

Addressing carbon emissions from international aviation requires the recognition of special circumstances



26 January 2015 – At ICAO’s 38th Assembly in 2012, States agreed to develop a global market-based measure (MBM) to address carbon emissions from international aviation. It is expected that in 2016 the 39th Assembly will consider a proposal for a global scheme designed to start in 2020. According to the resolution adopted (A38-18), in developing such a scheme, ICAO must take into account the principles of common but differentiated responsibilities and respective capabilities (CBDR), special circumstances and respective capabilities (SCRC), non-discrimination, and equal and fair opportunities. But what do these

seemingly contradictory principles mean in the context of addressing international aviation’s carbon footprint? Aviation legal expert *Alejandro Piera* explains.

The Kyoto climate change treaty embraces CBDR. Although States disagree on its definition, scope and whether, in its current form, it should remain part of a new international agreement, the principle bears the following salient characteristics. First, all States bear a common, inter-generational obligation to protect the climate system as a whole. Secondly, while recognising they are responsible for the largest share of historical emissions, developed countries should take the lead in mitigation efforts.

In order to take into account of the special circumstances of developing countries, on the basis of equity and fairness, CBDR differentiates responsibilities. Developing countries do not have to pursue quantified emissions reductions but they are required to maintain national inventories and cooperate with the international climate change regime. In essence, there are those with reductions obligations and those without.

In the context of international aviation, for instance, some developing countries have clearly stated that “developed countries should take the lead in taking reduction measures in order to offset the growth of emissions from international aviation of developing countries.” Developing countries would argue that “developed States [must] take more ambitious [mitigation] actions [to] offset an increase in emissions from the growth of air transport in developing States.”

Developed countries would, on the other hand, argue that emissions from developing countries are growing at a very high rate. In fact, developing countries are likely to account for more than half of global emissions by 2020, if not before. Various models confirm the view that developing countries will soon rank amongst the largest emitters. It makes very little sense for developed countries such as the US to assume emission reduction commitments if major developing countries – powerhouses such as Brazil, China and India – are not on board. Arguably, without the participation of developing countries, it will be extremely difficult to achieve any significant reduction in GHG emissions.

Finally, CBDR also touches upon the often forgotten “respective capabilities of States” – an element that a number of developing countries consciously opt to disregard. In theory, at least a literal interpretation of CBDR would suggest the differentiation treatment should not be applicable for those States that are “capable” of contributing more to climate change, regardless of the fact that they may be labeled as developing countries. For instance, with the highest per capita income, the State of Qatar is in a much better position to tackle climate change than the small island state of Seychelles.

CBDR finally arrives at ICAO

One of the most interesting aspects of the outcome of the last ICAO Assembly is that for the first time, ICAO now acknowledges CBDR within the operative clauses of its Assembly resolution. In the past, references to CBDR were only included in the preambular clauses. CBDR is no longer just a symbolic principle included for rhetorical purposes but is now a concept which, along with other principles, should be put into practice.

The inclusion of CBDR into the resolution bears remarkable consequences for ICAO’s future work in addressing climate change. First, although 50 States filed reservations against it, the principle now forms an integral part of ICAO’s guiding principles on MBMs. For States abhorring CBDR, it will be very difficult to preclude its consideration as one of the principles that must guide the design of a global MBM. Secondly, it will also be an uphill battle to

continue arguing that CBDR does not exist in the international civil aviation context. CBDR has been upgraded from the preambular to the substantive clauses.

Arguably, for the vast majority of member States, CBDR deserves not only to be recognised but also made operational in any global MBM scheme. It is illusory to expect that in 2020, once ICAO's global scheme hopefully starts, everyone will be treated equally.

Thirdly, the Assembly resolution lists different principles. It is therefore now evident that CBDR and SCRC are different principles with different meanings. In the past, some States argued that SCRC was the manner in which international civil aviation applied CBDR at ICAO. The challenge, of course, will be how to reconcile these two principles.

Non-discrimination principle

Although nowhere defined in the Chicago Convention, non-discrimination is a cornerstone principle of international civil aviation. In fact, one of ICAO's objectives is precisely to "avoid discrimination between [States parties]". Several provisions of the Chicago Convention nonetheless capture this principle. For instance, in exercising jurisdiction over the arrival and departure of aircraft from its territory, a State may not discriminate between the aircraft on the basis of nationality.

In the context of international civil aviation, the non-discrimination principle manifests itself in the form of a prohibition that enjoins States to refrain from arbitrarily and capriciously applying differential treatment to aircraft operators on the basis of nationality. Such treatment may not be justified on any objective basis. More specifically, in the context of designing a scheme to address GHG emission from international aviation, the non-discrimination principle means that aircraft operators flying on the same route should be subject to the same rules.

Reinventing CBDR: ICAO's SCRC

As a result of the pressure exerted by some developing countries since 2007, ICAO has included references to CBDR in its Assembly resolutions on climate change but only in the preambular clauses. However, to offset the potential market distortions that CBDR may create if applied in the aviation environmental context, reference to the principle has always been either preceded or followed by ICAO's non-discrimination principle.

Until 2013, CBDR never featured in the operative clauses of ICAO's Assembly resolutions. The intention behind this was to acknowledge in a declaratory manner that although CBDR guided the UNFCCC process, it did not have any practical application within the international civil aviation regime. Again, a number of developed States have strongly argued that because it conflicts with non-discrimination, CBDR has no place in an international civil aviation context.

In 2010, while still replicating both the CBDR and the non-discrimination principles in the preambular clauses of its climate change resolution, the Assembly attempted to move away from the political divide and potential operational repercussions embedded in CBDR by developing the new concept of special circumstances and respective capabilities (SCRC) of developing countries. As such, in working towards achieving ICAO's global aspirational goals, the 37th Assembly suggested that States and international organisations should take into account SCRC.

Originally, the scope of SCRC was exclusively restricted to developing countries. In 2013, however, the 38th Assembly made several references to the principle without restricting it to developing countries. As its name suggests, this principle seeks to accommodate those States whose specific circumstances may require special consideration in order for them to fully participate in ICAO's initiatives to tackle GHG emissions.

What is the difference?

On the basis of fairness and equity, both CBDR and SCRC aim to address the challenges that some developing countries face in their effort to combat climate change. It is clear that not all countries are equipped with the same

resources to perform this task. Both principles therefore seek to recognise the special conditions of some States to address the problem.

These principles, however, differ in at least four key respects. First, there is a clear difference in their political perception. As embedded in the UNFCCC climate change regime, CBDR implies that only developed countries bear mitigation obligations. If one were to follow this interpretation, applying it in the ICAO context would pose operational challenges and increase the political risk of perpetuating a differentiated scheme in another forum beyond the context of the climate change regime.

Foregoing CBDR sets the precedent that developing countries may be willing to accept a climate change regime without differentiated obligations. CBDR is also perceived as the perfect excuse for inaction because developing countries will continue to argue that they should not bear any obligation in spite of the fact that their airlines compete head-to-head with airlines from developed States and quite often have been much more successful.

In addition, the rate of growth of air transport in many developing countries is now higher than it is in developed States. This explains why developed States and the aviation industry argue that CBDR does not exist at ICAO. On the other hand, SCRC is an ICAO creation – although its wording would seem to be a reformulation of existing UNFCCC language.

Secondly, as mentioned above, CBDR refers to the “common but differentiated responsibilities and *respective capabilities*” of States. However, when developing countries such as Brazil, China and India refer to CBDR, they purposely ignore the last part. This is clearly self-serving. SCRC, on the other hand, emphasises this forgotten part of the CBDR language. In theory at least, this would allow differentiation amongst developing countries – a concept that some States have strongly resisted within the UNFCCC context.

For instance, for the purpose of UNFCCC’s classifications, Mauritania, Qatar, UAE and Yemen are all developing countries. However, Qatar and UAE have achieved a significantly higher level of aviation development. In fact, the growth of aviation in these two countries poses a real and tangible threat to well-established aircraft operators in developed States. This is certainly not the case for civil aviation in Mauritania and Yemen. Given that their “respective capabilities” are substantially different, it does not seem fair to treat all of these States in the same manner.

Thirdly, some States are of the view that when dealing with environmental issues, ICAO should assess the impact of proposed measures for both developed and developing countries. In this context, SCRC in its latest form does not preclude the extension of special consideration to developed States whose capabilities may justify a request for assistance under a given set of circumstances. One could reasonably argue that in spite being a developed State and member of the European Union, Greece may be going through some special circumstances. Some States have expressed the view that SCRC should only be applicable to developing countries.

Fourthly, as applied in context of the UNFCCC, CBDR very clearly takes into account the historical responsibilities of developed States. Because of their large share of historical GHG emissions, developed countries have taken the lead with regard to mitigation obligations. At least as currently construed at ICAO, SCRC does not weigh these two key elements.

Why has SCRC not worked?

SCRC represents a laudable attempt to incorporate a workable principle into the ICAO domain that would recognise the different circumstances and level of development of States while minimising market distortions. It has certainly sought to bridge the political divide between die-hard CBDR adherents and non-discrimination fanatics. Having said this, judging from the unprecedented number of reservations filed against the last two ICAO Assembly resolutions on climate change, one could speculate that SCRC has not necessarily brought the divergent views of both developed and developing States any closer. A number of reasons may explain why this has been the case.

SCRC evolved from the premise that CBDR leads to market distortions. As such, CBDR conflicts with the Chicago Convention. This however holds if one follows CBDR’s conceptualization as applied in the UNFCCC context. CBDR is not implementable in international aviation. However, CBDR is not set in stone. Nothing prevents States from

reformulating CBDR in a manner that allows them to take into account the particular characteristics of the aviation sector.

However, a number of actors did not attempt to adapt CBDR to the international aviation environment but rather, under the pretext that CBDR does not exist at ICAO, they opted to replace it completely with SCRC. In the end, this not only alienated major developing countries but also contributed to creating a sense of distrust. It is true though that to some extent, as Brazil has put it, while some States have “accepted the euphemism of SCRC in the name of consensus and to accommodate the concerns of certain States, it was not reasonable to distort the concept and essence of CBDR.”

The situation has been aggravated by the fact that SCRC has never been made operational. It still remains an abstract concept. In other words, almost 17 years after the Kyoto Protocol entrusted ICAO with the mandate to tackle GHG emissions from international aviation, it is not clear how the principle will be put in practice to accommodate developing countries or those States that may require special treatment. In light of the foregoing, it can be argued the approach should have been to reformulate CBDR in a manner compatible with ICAO’s practices, as opposed to rejecting it. It is evident that SCRC has not achieved the desired results.

Fair and equal opportunity

According to ICAO, “fair and equal opportunity” refers to a general principle that appears on bilateral air services agreements. In principle, it seeks to “ensure against discrimination or unfair competitive practices affecting” aircraft operators designated under such bilateral arrangements. In practice, however, States interpret it differently. For States desirous to gain market access and expand international routes for their aircraft operators, this principle seeks to ensure competition and prevent discriminatory treatment. On the other hand, for conservative States, the principle provides a justification to impose market restrictions in order to protect their designated aircraft operators.

In the last three ICAO resolutions dealing with climate change issues, fair and equal opportunity has been linked to the principle of non-discrimination, as if they were one sole concept. Although the preamble of the Chicago Convention recognises that “air transport services may be established on the basis of equality of opportunity”, it does not automatically follow that “equal and fair opportunities”, as incorporated in the ICAO climate change resolutions, forms an integral part of the non-discrimination principle. It is unquestionable, however, that both principles present some similarities.

For instance, both of them are part of ICAO’s objectives. In spite of this, the principles are essentially different. In the Chicago Convention, non-discrimination is constructed as a prohibitive rule against arbitrary treatment of both States and aircraft operators. On the other hand, “equality of opportunity” denotes an ideal that should be met to operate air transport services. In other words, it seeks to ensure access to these services by all States.

The sharp-eyed reader will note the use of the word “may”. Although in some cases such access may be denied as a result of discriminatory treatment, the scope of the principle is much broader. As mentioned above, the main problem with the principle relates to its disparate interpretation. I do not consider it to be part of the non-discrimination principle, but rather a serious drafting oversight.

Developing countries and differentiation

Although international civil aviation has been based on equal treatment of States and aircraft operators, the Chicago Convention and ICAO’s own practice illustrate a number of scenarios where special consideration, and in some cases special treatment, was given to the specific circumstances of developing countries. This will be key for developing ICAO’s global MBM.

For instance, without differentiating rights and obligations, composition of the ICAO Council – which is distributed along the lines of three groups of States – recognises different levels of contributions, namely “States of chief importance”, “States with the largest contribution to the provision of facilities for international civil air navigation” and “States whose participation is necessary to ensure equitable geographical representation”. Most developing countries fall under the third category.

Similarly, the financial contributions, or ‘assessments’ in ICAO parlance, allocated to States to support ICAO’s regular budget take into account the special circumstances of States. While a developed country such as the United States contributes roughly 22% of the organisation’s regular budget, the share contributed by the vast majority of developing countries is only 0.06%.

ICAO also runs a comparatively large technical cooperation programme that is primarily designed to assist developing countries “in remedying their deficiencies in the field of civil aviation”, including non-compliance with technical standards and recommended practices (SARPs), lack of appropriate aeronautical infrastructure, and insufficient regulatory oversight.

The special needs of developing countries have been expressly acknowledged in many ICAO Assembly resolutions. For instance, with regard to operational restrictions due to aircraft noise, ICAO recommends that States “consider the special circumstances of operators from developing countries, in order to avoid undue hardship for such operators, by granting exemptions.”

The Assembly has also noted the difficulties developing countries encounter in “[securing] the necessary resources required to optimise the opportunities and meet the challenges inherent in the development of air transport.” Therefore, the Assembly has instructed the Council “to attach particular importance to the problem of financing the development of the human and technical resources necessary to ensure the best possible contribution of air transport to the economic and social well-being of developing countries.”

With regard to air transport liberalisation initiatives, the Assembly has suggested that States should “[give] special consideration to the interests and needs of developing countries.” In the field of aviation security, ICAO notes that developing countries may “lack aviation security oversight capacity and still face difficulties in fully implementing preventive measures due to insufficient financial, technical and material resources.” Similarly, without establishing preferential treatment in favour of any group of States, the 2014-2016 ICAO Global Aviation Safety Plan (GASP) implicitly acknowledges that States present different levels of maturity with respect to their oversight capabilities.

On climate change, the ICAO Assembly has noted that “some States may take more ambitious actions prior to 2020, which may offset an increase in emissions from the growth of air transport in developing States.” It has underscored the need to provide support to developing countries, including financial assistance and technology transfer. It has also warned that “emphasis should be on those policy options that will reduce aircraft engine emissions without negatively impacting the growth of air transport especially in developing economies.”

Further, ICAO has recommended the revenues accruing from the implementation of MBMs be “applied in the first instance to mitigating the environmental impact of aircraft engine emissions, including mitigation and adaptation, as well as assistance to and support for developing States.”

In designing a scheme to address carbon emissions from international aviation, the international community will have to recognise the special circumstances of developing countries. Without such differentiation, the scheme will simply not gather enough traction and will not work. The challenge, of course, is to provide for such differentiation without altering the way in which international air transport functions. As detailed above, ICAO has substantial experience in this regard. The only thing missing is political will.

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