

## The challenge of finding a legal vehicle to enforce compliance with a global aviation emissions scheme



19 November 2014 – By agreeing to develop a global market-based mechanism (MBM) for international civil aviation, ICAO's 38th Assembly has set the expectation that such a scheme will be adopted in 2016 and that it will be operational by 2020. ICAO has already carried out a considerable amount of technical work, yet significantly less attention has been paid to the legal vehicle through which the scheme would be implemented. Although experts have identified standards, Assembly resolutions and international conventions as possible options, very little analysis has been undertaken. It is clear the final selection will depend on a number of technical and political considerations, writes *Alejandro Piera*.

The Chicago Convention entrusts ICAO with the mandate to develop standards addressing "matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate." It is the Council that adopts standards as part of its mandatory functions. In theory at least, one could foresee a global MBM for international aviation could be implemented through ICAO's standard setting process. In this regard, provisions for the scheme could be developed through standards that would form part of a new Annex to the Chicago Convention.

This option presents two obvious advantages. First, the development and implementation of a set of standards may be significantly less time-consuming than an international treaty. A set of standards for a global MBM scheme or even an entirely new Annex may be developed in less than two years. In most cases, unless a majority of ICAO Member States object – something which has yet to happen in the annals of ICAO – a standard enters into effect 90 days after its adoption by the Council.

The second advantage of this option is that it would permit States to bypass their respective legislatures in incorporating the global MBM within their domestic legal systems. Although standards may require States to adopt implementing domestic regulation, this does not automatically mean they must obtain legislative approval. ICAO's standard setting process is part of its law-making function as set out in the Convention which States are parties to.

The use of standards as a legal vehicle for a global MBM scheme, however, comes with three clear disadvantages. First, until now, standards have been primarily concerned with technical issues. Although the subject matter of standards should not be construed in a restrictive manner, they have traditionally not dealt with economic measures such as those envisaged in a global MBM scheme. Therefore, the incentive to take a free ride may be enormous, especially if the price of carbon rises.

Second, the Convention allows States to file differences in situations where they do not find it practicable to bring their domestic practices in conformity with the standards, which, in practice, functions as an opt-out mechanism. Nowadays, this may even be done electronically. Although one could argue that a State may also withdraw from a treaty, doing so certainly entails a much more difficult process and it implies other considerations, such as the country's reputational loss and international relations considerations. It will be much easier to opt out of a climate change-related standard than it is to do so with those relating to safety and aviation security.

As explained later, there are external enforcing mechanisms, for example bilateral air services agreement and the Convention itself, that make it much harder for States to deviate from safety and security standards. But this is not at all the case with climate change.

Third, ICAO has no powers to enforce standards. It is true, however, that through its safety and aviation security audits, ICAO oversees State compliance with standards. This has only been partially extended to cover environment-related issues. Should the global MBM be adopted through standards, they should form an integral part of the ICAO audit programme.

Standards may be a useful legal vehicle to develop certain technical elements of ICAO's global MBM scheme, including but not limited to a common monitoring, reporting and verification (MRV) system, rules on fuel consumption recording and reporting requirements, and the surrendering, cancelling and acquiring of carbon allowances or offsets.

### **Assembly resolutions are non-binding**

Just like UN General Assembly resolutions, ICAO Assembly resolutions are not binding upon Member States. They are nonetheless indicative of the Organization's policies. In theory, a global MBM scheme could be adopted through an Assembly resolution. In all likelihood, this option would be considerably less time-consuming than an international treaty, which requires ratification at the domestic level. Another advantage is that non-binding agreements are flexible and can easily be changed when the circumstances so demand.

The main challenges associated with this option are the difficulties in enforcing the global scheme and in imposing penalties upon non-compliant participating aircraft operators. Admittedly, Assembly resolutions are significantly weaker vehicles for carrying out these functions. But one could argue that the vehicle used to implement the global MBM scheme has nothing to do with these challenges. After all, this is an intrinsic problem involving all international organisations and not only ICAO.

Regardless of the vehicle chosen, it is simply unrealistic to expect ICAO will ever impose penalties on non-compliant participants. While this point has merit, an international convention provides more options when it comes to enforcement and imposition of penalties.

In theory, an Assembly resolution could delegate enforcement functions and the imposition of penalties to States. Each State would be in charge of enforcing the scheme on its aircraft operators. This, however, may pose serious challenges. States may exercise different levels of enforcement or monetary sanctions. Given that it could lead to market distortions, States may also be reluctant to impose sanctions where other States fail to take measures over their own aircraft operators.

### **New international convention**

A new international convention may also be used as a legal vehicle to adopt a global MBM for international aviation. Through a treaty, it may be easier to address issues such as enforcement, sanctions and a dispute resolution mechanism. A treaty may also establish a new international entity with its own legal personality to handle specific issues such as the scheme's registry or the management of revenues and the imposition of sanctions. In essence, the treaty may empower either ICAO or the newly created entity to carry out functions which are not necessarily provided for in the Chicago Convention and air services agreements, or for which ICAO's Assembly resolutions are not suitable.

For instance, a scheme with a revenue generation mechanism will most likely require the adoption of a new treaty given decisions will have to be made on who pays what and for what purposes. The Chicago Convention does not provide ICAO with specific powers to manage funds other than those that form part of its regular budget. The new instrument could set up sanctions for non-compliance with environmental-related requirements such as operational bans to be implemented by States. At present, this is not contemplated in bilateral or multilateral air services agreements.

A new international convention also presents some disadvantages. Its binding nature may pose some challenges for some States. This is particularly so with regard to climate change where international aviation is not necessarily disassociated from the UNFCCC context. For instance, it is well known the US Congress is unlikely to pass any legislation imposing binding emission reduction commitments on US enterprises, unless a number of factors are met. The withdrawal of the United States from the Kyoto Protocol and the reluctance of the US Congress to ratify it was a clear example. If the ICAO-led

global aviation MBM is adopted through an international instrument, the United States will have to go through the US Congress – a daunting challenge.

The most obvious disadvantage of this option is that the mere negotiation and adoption of the instrument may take a number of years. In fact, this may be the perfect recipe for States to engage in dilatory tactics. The last five international conventions adopted under the auspices of ICAO since 2009 are yet to enter into force and are unlikely to do so in the near future. Although the Montreal Convention of 1999 on air carrier liability entered into force roughly four years after its adoption, given its complexity and the multiplicity of exogenous elements, it is unlikely that an aviation climate change treaty will enter into force in such a short period of time, if ever adopted.

By way of comparison, the Kyoto Protocol entered into force almost eight years after its date of adoption. Moreover, the fact that it did enter into force may, to a large extent, be attributed to Europe's very strong 'norm entrepreneurship'. If the global MBM scheme is adopted through a treaty, a norm entrepreneur would have to champion the cause and lobby around the world to expedite the ratification or accession processes. Otherwise, it is unlikely that an aviation and climate change treaty could enter into force in the near term.

### **Compliance through transparency**

Just like most international organisations, ICAO has no enforcement authority in a strict legal sense. This, however, does not mean the design of the global MBM scheme should not envisage mechanisms to facilitate enforcement. Without such mechanisms, it is ludicrous to expect that the scheme will bear any meaningful effect in reducing or limiting GHG emissions from international aviation.

An argument could be made that although important, enforcement and penalties do not constitute insurmountable challenges for the adoption of a global scheme, not even where it is adopted through a set of standards or an Assembly resolution. ICAO has other means to induce compliance. One of these is transparency. For instance, ICAO has implemented audit programmes on safety and aviation security. By overseeing adherence to ICAO standards, these audits have been instrumental in raising awareness of safety and security issues as well as contributing to higher state compliance levels. One of the reasons for this success story is that audit results have progressively been made public.

Transparency must therefore be a cornerstone design element of the global MBM scheme regardless of the legal vehicle chosen for its adoption. Transparency should allow the public to know aircraft operators' verified fuel consumption levels, CO<sub>2</sub> emissions produced over a compliance period, whether the emissions produced by aircraft operators have exceeded their limits, and the number of offsets or allowances required to comply with their obligations.

ICAO should establish a public, central registry where this information would be processed and record all transactions involving participants. These may include exchanges of allowances or offset purchases. The ICAO registry should also be linked to the UNFCCC's International Transaction Log. This link would ensure carbon credits generated outside aviation are properly recorded, cancelled if necessary and not accounted for twice.

Transparency will not only allow the public to identify those non-compliant participants, but it will also place significant 'blame and shame' on them. This may expose them to reputational losses. However, making the system fully transparent will be a challenging task due to concerns over disclosure of commercially sensitive information.

The obvious criticism to placing such high expectation on the scheme's transparency as a quasi-enforcement mechanism is that the subject matter is completely different from those involving safety and aviation security issues. It is one thing to expose a State and an aircraft operator on the basis of their poor safety or security records than to blame them for their lack of environmental commitment.

In cases involving safety and security, one can certainly expect the travelling public will not only be concerned but may also opt for another destination or another airline. Clearly, the public values safety and security much more than it cares for the aviation sector's contribution to climate change. This is the case in most countries. However, it is expected that through education, environmental issues will gradually attain a degree of importance that, to date, is certainly not present in the agendas of most aviation policy makers. When this happens, transparency will play a major role.

### **External enforcers**

Although transparency has been an invaluable tool to induce compliance with ICAO's standards, this should not be examined in isolation. Transparency by itself may not be sufficient. In practice, the ICAO audits have also had 'external enforcers'. Actors outside of ICAO – either industry stakeholders or States – have indirectly or directly induced compliance. Close consideration of this factor is therefore extremely relevant in the design of the global MBM scheme.

Almost all air services agreements through which States have exchanged traffic rights among themselves contemplate the prerogative of revoking the authorisation granted to a foreign aircraft operator when the granting State "has reasonable grounds to believe" that the other State is not observing ICAO safety or aviation security-related standards.

In addition, the Chicago Convention has a built-in mechanism whereby a State may not recognise certificates of airworthiness, competency and licences issued by another State which were rendered not in conformity with ICAO standards on these issues. On this basis, some States have banned foreign aircraft operators in cases where their home States allegedly were not in compliance with ICAO standards.

In view of the language used in the Convention, however, this would only be applicable to situations in which non-compliance involves standards dealing with certificates and licences. It would not cover environment-related standards or, more specifically, technical standards establishing a global MBM scheme. Both the air services agreements and the Convention have served as additional enforcers for ICAO standards. In their present forms, neither of these could be extended to cover a global MBM scheme.

As previously mentioned, it seems much easier to address enforcement issues through the adoption of a new treaty. If, on the other hand, the chosen vehicle is an Assembly resolution, things get much more complicated as the assistance derived from external enforcers would become much more relevant. The design of the global scheme should therefore carefully consider this element.

For instance, IATA could make compliance with ICAO's global MBM mandatory for its member airlines. These carriers should be ICAO compliant in order to be eligible for or to maintain the IATA membership. It is true though this will not capture the full universe of airlines but it would ensure a great number of them are already on board. IATA could impose on its member airlines mandatory participation in its environmental audits.

States could also gradually start introducing amendments to their air services agreements to allow for the imposition of operational bans upon aircraft operators of other States to the extent that they are not in compliance with ICAO's global MBM. ICAO could also develop guidance material to assist States in this respect.

### **Reporting non-compliant States**

The built-in reporting mechanism of the Chicago Convention may also serve as an appropriate tool to enforce ICAO's global MBM scheme. Article 54 (j) mandates the Council to report non-compliant States to the Assembly. The scope of this provision is twofold. First, it deals with an infraction of the

Chicago Convention by a Member State. Second, it also involves situations in which a State fails to implement a Council “recommendation” or “determination”.

The Convention does not provide a definition of what would constitute an “infraction”. However, in a seminal legal opinion rendered in 1999, ICAO’s Legal Bureau clarified the term should be given its ordinary meaning, that is to say any breach, violation or infringement of any of the articles of the Convention. Non-compliance with a global MBM scheme is unlikely to constitute a violation of the Chicago Convention.

The constating instrument of the global MBM scheme – such as an Assembly resolution – could however mandate the Council to report non-compliant participants to the Assembly. The Council would inform affected States that some aircraft operators are not in compliance with the scheme, which would amount to a “determination” in the words of the Convention.

Such States would be given reasonable time to take corrective action. If such corrective actions are not implemented, the Council would then report the matter to the Assembly. In theory, this procedure could act as a strong deterrent to induce compliance. However, the reality is that the Council has never formally resorted to this process.

### **Enforcement will be key**

In summary, although a new international convention would seem to provide more options, its lengthy adoption and ratification processes may well prove to be insurmountable obstacles. Others have suggested that standards should be used. In this context, the next best option would be to adopt a scheme through an Assembly resolution. But enforcement will be key. Transparency should serve as a quasi-enforcement mechanism.

Additionally, a number of elements could serve as the scheme’s external enforcers. This may include developing special clauses in air services agreement whereby a State may impose operational bans to those aircraft operators that are not compliant with ICAO’s global MBM. IATA could also subject the membership of its airlines to participation in the scheme. In this regard, just like in safety and aviation security, the role of Europe and the US would be of paramount importance. Without them on board, the scheme would be meaningless.

ICAO could also resort to its never-used Article 54 (j) reporting mechanism. ICAO’s standards seem to be the appropriate vehicle to incorporate some of the technical elements of the scheme, such as MRV. However, one thing is clear: even if adopted in 2016 and made operational in 2020, compliance and enforcement will not be optimal. They will undergo a long trial and error process.

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