

Aviation emission norms under the EU-ETS

By Anuradha R.V. *

Since January 2012, aviation has been included in the European Union's Emissions Trading Scheme (ETS). The Aviation ETS requires aircraft operators to surrender one allowance per tonne of carbon-dioxide emitted on a flight to and from (and within) the EU. This covers passenger, cargo and non-commercial flights and applies no matter where an aircraft operator is based. Each such airline would have to comply with a benchmark set by the EU on the basis of its average annual emissions in respect of flights to and from the EU. One of the most controversial aspects of the EU measure is that it calculates an airline's emissions from the point of take off; this means that a flight from New Delhi to London, which flies within the EU only for a few hours, would have to account to the EU for its emissions from New Delhi itself. EU's rationale in putting in place the system, evidently, is to ensure that its own operators are not at a competitive disadvantage.

What EU's move means for Climate Change

The Aviation ETS requirements can be characterized as the first global emissions trading scheme that affect operators both within and outside of the EU. The economic impact of the EU-ETS for the global airline industry has been estimated to be USD 1.5 billion according to a study by Thomson Reuters Point Carbon. The financial impact on major airlines from India has been estimated to be in the range of USD 40-50 million. The EU system offers airlines some allowances for free, and they are required to purchase the rest at EU auctions. If an airline exceeds the benchmark set for it, it can

buy carbon credits from the market. The revenues for auction for aviation allowances is expected to earn the EU close to USD 334 million for 2012. The ETS does not delve into the modalities of use of this money. EU member states would have the liberty to use this money at their discretion.

Airlines would simply pass on the enhanced costs of EU-ETS compliance to consumers, and it could indeed be argued that perhaps it is not such a bad thing for international air travellers to pay for their carbon footprint. However, from the perspective of multilateral negotiations and rule making, EU's action is essentially a statement that it would take measures on its own to police climate change, disregarding multilateral processes, which impact activity both within its own territory and outside of it. There are potentially other forms that such unilateral action could take, for instance, through imposition of taxes or other charges on imports, or other non-tariff regulatory requirements, whose impact on goods and services from countries like India, could be more severe. EU's ETS in fact already includes a provision which states that the EU would consider measures for 'carbon equalization' which could affect imports from countries which do not have comparable emission reduction norms, depending on the outcome of the ongoing multilateral negotiations. The main reasoning that EU seems to be adhering to is that if multilateral negotiations do not have the effect that EU desires, then EU would impose unilateral measures.

To state the obvious, any unilateralism would

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make a mockery of the multilateral processes. Under the United Nations Framework Convention on Climate Change (UNFCCC), any unilateral action would run contrary to the principle that only Annex I (i.e. developed) countries have quantitative legally-binding emission reduction targets, while other countries have no binding quantitative targets of any kind. This principle - also referred to as the principle of 'common but differentiated responsibilities' (CBDR), is clearly violated by EU's ETS requirements which effectively treats Annex I and non-Annex I countries (or at least their airlines) in the same way. The Kyoto Protocol to the UNFCCC required Annex I countries to pursue reduction of aviation emissions by working through the International Civil Aviation Organization (ICAO). ICAO resolutions in 2007 and 2010 emphasized that countries should undertake market-based measures (MBMs) relating to aviation emissions only subject to multilateral or bilateral agreements. Such a mandate essentially means that measures such as the EU's Aviation Directive can be enforced against an aircraft operator from a third country *only if* the EU has entered into an agreement with such country. EU's move under the ETS however ignores this principle.

ECJ ruling

EU's Aviation ETS requirements were challenged by Air Transportation Association of America (ATAA) before the court in the United Kingdom. The UK court in turn referred the matter before the European Court of Justice (ECJ). On 21 December 2011, the ECJ delivered its judgment upholding the validity of the Aviation ETS. The key issue that the ECJ was required to determine was whether the relevant EU legislation (Directive 2003/87/EC, as amended by Directive 2008/101/EC) contravened international law, including the ICAO Convention (also referred to as the Chicago Convention), the Kyoto Protocol and the US-EU Air Transport Agreement (the "Open Skies Agreement"), and customary international law.

The ECJ however rejected all the above alleged violations and ruled that EU's Directive was consistent with EU's international obligations. As the ECJ explained, the EU is not party to the Chicago Convention, only its member states are. And because of this, the EU is not bound by the terms of the Convention. As a result, the ECJ did not consider claims of violation of the key principles of the Chicago Convention such as the extra-territorial application of EU's Directive, and concerns relating to EU's violation of principles of sovereignty over airspace which results from its requirements for reporting of emissions in areas outside of EU's airspace.

With regard to the Kyoto Protocol, the ECJ acknowledged the provision of the Kyoto Protocol which mandated countries to work through the ICAO in relation to reduction of aviation emissions. It however held that the Kyoto Protocol provisions were not unconditional or sufficiently precise to allow parties the right to rely on it in legal proceedings contesting the validity or legality of an act of EU law.

The significance of ECJ's ruling is essentially that it upheld the validity of a unilateral move by the EU which would affect airline operators and airline operations outside of its territory.

Response to EU's measures - An eye for an eye?

As a response to EU's Aviation ETS, 23 members of the ICAO (including the USA, Japan, Singapore, India, China and Brazil) met in late February 2012 to condemn EU's move in a Joint Declaration which states that the unilateral inclusion of international civil aviation in the EU-ETS has constituted an obstacle to the progress of ICAO's work. These countries have outlined a basket of measures which they would want to explore against the EU, which include:

- Filing of an application under ICAO's Convention for resolution of the dispute;
- Prohibiting their airlines/aircraft operators from participating in the EU ETS;

- Imposing additional levies/charges on EU carriers/ aircraft operators as a form of counter-measure;
- Reviewing Bilateral Air Services Agreements, including Open Skies with individual EU Member States;
- Suspending current and future discussions and/or negotiations to enhance operating rights for EU airlines/ aircraft operators;
- Exploring action under WTO agreements.

Following the above declaration, the Governments of China and India have taken the position that their airlines would not comply with EU's aviation norms. Under the EU directive, non-complying aircraft operators face a penalty of € 100 per missing allowance, and also face a potential ban from operating in the EU. The European Commission has so far noted that there has been "systematic non-reporting of emissions to and from the EU from 10 airlines based in India and China". These airlines have till mid-June to submit the required data. The extent to which the stalemate continues, and the extent to which EU will enforce its penalties or even suspend non-complying airlines from entering its airspace, remains to be seen.

As seen from the Joint Declaration of the countries opposing EU's move, the only effect of EU's unilateral move could be a spate of unilateral measures from other countries. The two multilateral dispute resolution processes referred to in the Joint Declaration - under the ICAO and the WTO do present some options for consideration; but these may not represent perfect solutions either. Since promulgation of Chi-

cago Convention, only five disputes have been submitted to the ICAO for formal judicial resolution, but the ICAO Council has not issued a formal decision on the merits of the case in any of them. There are also no clear binding enforcement mechanisms under the ICAO process.

A question that keeps arising for discussion with regard to unilateral measures is the possibility of using the WTO's strong enforcement powers in a dispute situation. However, with regard to the aviation norms under the EU-ETS, the WTO can only have a very limited role to play. The EU has not committed to Passenger and Freight transportation services under its schedule of commitments to the WTO's General Agreement on Trade in Services (GATS), which limits the possible remedies that may have been available under the GATS. Any potential argument in relation to principles of the General Agreement on Tariffs and Trade (GATT) in relation to trade in goods would need to be supported by clear data on the discriminatory impact of the aviation requirements on domestic goods and like imported goods. Since there is no direct imposition of any charge or tax on goods, the arguments would need to carefully build on the *de facto* implications for trade in goods through air transportation.

Where then do the real solutions really lie? Will good sense prevail to enable an amicable resolution? The ICAO has reportedly stated that it would be able to reach a multilateral deal by 2013. A graceful suspension by the EU of its measures for non-EU operators until such a multilateral deal is reached, and a genuine effort from all countries to arrive at a consensus at the ICAO, would be imperative to preserve the sanctity of multilateral processes. Otherwise, between the various unilateral measures - threatened and actual, the only casualty would be climate change.



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