



CANADA-EUROPE TRANSATLANTIC DIALOGUE:
SEEKING TRANSNATIONAL SOLUTIONS TO 21ST CENTURY PROBLEMS

canada-europe-dialogue.ca

*April 2013
Policy Brief*

A pre-analysis of Canada–EU Aviation Relations post-ICAO Assembly Meeting Concerning Emissions Trading System

Armand de Mestral and Md. Tanveer Ahmad*
McGill University

Introduction

On 12 November 2012, the European Commission proposed to defer the requirement that airlines surrender emission allowances for flights into and out of Europe under the greenhouse gas emissions trading system (EU ETS), which entered into force in 2012, until after the 38th International Civil Aviation Organization (ICAO) General Assembly meeting to be held in the autumn of 2013.¹ A formal legislative proposal to suspend for one year the application of EU *Directive 2008/101*,² which included international aviation within the EU ETS, has been submitted by the European Commission to the European Parliament and the Council of the EU

* Armand de Mestral is Emeritus Professor, Jean Monnet Professor of Law at McGill University, and a Canada-Europe Transatlantic Dialogue Lead Researcher. Tanveer Ahmad is DCL candidate at McGill University.

¹ European Commission (EC), News, “Commission proposes to ‘stop the clock’ on international aviation in the EU ETS pending 2013 ICAO General Assembly” (12 November 2012) online: Newsroom, Climate Action, European Commission <http://ec.europa.eu/clima/news/articles/news_2012111202_en.htm> (visited March 28, 2013).

² EC, *Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community*, [2009] OJ, L 8/3 [*Directive 2008/101*].

for their approval.³ This proposal states that, under *Directive 2008/101*, the EU would not require emission allowances to be surrendered in April 2013 for emissions to and from the EU during 2012.⁴ The proposal was a response to the intense political pressure from the non-EU countries like Russia, China, India, Canada, and the United States (US). Nevertheless, it is worth noting that the proposal is not to rescind but to suspend the application of *Directive 2008/101* for one year. Therefore, it is crucial to consider Canada-EU aviation relations post-ICAO Assembly meeting.

Concerning this proposal, Connie Hedegaard, European Commissioner for Climate Action, stated that the EU firmly desires an international framework tackling carbon dioxide (CO₂) emissions from aviation, and the proposal to defer has been made since many countries are now prepared to take action within ICAO and even prepared to move toward a global market-based mechanism.⁵ However, “if this exercise does not deliver – and I hope it does – then needless to say we are [automatically] back to where we are today with the EU ETS,”⁶ she added. Will this exercise deliver? Let us see first what ICAO is doing at present.

ICAO’s current action dealing with aviation emissions

On 16 November 2012, the ICAO Council presented the provisional agenda for the 38th triennial ICAO Assembly meeting.⁷ Agenda item 17 dealing with environmental protection provides that the ICAO Council will present reports on activities with regard to, *inter alia*, aircraft engine emissions affecting local air quality, international aviation and climate change, including progress made on a new carbon dioxide (CO₂) emissions standard for aircraft, “sustainable alternative fuels for aviation, market-based measures and global aspirational goals.”⁸ Additionally, the Council will present proposals for updating the two Assembly

³ EC, News, “Commission submits formal proposal to defer EU ETS international aviation compliance by one year” (20 November 2012) online: Newsroom, Climate Action, European Commission <http://ec.europa.eu/clima/news/articles/news_2012112001_en.htm> (visited March 28, 2013).

⁴ “Commission proposes,” *supra* note 1.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ International Civil Aviation Organization (ICAO), “Provisional Agenda for the 38th Session of the ICAO Assembly,” A38-WP/1 P/1, online: Agenda, Assembly 38th Session, Meetings, ICAO <<http://www.icao.int/Meetings/a38/Pages/agenda.aspx>> (visited March 28, 2013).

⁸ *Ibid.*

Resolutions, namely Resolution A37-18,⁹ which deals with environmental protection in general, noise and local air quality, and Resolution A37-19,¹⁰ which specifically deals with climate change.¹¹ Most recently, the Committee on Aviation Environmental Protection (CAEP) of ICAO delivered its agreement on the certification procedures supporting a new CO₂ standard for aircraft.¹² This agreement follows from the CAEP's unanimous agreement, reached last July, on a CO₂ metric system which characterizes the CO₂ emissions for aircraft types with varying technologies.¹³ It appears from the provisional agenda that no consensus regarding the market-based measures has been reached yet.

Since June 2012, ICAO has been considering three options for a global market-based measure, namely, global mandatory offsetting, global mandatory offsetting with a revenue generation mechanism, and global emissions trading.¹⁴ In November 2012, a High-level Group, comprising officials from 17 countries, has been set up “to provide near-term recommendations on a series of policy issues which have arisen in the course of ICAO's ongoing research into the feasibility of a global market-based measure (MBM) scheme appropriate to international aviation, as well as its development of a policy Framework to guide the general application of any proposed MBM to international air transport activity.”¹⁵ The 17 countries are Canada, the US, the Russian Federation, France, the United Kingdom (UK), Belgium, Nigeria, Uganda, the United Arab Emirates (UAE), Saudi Arabia, Brazil, Mexico, China, India, Japan, Australia and

⁹ *Consolidated statement of continuing ICAO policies and practices related to environmental protection – General provisions, noise and local air quality*, ICAO Assembly Res A37-18, 37th Sess, ICAO Doc 9958, I-54, online: ICAO <http://www.icao.int/publications/Documents/9958_en.pdf>.

¹⁰ *Consolidated statement of continuing ICAO policies and practices related to environmental protection — Climate change*, ICAO Assembly Res A37-19, 37th Sess, ICAO Doc 9958, I-67, online: ICAO <http://www.icao.int/publications/Documents/9958_en.pdf>.

¹¹ ICAO, “Provisional Agenda,” *supra* note 7.

¹² ICAO, ICAO News Release, COM 4/13, “ICAO Environmental Protection Committee Delivers Progress on New Aircraft CO₂ and Noise Standards” (14 February 2013) online: ICAO <<http://www.icao.int/Newsroom/Pages/ICAO-environmental-protection-committee-delivers-progress-on-new-aircraft-CO2-and-noise-standards.aspx>> (visited March 28, 2013).

¹³ ICAO, ICAO News Release, COM 15/12, “New Progress on Aircraft CO₂ Standard” (11 July 2012) online: ICAO <<http://www.icao.int/Newsroom/Pages/new-progress-on-aircraft-CO2-standard.aspx>> (visited March 28, 2013).

¹⁴ Jane Hupe, “Aviation and Environment” (Presentation delivered at the Aviation and Climate Change Seminar of ICAO, Montreal, 23 – 24 October 2012), [unpublished].

¹⁵ ICAO, ICAO News Release, COM 20/12, “New ICAO Council High-level Group to Focus on Environmental Policy Challenges” (15 November 2012) online: ICAO <<http://www.icao.int/Newsroom/Pages/new-ICAO-council-high-level-group-to-focus-on-environmental-policy-challenges.aspx>> (visited March 28, 2013); “ICAO appoints 17 countries to new High-level Group to hammer out important policy issues on aviation MBMs”, (28 November 2012) online: GreenAir online.com <<http://www.greenaironline.com/news.php?viewStory=1626>> (visited March 28, 2013).

Singapore.¹⁶ Since the EU is not a state and has only observer status at ICAO, it cannot be a member of this Group. However, three EU Member States – Belgium, France, and the UK – are members of this Group.¹⁷ Interestingly, ICAO is not concerned with the EU’s threat that the suspension on EU ETS would be lifted if sufficient progress toward a global agreement had not been reached by the 38th ICAO Assembly. This is apparent from the statement of the ICAO Secretary General.¹⁸ The Secretary General stated that ICAO would evaluate its position at the next Assembly, and the EU would have to make its own assessment of what it wants to do since the EU ETS is not on ICAO’s agenda.¹⁹ He further stated that, in any event, ICAO’s work is not dependent on the EU but on the Assembly’s instructions.²⁰ Therefore, it is probable that the outcome of the next ICAO Assembly meeting will fail to satisfy the EU, i.e. the exercise will not deliver, and, consequently, the EU ETS will become operative automatically.

What role should Canada play in the High-level Group set up to consider a global market-based measure scheme?

Canada should play an active role in the High-level Group to speed up the process that may culminate in an agreement on a global market-based measure. Canada should play this role for political reasons (e.g., maintaining existing harmonious relations with the EU), for economic reasons (e.g., saving its flag carriers from paying EU countries for emissions charges) and for environmental reasons (e.g., to combat climate change). It is true that Canada is not satisfied with the EU ETS.²¹ Canada recognizes that “efforts to address climate change require international action and coordination,” and vows “to actively participate, through ICAO, on the

¹⁶ “ICAO appoints 17 countries,” *ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Transport Canada, News Release, No H039/12, “Canada’s Transport Minister firm on stance regarding aviation and maritime emissions with the European Commission’s Vice-President responsible for Transport” (3 May 2012) online: Transport Canada <<http://www.tc.gc.ca/eng/mediaroom/releases-2012-h039e-6693.htm>> (visited March 28, 2013).

implementation of global approaches and standards to address climate change, including system efficiencies and market-based measures.”²²

Canada might propose two schemes that may accommodate any of the three global market-based measures under consideration by ICAO:

- (1) A global scheme run by ICAO (a most unlikely outcome); or
- (2) A global model in which each country like Canada adopts its own scheme based on an ICAO model. Each country will apply the scheme to its aircraft wherever they are. Each national scheme would be recognized by all other states.

There are three possible alternative solutions currently being discussed at ICAO with respect to the application of any scheme:

- (a) Application to all departing international flights from a state;
- (b) Application to all international flights carried out by operators registered in a given state;
- (c) Application to all international flights on the basis of the nationality of airspace traveled through.²³

The first solution is “considered the most realistic of the alternatives.”²⁴ This solution “would involve charging just departing flights. They could be charged on the basis of fuel burn calculated using a standard conversion factor to translate fuel use into emissions.”²⁵ Under the second alternative, “each country would be responsible for accounting for the emissions of all its registered operators worldwide, based on fuel burn.”²⁶ However, this alternative “would require each country to agree to participate, something many observers consider extremely unlikely,

²² Transport Canada, “Canada’s Action Plan to Reduce Greenhouse Gas Emissions from Aviation,” online: Transport Canada <<http://www.tc.gc.ca/eng/policy/acs-reduce-greenhouse-gas-aviation-menu-3007.htm#s64>> (visited March 28, 2013).

²³ “Factbox: Possible solutions to curb airline emissions globally,” *Reuters [US]* (21 January 2013) online: Reuters <<http://www.reuters.com/article/2013/01/21/us-eu-airlines-idUSBRE90K0Y220130121>> (visited March 28, 2013).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

given the extent of opposition to the EU law.”²⁷ The third alternative, which is being supported by the US,²⁸ is a relatively weak one given the fact that, under this approach, “when aircraft are flying in international airspace, emissions would not be accounted for, leaving about 50 percent of global emissions unregulated.”²⁹

Although the market-based measures are mandated by the Kyoto Protocol,³⁰ the global scheme for aviation is not likely to be developed in line with that Protocol. Specifically, the new scheme for aviation should not grant developing country status to developing countries under the Kyoto Protocol automatically. This is so not only because of the non-discrimination or equal treatment principle under article 11 of the Chicago Convention, i.e. the laws and regulations of a Contracting State shall be applied to foreign airlines without any distinction as to nationality while in their territory,³¹ but because a significant number of those developing countries (e.g., China, the UAE, Brazil, and Singapore) have well developed, extremely competitive, well-capitalized, and rapidly growing airlines.³² The common but differentiated responsibility principle under the Kyoto Protocol should apply in the same manner in aviation, however, with a new definition of “developing country” for the purposes of aviation. Regard must be made to the fact that the US, which has one of the world’s largest aviation industries, is not a party to that Protocol and Canada is no longer a party. The International Air Transport Association argues that the airlines industry “believes that, with some political leadership and innovative solutions, the principles of equal treatment between airlines and differentiated responsibilities for [states] are completely consistent in the context of international aviation.”³³

²⁷ *Ibid.*

²⁸ “US Offers Airspace-based Emissions Regime,” (25 February 2013) online: AviationBrief.com <<http://www.aviationbrief.com/?p=11684>> (visited March 28, 2013).

²⁹ “Factbox: Possible solutions,” *supra* note 23.

³⁰ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) [*Kyoto Protocol*].

³¹ *Convention on International Civil Aviation*, 7 December 1944, 61 STAT 1180, TIAS No 1591, 15 UNTS 295, Can TS 1944 No 36, ICAO Doc 7300/9, art 11 [*Chicago Convention*].

³² See also Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008) at 479 – 480.

³³ International Air Transport Association, “Aviation and Climate Change: Pathway to carbon-neutral growth in 2020,” online: IATA <<http://www.iata.org/whatwedo/environment/Documents/aviation-climatechange-pathway-to2020.pdf>> (visited March 28, 2013). See also International Air Transport Association, “A global approach to reducing aviation emissions: First step: carbon-neutral growth from 2020”, online: IATA <<http://www.iata.org/whatwedo/environment/Documents/global-approach-reducing-missions.pdf>> (visited March 28, 2013).

The question arises as to whether or not ICAO has authority to regulate these activities: can ICAO adopt a scheme for all its Contracting States by way of a standard or is a new convention required? Article 2(2) of the Kyoto Protocol provides that the Annex I Parties shall pursue limitation or reduction of emissions of greenhouse gases from aviation not controlled by the Montreal Protocol³⁴— working through ICAO.³⁵ “This provides a clear mandate for ICAO to be the authoritative body for aviation environmental issues, which the organization has welcomed.”³⁶ Article 44 of the Chicago Convention provides that the aims and objectives of ICAO are “to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to,”³⁷ *inter alia*, “promote generally the development of all aspects of international civil aeronautics.”³⁸ Restricting emissions from aviation is one of the aspects of international civil aviation and it follows that ICAO has a duty to regulate emissions from aviation.

The Chicago Convention facilitates the adoption of international standards and recommended practices (SARPs) as Annexes to the Convention by the ICAO Council, in accordance with article 90,³⁹ to address new issues to meet the current global need.⁴⁰ The ICAO Council is bound to adopt SARPs in accordance with the provisions of Chapter VI of the Convention,⁴¹ i.e. articles 37 – 42. Among these provisions, article 37 provides guidelines regarding such adoption.⁴² The ICAO Council made good use of this authority by adopting Annex 16 to the Chicago Convention to address environmental issues faced by aviation. The SARPs are designated as Annexes to the Chicago Convention for convenience.⁴³ Therefore, the ICAO can adopt a scheme for all its Contracting States by way of a Standard. Annex 16 can be amended or a new Annex can be adopted for this purpose.

³⁴ *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 3, Can TS 1989 No 42 (entered into force 1 January 1989).

³⁵ *Kyoto Protocol*, *supra* note 30, art 2(2).

³⁶ Dempsey, *Public*, *supra* note 32 at 450.

³⁷ *Chicago Convention*, *supra* note 31, art 44.

³⁸ *Ibid*, art 44(i).

³⁹ *Ibid*, art 90.

⁴⁰ See *ibid*, art 37.

⁴¹ *Ibid*, art 54(1).

⁴² *Ibid*, art 37.

⁴³ *Ibid*, art 54(1).

However, Annexes to the Chicago Convention do not become part of the Convention and, therefore, are not mandatory like the provisions of the 1944 Convention.⁴⁴ “In fact, their adoption and their legal force are not subject to the general international law of treaties.”⁴⁵ Furthermore, articles 37 and 38⁴⁶ weaken the binding nature of the Annexes. Both of these articles allow any Contracting State to the Convention to avoid implementing the Annexes.⁴⁷ Although article 37 invites all the Contracting States “to collaborate in securing the *highest practicable degree of uniformity* in regulations, standards, procedures, and organization,”⁴⁸ any state can refrain from doing so since the phrase “highest practicable degree of uniformity”⁴⁹ is not defined.⁵⁰ Article 38 allows deviation from any standard or procedure of any Annexes or any amendments thereto by any Contracting State.⁵¹ According to article 38, if any state finds it “impracticable to comply in all respects” with any of those standards or procedures, it merely has to notify ICAO of the discrepancy between its own practice and the respective standard or procedure.⁵² The Convention does not define the term “impracticable.”⁵³ Again, although the deviating Contracting State must give “immediate notification”⁵⁴ to ICAO of such “differences between its own practice and that established by the international standard,”⁵⁵ the concerned state can avoid notifying since no defined time limit is set for that purpose.⁵⁶ The Convention is silent on the definition of the term “immediate.”⁵⁷ “In practice, states have notified ICAO of impracticality of compliance with SARPs at any time, or indeed not at all, thereby violating the

⁴⁴ See Michael Milde, “Aviation Safety Oversight: Audits and the Law,” (2001) XXVI Ann Air & Sp L 165 at 168. See also *New Zealand Airline Pilots’ Association v Attorney General*, [1997] 3 NZLR 269 (CA).

⁴⁵ Milde, “Aviation Safety,” *ibid* at 168.

⁴⁶ *Chicago Convention*, *supra* note 31 arts 37, 38.

⁴⁷ See Md. Tanveer Ahmad, *Adapting the Existing Regime for the Contemporary World to Achieve Global Civil Aviation Safety: A Developing Country Perspective* (LLM Thesis, McGill University Faculty of Law, Institute of Air and Space Law, 2009) at 13 [unpublished], online: eScholarship@mcgill, Library and Collections, McGill University <http://digitool.library.mcgill.ca/R/-?func=dbin-jump-full&object_id=87019> (visited March 28, 2013).

⁴⁸ *Chicago Convention*, *supra* note 31, art 37 [emphasis added].

⁴⁹ *Ibid*.

⁵⁰ See Milde, “Aviation Safety,” *supra* note 44 at 168 – 169; Ahmad, *Adapting the Existing Regime*, *supra* note 47 at 13.

⁵¹ See *ibid*; *Chicago Convention*, *supra* note 31, art 38.

⁵² See *Chicago Convention*, *ibid*, art 38.

⁵³ Ahmad, *Adapting the Existing Regime*, *supra* note 47 at 13.

⁵⁴ *Chicago Convention*, *supra* note 31, art 38.

⁵⁵ See *ibid*.

⁵⁶ See *ibid*; Ahmad, *Adapting the Existing Regime*, *supra* note 47 at 13.

⁵⁷ See *Chicago Convention*, *supra* note 31, art 38.

plain meaning of the phrase “immediate notification.”⁵⁸ In fact, the overwhelming majority of states do not discharge their obligation to notify ICAO under article 38.⁵⁹ ICAO itself admitted this unexpected fact.⁶⁰ Most importantly, “[t]here is no explicit sanction in the Convention for failing to notify.”⁶¹

In such circumstances, ICAO can move toward either amending the Chicago Convention or drafting a new convention. The ICAO Assembly has the power to consider proposals for the modification or amendment of the provisions of this Convention and, if it approves the proposals, to recommend them to the Contracting States.⁶² Any such proposed amendment “must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of [states] which have ratified such amendment when ratified by the number of [Contracting] States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of [Contracting] States.”⁶³ Although the Chicago Convention does not authorize ICAO to promote the enactment of new conventions, precedent exists in the field of aviation security where several multilateral conventions were drafted under the auspices of ICAO.⁶⁴

Canada’s next step: if ICAO fails in adopting a market-based measure satisfactory to the EU

No problem would arise between Canada and the EU, if ICAO succeeds in reaching a conclusion satisfactory to the EU. However, a problem will surely arise if ICAO fails in its efforts to reach a goal that will satisfy the EU because, in that case, the EU will implement its EU ETS again. What might Canada do in such a circumstance?

⁵⁸ Dempsey, *Public*, *supra* note 32 at 77 [footnote omitted].

⁵⁹ See *ibid* at 78.

⁶⁰ “[A] Secretariat document in 1995 admitted that “it is at the present time impossible to indicate with any degree of accuracy or certainty what the state of implementation of regulatory Annex material really is, because a large number of [states] have not notified ICAO of their compliance with or differences to the Standards in the Annexes for some considerable time.”” Milde, “Aviation Safety,” *supra* note 44 at 170 [footnote omitted].

⁶¹ Dempsey, *Public*, *supra* note 32 at 79 [footnote omitted].

⁶² *Chicago Convention*, *supra* note 31, art 49(j).

⁶³ *Ibid*, art 94(a).

⁶⁴ See Dempsey, *Public*, *supra* note 32 at 233.

Canada might opt for the third option we recommended in our last paper,⁶⁵ i.e. Canada might introduce an emissions trading scheme or carbon offset programme applicable only to Canadian aircraft under article 18, paragraph 2 of the Canada-EU Air Services Agreement,⁶⁶ signed on December 17-18, 2009 and provisionally in force since that date,⁶⁷ that authorizes both Canada and the EU to take and apply environmental measures within their own sovereign jurisdiction so long as they do not prejudice the rights and obligation of the parties under international law and the Chicago Convention.⁶⁸ Such a scheme would contribute to the reduction of carbon emissions from Canadian aircraft and should qualify for an exemption under the EU ETS. Any such scheme should be based on the ICAO guidelines for market-based mechanisms that may be set out in the upcoming ICAO Resolution superseding the current Resolution A37-19. During the planning process, Canada should endeavor to consult with its EU counterparts using the Joint Committee instrument under the Air Services Agreement.⁶⁹ After launching the scheme, Canada should apply for exemption from the EU ETS.⁷⁰

⁶⁵ See Armand de Mestral & Md. Tanveer Ahmad, “EU Emissions Trading Scheme: Problems Presented to Canada” (April 2012), Canada-Europe Transatlantic Dialogue <<http://canada-europe-dialogue.ca/category/publication/commentaries/>> (visited March 28, 2013).

⁶⁶ *Agreement on Air Transport between Canada and the European Community and its Member States, Canada and European Union*, 17-18 December 2009, online: Transport, European Commission <http://ec.europa.eu/transport/air/international_aviation/country_index/doc/canada_final_text_agreement.pdf> (not yet in force) [*Canada-EU Air Services Agreement*].

⁶⁷ See European Commission, Press Release, IP/09/1963, “EU and Canada sign Air Transport Agreement” (17 December 2009) online: Press Releases RAPID, Europa <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1963&format=HTML&language=en>>; European Commission, Press Release, Memo/09/218, “The EU-Canada aviation agreements – Q&A” (6 May 2009) online: Press Releases RAPID, Europa <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/218&format=HTML&aged=0&language=en&guiLanguage=en>>.

⁶⁸ *Canada-EU Air Services Agreement*, *supra* note 66, art 18(2).

⁶⁹ *Ibid*, art 18(4), (6).

⁷⁰ See EC, *Directive 2008/101*, *supra* note 2 at 5, 7, 14 – 15.