Airlines for America
We Connect the World

Testimony

The European Union's Emissions Trading System

Statement of
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before the
Senate Committee on Commerce, Science and Transportation

June 6, 2012

Introduction

Airlines for America (A4A) 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.

We are joined in our opposition to this scheme by an extensive, diverse and bipartisan constituency, including the Obama administration, manufacturers, labor unions, travel-service providers, a broad array of aviation trade associations and countries around the world. We are appreciative that the United States Congress has also expressed opposition to the unilateral EU scheme in the recently approved FAA reauthorization legislation, H.R. 2954 as approved in the U.S. House of Representatives, and bipartisan legislation pending here in the Senate.

This deep and abiding opposition to the EU tax scheme is warranted. The unilateral imposition of the cap-tax-and-trade scheme on U.S. citizens and U.S. companies is a clear violation of U.S. sovereignty and the treaties governing international aviation and commerce.

Of course, it may not come as a big surprise that A4A and its member airlines are raising concerns about such a broad-based tax and regulatory scheme. While significant, however, this dispute is not really about the amount of the exorbitant tax – $3.1 billion – that U.S. airlines, aircraft operators and consumers will have to pay into European coffers through 2020. It is about the implications of the EU jurisdictional grab over worldwide aviation. Simply put, if the EU can tax the emissions over the entirety of a flight merely because it touches down in Europe, despite U.S. sovereignty and international agreements, what is to keep the EU from imposing greenhouse gas (GHG) import taxes on U.S. automobiles, pharmaceuticals, chemicals and other goods the EU imports from the United States? And on what basis will the United States stand up against other countries that seek to cover global aviation emissions or emissions from the production of U.S. imports with multiple, unilateral, overlapping, worldwide GHG taxation schemes?

Through direct and coalition diplomatic efforts, the Obama administration has given the EU every chance to withdraw or stay its unilateral scheme. But the EU has snubbed these diplomatic efforts, as it did when they adopted an illegal ban on aircraft fitted with "hushkit" technology in the early 2000s. As it did with the unilateral hushkit ban, the United States must now take concrete legal action to overturn the application of the EU ETS as to U.S. airlines and operators.

Doing so is critical to preserving fair and open international aviation and trade. It also would be beneficial to the environment, as it would remove a significant roadblock to implementing an international agreement on aviation and climate change at the International Civil Aviation Organization (ICAO), the United Nations body charged by treaty with setting standards and recommended practices for international aviation. 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 that U.S. airlines are undertaking to enhance our already strong record of fuel-efficiency advances and GHG emissions 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 ICAO, on which full agreement could be reached at the next ICAO Assembly in September of 2013.

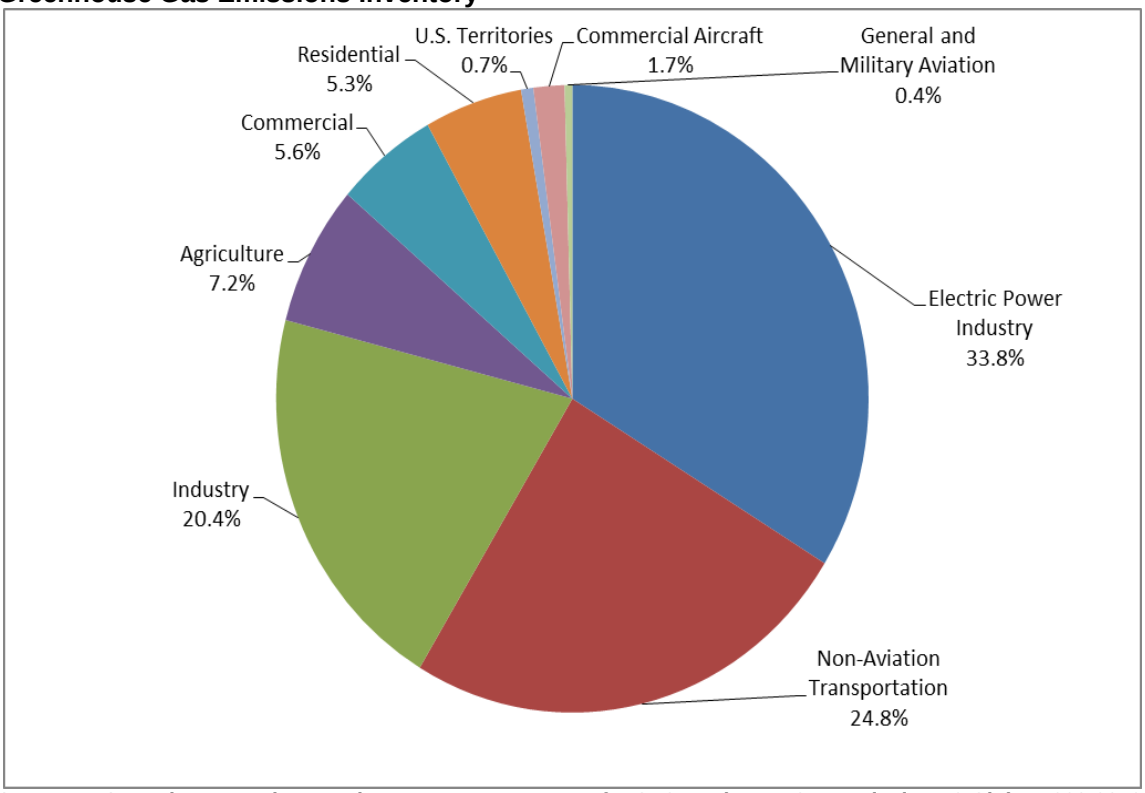
Urgent, concrete action by the United States is needed to overturn the application of the EU ETS to U.S. airlines and aircraft operators, and to bring the EU back to the table in support of a global framework under ICAO. The United States Senate can and should help in this regard, by approving S. 1956, the "European Union Emissions Trading Scheme Prohibition Act."

America'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 more technologically advanced – they are quieter, cleaner and use less fuel than ever – and airlines are flying them in ways that make maximum use of the technology to reduce fuel burn and environmental impacts. That's why our industry represents just 2 percent of all GHG emissions in the United States (see Figure 1) while driving 5 percent of the nation's GDP. Commercial aviation is a tremendous enabler of the U.S. and global economies. In the United States, aviation drives over $1 trillion in annual economic activity. Airlines are at the heart of this, responsible for nearly 10 million U.S. jobs. And every 100 airline jobs help support some 360 jobs outside of the airline industry.

FIGURE 1. U.S. Commercial Aviation Represents Less Than 2 Percent of the U.S. Greenhouse Gas Emissions Inventory



Source: U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions & Sinks*, 1990-2010 (April 2012).

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. As a result, between 1978 and 2011, the U.S. airline industry improved its fuel efficiency by 120 percent, resulting in 3.3 billion metric tons of carbon dioxide (CO_2) savings – equivalent to taking 22 million cars off the road on average in each of those years. Further, data from the Bureau of Transportation Statistics confirms that U.S. airlines burned 11 percent less fuel in 2011 than they did in 2000, resulting in an 11 percent reduction in CO_2 emissions, even though they carried almost 16 percent more passengers and cargo on a revenue-ton-mile basis.

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. For example, A4A and its airlines are dedicated to developing commercially viable, environmentally friendly alternative jet fuel, which could be a game-changer in terms of aviation's output of GHG emissions while enhancing U.S. energy independence and security. To these ends, A4A is a founder and co-lead of the Commercial Aviation Alternative Fuels Initiative® (CAAFI), a consortium of airlines, government, manufacturers, fuel suppliers, universities, airports and others working to hasten the development and deployment of such fuels. Moreover, we are central stakeholders in partnering efforts to modernize the outdated air traffic management (ATM) system on a business-case basis and to reinvigorate research and development in aviation environmental technology, both of which can bring additional and extensive emissions reductions.

America's Airlines Have Put Forward an Affirmative, Global Plan for Even More Greenhouse Gas Emissions Savings

Because A4A opposes the unilateral application of the EU ETS to U.S. airlines and aircraft operators, some have tried to assert that A4A and its member airlines oppose regulation altogether. This could not be farther from the truth. What we seek is what the Future of Aviation Advisory Committee (FAAC) recommended in December 2010, a "harmonized sectoral approach for aviation CO_2 emissions reductions."[1] As recognized by the FAAC, "disparate and conflicting requirements imposed at the state, Federal, and/or international levels can undercut necessary investments and progress."[2] To address this, the FAAC found that "[t]here is a strong need for a rationalized, harmonized approach to aviation GHG emissions, as opposed to the myriad of often counterproductive proposals—particularly those involving emissions taxes, charges, and trading."[3]

A4A and its members are part of a worldwide aviation coalition with a significant proposal on the table for further addressing aviation CO_2 through a harmonized approach, 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 EU seeks to justify its unilateral approach to regulating the world's airlines on the grounds that ICAO has not taken action on aviation and climate change. This is ironic, given that the EU ETS itself has been a roadblock to the most recent work at ICAO, but it is also inaccurate, as ICAO has taken many steps to address the climate change impacts of international aviation, including, but not limited to, the following:

- When climate change concerns first began to emerge, ICAO called on the Intergovernmental Panel on Climate Change (IPCC) to undertake a sector-specific study of the climate change impacts of aviation. The resulting study, "Aviation and the Global Atmosphere," remains the only sector-specific study ever prepared by the IPCC and continues to be recognized as a seminal work.

- In 2003, ICAO published ICAO Circular 303, "Operational Opportunities to Minimize Fuel Burn and Reduce Emissions." This comprehensive guidance document provides state-of-

[1] *See* U.S. DOT, *Future of Aviation Advisory Committee (FAAC) Recommendations*, at 5 (Dec. 15, 2010).

[2] U.S. DOT, *Future of Aviation Advisory Committee, Final Report*, at 19 (April 11, 2011), available at http://www.dot.gov/faac/docs/faac-final-report-for-web.pdf.

[3] *Id.*

the-art information on a wide range of operational measures that airlines, air-navigation service providers and airports can take to reduce fuel burn and resulting GHG and local air quality emissions of concern. ICAO has held several workshops around the world to raise awareness about the content of the document and to promote the implementation of its environmentally friendly procedures.

- ICAO has developed and published a template voluntary agreement on voluntary measures that may be taken by aviation stakeholders to limit or reduce GHG emissions. In the Assembly Resolution adopted in 2004, ICAO urged States and aviation stakeholders to adopt voluntary GHG reduction measures. The aviation industry has done that through our "global sectoral approach" program.

- The 2004 ICAO Assembly also directed that the ICAO Council conduct further work on open emissions trading while agreeing that States should "refrain from unilateral environmental measures that would adversely affect the orderly development of international civil aviation."[4]

- In response to the 2004 ICAO Assembly request, the ICAO Council has prepared and adopted guidance on the participation of international aviation in open emissions trading systems. Finalized in 2007, this guidance provides the basis for agreeing States to address GHG emissions from their airlines' international flights through emissions trading.[5]

- In October 2009, ICAO held a special "High Level Meeting on Climate Change." At that meeting, the ICAO Member States adopted a "Programme of Action" and Declaration on aviation and climate change. In addition to adopting a worldwide, aviationwide fuel-efficiency target through 2020, the States agreed to work more on "goals of greater ambition," a framework for market-based measures, and initiatives to foster the development of more energy-efficient aircraft, sustainable alternative fuels and operational measures, ATM improvements and airport improvements to reduce emissions.

- In 2010, the ICAO Committee on Aviation Environmental Protection completed work on how countries with domestic emissions trading schemes might mutually agree to link

[4] The EU often asserts that the 2004 ICAO Assembly endorsed the approach the EU has taken, to unilaterally include the world's airlines in its emissions trading system. This assertion is inaccurate. What ICAO endorsed was "further development of an open emissions trading system for international aviation," under certain conditions. *See* ICAO Assembly Resolution A35-5, *Consolidated statement of continuing ICAO policies and practices related to environmental protection*, 2004. Specifically, while agreeing that States should refrain from unilateral measures that would harm aviation, the ICAO Assembly requested that the ICAO Council conduct further work on a voluntary emissions trading approach and provide guidance on how States with existing emissions trading schemes might incorporate emissions from international aviation into those schemes "consistent with the UNFCCC process," and to the extent "appropriate," while addressing "the structural and legal basis for aviation's participation in an open emissions trading system." *Id.* As noted herein, ICAO has done the requested work on how mutually agreeing countries may include international aviation in emissions trading.

[5] The ICAO work shows how two or more countries may employ emissions trading through mutual agreement. Thus, to the extent that European States wish to employ emissions trading among their own airlines, the ICAO provisions allow for and provide guidance on this. However, the EU has overstepped these provisions by unilaterally imposing the EU ETS on non-agreeing countries.

them and include international aviation in that linkage. The resulting "Report on Scoping Study of Issues Related to Linking Open Emissions Trading Systems Involving International Aviation" was approved by the ICAO Council in June 2010.

- The 2010 ICAO Assembly Resolution took another significant step toward a full framework on aviation GHG emissions. It confirmed that the appropriate approach for addressing aviation GHG emissions through 2020 is through fuel-efficiency goals and established a sectorwide goal of carbon neutral growth from 2020. Through the resolution, States agreed to track their aviation emissions and to submit "Action Plans" by the end of this June that describe the steps they are taking to help achieve the global emissions goals.[6] Further, after adopting a set of principles for market-based measures, the States directed ICAO to further assess the potential for market-based measures that might be agreed on a global basis and a framework (or more detailed "playbook") for such measures. This work is going on now, as is work on a first-of-its-kind CO_2 standard for aircraft (work that is being co-led by the U.S. Environmental Protection Agency with support from the Federal Aviation Administration), which also was agreed at the ICAO Assembly.

Significant pieces of a global framework are in place, and A4A continues to support the stepwise approach the international community is taking toward a fully harmonized global aviation framework on GHG emissions. With the aviation industry supporting a global sectoral approach at ICAO and the many countries who oppose the EU ETS recommitting themselves to further address aviation GHG emissions through ICAO, implementation of this framework could be agreed, as hoped, at the ICAO Assembly in September 2013. Contrary to what the EU asserts, this timing would not be "late." Rather, it would be ahead of the United Nations Framework Convention on Climate Change (UNFCCC) efforts to replace the Kyoto Protocol (whose terms expire at the end of this year), now aimed at completion of a climate change agreement by or in 2015, with the view of having emissions targets from 2020 and beyond.

The Unilateral and Extraterritorial Application of the EU ETS to U.S. Airlines Violates U.S. Sovereignty and Is a Recipe for Chaos in Aviation and Global Trade

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. Since 2009, the EU ETS legislation has required U.S. airlines with flights to European States and territories to monitor and report to the EU their emissions for the entirety of each individual flight to, from and within the EU.[7] Beginning on January 1, 2012, that

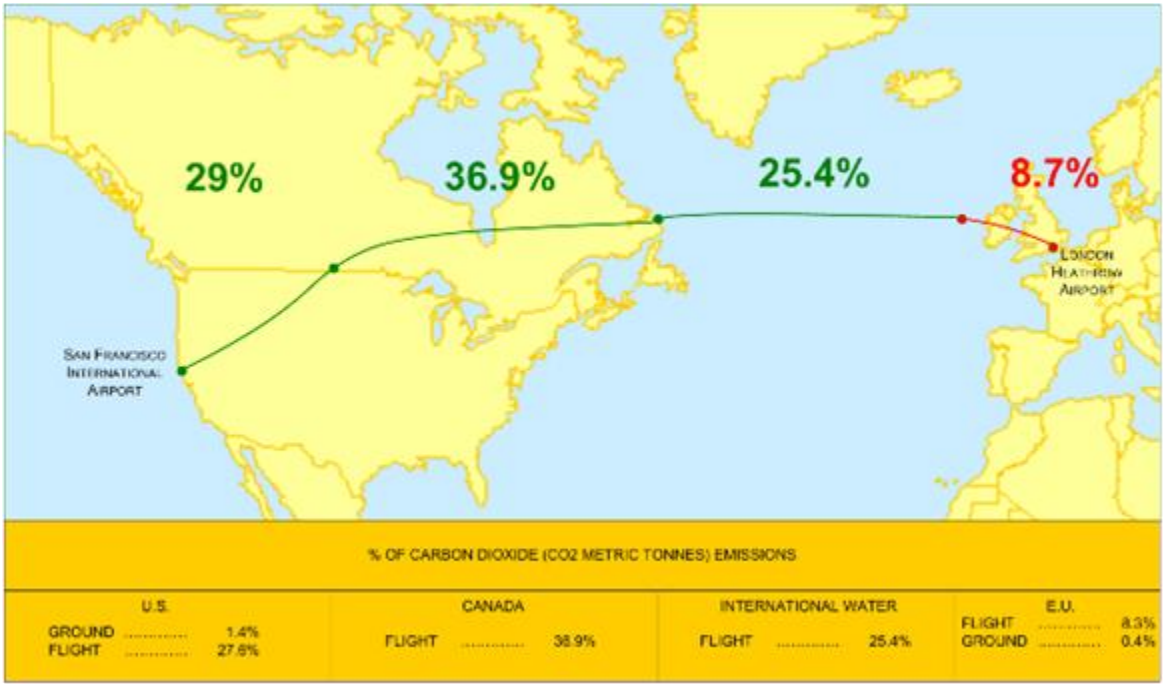
[6] In fact, the United States is poised to file its Action Plan later this month.

[7] Notably, U.S. airlines long have been subject to the world's most comprehensive aviation-related data reporting obligations, reporting to the U.S. Department of Transportation Office of Airline Information (OAI). That "Form 41" data provides detailed fuel-burn data that is translated into GHG emissions data. Thus, the United States has long had the most comprehensive aviation

legislation imposed on our airlines an obligation to acquire allowances to cover the emissions over the whole of these flights.[8] 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 A4A member airline flight from San Francisco to London Heathrow illustrates this well (see Figure 2). From the time the aircraft engine is engaged, even 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 emissions-allowances requirement applies to 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.

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

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GHG data of any country in the world. Although A4A urged the EU to recognize the Form 41 data when adopting rules to implement the EU ETS with respect to aviation, the EU chose instead to create a whole new emissions reporting regime, subjecting U.S. carriers with EU flights to overlapping and differing reporting requirements.

[8] Although airlines do not have to "pay up" until 2013, the liability is very real, triggering securities disclosures and significant expenditures for U.S. airlines to be prepared to pay the bill in 2013.

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 Threatens International Aviation and International Commerce

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.

The EU's unilateral act 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 GHG emissions from international aviation. This unilateral and piecemeal approach can only lead to chaos in international travel and trade.

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. The levy aspect of the scheme violates provisions in the Chicago Convention and in the US-EU bilateral air services agreement that govern the conditions under which one country may impose taxes and charges on the airlines of another.[9]

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

[9] 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." 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 U.S.-EU bilateral air-services agreement, which prohibit countries from taxing fuel onboard an aircraft or uplifted for an international flight absent the express consent of the airline's country of registry.

predict and incorporate into business planning. In light of the sustained economic downturn in Europe and uncertainty regarding negotiations to replace the Kyoto Protocol, which expires in 2012, carbon-allowance prices in the EU currently are about a third of what they were just three 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.[10] That outlay could support over 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 three 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, such as the United Kingdom, have expressly denounced any obligation to earmark the collected funds for an aviation or environmental purpose.[11] 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.

There is no question that A4A 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 on a global basis despite treaties and trade agreements, as is the case with the EU ETS, should be of grave concern to us all.

According to U.S. trade statistics, in 2011, the United States exported goods to the EU valued at more than $268 billion.[12] If the EU and its States may impose a GHG emissions levy on emissions over the entirety of a flight merely because it touches down in Europe, what is to keep the EU from imposing GHG import taxes on the 9 billion dollars' worth of U.S. automobiles imported by Germany, the 4 billion dollars' worth of U.S. pharmaceuticals imported by the United Kingdom, the 7.2 billion dollars' worth of U.S. civilian aircraft imported by France, or the 5 billion dollars' worth of U.S.-manufactured chemicals imported by Belgium last year? And if the EU can impose a tax reaching aircraft emissions around the world despite the limits in relevant treaties, on what grounds will we be able to keep other countries from imposing multiple, overlapping, worldwide taxation schemes on aircraft emissions? And what if the EU decides that the principles it has used to justify a unilateral assertion of jurisdiction over GHG emissions also apply to labor laws, health care policies or other regulatory matters attendant to a flight that might touch down in

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[10] While different analysts may come up with different numbers, in November 2011, Bloomberg Government put the cost between $2.1 billion and $4.2 billion through 2020, depending on the cost of carbon allowances. *See* Bloomberg, *Europe's Overreach on Plane Emissions Won't Clean the Sky*, (Dec. 21, 2011) (available at http://www.bloomberg.com/news/2011-12-22/europe-s-overreach-on-airplane-carbon-emissions-won-t-clean-the-sky-view.html). This is squarely within the range that A4A analysis suggests.

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

[12] See http://www.census.gov/foreign-trade/balance/c0003.html

Europe or a particular product imported into the EU from the United States? To avoid such results, the United States must act to overturn the unilateral EU scheme.

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

In answer to criticism regarding EU unilateralism raised by A4A, 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 States adopts some sort of measure 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, 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 GHG policy.

U.S. Government Action to Turn Back This Extraterritorial Scheme Is Essential

Facing a statute of limitations, in December 2009 A4A brought a private legal action in European courts against the EU ETS. In December 2011, the European Court of Justice (ECJ) upheld the application of the EU ETS to the world's airlines against this challenge, finding that A4A, as a private party, did not have standing to raise certain questions of international law and sovereignty, that the EU is not bound by the Chicago Convention even though each of its Member States is, and that the EU ETS could not possibly be considered a "tax or charge," as is a "market-based measure," despite the fact that economists recognize taxes and charges as types of market-based measures.[13]

With due respect, A4A believes that the ECJ decision was wrong,[14] as do the many countries that continue to speak out and take action to oppose the application of the EU ETS to international aviation. That countries are now fully engaged in the fight is a good thing – there is no question that countries have standing to prosecute the violations of international law and sovereignty occasioned by the EU ETS. Accordingly, we applaud the declarations adopted by a set of States

[13] Notably, ICAO also recognizes taxes and charges as market-based measures. See ICAO website at http://www.icao.int/environmental-protection/Pages/market-based-measures.aspx ("Market-based measures include: emissions trading, emission related levies - charges and taxes, and emissions offsetting.")

[14] Many legal scholars join A4A in this view. *See, e.g.,* B. Havel & J. Mulligan, *The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme*, Air & Space Law v. 37, no. 1, pp 3-33 (2012).

in New Delhi and Moscow and in the ICAO Council condemning the unilateral EU scheme. And we appreciate the steps that China, India and other countries have taken to push back against it.

But most significantly, we appreciate the diplomatic steps the U.S. government has taken to state its opposition to the EU ETS, from joining in multilateral declarations, to direct talks, to the December 2011 letter from Secretaries Clinton and LaHood, to the Sense of the Congress language approved in the FAA reauthorization bill, and to President Obama raising his concerns directly with EU President Barroso. There can be no question that the administration has given diplomacy every chance. But the EU and its Member States have snubbed these diplomatic efforts, as they did when they adopted an illegal ban on aircraft fitted with "hushkit" noise technology in the early 2000s.

As the United States did with the unilateral ban on noise-hushkitted aircraft, the United States now must take concrete legal action to overturn the application of the EU ETS to U.S. airlines and aircraft operators. This should include the filing of a challenge under Article 84 of the Chicago Convention, just as the United States did as a mechanism to help resolve the hushkit dispute. Such a measure would not only call the EU and the EU States on their actions, but would 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. Significantly, when the United States brought the Article 84 challenge to the illegal EU ban of noise-hushkitted aircraft, ICAO also was working on a new noise standard for aircraft and on a new framework for addressing community noise exposure in the vicinity of airports under a "balanced approach." The United States was able to work with the EU States and the remainder of the (then) 190 Member States to ICAO to agree to a new noise standard and the balanced approach framework and to come to a negotiated resolution of the hushkit dispute under which the Europeans withdrew their wrongful ban on noise-hushkitted aircraft and embraced the new ICAO noise provisions. With ICAO currently working on a CO_2 standard for aircraft and on means of implementing the provisionally agreed global approach to aviation and climate change, the parallels to today's dispute regarding the EU ETS are palpable.

Some have asked why the United States should engage in a legal challenge, given that the Chinese, Indians, Russians and others are already threatening retaliatory trade measures against the EU, and the United States itself has signaled the potential for such measures. It is precisely because a trade war is at hand that U.S. leadership is needed to help navigate a way through. The EU fired the first shot, with its unilateral measure that threatens international aviation and establishes an even broader threat to international trade. That others are retaliating is, unfortunately, necessary as diplomacy has not worked. As it has done before, the United States, in its role as a world leader, must wield the tools it has to remove the wrong measure in favor of the right one.

The United States Senate has an important role to play. We thank Senators Thune and McCaskill for their leadership in sponsoring S. 1956, the "European Union Emissions Trading Scheme Prohibition Act," and we urge the Senate to approve this legislation. Doing so would lend further support to the Obama administration in its efforts to overturn the EU ETS in favor of a global framework at ICAO. It would further convey to the EU and its Member States 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, the U.S. economy and U.S. exports. Not only would it help the United States wield the tools necessary to work through this precedent-setting trade dispute, it would spur on work at ICAO to foster a truly international approach to aviation GHG emissions.

Thank you for the opportunity to testify on this important issue.