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TURKISH AVIATION ACADEMY

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Market-based Measures in International Civil Aviation: Current State of the Law

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Beginning with Questions.....

- o Question: Does there exist any global market-based measure of international civil aviation?
- o Answer: **NO.**
- o Question: What does the Chicago Convention say about environmental protection?
- o Answer: **NOTHING.**
- o The Chicago Convention does not *explicitly* address the issue of the protection of the environment since the need to protect the environment was not envisaged at the time of negotiation and drafting of the Convention in 1944.
- o Question: Therefore, the ICAO, which is established by the Convention, does not have any obligation in this respect under the Convention. Is it correct?
- o Answer: **That is not correct.**
- o The Convention tacitly confers responsibility on the ICAO to address aviation environmental issues under article 44.

Questions continue.....

- o Question: Is there anything outside the Chicago Convention?
- o Answer: **Yes.**
- o The Kyoto Protocol to the UNFCCC provides a clear mandate for ICAO to be the authoritative body to address emissions from aviation. Article 2(2) of the Kyoto Protocol provides that the Annex I developed country Parties shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from **aviation** bunker fuels *working through* the ICAO.
- o Question: The provision only refers to “aviation”, not “international civil aviation” specifically. Does it mean that Kyoto Protocol only addresses domestic aviation?
- o Answer: **Yes.** It appears that emissions from international aviation are kept outside the purview of this Protocol. According to IPCC and UNFCCC Guidelines, emissions from both national and international aviation should be calculated as part of the national greenhouse gas inventories of Parties, but emissions from international aviation “should be excluded from national totals and reported separately.”

ICAO's actions with respect to reducing emissions from aviation

- o The ICAO has a duty under the Chicago Convention and a mandate under the Kyoto Protocol to address emissions from international civil aviation.
- o The ICAO has taken various initiatives to address aviation emissions. However, none of these initiatives have resulted in any global market-based measure for aviation.
- o ICAO has adopted Annex 16 to address aviation environmental issues, . However, Annex 16 neither provides for any market-based measure nor regulates major greenhouse gases emitted by aircraft, namely, carbon dioxide (CO₂) and water vapor (H₂O). Volume II of Annex 16 regulates smoke, unburned hydrocarbons (HC), carbon monoxide (CO), and oxides of nitrogen (NO_x).
- o A new volume, namely Volume III, will be added to Annex 16 that will provide for new CO₂ aircraft standards.
- o Basket of Mitigation Measures:
 - Market-based Measures
 - Technology Improvements
 - Operational Improvements
 - Sustainable Alternative Fuels

ICAO's actions with respect to market-based measures

- o A number of studies have been undertaken by the ICAO since 2001 that resulted in the preparation of guidance material on market-based measures.
- o Market-based measures have become a part of a basket of mitigation measures that States can use to address CO₂ emissions from international civil aviation.
- o In early 2012, six potential options for a global market-based measure were identified and, in June 2012, the ICAO Council narrowed these options to three:
 - global mandatory offsetting,
 - global mandatory offsetting with revenue,
 - global emissions trading.
- o Further quantitative and qualitative assessment of these options was requested and performed as well.
- o Two quantitative assessments were undertaken in 2012 and 2013.
- o One qualitative assessment was undertaken during this period.
- o Outcome of these assessments of the three options:
 - cost effective
 - technically feasible
 - capacity to contribute to achieving ICAO's environmental goals.

What happened after this positive outcome of those assessments?:

38th session of the ICAO Assembly

- Assembly Resolution A38-18: An agreement to develop a global market-based measure was reached at the 38th Assembly meeting.
- Paragraph 19 of Assembly Resolution A38-18:
The Assembly requested the ICAO Council with the support of contracting States to:
 - finalize the work on the technical aspects, environmental and economic impacts and modalities of the *possible options* for a global market-based measure,
 - organize seminars, workshops on a global scheme for international civil aviation,
 - identify the major issues and problems and make a recommendation on a global market-based measure scheme that appropriately addresses them, and key design elements and the mechanisms for the implementation of the scheme from 2020, and
 - report the results of all these works for decision by the next session, i.e. 39th session, of the Assembly.
- Therefore, it is now certain that no global market-based measure for international civil aviation will come into effect before 2020. Moreover, new options may be considered since the Resolution mentions “possible options” instead of the three options that were under consideration.

Authority of States to adopt market-based measures

- o Any State or States can design and implement any national or regional market-based measure that is applicable within its sovereign airspace.
- o Customary international law: Every State has complete and exclusive sovereignty over the airspace above its territory.
- o Chicago Convention:
 - Article 1: airspace sovereignty.
 - Article 2: territory of State: includes airspace above territorial sea.
 - Article 6: special permission or authorization required for scheduled international air service.
 - Article 11: State laws and regulations apply and must be complied with.
 - Article 12: States undertake to adopt measures to ensure compliance.
- o Assembly Resolution A38-18: States allowed to design and implement market-based measures for international civil aviation. However, agreement between States should be reached, carriers from developing States whose share of international civil aviation activities is below the threshold of 1% of total revenue ton kilometers of such activities should be exempted and the guiding principles set out in the Annex should be followed.

The EU ETS

- The EU ETS works on the “cap and trade” principle: a “cap” or limit is set on the total amount of CO₂ emissions from aircraft. Within the cap, the airlines receive or buy emission allowances that they can trade with one another as needed.
- Airlines can also buy limited amounts of international credits from emission-saving projects around the world.
- Airlines can use both aviation allowances and general allowances for compliance purposes.
- After every year, each airline must surrender enough allowances to cover all its emissions to avoid paying heavy fines, which is 100 euros for each tonne of CO₂-equivalent emitted by that carrier for which it has not surrendered allowances.
- In response, and to give further momentum to the global discussions, the European Commission has made a proposal to amend the EU ETS so that only the part of a flight that takes place in European regional airspace is covered by the trading system. The change would apply from the beginning of 2014 until the global measure enters into force.
- In March 2014, the Council of the EU and European Parliament reached agreement to limit the aviation coverage of the EU ETS to emissions from flights within the European Economic Area [EEA] for the period from 2013 to 2016.

Key Features of the amended EU ETS

- Flights between aerodromes in the EEA remain fully covered.
- Flights to and from third countries which are not developed countries and which emit less than 1% of global aviation emissions would be exempted.
- As of 2014, flights to and from non-EEA countries are not responsible for emissions taking place beyond EEA countries. Emissions from such flights occurring beyond 12 nautical miles from the last point in EEA countries will not be accounted. However, **sea area not in excess of 400 nautical miles between EEA countries will be accounted**. A simplified procedure is proposed to determine the relevant proportion of emissions of a given flight which is covered by the ETS. It is proposed that operators can choose between approaches to monitoring, reporting and verification [MRV] methodology for compliance.
- Overflights of EEA countries are exempt, as are emissions from flights between airports in third countries and EEA airports as regards European dependencies and territories, and flights to and from EEA airports and those territories.
- **Issues remain:**
It appears that the EU ETS still applies **extra-territorially: sea area of 400 nautical miles between EEA countries**. Airspace above exclusive economic zone does not fall within the sovereignty of States. Freedoms of the high seas, including the freedom of overflight, apply.

Thank You

Questions?