment of alternative fuels; focused on accelerating technology for aircraft and engine technology to improve efficiency of the industry. We have put these goals and these efforts at the heart of our NextGen program to modernize the aviation system.

We are working in these areas, as you have alluded to, Mr. Chairman. We are working very closely with the industry in a number of these areas. They are also very committed to making improvements. And as you noted, it is very much in the airlines' economic interest where fuel is now the single largest expense of the airlines, and so they have every economic interest to reduce their fuel burn and are very committed to working with us in terms of the initiatives that I have mentioned.

Also, we are working very closely, we are very committed to working internationally to forge consensus on positive steps that we can take through ICAO. We have been working with other countries very closely. We have been supported by our industry in

this regard as well. So I think I agree with the statements that have be made already that this is a strong commitment of the U.S. Government to take positive steps with the industry support, and we don't have anything to apologize for.

Mr. PETRI. Thank you.

Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

The date isn't too far off here for the application of these fees, so I am wondering—I know litigation has been filed, but I am wondering what other steps the administration is considering.

For instance, I am pretty much an expert on how their cap-and-trade scheme works. I voted against it here in the House because I know how the system is gamed. We could set up some fake credits over here just like are being used there.

For instance, in China they produce refrigerants. When you produce a refrigerant, you produce a horrible off-gas. The horrible off-gas under U.S. law is destroyed. Under European law it is destroyed. In China they save it, they transport it to another Chinese company. The other Chinese company offers to bid to European companies to destroy this off-gas, and then they get paid to destroy the off-gas, and then they sell the credits. Then the Europeans sell those credits, and they sell them to polluters in Europe. So we could just say, OK, in the U.S. we will now take that off-gas, we will destroy it, we will put it in the European market, and we will have fake credits, and so we have taken care of the problem. That is one thing we could do because this whole thing is just nuts.

Secondly, have we thought of going to the WTO, because they actually have rules. The U.S. lost cases to Mexico and others because when you have an environmental concern, you must take the least expensive, least intrusive approach. We lost a case to Mexico on their catch of dolphins when fishing for tuna, and we have to pay the Mexicans to not do that. So we can't have our environmental laws under the WTO.

I believe they are in violation of the WTO. Have we contemplated they have not taken the least intrusive, least expensive means here? Are we contemplating a WTO complaint?

Ms. KURLAND. Thank you, Congressman.

At this point, as you have heard, we are taking this matter very, very seriously, and we are considering a wide range of options, and we are working with our interagency colleagues within the Government. At this point we would prefer not to discuss in open discussion what we are thinking about in terms of not wanting to telegraph any strategies to the EU.

Mr. DEFAZIO. Yeah, but WTO complaints take quite a while to process. I suggest if you are contemplating that strategy, you need to file soon, since 2012 isn't very far away. There is nothing to contemplate. File it. They are clearly in violation of the WTO. If we are meeting the standards, they are going to obviously try and mess with us on equivalence. They will determine they are doing equivalence, but we are not. We did this with noise before where the Europeans were trying to advantage their airlines, you know, we could quite simply then get credit for our equivalent measures, because that would be the least intrusive, least expensive way of meeting this if we want a WTO complaint.

So that should be filed as quickly as possible because otherwise you are going to drag this out, wait for the court decision in a European court when the Europeans are going to make a pile of money with this, some of which they might use for greenhouse gas reduction, and some of which they will use to run their governments. That is not acceptable.

And then the third thing would be some sort of reciprocal trumped-up charge on the European airlines coming here since this is just outrageous. We had a representative of the EU here a few years ago, and they told us then this is what they were going to do, and a number of us objected strenuously. Obviously they went ahead, and we are a little bit behind the eight ball here in terms of fighting back aggressively against a nonsensical rule that does nothing for climate change.

Thank you, Mr. Chairman.

Mr. PETRI. Thank you. And I would like to associate myself with the bulk of your remarks, particularly so far as starting an action with the World Trade Organization, if, as you have said, that framework would exist, and that has the potential of bringing some real pressure down the road at least.

Mr. LoBiondo.

Mr. LOBIONDO. Thank you, Mr. Chairman. I, too, would like to echo and associate myself with the remarks of Mr. DeFazio.

I think there is not a lot to contemplate here, and with the timing that the WTO takes, I don't understand why we would not be initiating every action possible. And since the emissions trading proposal is a violation of U.S. law and our international agreements, you have talked about some of the remedies of, but can we impose tariffs or other measures? Is this part of what you are looking at here? You don't want to talk about the specifics you are looking at, but I think we maybe need something to go on.

Ms. KURLAND. Thank you, Congressman. As I mentioned, we are taking this very seriously. We are in constant contact with our interagency colleagues, and we are considering a wide range of options that are available to us.

The Department of Transportation does have regulatory authority to impose—under statute and under law, to impose countervailing proportionate countermeasures at the appropriate time. And as we move forward, and as we consider the options that we want to move forward with, we will work very closely with the committee, and we will keep you informed. And we thank you very much for your suggestions.

Mr. LOBIONDO. And it also seems that they have been very reluctant and resistant to even being at the table, to even negotiating on this. So I am hopeful that in this list that you are looking at, I don't know what else to call it, that there are some ideas that can come to mind from either the Department of Transportation or even the State Department of how to get these people to the table. You have got to get them to the table to understand if they think that we are not taking it seriously, if they think that, well, we are raising some verbal opposition, and they can let this thing go, that they are going to take advantage of it. So I think now is the time, as Mr. DeFazio said, to make sure that they have no ambiguity about how strongly we feel.

Thank you, Mr. Chairman. I yield back.

Mr. PETRI. Thank you.

Mr. Costello.

Mr. COSTELLO. Thank you, Mr. Chairman. And I would agree with my friend from New Jersey.

Let me ask you, Ms. Kurland, I know that formal negotiations took place in June. Do you have additional formal meetings scheduled now or in the future?

Ms. KURLAND. At this point, as I mentioned, we are considering the range of options. We do not have a formal meeting scheduled. But maybe I would ask Deputy Assistant Secretary Urs to comment a little bit further on that.

Mr. URS. We do not have a specific meeting scheduled to continue discussion of EU ETS with the European Union at this time. We do have a regular set of meetings with the European Union that are provided for under our air services, our air transport agreement. And so should we wish to raise the issue with the European Union again at any point, we would be in a position to do so.

But as I say, as Susan has mentioned on several occasions here, we are looking at a wide variety of options that we have available to us. Certainly continuing our conversations with the European Union could be a part of that set of possible options that are available to us, but we are considering them at this point.

Mr. COSTELLO. Well, we know that the airlines have filed a lawsuit, and they are before the European Court of Justice. Do you have any idea what the timeline is there for a ruling, or at least for the airlines to make their case?

Ms. KURLAND. What has happened thus far is that the—as you know, the airlines case before the ECJ, there was a hearing, I believe it was on July the 5th, and we have been informed that the Court's Advocate General will likely be making or submitting a proposed findings to the Court's Justices in the beginning part of October. We are continuing to monitor the matter very, very closely. I don't know if my colleagues want to add anything to that.

Mr. COSTELLO. You mention a range or a whole host of options. We know that you can go to ICAO and file a complaint there. We know that you can file a complaint with the WTO. What other options exist?

Ms. OETTINGER. One other option, Mr. Congressman, that exists is there is a dispute resolution process associated with the U.S.-EU Open Skies Agreement, and I think, as Assistant Secretary Kurland said, there are a wide variety of legal avenues that are open to us. We had hoped to resolve the issue through diplomatic efforts and through international efforts. We are, at this point, looking very closely at what legal options we have, as well as the legal evidence to pursue, as well as potential retaliatory options, and we are considering that closely right now.

Mr. COSTELLO. Well, I, as my friend from New Jersey just said, Mr. LoBiondo, I think our friends in Europe need to understand that we are serious about this, and I would encourage you to go back and start exercising the options that are available to us sooner rather than later so that they do not run the clock out on us.

So I would just encourage you to do that, to look at complaint with ICAO, to look at the WTO, going the WTO route as Mr.

DeFazio suggested, but they need to understand that we are serious. The purpose of the legislation that we introduced is to put our friends in Europe on notice that the Congress of the United States—I have every confidence that the legislation will pass this committee in a bipartisan vote, and pass the House of Representatives, and hopefully the Senate as well, and that should send a strong signal where the Congress is. But the agency, the Department needs to exercise its options sooner rather than later.

With that, Mr. Chairman, I yield back.

Mr. PETRI. Thank you.

I underline that we are not—we are affected potentially, but we are not the only country that is affecting many other—this approach by the EU is potentially going to affect many other countries, from China to the Middle East and Latin America, and we can hopefully coordinate our outrage with some of theirs as well.

Mr. Hultgren.

Mr. HULTGREN. Thank you, Mr. Chairman. Thank you for being here.

Following up on really what the chairman just said, I wondered if you could just talk briefly about what has the reaction been to the EU trading scheme from other countries around the world?

Ms. KURLAND. Thank you. Thank you, Congressman.

We have heard from many other countries of the world. There has been basically uniform opposition from other countries within the world. I don't know if Chris would want to comment more from the State Department's perspective.

Mr. URS. Only to say that, Mr. Congressman—only to say that the response has been overwhelmingly negative from other countries around the world, and that—for example, that the 2010 ICAO Triannual Assembly, as also with the one before that—these are 3-year—every-3-year assemblies in Montreal—the European Union was virtually isolated in taking the view that it had the right to impose the Emissions Trading Scheme on other countries' airlines. So a number of countries share our position that the EU is not correct in going ahead and doing this.

Mr. HULTGREN. I wonder if you could talk briefly about what happens from the proceeds from the EU trading scheme? Do they go to aviation? Where do the revenues go according to the scheme?

Ms. OETTINGER. The revenues from the scheme go into the treasury, the national treasuries of the individual member states that administer the scheme on behalf of the European Union. There is a provision in the directive that suggests that 50 percent of the proceeds should go toward climate mitigation or toward environmental efforts, but there is nothing that requires that, and we—as Susan mentioned in her opening statement, we have heard no commitments of any governments to use the proceeds in that way.

Mr. HULTGREN. And nothing specifically goes to aviation?

Ms. OETTINGER. No.

Mr. HULTGREN. Switching gears a little bit, I wonder how it impacts us and the Government. Does the U.S. Government have any planes that would be subject to the EU's ETS scheme? And I wonder specifically would the FAA Administrator's plane be subject to the scheme?

Ms. OETTINGER. The answer is that we believe we have pretty much resolved that issue. It has, unfortunately and quite sort of surprisingly, taken us a while to work through that both at the FAA and the Department of Defense to ensure that the administering European States agree that FAA—the FAA fleet and the DOD fleet should not be subject to the ETS. And we have pretty much resolved that issue, although it has taken us quite a while to get there.

Mr. HULTGREN. Thank you very much. I appreciate the work that you are doing on this.

I yield back.

Mr. PETRI. Thank you.

Mr. Fleischmann, do you have any questions?

Mr. FLEISCHMANN. I am fine, thank you, Mr. Chairman.

Mr. PETRI. Well, we thank you very much for your testimony. We urge you to get on with the tasks so that this can be resolved in as efficient a manner and satisfactory a manner as possible. But clearly doing nothing is not an option at this point, given the prospect of European overreaching that we are confronted with.

Thank you very much.

Mr. PETRI. The second panel consists of Ms. Nancy Young, vice president for environmental affairs of the Air Transport Association; and also Captain Lee Moak, who is president of the Air Line Pilots Association, International.

We thank both of you for joining us today to offer your testimony on this legislation and the general subject that it deals with. And we will begin with Ms. Young.

TESTIMONY OF HON. NANCY N. YOUNG, VICE PRESIDENT OF ENVIRONMENTAL AFFAIRS, AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AND CAPTAIN LEE MOAK, PRESIDENT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Ms. YOUNG. Good morning, and thank you for the opportunity to testify on the unilateral and extraterritorial European Emissions Trading Scheme, a scheme that poses a threat to our Nation's airlines, economy and jobs, and also to advancing the right kind of measures to further address aviation greenhouse gas emissions.

My name is Nancy Young, and I am the vice president of environmental affairs for the Air Transport Association of America, ATA, representing major passenger and cargo airlines of the United States.

ATA opposition to the ETS is twofold. First, it violates international law, including the sovereignty of the United States. Second, it imposes an illegal, exorbitant and counterproductive tax on U.S. citizens, diverting U.S. dollars, and threatening thousands upon thousands of U.S. jobs.

Even projecting from the unusually low carbon prices of today, the U.S. airlines will be required to pay into EU coffers over $3.1 billion between 2012 and 2020, an outlay that could support over 39,200 jobs. Now, consider that the costs would be several times higher if the cost of carbon in Europe returns to where it was just 2 years ago, and if, as expected, the EU makes it emissions caps even higher. Yet none of the monies collected by the Europeans are required to be used for environmental purposes.

By contrast, the initiatives the U.S. airlines are taking are resulting in real environmental improvements. Our airlines have dramatically improved fuel and greenhouse gas emissions efficiency by investing billions of dollars in fuel-saving aircraft and engines, innovative technologies like winglets and advanced avionics. Accordingly, the U.S. airline industry improved its fuel efficiency by 110 percent between 1978 and 2009, resulting in emissions savings equivalent to taking 19 million cars off the road each of those years. That is why our industry represents just 2 percent of all U.S. greenhouse gas emissions, while driving over 5 percent of the Nation's GDP.

And we are not stopping there. ATA and its members are part of a worldwide aviation coalition with an aggressive proposal for further carbon emissions reductions under the appropriate international body, the International Civil Aviation Organization, or ICAO. Significantly, in 2010, ICAO adopted much of the industry's framework. While more work is needed, EU's insistence on the unilateral scheme has been a roadblock.

Although the ETS violates international law in many respects, perhaps the most egregious is its regulatory overreach into other nations, including the United States. U.S. airlines already are required by the scheme to monitor and report emissions for the entirety of each individual flight to, from and within the EU at exorbitant expense. But starting on January 1, 2012, the costs of complying multiply. At that stage our airlines will be required to acquire allowances to cover the emissions over the whole of their flights.

Consider the example of an actual ATA member flight from San Francisco to London. Even before the aircraft begins to taxi, the EU emission rules apply. As a percentage of total emissions, 29 percent take place in U.S. airspace, 37 percent in Canadian airspace, 25 percent over the high seas. Less than 9 percent of the emissions will take place in EU airspace. This extraterritorial assertion of jurisdiction violates the Chicago Convention and customary international law.

The Europeans are also acting contrary to their commitments to work this issue through ICAO. Moreover, the levy aspect of the scheme violates provisions in the Chicago Convention and the U.S.-EU Bilateral Air Service Agreement that govern the conditions under which one country may impose taxes and charges on the airlines of another.

The EU tries to argue that if the U.S. just would adopt equivalent measures, the EU will exempt U.S. airlines on one leg of a flight. That our Government should take orders from the EU on how to fashion U.S. law is an astonishing proposition. Moreover it is a recipe for chaos. With the EU unilaterally determining equivalence, the prospects for competitive distortions and discrimination are enormous.

Although ATA has brought a legal action in European courts against the ETS, U.S. opposition to the scheme is essential. Our Government has the tools not only to call the EU on its actions, but to get them back to the table at ICAO. ATA commends the bipartisan leadership shown by Chairmen Mica and Petri and Ranking Members Rahall and Costello in introducing legislation oppos-

ing the EU ETS and urging the administration to take further steps in this regard. We appreciate the opportunity to work with the U.S. Government on this critical endeavor. Thank you.

Mr. PETRI. Thank you.

Captain Moak.

Mr. MOAK. Thank you, Chairman Petri, Ranking Member Costello and other members of the committee, for the opportunity today to testify on this important subject. The Air Line Pilots Association represents 53,000 pilots flying for 39 airlines in the U.S. and Canada.

The Air Line Pilots Association wants to assure the long-term viability of the U.S. aviation industry. Our aviation industry has been the leader in taking the steps to reduce carbon emissions. They have been leaders in the development of lighter-weight composite structures, leaders in the development of biofuel, leaders in the development and implementation of satellite-based navigation which enables more direct routing, thus shortening time aloft and decreasing fuel burn. Our aviation industry in the U.S. needs to be recognized and given credit for the advancements that aviation has made towards reducing greenhouse gases.

The European Union, with their Emissions Trading Scheme, to be blunt, is a job killer. Commercial aviation, $1.3 trillion in economic activity, 5 percent of the U.S. GDP, employs 11 million people. The ETS is an additional tax on our U.S. industry, nothing more. It is a tax. And it is a foreign tax at that, a foreign tax in an already overtaxed commercial aviation industry. Current taxes, $17 billion. Compare and contrast that to back in 1993 where it was $3.7 billion. A current $300 domestic airfare has $63, 20 percent of it, in tax, 300 percent more than 1972. This is a tax that will ultimately cost good U.S. jobs.

The European Union has acted unilaterally. This is stand-alone taxation. They cap annual emissions per airline, then they allocate an emissions allowance. They have a penalty, a tax penalty, for exceeding allowances, which equates to billions of dollars over the next few years. Their scheme is at odds with the customary international law and agreements, and it will lead, if allowed to be enacted, to conflicting and redundant schemes by other countries.

Our airline industry has made significant and meaningful emission improvements for decades. Fuel efficiency has improved 110 percent between 1978 and 2008. That saved 2.7 billion metric tons of CO2. Between 2000 and 2008, greenhouse gas emissions and fuel burn total was reduced by 5.5 percent, while transporting 17 percent of the passengers and cargo.

The airline industry is working to develop synthetic fuel sources, and a 6-month biofuel trial is ongoing. Our aircraft are more fuel-efficient. As was brought up earlier, the 787 is designed to use 20 percent less fuel than a comparably sized aircraft.

Now, my members, your pilots here in the U.S., we have been doing our part, operational techniques that we use routinely. Single-engine taxi for ground operations. We participate, help develop and encourage technology-enhanced departure and arrival procedures. We fly optimum altitudes and speeds, and we participate in continuous descent arrival procedures to save fuel.

The European Union's Emissions Trading Scheme is a bad idea and of questionable legality. And I would like to just be blunt in my summary of it. Basically this is an arbitrary voodoo tax scheme. That is what it is, and if allowed to be enacted, it will be another ticket expense that a passenger has to pay, making airline travel more expensive. Less people will fly, airlines will shrink, Americans will lose their jobs, communities large and small will lose their service. Basically this is a bad idea, period.

Thanks. I am happy to take your questions, sir.

Mr. PETRI. Thank you.

Thank you both. I guess it is a bad idea whose time we hope will never come.

I wonder if you could, either of you or both of you, speculate a little bit if this scheme were actually to go into effect. People in a free society don't just sit like deer in the headlights. They change their behavior when the incentive is changed to maximize the situation that they find themselves in. And you would think that this could affect the flights going from, say, the west coast to Europe. It might affect the flights going directly to Europe. Maybe an airport in Morocco or something would develop, and people would fly there, and then as close as possible to European airspace.

I don't know how much of a—how this tax is related in relation to the other expenses that airlines have, but you are always looking at trying to save money on fuel, trying to save money on 101 other ways, and even on peanuts for the passengers sometimes. So this probably won't be peanuts, this will be something pretty significant, and it could well affect the pattern of flights to and from Europe.

Would either of you care to speculate on that and how you think it might unfold, or what the incentives—what incentives, how they would change?

Ms. YOUNG. Thank you, Mr. Chairman. Yes, you are correct. The EU ETS, by taking money away from our airlines, is going to affect our behavior. As has been noted by a number of Congressmen today and panelists, it will take money away from our ability to invest in fuel-saving measures.

Two points. We actually already are covered by the EU ETS. Our airlines have spent thousands and thousands of dollars complying with emissions-monitoring requirements that are very Eurocentric to date. But the emissions trading obligation will multiply that exponentially.

The observation you make that there is a potential to change routing around the world is one of the concerns that brings the U.S. airlines to the International Civil Aviation Organization, ICAO, to deal with this on an international level so there isn't this kind of jury-rigging of flying around the world. And as you know, in many cases it will be very difficult. I mean, if you want to go from Dulles over to Europe, you don't want to go somewhere in between and stop.

So I am not sure how much of that will take place, but you could expect, particularly with countries like the Middle Eastern countries and others near Europe, you might see some stopovers from some of the far-reaching destinations. Again, we need to come back

to an international approach that allows for seamless international aviation.

Mr. MOAK. I agree completely. This is a tax, and it will cause changes in behavior, changes in flight patterns. There will be, I believe, over the longer term hubs developed, places to go to avoid this tax. In the near term, which is important, though, this tax will cost jobs, and it will cause airlines to have less income to be able to purchase new, more fuel-efficient airplanes.

So it is a near-term problem, but it is also a long-term problem.

Mr. PETRI. Thank you.

Mr. Costello.

Mr. COSTELLO. Mr. Chairman, thank you. Mr. Chairman, I think that both Captain Moak and Ms. Young, they both have touched on areas that I was going to ask them about. And Captain Moak's testimony talked about the EU ETS as a job killer, and I think you were pretty clear about that, and a few other issues that I was going to touch on you have already addressed.

So let me just say, as I said in my opening statement, that climate change is a global problem, and we need to find a global solution to that problem. And as a result, the EU needs to work with the U.S. and other countries for a global solution.

I would hope that the administration—our first panel will take back to the administration that this subcommittee and members of this subcommittee want the administration to take action now—not later, but now—in order to make our case that this is a bad idea, and to make certain that it doesn't happen, that it is not implemented. And last, of course, is that we intend to, as I said earlier, to pass our legislation to make it clear to our friends in Europe that we are not going to allow our airlines in the United States to participate in this scheme.

So I look forward to working with you Mr. Chairman, Chairman Mica and Mr. Rahall, to pass the legislation through our committee and get it to the floor of the House as quickly as possible. And again, I thank you for calling this hearing, and I thank our witnesses for being here today.

Mr. PETRI. And with that, this hearing is concluded.

[Whereupon, at 11:02 a.m., the subcommittee was adjourned.]

STATEMENT OF
THE HONORABLE SUSAN KURLAND
ASSISTANT SECRETARY FOR AVIATION
AND INTERNATIONAL AFFAIRS
U.S. DEPARTMENT OF TRANSPORTATION

BEFORE THE

SUBCOMMITTEE ON AVIATION
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

HEARING ON

The European Union Emissions Trading Scheme:
A Violation of International Law

July 27, 2011

Good morning Chairman Mica, Chairman Petri, Ranking Member Rahall, Ranking Member Costello, and Members of the Subcommittee. Thank you for inviting me to testify today.

The European Union (EU) Emissions Trading Scheme, or ETS, is a very important issue for the U.S. Government and the U.S. aviation industry. This Committee's leadership has been instrumental in raising awareness about the legal and design issues of the EU ETS as the EU proposes to apply it to international aviation. As your efforts show, opposition to the unilateral imposition of ETS on foreign operators, including U.S. operators, is not limited to one branch of government or one political party. Opposition is shared throughout our government and across the political spectrum.

In January next year, U.S. aircraft operators will begin to incur liability for greenhouse gas emissions under the EU ETS. We strongly object, on both legal and policy grounds, to the proposed unilateral imposition of ETS on foreign operators.

This is the wrong way to pursue the right objective. The Administration strongly supports the goal of combating climate change through reductions in greenhouse gas emissions, including from the aviation sector. The U.S. aviation industry has made substantial progress over the last ten years in improving fuel economy and reducing emissions. However, we believe that the right way forward is a global solution built on strong domestic action, rather than a system imposed on us from outside.

To this end, the Department of Transportation is actively working domestically and with our international partners to reduce greenhouse gas emissions caused by aviation. We believe that the International Civil Aviation Organization (ICAO) should provide the framework to address international greenhouse gas emissions. Efforts to reduce greenhouse gases must be accomplished by constructive international negotiation and mutual agreement, not by the unilateral decision of one government.

To address our international commitments at ICAO with respect to aviation and climate change, the Department is undertaking a set of initiatives under the U.S. Next Generation Air Transportation System (NextGen) Plan, as well as working at ICAO to develop a meaningful carbon dioxide (CO_2) standard. We have set aspirational goals in our NextGen plan to improve aviation fuel burn and emissions performance by 2% a year and achieve carbon neutral aviation growth by 2020 from a 2005 baseline. To achieve this, we are working in partnership with industry to implement more efficient air traffic management, accelerate development of cleaner aircraft technology, and develop and deploy sustainable alternative fuels.

The good news is that we are building on a strong record of U.S. aviation fuel efficiency improvements and greenhouse gas emissions savings. Commercial aircraft operations in the United States have shown significant improvement in fuel efficiency and emissions. U.S. aviation emissions have barely grown since 1990 (up 5%), and U.S aviation emissions have actually declined since 2000 (down 15% through 2009 while U.S. carriers have transported approximately 15% more passengers and cargo).

We believe that the EU's plan to include aviation in the EU ETS is undermining efforts to build an international consensus on how to best reduce aviation's greenhouse gas emissions. We saw that last fall at the ICAO Assembly and we see it from the reports of opposition to application of this EU legislation by countries from around the world.

Moreover, we have several major concerns with the EU ETS as applied to international aviation.

First, inclusion in the ETS of foreign operators is inconsistent with international aviation law and practice. As a legal matter, we consider the EU ETS Directive to be inconsistent with both the Chicago Convention and the U.S.-EU Air Transport Agreement.

Second, the EU has no transparent methodology or standards for its application of a provision that allows carriers from countries undertaking "equivalent measures" for reducing emissions to be exempted from the EU ETS. We believe this could foster discrimination and competitive distortions in the industry.

Third, contrary to EU assertions, work by ICAO has recognized a range of approaches for reducing greenhouse gas emissions and not exclusively endorsed any one measure.

Fourth, any money U.S. airlines pay to European treasuries is money that is not available to invest in new aircraft and equipage required under our NextGen plan. Moreover, despite public statements pledging ETS revenues as a source of climate mitigation funding, the EU ETS Directive imposes no requirement that revenues generated from the auction of ETS allowances be used to address climate change, nor are we aware of any commitments by any EU member state to dedicate ETS revenue for climate change purposes.

Finally, the EU ETS does not preclude EU member states from levying additional emissions-related charges or taxes, or maintaining existing levies. There are already countries, such as Austria, Germany and the U.K., that have done so. Accordingly, a U.S. air carrier forced to participate in the EU ETS could end up paying multiple times for the same ton of CO_2 emissions.

We discussed our concerns with our European counterparts at the Joint Committee of the U.S.-EU Air Transport Agreement last month in Oslo. During that meeting, we conveyed our serious policy and legal objections to the EU's planned inclusion of foreign operators in their ETS. European Commission representatives insisted that the ETS Directive will not be amended or delayed, and that the only way for U.S. carriers to be even partially exempted would be for the U.S. to demonstrate equivalent measures. The ambiguous responses of the EU to U.S. questions about potential discrimination and criteria for equivalence in possible EU exemptions for third countries only heightened our concerns.

We strongly believe that a collaborative international approach is the best way to reduce global greenhouse gas emissions and will continue to work actively for a global solution.

Thank you again for bringing attention to this important issue. I look forward to your questions.

STATEMENT OF

CAPTAIN LEE MOAK, PRESIDENT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

BEFORE THE

SUBCOMMITTEE ON AVIATION

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

July 27, 2011

The European Union's Emission's Trading Scheme:

A Violation of International Law

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Statement of
Captain Lee Moak, President
Air Line Pilots Association, International
Before the Aviation Subcommittee
Committee on Transportation and Infrastructure
U.S. House of Representatives
On
The European Union's Emission's Trading Scheme:
A Violation of International Law

July 27, 2011
Washington, DC

Mr. Chairman, Ranking Member Costello and members of the Committee, I am Captain Lee Moak, president of the Air Lines Pilots Association, International (ALPA). It is a pleasure and an honor for me to be here today to testify on behalf of more than 53,000 pilot members who fly for 39 airlines in the U.S. and Canada. Accompanying me today is Captain Kathi Hurst, who serves as our subject matter expert on aviation environmental issues and emissions trading. We appreciate the Committee's interest in the European Union's (EU's) emissions trading scheme and the opportunity to present our views on it today.

The EU ETS is a Job Killer

The Federal Aviation Administration, according to a December 2009 study, showed that commercial aviation helps drive $1.3 trillion in economic activity each year, and it is responsible for more than 5 percent of U.S. gross domestic product, and employs 11 million people. It is no exaggeration to say that commercial aviation is part of the very foundation of our nation's economy, safely transporting people and cargo on millions of flights each year and generating enormous revenues for multiple sectors of the economy. For evidence of this fact, we need only remind ourselves of the tremendous damage done to our economy when the industry came to a standstill for just a few days following the 9/11 attacks.

The EU ETS is no more than a thinly disguised tax on commercial aviation, the proceeds of which may well accrue to the treasuries of foreign governments instead of being used in a meaningful way to reduce GHG emissions. It is our strong contention that *the industry already pays more than its fair share of taxes.* According to the ATA, the industry's non-income tax burden has grown from $3.7 billion in 1993 to approximately $17 billion

now. In 1972, the taxes on a $300 domestic round-trip ticket totaled $22, or 7% of the total. In 1992, the tax bite on that same $300 ticket had nearly doubled to $38, or 13% of the total. Today, the taxes on a $300 airfare are $63, or 20% of the fare and represent *nearly a 300% increase* over the ticket taxes levied on the airlines in 1972.

The EU ETS taxes will ultimately cost more American jobs at a time when unemployment stands at 9.2% and job creation is everyone's goal. The airlines simply cannot afford any new taxes and we must do all that we can to keep from losing any more jobs in this industry.

The EU ETS is Legally Questionable and Ill-Advised

ALPA has an abiding interest to ensure the ongoing viability, what we call the sustainability, of our airline industry in the United States. We know very well that our employers are under tremendous stress to reduce fuel consumption and corresponding emissions. This is so despite the fact that over the past 30 years, U.S. commercial airlines have made great progress in reducing the environmental impact of aircraft operations, improving fuel efficiency by more than 100 percent. Moreover, the U.S. industry has committed to making additional improvements including an average annual carbon dioxide (CO^2) efficiency improvement of 1.5 percent per year and an industry-wide cap on CO^2 emissions from 2020 forward. The industry is also promoting the creation of international emissions guidelines through the International Civil Aviation Organization (ICAO).

It is most unfortunate, therefore, that the EU has decided to unilaterally implement a stand-alone taxation scheme ostensibly for the purpose of reducing aircraft emissions. This emissions trading scheme would cap emissions at a set amount per airline per year, and then allocate a specific number of free emissions allowances to individual airlines. By April 30 of each year, an airline would be required to surrender a number of allowances equivalent to the amount of its total emissions during the preceding calendar year. An airline that does not surrender sufficient allowances will be held liable for paying a penalty of 100 Euros for each ton of carbon dioxide equivalent emitted for which the airline has not surrendered allowances. These penalties could amount to thousands of dollars per flight. All emissions from flights to and from the EU are covered including emissions from those parts of the flights that are outside the territories of the EU member states.

The cost to U.S. airlines for acquiring allowances sufficient to cover their projected emissions could be several billion dollars between 2013 (when the first allowance surrender is scheduled) and 2020.

The EU ETS is legally questionable on many grounds. First, to the extent that the EU seeks to regulate activities occurring outside the territories of its member states, it is at odds with the principle of customary international law that each state has complete and exclusive sovereignty over the airspace above its territory, with several provisions of the Chicago Convention, and with the Air Transport Agreement between the EU and the United States. Second, the ETS is inconsistent with the obligation imposed by the Kyoto Protocol of 1997 to address aircraft emissions issues through ICAO. Third, the ETS runs afoul of the prohibitions on fuel taxes or charges set forth in the Chicago Convention and the Air Transport Agreement.

Another significant concern with the ETS is that it may spawn conflicting or redundant emissions schemes in other countries. The ETS permits the exclusion of a country's aircraft from the scheme if that country adopts measures that have "an environmental effect at least equivalent to" those of the ETS. If multiple countries attempt to craft emissions reduction programs that satisfy the EU, airlines may be confronted with a range of schemes that will be complex, costly and perhaps redundant. Such a result must be avoided.

As stated above, the commercial airline industry has made significant and meaningful emissions improvements for decades. Airlines have an inherent economic incentive to reduce fuel consumption and greenhouse gas (GHG) emissions because fuel accounts for a significant and volatile part of an airline operating budget. According to the Department of Transportation, in May 2011, the average cost of a gallon of jet fuel was $3.03 per gallon, not including taxes, which represents a 31% increase for this commodity compared to its cost in May 2010. According to the Air Transport Association (ATA), a one-penny-per-gallon increase in the cost of jet fuel results in an additional cost to the airlines of $175 million over the course of a year.

The commercial aviation industry improved fuel efficiency by approximately 110 percent between 1978 and 2008. This resulted in a savings of 2.7 billion metric tons of CO^2 – roughly equivalent to taking more than 19.5 million cars off the road each year. Between 2000 and 2008, GHG emissions and fuel burn were reduced by 5.5 percent while transporting 17 percent more passengers and cargo.

These impressive efficiency and GHG-reduction gains have come about, not from the unilateral and ill-advised actions of a consortium of foreign governments, but through the research, development and implementation of new engine and airframe technology by the airline industry. If the EU's planned imposition of expensive, new taxation on the airline industry is enacted, we would expect several unintended consequences to result,

to include less available capital to invest in new technology, and older, more-polluting aircraft kept in use longer.

Not content to rely solely on new aircraft technology, the airlines are also helping develop and implement renewable energy sources and cutting-edge operational procedures and navigation technologies, described further below. Seven U.S. airlines have signed letters of intent with a synthetic fuel production company for a future supply of jet fuel derived exclusively from biomass. It is expected that by 2015 the company's facility in Northern California will be able to produce up to 16 million gallons of jet fuel to support airline operations in California. The FAA, along with ATA and other industry organizations, have worked since 2006 in a consortium called the Commercial Aviation Alternative Fuels Initiative (CAAFI) to enhance energy security and environmental sustainability for aviation through alternative jet fuels. CAAFI is promoting the development and deployment of alternative fuels that offer equivalent levels of safety and compare favorably with petroleum-based jet fuel on cost and environmental bases. CAAFI has several notable accomplishments to date, which include development of a new American Society for Testing and Materials International (ASTM) specification for a drop-in alternative aviation fuel. ALPA is fully supportive of the CAAFI effort.

As an indicator of where these kinds of initiatives are leading both here and around the globe, a major European airline recently initiated a six-month biofuel trial on scheduled flights, which will be conducted four times daily. One of the engines of a twin-engine Airbus A321 will run on a 50/50 mixture of regular jet fuel and biosynthetic kerosene, which has been approved for use by the ASTM. The biofuel is made from jatropha, camelina, and animal fats which are produced in a sustainable manner without competing with food production. The total cost for conducting this biofuel project will be almost $9.5 million dollars and during the test period the use of biofuel is expected to reduce CO_2 emissions by up to 1,500 tons.

The Pilot's Perspective

Pilots literally sit at the intersection of new technology, operational measures, air traffic control procedures, and varying aircraft capabilities. Pilots and the airline industry as a whole continue to make great strides toward reducing total fuel burn, noise, and tailpipe emissions. These gains have been realized through technological advances and implementation of operational efficiencies.

Airlines and the aviation industry face unique challenges in making these improvements. First are the long and expensive lead times for the research, development, design, and certification implementation for new technologies to improve operational efficiencies and realize significant fuel reductions. Second is the lack of any economically viable alternative to fossil-based fuel.

Aviation arguably has the most successful record of limiting its impact on the environment, while increasing its productivity, of any industrial sector. Airlines have greatly reduced carbon-based emissions through engine technology which reduces fuel burn and emission of undesirable gases and particulates. Compared to aircraft in use in 1972, the U.S. airline industry now carries six (6) times more payload using 60% less fuel and has reduced by 95% the number of people significantly impacted by aircraft noise. This outstanding record of environmental achievement has resulted in large measure from the airlines continually demanding new aircraft from the manufacturers that burn less fuel, carry greater payloads, and create less noise. Boeing is presently conducting certification test flights of the B-787; due to its cutting-edge technology, that aircraft is designed to use 20% less fuel--and thereby create 20% less greenhouse gas (GHG) emissions--than current aircraft of the same size. This aircraft is just one example of the kinds of investments that the airlines make in a very heavily capitalized industry.

It should be noted that according to the Environmental Protection Agency (EPA), U.S. commercial aviation contributes just 2 percent of domestic GHG emissions; a small fraction of the 25 percent produced by the balance of the transportation industry.

Airline pilots can, and do, save fuel and emissions through various operating techniques. Safety is our utmost concern, of course, but where safety is not impacted, airline pilots will reduce fuel usage through such measures as:

- Single-engine outbound taxi –Under certain conditions, it is not necessary that all aircraft engines be operated to taxi on the ramp or on taxiways. When conditions permit, only one engine may be started out of two or more available engines until reaching the end of the runway for takeoff.
- Engine shut-down during inbound taxi – Once the aircraft has exited the landing runway and is headed to the gate or parking stand, one or more operating engines may be shut down either in the taxiway environment or on the ramp.
- Technology enhanced departure and arrival procedures; new procedures are being developed with the aid of satellite-based navigation. Area Navigation (RNAV) and Required Navigation Performance (RNP) technology permit shortening the distance and time traveled during departure and arrival.

- Optimal altitude – Each jet aircraft, based on weight and ambient conditions, has an optimum altitude where fuel burn is minimized. To the extent that conditions and circumstances permit, pilots often request that optimal altitude in order to conserve fuel, which reduces emissions.
- Optimal-speed flight plans – Planning and operating a flight at an efficient speed can save fuel. Pilots can optimize fuel burn based on aircraft weight, winds, and atmospheric conditions.
- Continuous Descent Arrival (CDA)/Optimized Descent Procedure (OPD) – Normal approach and landing procedures require an aircraft to reduce power, descend to a new altitude, and then add considerable power to level off, before descending again in stair-step fashion. That process may be repeated several times during any approach and landing. A new approach procedure, the CDA, or what we refer to as an OPD, is being developed that permits pilots to reduce power on all engines and not use significant thrust until safety concerns dictate establishing a stabilized approach configuration just before landing. This procedure cannot work at all airports at all times due to operational constraints, but at those locations where it can be used, it can save substantial fuel on a single approach.
- Reduced Vertical Separation Minimum (RVSM) – Taking advantage of improved technology, appropriately equipped aircraft can now fly with 1,000 feet – compared with 2,000 feet previously – vertical separation at higher altitudes. This operational change added six additional useable altitudes increasing the opportunity for pilots to fly their aircraft at the optimal, most fuel efficient altitude, in addition to permitting much greater airspace utilization.

Recommendations

As pilots, we deal with facts, and the facts clearly show that while aviation is a contributor of greenhouse gas and other emissions, it plays only a very small role in the overall issue. Indeed, we could ground the entire world's fleet, and not have any significant effect on climate change. The industry is poised to continue to make great strides in reducing emissions through technology and operating procedures. We believe that the best way to achieve those results is the same way that we have made such great advances thus far, namely, through industry's investments in increasingly advanced technology, alternative fuels and better operating procedures. Allowing the EU to impose an ETS will have very little, if any, actual impact on the amount of GHGs released into the atmosphere by U.S. airline aircraft. However, it will take away from investments in new fuel-efficient aircraft and infrastructure while adding to an already high tax burden.

The EU's ETS is a job killer that has the potential to do severe economic harm to the U.S. economy and U.S. airlines at a time when taxation and unemployment are already very high. Congress should determine what it can do to support the Administration's effort to obtain an exclusion of U.S. carriers from the scheme and act accordingly.

Thank you, again, for the opportunity to testify today. I would be pleased to address any questions that you may have.

# # #

Statement of

Krishna R. Urs

Deputy Assistant Secretary
for Transportation Affairs
U.S. Department of State

before the

Committee on Transportation and Infrastructure
Subcommittee on Aviation
U.S. House of Representatives

hearing on

The European Union Emissions Trading Scheme

July 27, 2011

Mr. Chairman, Ranking Member Costello, and Members of the Subcommittee:

Thank you for inviting me to testify this morning. I will focus my remarks on our diplomatic efforts to date to prevent the unilateral inclusion of U.S. air operators in the European Union Emissions Trading Scheme (ETS). The Department of State has worked closely with the Department of Transportation, the Federal Aviation Administration, the Environmental Protection Agency, and the Department of Commerce to develop a strategy to advance this goal.

First let me state up front that we support the goal of addressing greenhouse gas emissions, including from the aviation sector. However, unilaterally including our carriers in an emissions trading system is the wrong way to achieve the right objective. We believe the right way is to work with our international partners to develop a multilateral solution through the International Civil Aviation

Organization (ICAO) while allowing the vital aviation sector to continue to grow. No other sector contributes more to the movement of people and goods across great distances and across international borders, and few other sectors are as vital to the growth and stability of the global economy.

We have made progress in developing a solution at the global level through ICAO, and we are eager to continue this progress. At the last Assembly of the International Civil Aviation Organization in 2010, the United States worked with our international partners to achieve agreement on a number of measures to limit or reduce aviation's impact on the environment. They included, for the first time ever, an ambitious, medium-term, global goal of carbon neutral growth from 2020 (that is, that net global international aviation carbon emissions will not rise above 2020 levels beyond 2020), agreement to develop a CO2 standard, mandatory reporting by all countries of fuel consumption, and agreement that States would submit to ICAO action plans listing the measures they plan to take to contribute to the global goal. Recognizing that the circumstances of each country's aviation industry may differ, no one specific action is required to reach the goal – each country can determine what measures make the most sense for its own industry and economy. For example, the U.S. is seeking even more ambitious goals—carbon neutral growth by 2020 using a 2005 baseline.

Further, at the Assembly a majority of ICAO member States acknowledged that the application of market-based measures to international aviation should be done following good-faith negotiations to reach an agreed way forward, not unilaterally. The Member States of the European Union and the Member States of the European Civil Aviation Conference (44 in all) reserved on this last point.

In the United States, we have a strong record of success in reducing emissions from aviation. Over the past decade, we have seen U.S. aviation emissions shrink by 15% through greater efficiencies and improved technology. We are committed to working with our U.S. government colleagues to enhance that record, in partnership with the aviation industry, and to support our commitments in ICAO.

Europe, as our largest aviation market, is one of our closest partners. As you know, in 2007 the United States signed an air transport agreement with the European Union and its member states (the "U.S. – EU Air Transport Agreement"). We signed a protocol to amend that Agreement, the so-called "Second – Stage Agreement" in 2010, and in June, Norway and Iceland, as members of the European Economic Area, signed an agreement to accede to it as amended. It is a significant agreement that has led to great benefits on both sides of the Atlantic.

Recognizing that the environment is taking on more significance in international aviation, Article 15 of the Agreement, as amended, underscores the Parties' intent to work together to reduce the impact of aviation on the environment and the commitment of both Parties to address questions raised concerning new environmental measures that might affect the exercise of rights. A Joint Committee established under the Agreement – made up of representatives from both Parties and technical experts as required – is charged with seeking to resolve questions related to the interpretation or application of the Agreement, including those arising under Article 15.

To that end, on June 22 in Oslo, Norway, we met with EU officials and delivered this Administration's formal objections to the EU's unilateral inclusion of U.S. air carriers in the ETS. I led the delegation at that meeting, which included representatives from FAA, DOT, EPA, Commerce, the U.S. aviation industry, and U.S. environmental organizations. The EU delegation was headed by the Director of Air Transport from the Directorate-General for Mobility and Transport, and included officials from the Directorate General for Climate and the European External Action Service, and representatives from EU member states, the European aviation industry associations, and environmental organizations.

We objected to the unilateral imposition of the EU's ETS on U.S. air carriers on both legal and policy grounds. We emphasized that unilateral imposition was the wrong way to pursue the right objective. We asked a number of questions about how the Emissions Trading Scheme is expected to work and frankly were disappointed with the answers. In fact, our concerns about the lack of transparency surrounding the EU's plans to determine "equivalency" of other countries' measures and the potential for discrimination in that process were only heightened.

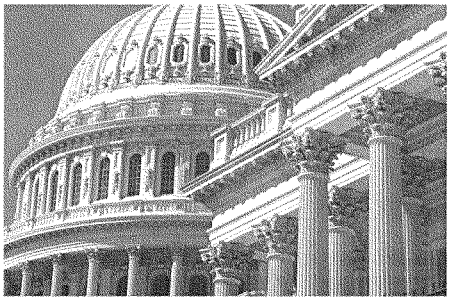
While this was the first time this Administration had rendered a formal objection, the United States – and other members of the international community – have been expressing our concern about the prospect of the EU unilaterally extending its ETS to international aviation for years. It is therefore disappointing to hear statements from European officials that our objections have been raised too late, and that because application of the EU's ETS to all air carriers is a matter of law, not policy, the European Commission is not in a position to delay or modify its implementation or application . In the end, the path the European Union has

chosen will likely hamper progress toward a multilateral solution that could bring about a much more far-reaching and beneficial impact on the climate than the EU ETS alone can achieve.

We will continue to strongly oppose the unilateral application of the EU's ETS to our airlines and will work with the international community to find constructive and collaborative ways to tackle the important issue of aviation and climate change.

ATA TESTIMONY

The European Union's Emissions Trading Scheme: A Violation of International Law



Statement of Nancy N. Young
Vice President of Environmental Affairs
Air Transport Association of America, Inc. (ATA)
before the
Subcommittee on Aviation
of the
House Transportation and Infrastructure Committee

July 27, 2011

AIR TRANSPORT ASSOCIATION

Introduction

The Air Transport Association of America (ATA) appreciates this opportunity to share its concerns regarding the unilateral and extraterritorial application of the European Union Emissions Trading Scheme (EU ETS) to our airlines and commends this Subcommittee for its leadership on this issue.

ATA opposition to the EU ETS is twofold: It violates international law, including the sovereignty of the United States, and imposes an exorbitant, counterproductive and illegal tax on U.S. citizens, diverting U.S. dollars and threatening thousands upon thousands of U.S. jobs.

Make no mistake. The EU ETS is not about the environment. It is about a new source of revenue for Europe. None of the monies collected by the Europeans are required to be used for environmental purposes.

By contrast, the initiatives the U.S. airlines are undertaking to enhance our already strong record of fuel-efficiency advances and greenhouse gas emissions (GHG) savings are resulting in real environmental improvements. Moreover, we have an ambitious proposal on the table for an international framework of aviation-specific emissions measures and targets at the International Civil Aviation Organization (ICAO), the United Nations body charged by treaty with setting standards and recommended practices for international aviation.

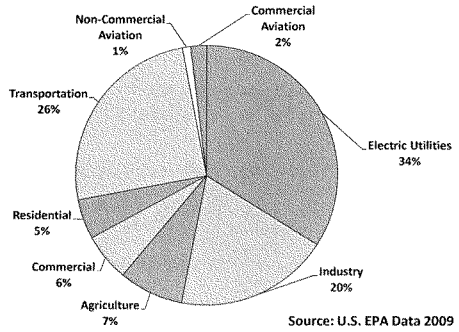
What we ask is for governments to do their part – to support air traffic management improvements and other initiatives that can enhance our fuel- and emissions-savings efforts and to refrain from unilateral and punitive measures like the EU ETS that undermine our industry and our efforts. Accordingly, the U.S. government should strongly oppose the application of the EU ETS to U.S. airlines and aircraft operators.

The U.S. Airlines: Green and Getting Greener – a Catalyst for U.S. Economic Growth

For generations, flying has contributed to a better quality of life. Commercial aviation has been essential to the growth of our economy, yielded breakthrough technologies, brought people together and transported critical cargo – all while achieving an exceptional environmental track record. No industry is better positioned to stimulate the nation's economy while constantly enhancing its environmental performance.

Today's airplanes are not just smarter – they are quieter, cleaner and use less fuel than ever before – but we also fly them smarter. That's why our industry represents just 2 percent of all GHG emissions in the United States (see Figure 1) while driving over 5 percent of the nation's GDP. Commercial aviation is a tremendous enabler of the U.S. and global economies. In the U.S., aviation drives $1.2 trillion in annual economic activity. Airlines are at the heart of this, responsible for 10.9 million U.S. jobs and $371 billion in personal earnings. And every 100 airline jobs help support some 388 jobs outside of the airline industry.

Figure 1. U.S. Commercial Aviation Greenhouse Gas Emissions Represent 2 Percent of the Inventory



For the past several decades, commercial airlines have dramatically improved fuel and GHG efficiency by investing billions in fuel-saving aircraft and engines, innovative technologies like winglets (which improve aerodynamics) and cutting-edge route-optimization software. For example, between 1978 and 2009, the U.S. airline industry improved its fuel efficiency by 110 percent, resulting in 2.9 billion metric tons of carbon dioxide (CO_2) savings – equivalent to taking 19 million cars off the road in each of those years. Further, data from the Bureau of Transportation Statistics confirms that U.S. airlines' burned almost 14 percent less fuel in 2009 than they did in 2000, resulting in a 14 percent reduction in CO_2 emissions, even though they carried 7.3 percent more passengers and cargo on a revenue-ton-mile basis. [1]

And we are not stopping there. The initiatives that our airlines are undertaking to further address GHG emissions are designed to responsibly and effectively limit our fuel consumption, GHG contribution and potential climate change impacts while allowing commercial aviation to continue to serve as a key contributor to the U.S. economy.

The U.S. Airlines Have Put Forward an Affirmative, Global Plan for Even More Greenhouse Gas Emissions Savings

ATA has challenged the EU ETS as applied to its airlines in European courts.[2] While we seek to overturn this unilateral scheme, we also are part of a worldwide aviation coalition that has put an aggressive

[1] Fuel savings and traffic numbers are from Bureau of Transportation Statistics data, U.S. Department of Transportation Form 41. Carbon dioxide savings and equivalencies were calculated using EPA tools at www.epa.gov/cleanenergy/energy-resources/calculator.html.

[2] On December 16, 2009, facing a statute of limitations applicable only to private parties, ATA filed a lawsuit in the High Court of the United Kingdom challenging the application of the EU ETS to our member airlines. This case was recently heard in the European Court of Justice on referral.

proposal on the table for further addressing aviation CO_2 under ICAO. Our focus is on getting further fuel efficiency and emissions savings through new aircraft technology, sustainable alternative aviation fuels and air traffic management and infrastructure improvements.

Our "global sectoral approach" proposal for aviation GHG emissions includes an aggressive set of measures and emissions targets. Under this approach, the framework for both international and domestic aviation emissions would be established internationally. All airline emissions would be subject to emissions targets requiring industry and governments to do their part. As proposed by the industry, these would be an annual average fuel-efficiency improvement of 1.5 percent through 2020 and carbon-neutral growth from 2020, subject to critical government infrastructure and technology investments such as air traffic control modernization, with an aspirational goal of a 50 percent reduction in CO_2 by 2050 relative to 2005 levels.

Significantly, at its 2010 Assembly, ICAO adopted much of the industry's framework. While more work is needed to flesh out this framework, as U.S. government representatives to ICAO have recognized, the opposition of many countries to the unilateral EU ETS has been a roadblock. Nonetheless, the airlines remain committed to seeing the framework implemented and are moving forward with fuel-efficiency and emissions-reducing measures in the meantime.

The Unilateral and Extraterritorial Application of the EU ETS to U.S. Airlines Violates International Law

Critically, international aviation is governed by treaty, customary international law and air-services agreements between countries. In addition to imposing requirements directly on international flights, these international and bilateral agreements set forth rules and limits on the types of regulations that individual countries can impose on the airlines of other countries. This makes sense. If one country or a set of countries could unilaterally impose any requirements they wanted on international flights, it would be very difficult – if not impossible – for flights from country to country to occur. Thus, the treaty, customary international law and air-services agreement rules are very important to ensuring freedom to travel and enabling international commerce.

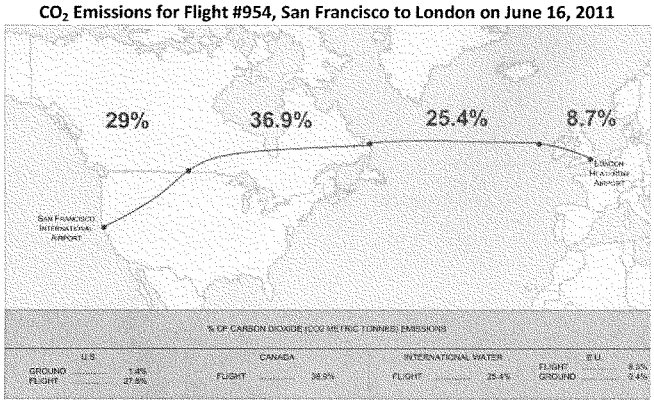
The Extraterritorial Reach of the EU ETS and U.S. Sovereignty

Although the EU ETS violates international law in many respects, perhaps the most egregious is its regulatory overreach into other nations, including into the United States. By its terms, the EU ETS applies to airlines that fly to, from and within the EU, placing a cap on the total quantity of emissions for such flights. While U.S. airlines with flights to European States and territories already are required by the EU ETS to monitor and report emissions for the entirety of each individual flight to, from and within the EU, from January 1, 2012, our airlines will be required to acquire allowances to cover the emissions over the whole of their flights. That includes emissions while at the gate or taxiing on the ground at U.S. airports, in U.S. airspace, over Canada or other non-EU countries, over the high seas, as well as within the airspace of EU Member States.

The example of an actual ATA member airline flight from San Francisco to London Heathrow illustrates this well (see Figure 2). From before the aircraft begins to taxi from the gate in San Francisco, the EU emissions rules apply. As a percentage of total emissions, 29 percent take place in U.S. airspace, including those on the ground at the airport. A further 37 percent take place in Canadian airspace, and a further 25 percent over the high seas. Less than 9 percent of emissions from this flight take place in EU airspace. Yet the EU ETS will base the emissions-allowances requirement for this carrier on the emissions for the entire flight from start to finish. And should the U.S. airline not purchase and surrender to the EU

the amount of allowances required by the scheme, that airline will be subject to an "excess emissions penalty" of 100 euros per metric ton of carbon dioxide equivalent.[3]

FIGURE 2.
CO_2 Emissions for Flight #954, San Francisco to London on June 16, 2011



By asserting EU jurisdiction over U.S. airlines and emissions on the ground in the United States and in U.S. airspace, the EU and its States are in violation of Article 1 of the Convention on International Civil Aviation, referred to as the "Chicago Convention" and customary international law, which state that every country has jurisdiction over its own airspace. Further, by asserting EU jurisdiction over U.S. airlines and their emissions over the high seas, the EU and its States are violating the Chicago Convention and customary international law, which provide that only the country of registry and ICAO may regulate aircraft over the high seas.

Reducing these violations to mere legal citations does not do them justice. What is at issue here is nothing less than U.S. sovereignty.

The EU and EU States' Unilateral Action Violates Their Agreement to Work through ICAO

The Chicago Convention is intended to establish "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically." To carry out this important mandate, ICAO was created and authorized to adopt and amend "international standards and recommended practices and procedures" dealing with various aspects of safety, operation and efficiency of air navigation and environment. ICAO authority extends to setting international standards, policy and recommended practices for international aviation and climate change.

[3] For the San Francisco to London flight, an excess-emissions penalty could be as much as 21,300 euros (more than $30,000 U.S.).

The unilateral act of the EU is in breach of ICAO authority and the agreement of parties to the Chicago Convention "to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization" regarding international aviation. Further, the EU unilateral scheme violates Article 2.2 of the Kyoto Protocol, to which the EU and its Member States are parties, which expressly recognizes ICAO as the proper body through which countries may agree to a framework for further addressing greenhouse gas emissions from international aviation. This unilateral and piecemeal approach can only lead to chaos in international travel and trade.

The EU Scheme Violates Agreed Rules for Taxes and Charges

Not only does the extraterritorial nature of the EU ETS violate international law in U.S. airspace and over the high seas, but so too does the type of regulation that the EU ETS imposes, regardless of where the aircraft is. It imposes an improper levy, contrary to agreed international and bilateral rules on aviation taxes and charges.

As noted, the EU ETS imposes a cap on the total quantity of aviation emissions for flights to, from and within the EU. This cap is set at a level lower than "historical aviation emissions," defined as the average of aviation emissions from 2004 to 2006. For 2012, the cap is set at 97 percent of the 2004-2006 average; for 2013 the cap is set at 95 percent. Although the current EU ETS legislation – which by its own terms is to be reviewed and subject to amendment after 2014 – calls for up to 85 percent of aviation emissions allowances under the cap to be distributed "free of charge," 15 percent are only available by auction by EU States. Further, airlines must purchase emissions allowance to cover any emissions above the historic cap.

The language of the EU ETS Directive reflects the reality of the situation; while some allowances may be distributed "free of charge," the remainder may only be procured upon payment of a charge, making the EU ETS a cap, levy and trading scheme. This requirement violates Articles 15 and 24 of the Chicago Convention, as well as Article 11 of the bilateral air-services agreement between the United States and the European Union and its Member States.

Specifically, the EU ETS breaches Article 15 of the Chicago Convention, which prohibits the levying of "fees, dues or other charges" on international aircraft "solely of the right of transit over or entry into or exit from" the EU. While Article 15 allows for charges to be applied under certain circumstances, such charges must be "cost-based and related to the provision of facilities and services for civil aviation."[4] However, payments by airlines for emissions allowances under the EU ETS are not cost-based and do not have to be used specifically to address the impact of aviation emissions.

Further, by basing the levy on an airline's fuel consumption, the EU ETS violates Article 24 of the Chicago Convention and Article 11(2) of the US-EU bilateral air services agreement, which prohibits countries from taxing fuel onboard an aircraft or uplifted for an international flight absent the express consent of the airline's country of registry.[5]

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[4] ICAO's Policies on Charges for Airports and Air Navigation Services (Doc 9082/7); see also ICAO Council Resolution on Environmental Charges and Taxes adopted on 9 December 1996 (149/16). Consistent with the December 1996 Council Resolution on Environmental Charges and Taxes, ICAO guidance specific to such charges makes clear a cost-basis between the emissions, the charges and the specific emissions mitigation measures must be established, and the funds collected must go to mitigating the specific environmental impact. See ICAO, Guidance on Aircraft Emissions Charges Related to Local Air Quality (Doc 9884).

[5] Ironically there is European case law directly on point here. In *Braathens Sverige AB v Riksskatteverket*, Case C-346/97 [1999] ECR I-3419, the EU court held that a Swedish emissions tax violated the prohibition on taxation of fuel in international

There is no question that ATA has significant concern about any tax or charge that may add to our airlines' and customers' financial burden. Indeed, the industry already pays more than its fair share of taxes – air travel and transport are taxed at a greater rate than alcohol and tobacco, products that are taxed at levels to discourage their use. However, taxes and charges imposed contrary to law, as is the case with the EU ETS, should be of grave concern to us all.

The EU ETS as Applied to U.S. Airlines Is Bad for U.S. Airlines and the U.S. Economy and Is Counterproductive to the Environment

As noted, the EU ETS imposes a steep levy on U.S. airlines. Moreover, given that carbon prices are volatile, the EU ETS exposes U.S. airlines to increasing and varying costs that are difficult to predict and incorporate into business planning. In light of the sustained economic downturn and uncertainty regarding negotiations to replace the Kyoto Protocol, which expires in 2012, carbon-allowance prices in the EU are about half of what they were just two years ago. However, even projecting forward from the current cost of carbon, the U.S. airlines will be required to pay into EU coffers more than $3.1 billion between 2012 and year-end 2020. That outlay could support more than 39,200 U.S. airline jobs. Now consider that the costs could be twice as high if the cost of carbon allowances in Europe returns to where it was within the past couple years. That cost outlay would represent over 78,500 U.S. airline jobs.

And it could get even worse, as the cost of carbon is not the only variable here. These cost estimates are based on the amount of free allowances and the emissions caps established in the current EU ETS Directive. However, by its own terms, the Directive calls for a review in 2014 that could reopen the quantity of free allowances and emissions caps applicable to aviation.

Notably, none of the monies collected by the European States under the scheme are required to be used for aviation environmental purposes in particular or even environmental purposes at all. And in fact, some European countries like the United Kingdom, have expressly denounced any obligation to earmark the collected funds for an aviation or environmental purpose.[6] All the while taking U.S. airline, passenger and shipper dollars, the EU ETS will siphon away to European coffers the very funds that our airlines need to continue investing in the technological, operational and infrastructure improvements required to meet our emissions targets. This is truly anti-environment.

The EU ETS "Equivalent Measures" Provision Is Not a Way Forward

In answer to criticism regarding EU unilateralism raised by ATA, the United States government and other countries and airlines around the world, the EU has suggested that the provision in its EU ETS Directive allowing for exemptions under certain circumstances allows for a way forward. The EU argues that if other countries adopt "equivalent measures" to the EU ETS, it will withdraw application of its scheme on one leg of an international flight, allowing the other country's measures to apply on that leg.

This provision, Article 25 in the EU ETS Directive, reveals the full extent of the EU breach of sovereignty and improper extraterritorial action. It says that the EU will continue to regulate the U.S. airlines on the ground in the United States, in U.S. airspace, over Canada, over the high seas and so on until the United

flights as there was "a direct and inseverable link" between the fuel consumption on which the emissions levy was calculated and the carbon dioxide emissions it purported to cover.

[6] See, "UK Says it Will Not Earmark Aviation Revenues from EU ETS Auctioning for Environmental Measures," *GreenAir Online* (August 14, 2008), available at http://host1.bondware.com/~GreenAirOnline/news.php?viewStory=233.

States adopts some sort of measures that the EU, in its ***sole discretion***, determines to be "equivalent" to the EU ETS. And even then, the EU will relinquish regulation over only the incoming flight of the U.S. airline.

This is a recipe for further chaos. Although reserving for itself the authority to determine whether another country's measures are sufficiently "equivalent" to merit an exemption for its airlines, the EU has no criteria or transparent process for such a determination. This creates a tremendous prospect for competitive distortions and discrimination. Indeed, we have heard from sources around the world and it has been reported in the press that the EU may be offering variable "deals" to certain countries,[7] perhaps more on political bases than on objective criteria. The threat to U.S. aviation to be on the short end of this is palpable. Simply put, the unilateral and flawed EU ETS is the wrong starting point for discussions of what may be appropriate for U.S. or international aviation greenhouse gas policy.

U.S. Government Opposition to This Extraterritorial Scheme Is Essential

Although ATA has brought a legal action in European courts against the EU ETS, U.S. government opposition to the scheme is also critical. While we are confident that ATA is correct on the law and should prevail on the merits, being limited as a private party to pursue this matter in the EU court system is daunting. Indeed, the primary defenses raised against us are that ATA, as a private party, is not the appropriate party to bring before the EU courts questions of international law and sovereignty. Astonishingly, the EU also has asserted that it is not itself a party to the Chicago Convention, even though all of its Member States are and it has assumed the right to negotiate air-services agreements on the States' behalf – agreements, such as the one between the United States and the EU, that are assumed to be underpinned by the Chicago Convention. Although this is of direct interest and concern to ATA and its member airlines, so too should it be to the U.S. government.

The U.S. government has the tools, both in the legislative and executive branches, not only to call the EU on its actions, but to work to get the EU and its Member States back to the table at ICAO to flesh out and implement the global sectoral approach framework provisionally agreed at the 37th ICAO Assembly in 2010. That is why ATA commends the bipartisan leadership shown by Chairmen Mica and Petri and Ranking Members Rahall and Costello in introducing legislation opposing the EU ETS scheme and urging the administration to take additional steps in this regard. These steps are essential in conveying to the EU the seriousness of their breaches of U.S. sovereignty and international law and U.S. government concerns about the effect of the EU ETS on U.S. airlines, aircraft operators and the U.S. economy. From these steps, follow-though is critical to overturning the counterproductive EU ETS and getting the Europeans to support an internationally agreed, global approach to further addressing aviation CO_2 emissions.

Conclusion

If left unanswered, the EU breach of international law poses a direct threat to the ability of the U.S. airlines to transport passengers and goods, a critical enabler of the U.S. and global economies. The U.S. airlines are answering, and appreciate the opportunity to work shoulder-to-shoulder with the U.S. government in standing up against the illegal and counterproductive EU scheme.

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[7] See, e.g., "France Urges EU 'Rapid Action' in Air Carbon Row," *EurActive.com* (June 9, 2011), available at http://www.euractiv.com/en/climate-environment/france-urges-eu-rapid-action-air-carbon-row-news-505465

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