

*The European Union's Emissions Trading Scheme:
A Violation of International Law*



**Statement of Nancy N. Young
Vice President of Environmental Affairs
Air Transport Association of America, Inc. (ATA)
before the
Subcommittee on Aviation
of the
House Transportation and Infrastructure Committee**

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AIR TRANSPORT ASSOCIATION

Introduction

The Air Transport Association of America (ATA) 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 and commends this Subcommittee for its leadership on this issue.

ATA opposition to the EU ETS is twofold: It violates international law, including the sovereignty of the United States, and imposes an exorbitant, counterproductive and illegal tax on U.S. citizens, diverting U.S. dollars and threatening thousands upon thousands of U.S. jobs.

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 the U.S. airlines are undertaking to enhance our already strong record of fuel-efficiency advances and greenhouse gas emissions (GHG) 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 the International Civil Aviation Organization (ICAO), the United Nations body charged by treaty with setting standards and recommended practices for international aviation.

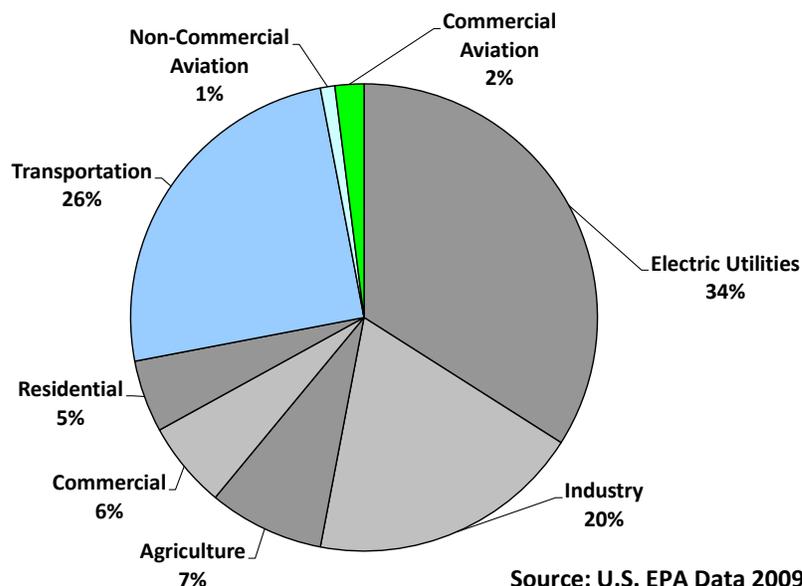
What we ask is for governments to do their part – to support air traffic management improvements and other initiatives that can enhance our fuel- and emissions-savings efforts and to refrain from unilateral and punitive measures like the EU ETS that undermine our industry and our efforts. Accordingly, the U.S. government should strongly oppose the application of the EU ETS to U.S. airlines and aircraft operators.

The U.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 not just smarter – they are quieter, cleaner and use less fuel than ever before – but we also fly them smarter. That's why our industry represents just 2 percent of all GHG emissions in the United States (see Figure 1) while driving over 5 percent of the nation's GDP. Commercial aviation is a tremendous enabler of the U.S. and global economies. In the U.S., aviation drives \$1.2 trillion in annual economic activity. Airlines are at the heart of this, responsible for 10.9 million U.S. jobs and \$371 billion in personal earnings. And every 100 airline jobs help support some 388 jobs outside of the airline industry.

Figure 1. U.S. Commercial Aviation Greenhouse Gas Emissions Represent 2 Percent of the Inventory



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. For example, between 1978 and 2009, the U.S. airline industry improved its fuel efficiency by 110 percent, resulting in 2.9 billion metric tons of carbon dioxide (CO₂) savings – equivalent to taking 19 million cars off the road in each of those years. Further, data from the Bureau of Transportation Statistics confirms that U.S. airlines’ burned almost 14 percent less fuel in 2009 than they did in 2000, resulting in a 14 percent reduction in CO₂ emissions, even though they carried 7.3 percent more passengers and cargo on a revenue-ton-mile basis.¹

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.

The U.S. Airlines Have Put Forward an Affirmative, Global Plan for Even More Greenhouse Gas Emissions Savings

ATA has challenged the EU ETS as applied to its airlines in European courts.² While we seek to overturn this unilateral scheme, we also are part of a worldwide aviation coalition that has put an aggressive

¹ Fuel savings and traffic numbers are from Bureau of Transportation Statistics data, U.S. Department of Transportation Form 41. Carbon dioxide savings and equivalencies were calculated using EPA tools at www.epa.gov/cleanenergy/energy-resources/calculator.html.

² On December 16, 2009, facing a statute of limitations applicable only to private parties, ATA filed a lawsuit in the High Court of the United Kingdom challenging the application of the EU ETS to our member airlines. This case was recently heard in the European Court of Justice on referral.

proposal on the table for further addressing aviation CO₂ 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 CO₂ 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 Unilateral and Extraterritorial Application of the EU ETS to U.S. Airlines Violates International Law

Critically, 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. While U.S. airlines with flights to European States and territories already are required by the EU ETS to monitor and report emissions for the entirety of each individual flight to, from and within the EU, from January 1, 2012, our airlines will be required to acquire allowances to cover the emissions over the whole of their flights. 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 ATA member airline flight from San Francisco to London Heathrow illustrates this well (see Figure 2). From 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 will base the emissions-allowances requirement for this carrier on 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.³

FIGURE 2.
CO₂ 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 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 Violates Their Agreement to Work through ICAO

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.

³ For the San Francisco to London flight, an excess-emissions penalty could be as much as 21,300 euros (more than \$30,000 U.S.).

The unilateral act of the EU 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 greenhouse gas emissions from international aviation. This unilateral and piecemeal approach can only lead to chaos in international travel and trade.

The EU Scheme Violates Agreed Rules for Taxes and Charges

Not only does the extraterritorial nature of the EU ETS violate international law in U.S. airspace and over the high seas, but so too does the type of regulation that the EU ETS imposes, regardless of where the aircraft is. It imposes an improper levy, contrary to agreed international and bilateral rules on aviation taxes and charges.

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. This requirement violates Articles 15 and 24 of the Chicago Convention, as well as Article 11 of the bilateral air-services agreement between the United States and the European Union and its Member States.

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.”⁴ 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 US-EU bilateral air services agreement, which prohibits countries from taxing fuel onboard an aircraft or uplifted for an international flight absent the express consent of the airline’s country of registry.⁵

⁴ ICAO’s Policies on Charges for Airports and Air Navigation Services (Doc 9082/7); see also ICAO Council Resolution on Environmental Charges and Taxes adopted on 9 December 1996 (149/16). Consistent with the December 1996 Council Resolution on Environmental Charges and Taxes, ICAO guidance specific to such charges makes clear a cost-basis between the emissions, the charges and the specific emissions mitigation measures must be established, and the funds collected must go to mitigating the specific environmental impact. See ICAO, Guidance on Aircraft Emissions Charges Related to Local Air Quality (Doc 9884).

⁵ Ironically there is European case law directly on point here. In *Braathens Sverige AB v Riksskatteverket*, Case C-346/97 [1999] ECR I-3419, the EU court held that a Swedish emissions tax violated the prohibition on taxation of fuel in international

There is no question that ATA 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 contrary to law, as is the case with the EU ETS, should be of grave concern to us all.

The EU ETS as Applied to U.S. Airlines Is Bad for U.S. Airlines and the U.S. Economy and Is Counterproductive to the Environment

As noted, 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 predict and incorporate into business planning. In light of the sustained economic downturn and uncertainty regarding negotiations to replace the Kyoto Protocol, which expires in 2012, carbon-allowance prices in the EU are about half of what they were just two 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. That outlay could support more than 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 couple 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 like the United Kingdom, have expressly denounced any obligation to earmark the collected funds for an aviation or environmental purpose.⁶ 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.

The EU ETS “Equivalent Measures” Provision Is Not a Way Forward

In answer to criticism regarding EU unilateralism raised by ATA, 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

flights as there was “a direct and inseverable link” between the fuel consumption on which the emissions levy was calculated and the carbon dioxide emissions it purported to cover.

⁶ See, “UK Says it Will Not Earmark Aviation Revenues from EU ETS Auctioning for Environmental Measures,” *GreenAir Online* (August 14, 2008), available at <http://host1.bondware.com/~GreenAirOnline/news.php?viewStory=233>.

States adopts some sort of measures 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,⁷ 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 greenhouse gas policy.

U.S. Government Opposition to This Extraterritorial Scheme Is Essential

Although ATA has brought a legal action in European courts against the EU ETS, U.S. government opposition to the scheme is also critical. While we are confident that ATA is correct on the law and should prevail on the merits, being limited as a private party to pursue this matter in the EU court system is daunting. Indeed, the primary defenses raised against us are that ATA, as a private party, is not the appropriate party to bring before the EU courts questions of international law and sovereignty. Astonishingly, the EU also has asserted that it is not itself a party to the Chicago Convention, even though all of its Member States are and it has assumed the right to negotiate air-services agreements on the States’ behalf – agreements, such as the one between the United States and the EU, that are assumed to be underpinned by the Chicago Convention. Although this is of direct interest and concern to ATA and its member airlines, so too should it be to the U.S. government.

The U.S. government has the tools, both in the legislative and executive branches, not only to call the EU on its actions, but to work to 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. That is why ATA commends the bipartisan leadership shown by Chairmen Mica and Petri and Ranking Members Rahall and Costello in introducing legislation opposing the EU ETS scheme and urging the administration to take additional steps in this regard. These steps are essential in conveying to the EU 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 and the U.S. economy. From these steps, follow-through is critical to overturning the counterproductive EU ETS and getting the Europeans to support an internationally agreed, global approach to further addressing aviation CO₂ emissions.

Conclusion

If left unanswered, the EU breach of international law poses a direct threat to the ability of the U.S. airlines to transport passengers and goods, a critical enabler of the U.S. and global economies. The U.S. airlines are answering, and appreciate the opportunity to work shoulder-to-shoulder with the U.S. government in standing up against the illegal and counterproductive EU scheme.

⁷ See, e.g., “France Urges EU ‘Rapid Action’ in Air Carbon Row,” *EurActive.com* (June 9, 2011), available at <http://www.euractiv.com/en/climate-environment/france-urges-eu-rapid-action-air-carbon-row-news-505465>



AIR TRANSPORT ASSOCIATION

Nancy N. Young, Esq.
Vice President, Environmental Affairs
Air Transport Association of America, Inc.
nyoung@airlines.org

Nancy N. Young is the Vice President of Environmental Affairs at the Air Transport Association of America, Inc. (ATA). In this capacity, Ms. Young directs ATA's environmental programs, represents the ATA airlines in international negotiations over new aircraft noise and emission standards and provides counsel to ATA and its members on other environmental issues of significance to the air transportation industry. Ms. Young also serves on the Steering Group and as environmental co-lead of the Commercial Aviation Alternative Fuels Initiative (CAAFI), which is working to hasten the development and deployment of commercially viable, environmentally preferred alternative jet fuels.

Immediately prior to her current engagement with ATA, Ms. Young was a principal/partner at the law firm of Beveridge & Diamond, P.C. There, she provided comprehensive regulatory and litigation services with respect to a wide range of environmental media, including climate change, hazardous and solid waste, fuel management, spill prevention, air quality, noise and water quality. Ms. Young served as Co-Chair of the Firm's Climate Change and Waste Management and Recycling practices.

Ms. Young is a graduate of The College of William and Mary in Virginia (B.A., 1986) and of Harvard Law School (J.D., cum laude, 1990), where she served as Editor-in-Chief of the Harvard Journal on Legislation. She served as a Legislative Assistant to Congressman E. Thomas Coleman (MO) from 1986-87. Ms. Young is a member of the bar in Virginia and the District of Columbia. She serves on the Governing Committee of the American Bar Association's Forum on Air and Space Law, the Board of Directors of the International Aviation Womens Association and the Advisory Board to the Partnership for AiR Transportation Noise and Emissions Reduction. Young also participates in the working groups under the International Civil Aviation Organization's Committee on Aviation Environmental Protection.

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
Truth in Testimony Disclosure

Pursuant to clause 2(g)(5) of House Rule XI, in the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include: (1) a curriculum vitae; and (2) a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by an entity represented by the witness. Such statements, with appropriate redaction to protect the privacy of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

(1) **Name:** Nancy N. Young

(2) **Other than yourself, name of entity you are representing:**

Air Transport Association of America, Inc.

(3) **Are you testifying on behalf of an entity other than a Government (federal, state, local) entity?**

YES

If yes, please provide the information requested below and attach your curriculum vitae.

NO

(4) **Please list the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by you or by the entity you are representing:**

Not applicable

Signature



Date

7-20-11