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The Study on EU ETS

(欧盟航空减排交易体制评析)

-From the Perspective of China-

Huaping Qin*

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* Director of Overseas Development Office, Researcher of the Institute of Air and Space Law, Faculty of International Law, China University of Political Science and Law, Beijing, China

I . The Evolution of EU ETS

EU Emission Trading Scheme (hereafter referred to as EU ETS) is the biggest emission trading scheme in the world. It is also the main pillar of EU climate change policy.

In 2003 European Parliament and European Council adopted Directive 2003/87/EC to establish a scheme for greenhouse gas emission allowance trading within the Community. The purpose of the Directive 2003/87/EC is to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. It was officially implemented on 1 January 2005. The Directive 2003/87/EC only regulates the emission of CO₂ and covers about 2000 industrial emission entities within the Community, not including the aviation industry.

Due to the rapid development of aviation industry, the greenhouse gas emissions emitted by aircrafts also has increased greatly, particularly from the international aviation transportation. By comparing the greenhouse gas emissions from aviation activities and those from other sectors, European Community found that the greenhouse gas from domestic and international aviation activities increased 7.5% in 2004 compared with 2003, and the aggregated increase is 8.7% from 1990. By this development, one fourth of the environmental benefit achieved by EU according to the stipulation of the Kyoto Protocol in respect of emissions reduction targets will be offsetted by the emissions from international aviation activities of EU as of the end of 2012.¹⁾ Therefore EU proposed that emissions from international aviation activities should be included in EU ETS. The proposal was realized by amending EU ETS 2003/87/EC on 19 November 2008 and the Directive 2008/101/EC came into force on 3 February 2009.

1) http://ec.europa.eu/policies/index_en.htm, visited on May 6, 2011.

II . Main Contents of EU ETS

1. Scope

According to Directive 2008/101/EC, emissions from all flights arriving at and departing from Community aerodromes should be included in EU ETS from 2012. Annex I stipulates the flights which are excluded from EU ETS. They are: (a) flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of a country other than a Member State, where this is substantiated by an appropriate status indicator in the flight plan; (b) military flights performed by military aircraft and customs and police flights; (c) flights related to search and rescue, firefighting flights, humanitarian flights and emergency medical service flights authorized by the appropriate competent authority; (d) any flights performed exclusively under visual flight rules as defined in Annex 2 to the Chicago Convention;

(e) flights terminating at the aerodrome from which the aircraft has taken off and during which no intermediate landing has been made; (f) training flights performed exclusively for the purpose of obtaining a license, or a rating in the case of cockpit flight crew where this is substantiated by an appropriate remark in the flight plan provided that the flight does not serve for the transport of passengers and/or cargo or for the positioning or ferrying of the aircraft; (g) flights performed exclusively for the purpose of scientific research or for the purpose of checking, testing or certifying aircraft or equipment whether airborne or ground-based; (h) flights performed by aircraft with a certified maximum take-off mass of less than 5 700 kg; (i) flights performed in the framework of public service obligations imposed in accordance with Regulation (EEC) No 2408/92 on routes within outermost regions, as specified in Article 299(2) of the Treaty, or on routes

where the capacity offered does not exceed 30 000 seats per year; and (j) flights which, but for this point, would fall within this activity, performed by a commercial air transport operator operating either:— fewer than 243 flights per period for three consecutive four-month periods; or— flights with total annual emissions lower than 10 000 tonnes per year.

2. Allocation of Allowances

For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 97% of the historical aviation emissions. 15% of such allowances shall be auctioned. Thereafter, the percentage auctioned would be decided in light of the results of the general review of the EU ETS due for completion later this year. Aircraft operators would have to monitor their emissions of carbon dioxide and report them to the competent authority of their administering Member State by March 31 each year. The reports would be independently verified to make sure they are accurate.

3. Penalties

According to Article 16 of the Directive, in case that the aircraft operator does not submit the verified report according to the schedule stipulated in the Directive, its registry will be frozen, and the administering Member State may take enforcement measures against it.

For the aircraft operator who can not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year, the Member States will list it in a blacklist and publish it. It shall also be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions

penalty shall not release the aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned. The Commission shall consult with the authorities responsible for regulatory oversight of the aircraft operator concerned and disclose the evidence and details based on which the decision is adapted to the aircraft operator concerned. The aircraft operator concerned shall be given an opportunity to submit written comments to the Commission within 10 working days from the date of disclosure. Finally, the Commission may, in accordance with the regulatory procedure, adopt a decision to impose an operating ban on the aircraft operator concerned. Each Member State shall enforce, within its territory, the decision adopted hereby.

III. Negative Effect Caused by EU ETS to China's Airline Industry

1. The Effect of Implementing EU ETS against China's Airline Industry

If we choose to implement EU ETS, the negative effect against China's airline industry may be analyzed from economic and political perspectives. From the economic perspective, the development of air transportation is much faster than any other transportations. The passenger transportation and cargo transportation by aircraft increased 260% and 220% respectively from 1970 to 1990. According

to the prediction of some experts, the increase of developing countries will be more outstanding in the next 10 to 15 years. According to the estimation made by China's civil aviation authority, the annual aviation fuel consumed by the airline industry was 11.29 million tons as of 2007. It is predicted that the annual aviation fuel in 2010 will be reached 15 million tons. At present the CO₂ emissions from the airline industry has increased greatly from 20 million tons in 2000 to 38 million tons in 2007. The increase rate is 15%. According the estimation made by the Department of Development and Planning of China Civil Aviation Authority, the increase rate of civil aviation during the period of "the Eleventh Five Year Plan" will be 14%.²⁾ Subject to this development, it is very possible that the fuel consumption of international flights will increase to 51.2 million tons, and the emission will increase to 16 million tons accordingly.

Based on the preliminary calculation of the total volume of flights from China to Europe in 2009, the airline companies which carry out the flight from and to Europe need to buy emission allowances with amount of 2.629 million tons in 2012, which will increase the cost with amount of 7.89 billion RMB. The cost will increase gradually in the subsequent years. In 2020, it will increase to 30.8 billion RMB. Therefore such regional emission reduction scheme will cause heavy burden to China's airline industry which is under development and finally hinders the development of the international flights of China's aviation industry.

From the perspective of politics, the climate change is not only an environmental issue; it is fundamentally a development issue. The European countries with developed airline industry emitted huge amount of greenhouse gases in the past decades and achieved the industrialization. Therefore they are able to undertake the obligation to make more contributions to prevention of the climate change.

As far as China is concerned, it is a developing country with small amount of historical emissions. Hence China shall not be obliged to undertake the quantified emission reduction by taking into account of its own current development. The

2) *China's civil aviation development in the Tenth Five-Year Plan*, see <http://www.caac.gov.cn>.

nature of EU ETS is to impose the quantified emission reduction on the aircraft operators, which is conflict with the position held by Chinese government that the developed countries shall take the lead to reduce the emission quantitatively as well as the principal of “Common but differentiated responsibility” always endorsed by Chinese government. If China’s aviation industry is forced to implement EU ETS, it will constitute a *prima facie* evidence that Chinese government admits and accepts its obligation of undertaking the quantitative emission reduction. This will largely affect Chinese national policy in the UNFCCC contracting parties assemble, and cause the national emission reduction work in a passive situation as a whole.

2. The Effect of not Implementing EU ETS against China’s Airline Industry

Since implementing EU ETS will cause negative effect to China both economically and politically, may we refuse to implement it and ignore it totally? This is not a feasible and sensible way to deal with this tough issue by analyzing from the perspective of economy and politics.

Firstly in terms of politics, a series of serious hazards caused by global warming has attracted the concern of the world community. For the purpose of reversing the trend of global warming and maintaining an environment with good condition of survival and sustainable development to the future generations, the world community is actively seeking the solution.³⁾Chinese government attaches great importance to the issue of climate change, the National Leading Group on Climate Change led by the Primer Wen Jiabao thus is set up. Chinese government adopts a lot of measures to cope with climate change and improve the ecological environment according to the national strategy of sustainable development while

3) For example, the UNFCCC and its Kyoto Protocol were convened for the purpose of preventing the global warming.

devoting itself to the economic development. “China’s National Programme on Climate Change” (hereafter referred to as Programme) was published by Chinese government in June 2007. Through the Programme Chinese government lets the rest of world as well as Chinese people know that China is willing to and interested in playing active role in the world efforts in tackling the climate change. Then the responsible power image in the field of environmental protection could be established. If China’s airline companies do not implement EU ETS, China’s international image of environmental protection could be undermined. Furthermore the administering Member State may impose penalties, including fine and operating ban, on China’s aircraft operators which do not implement EU ETS subject to its provisions. ⁴⁾Under such situation, China will take corresponding counter-measures which may cause negative effect to the Sino-EU bilateral relationship, particularly the bilateral trade development. This practice violates the principal that the negotiation of climate change should not be linked with the trade war.

Secondly from the perspective of economy, according to the method of allocation of allowances, each aircraft operator will be allocated the allowances free of charge proportionately based on the surrenders equal to the total emissions from aviation activities during the preceding calendar year. If China’s aircraft operator does not submit the report, it will not be allocated the allowances free of charge. Then the aircraft operator which carries out the flights to and from Europe countries needs to buy the allowances to cover the CO₂ emissions. It is estimated that the CO₂ emissions from the Europe routes carried out by China’s aircraft operators will reach 90.62 million tons in 2012. Assumingly the flights to and from Europe countries will not be decreased in spite of EU ETS, each tonne of carbon dioxide will be fined 100 Europe dollars which shall not release the aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.⁵⁾ If the

4) EU ETS Article 16 (3) (5).

5) EU ETS Article 16 (3).

price of EUR⁶⁾ is 10 Europe dollars per tonne carbon dioxide, the cost of emitting each tonne carbon dioxide will be 110 Europe dollars. According to this calculation 997 billion RMB will be spent to buy the allowances just in 2012, and the cost will increase gradually in the future. Therefore non-implementation of EU ETS will cause unaffordable financial burden to China's aircraft companies. The bilateral trade development will also be hindered, and the two parties will suffer great economic loss therefrom.

According to the above analysis, China's airline industry is in a dilemma situation no matter implementing or not implementing EU ETS. So where is the way forward for China's airline industry? As a matter of fact, the urgent task facing both China's airline industry and other country's airline industry which may be affected by EU ETS is to study the legality of EU ETS. In other word, is there any international legal basis for EU to unilaterally include the emissions from international flights into its ETS? If the answer is negative, it will be justifiable not to implement the ETS.⁷⁾

IV. The Analysis on Rationality and Legality of EU ETS

1. The Analysis on Rationality of EU ETS

Some scholars argue that the goal of reducing the aircraft emissions could be

6) EUR(Emission Reduction Units), it is the unit used in the Article 6 of the Kyoto Protocol.

7) On 1 April 2010, Mr. Justice Hickinbottom granted the Air Transport Association of America (ATA) permission for Judicial Review and leave to apply to the European Court of Justice for a Preliminary Ruling on the validity of the EU Directive establishing the EU ETS. In March 2011, the three Chinese airline companies paid a part of legal fees to China Air Transportation Association (CATA) to request the latter to make declaration for the purpose of protesting the implementation of EU ETS. It is at the edge of bringing the suit against this Directive as the ATA did.

achieved by using economic regulation which includes the following types:

(1) Fuel taxes or energy taxes.

The International Civil Aviation Organization (ICAO) defines that a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost-specific basis.⁸⁾ Although fuel and /or energy taxes may be readily applied to domestic aviation⁹⁾, this is very different in respect of fuel for international air service, which is exempted from duties under Article 24 of the Chicago Convention and most bilateral air service agreements concluded between States.¹⁰⁾ Avoiding discrimination against national operators could therefore be difficult on routes where foreign carriers have traffic rights and continue to enjoy tax exemptions under the relevant bilateral agreements.¹¹⁾ In this context it must be noted that States have the right to introduce the fuel taxes into specific routes based on the bilateral agreement. EU is a typical example in this regard. The legal barriers existing in the bilateral agreements between Member States are eliminated gradually by EU and the international fuel taxes could be levied on a mutual basis, thus seeking to circumvent the exemptions in the Chicago Convention.

(2) Charges.

The ICAO Council strongly recommends that any environmental levies on air transport which States may introduce should be in the form of charges rather than

8) ICAO Doc 9082/7 Policies on Charges for Airport and Air Navigation Services

9) See, inter alia, EU Council Directive 2003/96/EC of 27 October 2003 restricting the Community framework for the taxation of energy products and electricity.

10) ICAO has developed separate policy guidance for States on taxation (ICAO's Policies on Taxation in the Field of International Air Transport, Doc 8632), which recommends, inter alia, the reciprocal exemption from all taxes levied on fuel taken on board by aircraft in connection with international air service, a policy implemented in practice through bilateral air services agreements, and also calls on States to the fullest practicable extent to reduce or eliminate taxes related to the sale or use of international air transport.

11) Andreas Hardeman, *A Common Approach to Aviation Emissions Trading*, Air & Space Law, Vol.XXXII/1 (February 2007), p.6.

taxes.¹²⁾Charges are fundamentally different from taxes in that they must be based on the cost of providing an airport or air navigation service or facility and the related cost must be directly attributable to the operator.¹³⁾In addition, the funds collected should be applied in the first instance to mitigating the environmental impact of the emissions, for example by addressing the specific damage caused by these emissions, if that can be identified.¹⁴⁾However there are also some problems with respect to the charges. Since it is not easy to quantify or attribute the damages caused by CO₂, it will be difficult to make decision on how to spend the charges to recover the CO₂-related damages. Another legal issue unresolved until now is that whether the CO₂-related charges based on emissions quantity, fuel quantity or damages is allowed or not in Chicago Convention. That whether the State of Registry of the Convention enjoys exclusive jurisdiction over the charges is another unresolved problem.¹⁵⁾

(3) Emissions Trading

Given that the legal and political obstacles by using charges and taxations to solve the problem of emissions from international flights, the legislators shift the attention to emission trading system. As a matter of fact, ICAO and EU obviously tend to solve the issue of the aircraft emissions through emission trading system.¹⁶⁾ The emission trading system means the regulated entities have the right to buy or sell the emission allowances flexibly in the light of their demands so as to achieve the targets of emissions reduction. As long as the participants in the emissions trading system may control the marginal cost in a sufficient discrepancy, the emissions trading system would be the more cost-effective way to achieve the goal of the

12) ICAO Council Resolution on Environmental Charges and Taxes (adopted by the Council on 9 December 1996 at the 16th Meeting of its 149th Session.)

13) ICAO Doc 9082/7 Policies on Charges for Airport and Air Navigation Services.

14) ICAO Council Resolution on Environmental Charges and Taxes (adopted by the Council on 9 December 1996 at the 16th Meeting of its 149th Session.)

15) ICAO Council Working Paper C-WP/12530 of 3 October 2005.

16) Supra note 14.

emissions reduction than the traditional economic regulations such as charges and taxes. Although the application of emission trading system is quite successful in other sectors, it is just in the very beginning stage in the sector of aviation.

Based on the above analysis, we may draw the conclusion that the emission trading system should be the most cost-effective method at present to achieve the targets of emission reduction in the aviation sector. ICAO is sparing no effort to explore the feasibility of reducing the aircraft emissions by emissions trading system. Therefore from the point of economic view it is reasonable to some extent that EU includes the international aircraft emissions into its ETS. However it does not mean that EU ETS has the international legal ground just because of its economic rationality. Does EU have the right to include the international aircraft emissions into its ETS unilaterally? This question is vital to judge that whether the aircraft operators from the rest of the world except EU are obliged to abide by the EU ETS. In other word, it is necessary to assess the international legal basis on which EU ETS adopted the Directive.

2. The Analysis on Legality of EU ETS

The current positive international law governing the international aircraft emissions are mainly¹⁷⁾ the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the Framework Convention on Climate Change (Kyoto Protocol) as well as the Chicago Convention which is regarded as the Charter of international aviation law.

(1) Jurisdiction over emissions sources.

Article 1 of UNFCCC defines a “sources” as a process or activity which releases a greenhouse gas, an aerosol or a precursor of a greenhouse gas into the atmosphere.

17) This article only lists several important conventions regulating the international aircraft emissions. As a matter of fact, the issue may also be governed by other international legal sources, such as WTO laws.

Consequently each aviation flight could be principally treated as a separate “source”. For the convenience of administration in practice, it is preferable to treat all the aviation activities carried out by a single operator as one “source”. In addition, we need to note that the Kyoto Protocol only stipulates the issue in respect of the emissions from the national source, including the emissions from the national aviation activities. The emissions from international aviation activities and marine bunker fuels should be solved by working with ICAO and International Maritime Organization respectively.¹⁸⁾ This indicates that the drafters of the Kyoto Protocol deliberately impose the obligations on the contracting parties to take responsibility of reducing the emissions only from their territories, rather than from outside the territories. Therefore the contracting parties of Kyoto Protocol should not take responsibility for the emissions from outside their territories.

It is comparatively simple to include the emissions from the stationary source into EU ETS. The only requirement is that the emissions coming from the territory of the country participating the trading system. However, as for the issue regarding the emissions emitted by the non-stationary source (movable source), the case will not be so simple. The emissions from the international flights are one of the situations. Because from the perspective of geography, such international flights could not be bounded just in one country’s territory.

For the purpose of determining jurisdiction over the emissions from the aviation, the distinction should be made between: a/ flights within and between EU States that are party to the EU ETS (intra-EU Flights);¹⁹⁾ b/ flights that depart from airports located within but extending beyond the territory of those States (departing flights); and c/ flights that arrive in airports located within but extending beyond the territory of those States (arriving flights).²⁰⁾ According to the Kyoto Protocol, EU ETS may in principle include all the intra-EU flights into the emissions trading system.²¹⁾

18) Article 2.2 Kyoto Protocol.

19) Although the EU ETS is a domestic trading scheme under the Kyoto Protocol, the flights between EU Member States are still international and some of those flights in fact partially occur in the airspace above the high seas.

20) Supra note 14.

Consequently the Member States participating the system are obliged to take the responsibility of reducing the emissions. Otherwise they will not take responsibility.

Suppose that the international flight taking off from the airport of a Member State of EU, via the airspace of a third country (non-Member State of EU), for the purpose of including the emissions herefrom into the ETS, the mutual agreement signed between the third country is a precondition. The same requirement is for the arriving flights. The emissions from the flights above the high seas should be regulated by ICAO.²²⁾

(2) Jurisdiction over the aircraft operators.

It is also a controversial question with respect to the jurisdiction over the aircraft operators. On the one hand, EU argues that it can legally include the non-EU aircraft operators into ETS even without the bilateral agreement. On the other hand, that Non-Member State of EU, particularly those countries without undertaking specific obligations of emissions reduction subject to the Kyoto Protocol, are quite sure that EU has no right to apply the ETS to their operators.²³⁾

EU argues that the Chicago Convention recognizes expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States,²⁴⁾ so the Member States of the European Community and fifteen other European States may enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all states providing services to, from or within their territory. This is a misinterpretation about the Article 11 of Chicago Convention. Because Article 11 does not in fact establish a national jurisdiction over the aircraft operators. It just requires that all the aircraft operators falling the national jurisdiction should be treated equally. In

21) Article 1 of the Chicago Convention stipulates that "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".

22) Article 12 Chicago Convention.

23) ICAO CAEP Summary of Discussions and Decisions of the Fifth Meeting of the Steering Group (Attachment to CAEP-SG/20063-SD/5), Queensland, 26-30 June 2006.

24) Article 11 of Chicago Convention.

other word, the national jurisdiction over the aircraft operators should be prior-existed, and then the aircraft operators may request the non-discriminatory treatment by invoking this stipulation. Hence this Article could not be the legal basis for EU to include all the aircraft operators from non-Member States into its ETS.

However it must be admitted that some principle conflicts between Chicago Convention and UNFCCC do exist with respect to the international aircraft emissions. Because Chicago Convention advocates that all the aircraft operators, without distinction of their nationality, should enjoy the equal position and be treated without discrimination. The UNFCCC, however, adopts the principle of “common but differentiated responsibilities” which exempts the majority of countries from undertaking the quantified emissions reductions.²⁵⁾

In assigning responsibility for domestic emissions, the Kyoto Protocol does not differentiate on the basis of ownership or nationality of the source. This means that a Party to the Kyoto Protocol is responsible for all emissions sources located in its territory, regardless of the nationality of the owner of the source. Conversely, this Party is not responsible, nor can it assume responsibility for sources outside its territory even if these were owned by one of its own nationals. Because the EU ETS itself is intimately governed by the UNFCCC and Kyoto Protocol rule, this regime could also be applied to aircraft operators under the scheme in as far as the assignment of responsibility for flight emissions is concerned.²⁶⁾

V. Conclusion

From the perspective of controlling the global warming and maintaining sustainable development environment, each country should undertake the

25) Article 3(1) and 4 (2)(a) UNFCCC.

26) Supra note 14, p.16-17.

inescapable responsibility and obligation to reduce the international aviation emissions. Therefore that EU includes the aviation emissions into the ETS is positively significant. Notwithstanding this, the climate change is an environmental issue, but also an issue concerning the development. Fundamentally speaking, it concerns about the development. The development of economy of each country is greatly various, when it comes to the responsibility of emissions reductions, the principle of “common but differentiated responsibilities” stipulated by the UNFCCC, rather than the undifferentiated responsibilities stipulated in the EU ETS, should be followed. Additionally according to the Article 1 of Chicago Convention that every State has complete and exclusive sovereignty over the airspace above its territory.

Issues regarding open sky and civil aviation-related commerce, technology and operation should be based on the mutual agreement. Any changes or amendments to the aviation operation should be agreed by the countries concerned.²⁷⁾For the purpose of upholding the foundations concerning the international aviation rules pursued by the Chicago Convention, such internationally recognized fundamental principles as territory sovereignty, reciprocity and non-discrimination should be firmly insisted on. In view of the responsibility imposed by EU ETS on the aircraft operators without distinction as to nationality may cause negative effect to the above-mentioned principles, the mutual agreement should be the basis in dealing with the international emissions reductions.

Moreover, it respects the long-standing tradition in international aero politics that States find solutions through bi-or multilateral negotiation, rather than unilateral declaration. Just as the speech delivered by EU President Barroso to the Council of Foreign Relations in 2005, he advised U.S.policymakers that America will not be more successful in achieving its objectives by taking the unilateral path... Multilateral action, involving large parts of the international community, is often

27) Article 11 of the Chicago Convention stipulates that “ the law and regulations of a contracting State……shall be applied to the aircraft of all contracting States without distinction as to nationality.”

the only way forward if our goal is to find solutions that work rather than to engage in political wishful thinking... My message is then: do not throw the baby out with bathwater. Despite any imperfections, I remain convinced that the multilateral approach is the only way forward.²⁸⁾

As far as China is concerned, apart from taking the technological measures²⁹⁾ to reduce the aircraft emissions, China's airline industry needs to take part in pilot of the national carbon trading system as soon as possible. Based on the successful pilot, a local market could be established. This will be a long-term solution against EU ETS for China's airline industry. Meanwhile this kind of pilot could also provide a good example for the global airline industry to solve the problem of international aircraft emissions. It is hopefully that the feasible and duplicable China's standard of the carbon trading system could be set up during the process.

28) Daniel Calleja Crespo and Mike Crompton, *The European Approach to Aviation and Emissions Trading, Speak the Truth and Shame the Devil*, AIR & SPACE LAWYER, Volume 21, Number 3, 2007, P.25.

29) Such as revolutionary new plane designs; new composite lightweight materials; radical new engine advances; and the development of biofuels.

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Abstract

The Study on EU ETS -From the Perspective of China-

Huaping Qin

European Union unilaterally included the emissions from aviation activities into EU ETS on 19 November 2008 by amending Directive 2003/87/EC. According to the Directive³⁰⁾ all the emissions (mainly against the CO₂) from aviation activities shall be subject to the regulation of EU ETS from 2012. For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 97% of the historical aviation emissions.³¹⁾ From 1 January 2013, the allowances will be reduced to 95%.³²⁾ The allocation of allowances which may be applied by each operator with free of charge will be reduced from 85% to 82% from 1 January 2012 to 1 January 2013. Since the Directive will affect every country's airline industry more or less, the nations and international organizations respond variously. The controversial focus is that whether EU has the right to unilaterally include the emissions from international aviation activities into EU ETS. This article firstly analyzes the effect caused by EU ETS to China's airline industry, and then studies the legality of the action of EU subject to current positive international law, and finally draws the conclusion that EU enjoys no such right to unilaterally include the emissions from international aviation activities.

30) 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.

31) "Historical aviation emissions" means the mean average of the annual emissions in the calendar years 2004, 2005 and 2006 from aircraft performing an aviation activity listed in Annex I.

32) EU ETS Article 3c (2).