



**CANADA-EUROPE TRANSATLANTIC DIALOGUE:
SEEKING TRANSNATIONAL SOLUTIONS TO 21ST CENTURY PROBLEMS¹**

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Time to Support the EU ETS? - Some issues still need to be resolved

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The European Union [EU] has finally opted to amend its Emissions Trading System [EU ETS] concerning the system's application to aviation. In this regard, a new Directive has been proposed by the European Commission,³ which has been informally agreed to by the Council of the EU and the European Parliament in March 2014.⁴ Prior to this initiative, the EU temporarily derogated from certain provisions

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³ See EC, Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions – {SWD(2013) 430 final}{SWD(2013) 431 final}* (Brussels: EC, 2013) COM(2013) 722 final – 2013/0344 (COD), online: EUR-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0722:FIN:EN:PDF>>.

⁴ Online: Reducing emissions from aviation, Aviation, Transport, Policies, Climate Action, European Commission <http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm> (visited March 18, 2014).

of *Directive 2003/87*⁵ that concern the application of the EU ETS to aviation.⁶ *Directive 2003/87* established the EU ETS and included aviation in the system by an amendment made by *Directive 2008/101*.⁷ Although the derogation resulted from the intense political pressure from the non-EU countries,⁸ the EU stated that the derogation was made to facilitate progress and provide momentum in the International Civil Aviation Organization [ICAO] toward the adoption of “a global framework for emissions reduction policy which facilitates the application of market-based measures to emissions from international aviation, and on the development of a global market-based measure (MBM).”⁹ Due to this derogation, non-EU airlines were not required to surrender emission allowances in April 2013 for emissions to and from the EU during 2012.¹⁰ Since an agreement to develop a global market-based measure, which will be finalized at the 39th session of the ICAO Assembly in 2016 and be implemented by 2020, was reached at the 38th session of the ICAO Assembly,¹¹ but no progress was “made on a “framework” for national/regional MBMs up to 2020”,¹² the European Commission has proposed this new Directive.¹³ The main change, applicable from the beginning of 2014 until the global market-based measure takes effect, to be brought into effect by this new Directive is that aircraft emissions taking place within European regional airspace only will be covered by the EU ETS.¹⁴ Previously, emissions from

⁵ EC, *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, [2003] OJ, L 275/32.

⁶ See EC, *Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community*, [2013] OJ, L 113/1 [*Decision No 377/2013*].

⁷ 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.

⁸ See Armand de Mestral & Md. Tanveer Ahmad, “A Pre-Analysis of Canada–EU Aviation Relations post-ICAO Assembly Meeting Concerning Emissions Trading System” (April 2013) produced for the *Canada-Europe Transatlantic Dialogue* (Carleton University: Centre for European Studies, Ottawa) at 2, online: <<https://labs.carleton.ca/canadaeurope/2013/a-pre-analysis-of-canada-eu-aviation-relations-post-icao-assembly-meeting-concerning-emissions-trading-system/>> (visited March 18, 2014); Md. Tanveer Ahmad, “The CJEU’s Radical ETS Judgment: Destabilizing the Chicago Convention System” (2013) 13 *Issues in Aviation Law and Policy* 139 at 139 – 140.

⁹ *Decision No 377/2013*, *supra* note 6 at 1.

¹⁰ See *ibid.*

¹¹ See *Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change*, ICAO Assembly Res A38-18, 38th Sess, ICAO Doc 10022, I-68, online: ICAO <http://www.icao.int/publications/Documents/10022_en.pdf> [*ICAO Res. A38-18*]; ICAO, Press Release, “Dramatic MBM Agreement and Solid Global Plan Endorsements Help Deliver Landmark ICAO 38th Assembly” (4 October 2013), online: ICAO <<http://www.icao.int/Newsroom/Pages/mbm-agreement-solid-global-plan-endorsements.aspx>> (visited March 18, 2014).

¹² EC, Commission, *Proposal*, *supra* note 3 at 2.

¹³ *Ibid.*

¹⁴ Online: Reducing emissions from aviation, Aviation, Transport, Policies, Climate Action, European Commission <http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm> (visited March 18, 2014).

aircraft arriving at or departing from any aerodrome in the EU Member States were covered irrespective of where they occurred.

This significant amendment gives rise to a question: has the time come for Canada to comply with the EU ETS in its amended form? This policy paper addresses this question and argues that, unless some outstanding issues are resolved, Canada should not comply with the EU ETS.

Key features of the modified EU ETS with respect to aviation

The key features of the amended EU ETS ensuing from this proposed Directive would be:¹⁵

– Flights between aerodromes in the European Economic Area [EEA] will remain fully covered.¹⁶

– As of 2014, flights to and from non-EEA countries are not responsible for emissions taking place beyond EEA countries.¹⁷ Emissions from such flights occurring beyond 12 nautical miles from the last point in EEA countries will not be accounted.¹⁸ Hence, non-EEA country areas are excluded. However, sea area not in excess of 400 nautical miles between EEA countries will still be accounted.¹⁹ A simplified procedure is proposed to calculate emissions within that boundary.²⁰ It is proposed that operators can choose between approaches to monitoring, reporting and verification [MRV] methodology for compliance.²¹

– Flights to and from non-EEA countries that are developing countries and whose share of total revenue tonne kilometers of international civil aviation activities is less than 1 per cent would be

¹⁵ EC, Commission, *Proposal*, *supra* note 3 at 3.

¹⁶ *Ibid.*

¹⁷ *Ibid.* With effect from 2013 onwards, this proposed Directive derogates from *Directive 2003/87* in respect of a proportion of flight emissions to and from non-EEA countries. *Ibid.*

¹⁸ *Ibid.* at 11.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 3.

²¹ *Ibid.*

exempted for the period 2014 to 2020.²² This would in turn exclude routes to around 80 countries on a non-discriminatory basis.²³

– Overflights of EEA countries are exempt, as are emissions from flights between aerodromes in non-EEA countries and aerodromes in dependencies and territories of EEA countries.²⁴ Distances to and from those dependencies and territories, and over those dependencies and territories, are exempt as well.²⁵

Does Canada have a legal obligation to comply with the EU ETS?

At first glance, it appears that the EU ETS will not apply extra-territorially since, as it is claimed by the European Commission, the amended EU ETS will only cover aircraft emissions taking place within European regional airspace. However, the extra-territorial dimension of the EU ETS remains since emissions from aircraft of non-EEA countries occurring within sea area not exceeding 400 nautical miles between EEA countries, i.e. within their exclusive economic zone, will be accounted.

It is a principle of customary international law that every State has complete and exclusive sovereignty over the airspace above its territory,²⁶ where State sovereignty essentially means the right of a State within its territory to exercise its functions to the exclusion of other States.²⁷ The customary international law principle of airspace sovereignty has been codified in article 1 of the *Chicago Convention*.²⁸ Article 2

²² *Ibid* at 3, 7, 11. “Countries considered to be developing for the purposes of this proposal should be those which benefit at the time of adoption of this proposal from preferential access to the [EU] market in accordance with Regulation (EU) No 978/2012..., that is those which are not classified in 2013 by the World Bank as high-income or upper-middle income countries.” *Ibid* at 7.

²³ *Ibid* at 3.

²⁴ *Ibid*.

²⁵ *Ibid* at 3, 11.

²⁶ See e.g. *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, C-366/10, [2011] ECR I-13833 at I-13885 – I-13886; Ian Brownlie, *Principles of Public International Law*, 7th ed (New York: Oxford University Press, 2008) at 105.

²⁷ See generally Jean Bodin, *Les six livres de la république de I. Bodin Angeuin. A Monseigneur dv Faur, Seigneur de Pibrac, conseiller du Roy en son conseil priué* (Paris: Iacques du Puys, 1576) at 125; J. G. Starke, *Introduction to International Law*, 10th ed (London: Butterworths, 1989) at 157; Sharon A. Williams & Armand L. C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada*, 2nd ed (Toronto: Butterworths, 1987) at 108; Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (London: Springer International, 2014) at 17. “The competence of states in respect of their territory is usually described in terms of sovereignty[.]... The normal complement of state rights, the typical case of legal competence, is described commonly as ‘sovereignty’[.]... In brief, ‘sovereignty’ is legal shorthand for legal personality of a certain kind, that of statehood”. Brownlie, *supra* note 26 at 105 – 106.

²⁸ *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 1 [*Chicago Convention*]. Prior to the *Chicago Convention*, the principle

of the Convention defines territory as “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.”²⁹ Article 2 of the *Law of the Sea Convention* [UNCLOS] also confirms sovereignty of coastal States over the airspace above territorial waters or sea.³⁰ According to article 3 of UNCLOS, the breadth of territorial sea cannot exceed 12 nautical miles measured from baselines.³¹ Under UNCLOS, coastal States can claim an exclusive economic zone,³² which cannot extend “beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”,³³ over which these States have jurisdiction concerning “the protection and preservation of the marine environment”.³⁴ Under UNCLOS, States have a general obligation “to protect and preserve the marine environment”³⁵, and are obliged to take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source”³⁶ to the extent that those measures do not unjustifiably interfere “with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.”³⁷

Nevertheless, regarding pollution from or through the atmosphere, States do not have any unilateral authority to adopt and enforce laws and regulations to prevent, reduce and control pollution of the marine environment that can apply to foreign aircraft beyond the airspace under their sovereignty.³⁸ Since airspace above exclusive economic zone does not fall within the sovereignty of States and since freedoms of the high seas, including the freedom of overflight, apply there,³⁹ the application of the EU ETS within a sea area of 400 nautical miles between EEA countries can be considered extra-territorial. In

was codified in article 1 of the *Paris Convention*. See *Convention relating to the regulation of Aerial Navigation*, United States, Belgium, Bolivia, etc., 13 October 1919, 11 LNTS No 297 at 173, art 1 (not in force).

²⁹ *Chicago Convention*, *supra* note 28, art 2.

³⁰ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, art 2, UKTS 1999 No 81 (entered into force 16 November 1994) [UNCLOS]. Although the term “territorial sea” is now generally accepted, “[o]ther terms employed to denote the same concept include ‘the maritime belt’, ‘marginal sea’, and ‘territorial waters’.” Brownlie, *supra* note 26 at 173 [footnote omitted].

³¹ UNCLOS, *supra* note 30, art 3. Article 5 of UNCLOS provides that “the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.” *Ibid*, art 5.

³² *Ibid*, art 55.

³³ *Ibid*, art 57.

³⁴ *Ibid*, art 56(1)(b)(iii).

³⁵ *Ibid*, art 192.

³⁶ *Ibid*, art 194(1) [emphasis added].

³⁷ *Ibid*, art 194(4).

³⁸ *Ibid*, arts 212, 222. See also Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (New York: Oxford University Press, 2009) at 417 – 420.

³⁹ “Over the high seas, the rules in force shall be those established under [the Chicago] Convention.” *Chicago Convention*, *supra* note 28, art 12.

international law, the “governing principle”⁴⁰ is that States cannot adopt measures that have extra-territorial application without the consent of other States or except under the terms of a treaty.⁴¹ The *Canada-EU Air Services Agreement*,⁴² signed on December 17-18, 2009 and provisionally in force since that date,⁴³ does not permit either Canada or the EU Member States to take and apply environmental measures beyond their own sovereign jurisdiction.⁴⁴ Thus, the extra-territorial application of the EU ETS is a violation of international law and cannot be enforced against non-EEA countries. Therefore, Canada cannot be compelled to abide by the EU ETS over these areas since it violates international law; the application of the EU ETS to Canadian aircraft flying over these areas will not be permitted under the *Canada-EU Air Services Agreement*.

Furthermore, according to article 11 of the *Chicago Convention*, laws and regulations of a contracting State concerning admission to or departure from its territory or concerning operation and navigation while within its territory of aircraft engaged in international air navigation “shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.”⁴⁵ Article 5 of the *Canada-EU Air Services Agreement* provides the same.⁴⁶ Although the EU ETS does not differentiate between aircraft on the basis of nationality, it differentiates between aircraft on the basis of the economic development status and share of total revenue tonne kilometers of international civil aviation activities of the respective countries.⁴⁷ Ensuring equality of opportunity and non-discrimination is a general principle of international aviation law. Not only that several provisions and the preamble of the *Chicago Convention* provide for that principle,⁴⁸ but States have recognized such principle, as reflected in several working papers

⁴⁰ See Brownlie, *supra* note 26 at 309.

⁴¹ *Ibid.* See also *The Case of the S. S. “Lotus” (France v. Turkey)* (1927), PCIJ (Ser A) No 10 at 18.

⁴² *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*].

⁴³ 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>>.

⁴⁴ *Canada-EU Air Services Agreement*, *supra* note 42, art 18(2).

⁴⁵ *Chicago Convention*, *supra* note 28, art 11.

⁴⁶ *Canada-EU Air Services Agreement*, *supra* note 42, art 5.

⁴⁷ See EC, Commission, *Proposal*, *supra* note 3 at 3, 7, 11.

⁴⁸ See e.g. *Chicago Convention*, *supra* note 28, arts 7, 9, 11, 15, 35, 44, Preamble.

submitted by States at the latest session of the ICAO Assembly,⁴⁹ ICAO Assembly Resolutions,⁵⁰ and reservations to Resolutions.⁵¹ Therefore, the EU ETS violates this general principle of international aviation law.

The Canadian position taken at the latest session of the ICAO Assembly reveals that, Canada will accept the implementation of national or regional market-based measures before the implementation of global market-based measures subject to the following three conditions:

- no exemption has been granted by applying the concept of *de minimis* threshold, i.e. exemption on routes to and from developing States “whose share of international civil aviation activities is below the threshold of 1% of total revenue ton kilometres of international civil aviation activities”;⁵²
- the principle of common but differentiated responsibility has not been incorporated in the scheme;⁵³ and
- a mutual agreement has to be reached in this respect.⁵⁴

⁴⁹ See e.g. United Arab Emirates, *UAE’S VIEWS ON AVIATION AND CLIMATE CHANGE*, ICAO Assembly, 38th Sess, Agenda Item 17, Working Paper No 258, Doc A38-WP/258/Ex/85 (9 September 2013), online: Assembly Working Papers, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/WP/wp258_en.pdf> (visited March 18, 2014); Lithuania, *A COMPREHENSIVE APPROACH TO REDUCING THE CLIMATE IMPACTS OF INTERNATIONAL AVIATION*, ICAO Assembly, 38th Sess, Agenda Item 17, Working Paper No 83, Doc A38-WP/83/Ex/38 (31 July 2013), online: Assembly Working Papers, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/WP/wp083_en.pdf> (visited March 18, 2014).

⁵⁰ See e.g. *ICAO Res. A38-18*, *supra* note 11; *Consolidated statement of continuing ICAO policies in the air transport field*, ICAO Assembly Res A38-14, 38th Sess, ICAO Doc 10022, III-1, online: ICAO <http://www.icao.int/publications/Documents/10022_en.pdf>

⁵¹ See e.g. Republic of Korea, *Statement of Reservation of the Republic of Korea Regarding Resolution A38-17/2: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate Change*, online: Reservations to Resolution A38-18 (17/2), Resolutions, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/Resolutions/Korea_en.pdf> (visited March 18, 2014); United Arab Emirates, *UAE Reservation – Resolution 17/2 Environmental Protection – Climate Change*, online: Reservations to Resolution A38-18 (17/2), Resolutions, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/Resolutions/UAE_en.pdf> (visited March 18, 2014); Australia, *Reservation by Australia to Resolution A38/17/2 on international aviation and climate change*, online: Reservations to Resolution A38-18 (17/2), Resolutions, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/Resolutions/Australia_en.pdf> (visited March 18, 2014).

⁵² *ICAO Res. A38-18*, *supra* note 11.

⁵³ See Canada, *Statement of Canada’s Reservations Regarding the 38th International Civil Aviation Organization General Assembly Resolution: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Climate Change*, online: Reservations to Resolution A38-18 (17/2), Resolutions, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/Resolutions/Canada_en.pdf> (visited March 18, 2014).

⁵⁴ Canada has not filed reservation against paragraph 16(a) of Assembly Resolution A38-18 that provides: States, when designing new and implementing existing MBMs for international aviation should:

Unfortunately, the EU ETS does not satisfy any of the three conditions set out above. Although 28 Member States of the EU and 14 other member States of the European Civil Aviation Conference [ECAC] have filed reservations against the concept of a *de minimis* threshold and the principle of common but differentiated responsibility,⁵⁵ the EU ETS will grant exemption to flights to and from non-EEA countries that are developing countries and whose share of total revenue tonne kilometers of international civil aviation activities is less than 1%.⁵⁶ Such an exemption definitely includes the concept of *de minimis* threshold against which Canada has filed reservation,⁵⁷ and does not guarantee that the scheme does not include the principle of common but differentiated responsibility.⁵⁸ Again, as noted above, such exemption will violate the long-established international aviation law's general principle of equality of opportunity and non-discrimination.

Moreover, and most importantly, it is unlikely that the EU will resort to reaching a mutual agreement to implement the EU ETS, since the EU Member States and ECAC member States have filed a reservation against that paragraph of Assembly Resolution A38-18 that requires the EU, when implementing the EU ETS for international aviation, to “engage in constructive bilateral and/or multilateral consultations and negotiations with other States to reach an agreement”.⁵⁹ Unless a mutual agreement between Canada and the EEA countries has been reached, Canada can refuse to comply with the EU ETS. A mutual agreement can solve the issue of extra-territorial application of the EU ETS since, as noted above, consent of other States is one of the prerequisites to adopting and enforcing measures that have extra-territorial application.

a) engage in constructive bilateral and/or multilateral consultations and negotiations with other States to reach an agreement[.]

ICAO Res. A38-18, *supra* note 11.

⁵⁵ See Lithuania, *Written Statement of Reservation by Lithuania on behalf of the Member States of the European Union and 14 other Member States of the European Civil Aviation Conference (ECAC) with regard to ICAO Assembly Resolution A38-18*, at 2 – 3, online: Reservations to Resolution A38-18 (17/2), Resolutions, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/Resolutions/Lithuania_en.pdf> (visited March 18, 2014).

⁵⁶ EC, Commission, *Proposal*, *supra* note 3 at 3, 7, 11.

⁵⁷ See Canada, *Statement*, *supra* note 53.

⁵⁸ We have argued in our previous Policy Brief that the principle of common but differentiated responsibility should apply in international civil aviation but with a new classification of developed and developing countries for the purposes of aviation since a significant number of developing countries under the *Kyoto Protocol* (e.g., China, the UAE, Brazil, and Singapore) “have well developed, extremely competitive, well-capitalized, and rapidly growing airlines.” Mestral & Ahmad, “A Pre-Analysis”, *supra* note 8 at 6.

⁵⁹ See Lithuania, *Written*, *supra* note 55 at 2.

Available Avenues: the Solution

If the EU elects to apply the EU ETS to Canadian flag-carriers without mutual agreement, Canada would have various options available at its disposal. However, not all options could bring benefit. Although Canada can always take counter-measure(s) against the EU for violation of international law,⁶⁰ this option may not be beneficial to both Canada and the EU. In international civil aviation, any counter-measure from Canada cannot bring any benefit. It will affect the friendly relationship between Canada and the EU and will cause difficulty to the commercial aviation industry. The cessation of normal air transport relations between closely associated countries simply cannot be countenanced. Rather than exercising its rights under the *Canada-EU Air Services Agreement*, Canada must cooperate with the EU and the EU must seek mutual agreement to implement the EU ETS that can be the only solution in this respect. Market-based measures in aviation are necessary to effectively contribute to the global efforts to combating climate change. In the absence of any effective legal measure in international civil aviation, market-based measures are seen as “important gap filler”⁶¹ that can complement technology, operational

⁶⁰ Canada has the option of, using its authority under article 3(3) of the *Canada-EU Air Services Agreement*, withholding, revoking, suspending, imposing conditions or limiting the authorizations or permissions granted to EU carriers to operate air services under the same agreement if Canada determines that the implementation of the EU ETS to Canadian carriers is “not consistent with a fair and competitive environment and [is] resulting in a significant disadvantage or harm to its airline or airlines”. *Canada-EU Air Services Agreement, supra* note 42, art 3(3). However, to adopt this counter-measure, Canada needs to comply with certain procedures enumerated in the agreement. First of all, Canada may submit such observations to the EU and request a meeting of the Joint Committee established under article 17 of the agreement. *Ibid*, art 14(2). Consultation in the Joint Committee is crucial since the authority under article 3(3) can only be used after such consultation has taken place. *Ibid*, art 3(4). If after the consultation, EU does not take any step to reach a mutual agreement and continues to apply the EU ETS to Canadian airlines, Canada may take action since such continuation is “likely to result in significant disadvantage or harm being caused to its airline or airlines”. *Ibid*, art 14(5). Furthermore, the continuation of the EU ETS has the effect of unilaterally limiting capacity of Canadian carriers that is prohibited under the agreement. *Ibid*, art 13(1), (2). The EU ETS has such effect, since Canadian carriers will be forced to limit their volume of traffic, frequency or regularity of service, or the aircraft type or types to reduce amount of emissions. The EU cannot counter argue that such action is permitted under article 13 for environmental reasons, since environmental reasons under article 13 are local air quality and noise which in no way include climate change. See Armand de Mestral & Md. Tanveer Ahmad, “EU Emissions Trading Scheme: Problems Presented to Canada” (April 2012) produced for the *Canada-Europe Transatlantic Dialogue* (Carleton University: Centre for European Studies, Ottawa) at 4, online: Canada-Europe Transatlantic Dialogue <<http://labs.carleton.ca/canadaeurope/2012/commentary-eu-emissions-trading-scheme-problems-presented-to-canada/>> (visited March 18, 2014).

⁶¹ ICAO Secretariat, “Overview – Market-Based Measures: Market-Based Measures” in ICAO, *ICAO Environmental Report 2013: Aviation and Climate Change* (Montreal: ICAO, [2013]) 138 at 138, online: ICAO <<http://cfapp.icao.int/Environmental-Report-2013/>> (visited March 18, 2014). See also International Coalition for Sustainable Aviation, “EFFECTIVE MARKET-BASED MEASURES TO ADDRESS GREENHOUSE GAS EMISSIONS FROM INTERNATIONAL AVIATION”, ICAO Assembly, 38th Sess, Agenda Item 17, Working Paper No 288, Doc A38-WP/288/Ex/100 (12 September 2013), online: Assembly Working Papers, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/WP/wp288_en.pdf> (visited March 18, 2014); Airports Council International *et al*, “ADDRESSING CO₂ EMISSIONS FROM AVIATION”, ICAO Assembly, 38th Sess, Agenda Item 17, Working Paper No 68, Doc A38-WP/68/Revision no 3/Ex/33 (17 September

and infrastructure measures.⁶² The forecasts by the ICAO Committee on Aviation Environmental Protection [CAEP] show that, even after the implementation of technology and operational improvements and assuming 3 per cent use of alternative fuels, “the emissions gap from carbon neutral growth in 2020 would be on the order of 500 Mt by 2040.”⁶³ Although a global market-based measure is always preferable to any unilateral measure like the EU ETS, when any global market-based measure is not coming to effect so soon, and when “[w]arming of the climate system is unequivocal”⁶⁴ and the process of climate change is continuing at a much higher speed than before,⁶⁵ It is submitted that Canada must either design its own market-based measure or accede to the EU ETS at its amended form subject to mutual agreement.

2013), online: Assembly Working Papers, Assembly 38th Session, Meetings, ICAO <http://www.icao.int/Meetings/a38/Documents/WP/wp068_rev3_en.pdf> (visited March 18, 2014).

⁶² IATA, Press Release, 34, “Historic Agreement on Carbon-Neutral Growth” (3 June 2013), online: Press Releases, International Air Transport Association <<http://www.iata.org/pressroom/pr/Pages/2013-06-03-05.aspx>> (visited March 18, 2014); International Coalition for Sustainable Aviation, “EFFECTIVE”, *supra* note 61; Paul Steele, “Aviation – Benefits Beyond Borders – ICAO Destination Green” (Presentation delivered at the ICAO Symposium on Aviation and Climate Change, “Destination Green”, Montreal, 14 – 16 May 2013) [unpublished]; Annie Petsonk, “A Global MBM for Aviation and Climate Change: The Time is Now!”, (Presentation delivered at the ICAO Symposium on Aviation and Climate Change, “Destination Green”, Montreal, 14 – 16 May 2013) [unpublished].

⁶³ ICAO, “Market-based Measures and Climate Change”, online: A38 infoKit, Assembly 38th Session, Information on ICAO Programmes and Planning, ICAO <http://cfapp.icao.int/tools/38thAssyikit/story_content/external_files/Flyer_US-Letter_ENV_MBM_s_2013-08-30.pdf> (visited March 18, 2014).

⁶⁴ “Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased”. Lisa V. Alexander *et al*, “Summary for Policymakers” in Thomas F. Stocker *et al*, eds, *Climate Change 2013: The Physical Science Basis: Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (New York: Cambridge University Press, 2013) 1 at 2.

⁶⁵ See *ibid*.