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Continuing Controversy over EU Efforts to Regulate Aviation Carbon Emissions

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A series of events has heightened the controversy surrounding the European Union's ("EU") efforts to impose its Emissions Trading System ("ETS") on the international commercial aviation industry.

In a directive published on February 6, 2012, the Civil Aviation Administration of China forbade Chinese airlines from taking part in the ETS unless the airlines receive Chinese government approval, which it has withheld.

Countries opposed to the EU requirements met in Moscow on February 21 and 22, 2012 and proposed a variety of retaliatory measures that have raised the specter of the globe's first carbon trade war. These measures include barring national airlines from participating in the EU program, lodging a formal complaint with the United Nations' International Civil Aviation Organization, ceasing talks with European carriers on new routes and imposing retaliatory levies on EU airlines. The U.S.' position has not taken shape. "We're still talking to other countries that were adversely affected by it. We have not decided on any specific course of action yet." said U.S. Undersecretary of State Robert Hormats. EU officials viewed the threatened measures as "hypothetical."

Finally, on February 23, 2012, China called on the EU to drop its plan to levy fees on airline carbon emissions, a scheme that has drawn the ire of

several countries.

The EU has been regulating GHG emissions for several years, and its program to address aviation emissions went into effect in January of this year. Airlines are required to surrender credits to offset carbon-dioxide emissions from any flight starting or ending at an EU airport. Some of the credits are to be issued without charge by the EU, and others are to be auctioned off to operators. Initially, airlines will be handed allowances to cover 85 percent of their emissions. The overall amount of credits available will be 97 percent of historical (2004-06) aviation emissions. Operators must purchase allowances to cover any shortfall between free allowances and annual emissions[1].

Responding to a legal challenge brought by a group of U.S. airlines, the European Court of Justice just ruled last year that the ETS program, including the imposition of carbon costs on international flights, was legal.

In a statement on its website, the Civil Aviation Administration of China said, "Implementing this system will not only distort competition, distort the airline industry's development and create a financial burden for travelers, it will also damage the trust that is the foundation of the global response to climate change." However, Chinese airlines have apparently taken steps to comply with the scheme and have applied for the free carbon allowances to which they are entitled.

China is not alone in its condemnation of the ETS. More than 25 countries, including the U.S., Russia, China, India, and Brazil, contend that the EU is exceeding its legal authority by imposing emissions charges on airlines for portions of flights outside the EU. Some governments have suggested that the United Nations' International Civil Aviation Organization ("ICAO") is in a better position to develop a plan that has broader support. ICAO previously approved a resolution committing to cap greenhouse gas emissions from aircraft and propose a greenhouse gas emission standard for aircraft engines by 2013, which is when the ICAO next meets. Such a plan, if adopted, could replace the EU's plan. However, with 191 member countries, gaining a consensus within the ICAO on how to handle aviation GHG emissions could be difficult.

The EU has stated its intention to continue implementing the ETS, including fining noncompliant airlines US\$131 for every metric ton of carbon dioxide emitted without a carbon allowance. Airlines that persistently violate the rules could be banned from the EU. The EU has estimated that the per-ticket cost for complying with the ETS on a one-way trip from Beijing to Brussels would amount to about US\$2.70. Airline representatives have come up with much higher estimates. The China Air Transport Association, which last year urged China's airlines to refuse to take part, said the scheme would cost 800 million yuan (US\$123 million) in the first year and more than triple that by 2020.

[1] See O'Melveny & Myers LLP Client Alert "EU Begins Regulation of Aviation Carbon Emissions", October 22, 2009.

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