EU Climate Change Unilateralism

International Aviation in the European Emissions Trading Scheme

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Abstract

The EU is engaged in an ambitious, controversial and high-stakes experiment to extend the reach of its climate change law. It is seeking to use its market power to stimulate climate action, and to substitute for climate inaction, elsewhere. In some quarters, this has been greeted with dismay. While we are sympathetic to the EU’s objective, we argue that its current approach is flawed. In contrast to other observers, we do not condemn the EU on the basis that its approach is unilateral, extra-territorial or liable to infringe the sovereignty of other states. We argue instead that in its current guise, the aviation decision may not sufficiently reflect or give adequate weight to the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRRC). This is a key component of international climate change law and while its meaning and implications remain contested and vague, it makes it clear that developed countries should take the lead in addressing the causes and effects of climate change. We argue that the concept of CBDRRC retains relevance in the context of unilateral action, and that EU policy should be interpreted, applied and where necessary adjusted in the light of this principle to ensure that it is given proper weight. We argue that it is possible to achieve an alignment between CBDR and the principle of non-discrimination which is found in many parts of international law.

1. Introduction

This paper focuses upon the increasing propensity of the EU to engage in climate change unilateralism.1 EU climate unilateralism consists of two key components.

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First, it extends the reach of EU climate change law beyond the borders of the EU and regulates GHG-generating activities that may be viewed as taking place abroad. Second, this geographical extension in the scope or reach of EU climate change law is contingent in the sense that the EU may agree to waive the external application of its climate change law if adequate climate change regulation has been put in place internationally or by other states. EU climate unilateralism is most apparent in the recent revisions to the EU’s emissions trading scheme (ETS). Four examples are briefly set out below.

2. EU Climate Unilateralism in the EU-ETS

First, the EU decided in 2008 to include aviation emissions in the ETS, and to include all emissions generated by flights that arrive in or depart from the EU.\(^2\) This includes emissions that are generated outside of EU airspace and consequently airlines will be obliged to acquire emissions allowances also for those parts of their journeys that take place abroad. It is said that on a flight from San Francisco to London, 29% of emissions will occur in U.S. airspace, 37% in Canadian airspace and 25% over the High Seas. Less than 9% of emissions will take place in EU airspace.\(^3\) Nonetheless, the airline will be obliged to surrender allowances under the ETS for each tonne of carbon that they emit, regardless of where these emissions take place. We return to consider the aviation example in more depth below.

Second, the EU is actively contemplating the inclusion of maritime transport emissions in the ETS in a similar way. Unless the international community has approved an agreement by the end of 2011 that includes international maritime emissions in its reduction targets, the Commission should put forward a proposal to

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1 For another recent contribution on this theme see: Shaffer, Gregory C. and Bodansky, Daniel, Transnationalism, Unilateralism and International Law (August 31, 2011). Transnational Environmental Law, Forthcoming; Minnesota Legal Studies Research Paper No. 11-34. Available at SSRN: http://ssrn.com/abstract=1920470
2 See Directive 2008/101 and Articles 3a-3g and 25a of the consolidated version of Directive 2003/87. This is subject to only limited exemptions laid down in Annex I of Directive 2003/87.
include these emissions in the EU scheme. The framework for measuring and assigning emissions has yet to be agreed.

Third, the recently revised emissions trading directive creates a legal framework for its possible extension to imported products in energy-intensive industries in the event of carbon leakage. It falls to the European Commission to assess the situation for sectors exposed to a significant risk of carbon leakage and to put forward appropriate proposals to include the relevant imported products in the ETS. Although no proposals of this kind have as yet been introduced, a framework for a possible extension of this kind is in place.

Finally, from the start of 2013, the EU has prohibited the use of Certified Emissions Reductions (CERs) from new Clean Development Mechanism projects, except in so far as these projects are situated in Least-Developed Countries or originate in a

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4 See recital 3 of Directive 2009/29. The stated aim is that the proposed measure should enter into force by 2013. The recital goes on to say that a measure of this kind should reduce the negative impact on the EU’s competitiveness of including maritime emissions in the EU’s emission reduction commitment, while also generating environmental benefits. The EU has adopted unilateral measures in relation to shipping pollution previously. See, for example, Directive 2005/33.

5 The Commission’s ‘Roadmap’ on measures to include maritime transport emissions in the ETS suggests that all ships visiting EU and EEA ports would be included (at: http://ec.europa.eu/governance/impact/planned_ia/docs/2012_clima_001_greenhouse_maritime_transport_en.pdf), p. 1. This raises the question of whether ships departing EU ports for countries which have not signed up to an international agreement and who have not adopted domestic measures to reduce the climate change impact of shipping would be included as well. For a good discussion of the many issues arising see, CE Delft, ‘Technical support for European action to reducing Greenhouse Gas Emissions from maritime transport (December, 2009)

6 Directive 2003/87 (as amended), Article 10b(1)(b). Carbon leakage occurs when there is an increase in emissions in one country as a result of steps taken to reduce emissions in another country. If EU manufacturers were to buy proportionately more foreign steel due to the increase in price of European steel due to the ETS, this would generate carbon leakage. Where leakage occurs, it reduces or eliminates the emission reduction gains associated with policies put in place by one country. The EU emissions trading directive includes a threshold for assessing whether a sector or sub-sector is exposed to a significant risk of carbon leakage. This is based on calculating ETS-driven increases in production costs and intensity of trade with third countries. See Article 10a(14-17).

country that has concluded an agreement with the EU regulating the level of their use.  

In each of these examples, EU climate unilateralism is contingent rather than absolute. This is because the geographical extension, or externalization, of the ETS to foreign goods or services can be avoided if the goods or services are subject to adequate climate regulation, be it internationally or on the part of other states. In this sense, the EU may be viewed as a ‘norm entrepreneur’ in that the contingency inherent in its application of EU norms may serve to encourage norm elaboration elsewhere. For example, the extension of the ETS to maritime transport depends upon there being no suitable international agreement in place. The EU has hinted that it does not regard recent measures adopted by the International Maritime Organization as going far enough to obviate an ETS extension of this kind. For imported products in sectors exposed to carbon leakage, geographical extension of the ETS may be avoided if binding sectoral agreements are concluded which lead to global GHG emission reductions of the magnitude required to address climate change effectively.

The contingency that characterizes EU climate unilateralism is key to understanding and evaluating the EU’s approach. We will look at EU climate unilateralism more closely and provide an initial evaluation of it by looking at the aviation example in more depth. We have chosen to focus upon this example because it is already enshrined in EU legislation and is due to take imminent effect. The EU’s aviation

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8 Article 11a(5) Directive 2003/87 (as amended). CERs may also be used for compliance purposes in the ETS in the event that an international agreement on climate change is concluded. This article puts in place a framework for moving towards a Sectoral Crediting Mechanism which could operate on the basis of an emissions baseline which is more ambitious than that represented by a business as usual approach.


10 According to the EU, the recently agreed IMO measures would lead to an emissions reduction of 25-30% from shipping by 2030 relative to a business-as-usual baseline. This contrasts with the EU’s goal of achieving a 40% reduction by 2050 compared to 2005. This Climate Change Commissioner has recognized that the IMO measures are an important and positive first step but adds that the EU ‘remains fully committed to keep addressing this issue at all levels and international fora’. She also adds that progress on agreeing market-based measures for maritime transport in the IMO needs to be pursued.

decision already forms the subject matter of an action for judicial review which is currently pending before the Court of Justice. The Advocate-General’s opinion in this case was issued on 6th October, 2011. We will refer to this, and draw upon it, in the analysis below. While a number of environmental NGOs have spoken out in favour of the EU’s approach, the EU’s aviation decision has provoked a vocal and in the main critical reaction from the private sector and by many powerful states.

3. EU Climate Unilateralism: The Example of Aviation

i. Background

Aviation produces around 2.5% of the world’s GHG emissions, with international aviation responsible for around 55% of this. Aviation emissions are increasing rapidly, at a rate of around 3-4% per year.

International aviation emissions are essentially unregulated at the international level. While for developed countries, domestic aviation emissions are counted as part of that country’s emissions for the purpose of their international emission reduction commitments, international aviation emissions are not. There is not even an settled framework at the international level for assigning responsibility for international aviation emissions to specific countries.

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13 The Aviation Law Prof Blog is a good place to keep up with what states and other actors are saying about the EU’s aviation decisions: http://lawprofessors.typepad.com/aviation/. There have also been frequent reports in the press. A number of environmental groups intervened on behalf of the EU in the case pending before the Court of Justice. This included WWF-UK, the European Federation for Transport and Environment and the U.S. Environmental Defense Fund and Earthjustice. Jake Schmidt of NRDC has been active in blogging in favour of the EU’s aviation decision. See: http://switchboard.nrdc.org/blogs/jschmidt/.
14 In 2007 according to the International Transport Forum, Reducing Transport GHG Emissions: Trends and Data (2010), p.5. In its fourth report, the IPCC estimated that aviation’s total climate impact resulting from nitrogen oxides emissions and the creation of condensation trails is about 2.7 times the impact of its CO2 emissions alone.
16 The Subsidiary Body for Scientific and Technical Advice of the UNFCCC has recommended that four methodologies for allocating emissions be examined further, but as yet no agreement has been reached. Note though the discussion of the IPCC Reporting Guidelines below.
The Kyoto Protocol states that developed countries shall pursue limitation or reduction of international aviation emissions working through International Civil Aviation Authority (ICAO).\textsuperscript{17} Progress in ICAO has been exceedingly slow. While ICAO recently endorsed an ‘aspirational goal’ of annual fuel efficiency improvements in aviation of 2%, still no binding emission targets have been agreed.\textsuperscript{18}

The aviation sector will be included in the EU emissions trading scheme from the start of 2012.\textsuperscript{19} Subject to limited exemptions,\textsuperscript{20} all flights arriving in or departing from an EU airport will be covered in the scheme. Airlines will have to surrender emission allowances to cover each tonne of carbon dioxide emitted during the entire flight, including those parts of the flight that take place outside of the EU. Because of its broad scope, the European emissions trading scheme has the potential to cover emissions amounting to around 60% of international aviation emissions.

An airline operator may be exempted from the requirement to surrender emissions allowances for flights landing in the EU (but not for flights taking off from the EU), where the airline comes from a country which has itself taken measures to reduce the climate change impact of flights departing from it which land in the EU.\textsuperscript{21}

Exemptions may be granted following consultation with the third country concerned and the EU has insisted that it is ‘ready to engage constructively in such consultations so as to reach agreement’.\textsuperscript{22} At the time of writing no exemptions have been agreed. Ultimately, the Commission will take a decision operating on the basis of the regulatory committee with scrutiny procedure.\textsuperscript{23} According to this procedure, Commission decision-making is overseen by a committee comprising representatives

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\textsuperscript{17} Article 2.2 Kyoto Protocol.
\textsuperscript{18} See ICAO: Resolution A37/19 for a taste of the limited progress so far. This provides that states and international organizations will work through ICAO to achieve a global average fuel efficiency improvement of 2% per annum but it is based entirely on voluntary contributions by states. The EU has entered a reservation in relation to this, stating that ICAO’s ‘aspirational goal’ is insufficiently stringent and reiterating the EU’s goal of achieving a global reduction in aviation emissions of 10% by 2020 compared to 2005.
\textsuperscript{20} See Annex I Directive 2003/87 (as amended).
\textsuperscript{21} Article 25a Directive 2003/87 (as amended).
\textsuperscript{22} See ‘Written Statement of Reservation by Belgium on behalf of the EU, its 27 Member States, and the 17 Other States Members of the European Civil Aviation Conference on Resolution A37-17/2 at: http://www.icao.int/icao/en/assemble/A37/Docs/10_reservations_en.pdf, p. 11.
\textsuperscript{23} Directive 2003/87 (as amended), Article 25a(1).
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of the Member States, and a proposed Commission Decision may be blocked by either the Council of Ministers or the European Parliament.  

The emissions trading directive also provides that if a global agreement to reduce greenhouse gas emissions from aviation were to be concluded, the Commission shall consider whether amendments to the directive are required.

During the first year of the aviation sector’s inclusion in the emissions trading scheme, an overall emissions cap of 97% of historic emissions will be set. After that, the cap will be set at 95%. In the first instance, 85% of allowances will be issued free of charge, with the remaining 15% to be sold at auction by the individual Member States.

ii. Analysis

The EU’s aviation decision has been greeted in the main by dismay. A 25-nation meeting was held in Delhi on 29-30 September, 2011 to protest against the EU measure. The meeting resulted in a joint-declaration by the states present urging the EU to refrain from including non-EU carriers in the EU ETS, and pledging to work together to oppose the imposition of the EU ETS on its carriers. India has signaled its opposition to the scheme in the context of its proposed agenda item on ‘unilateral trade measures’ at the forthcoming seventeenth Conference of Parties to the FCCC (COP-17) in Durban. The U.S. Government has expressed ‘strong concern’ about the aviation decision and has said that it is working to have U.S. airlines exempted

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24 See Article 12 of Regulation 182/2011 preserving the effects of Article 5a of Decision 1999/468 for existing acts putting this procedure in place.
26 The baseline for calculating historic emissions is the average annual emissions during the year 2004-2006. See Article 3c Directive 2003/87 (as amended).
27 See Article 3d(1). Amending legislation would be required to increase the proportion of allowances sold at auction as per Article 3d(2).
28 ICTSD, ‘EU Aviation Emission Levy Critics Join Forces at New-Delhi Meeting’ at: http://ictsd.org/i/news/biores/114819/. It is reported that delegates at this meeting will file a formal complaint at the ICAO Council meeting scheduled to convene in November 2011.
29 Joint Declaration, Argentine Republic, Brazil, Canada, China, Chile, Colombia, Cuba, Egypt, Japan, Republic of Korea, Malaysia, Mexico, Nigeria, Paraguay, Peru, Philippines, Qatar, Russian Federation, Saudi Arabia, Singapore, South Africa, Thailand, Turkey, United Arab Emirates and United States of America, International meeting of ICAO Council and Non-EU Member States on Inclusion of Aviation in EU-ETS, September 29-30 2011
30 Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties, FCCC/CP/2011/INF.2/Add.1, 7 October 2011.
from it. In a radical role reversal, the U.S. Congress has passed a bill to resist the application of the EU measure in the United States. This prohibits U.S. aircraft operators from participating in the ETS, and instructs U.S. officials to negotiate or take any action necessary to ensure U.S. aviation operators are not penalized by any unilaterally imposed EU scheme.

This Congressional Bill condemns the EU’s aviation decision as unilateral, extra-territorial and as infringing directly upon the sovereignty of the United States. We will use these three concepts to begin our analysis of the EU decision.

**Unilateral:** While the EU’s aviation decision operates in pursuit of an internationally agreed objective, it is unilateral nonetheless. Drawing upon Reisman’s understanding of unilateralism, the EU measure is both initiated by an individual participant in the international system and ‘effectively preempts the official decision a legally designated official or agency was supposed to take’. The decision was adopted autonomously by the EU with only limited input by other states, and the EU decision occupies a policy space in which decision-making authority had already been allocated – albeit on a non-exclusive basis - to an international organization (ICAO).

As noted previously, over a period spanning more than fifteen years, this international

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33 The Copenhagen Accord recognizes ‘the scientific view that the increase in global temperature should be below 2 degrees Celsius’ and that in order to achieve this ‘deep cuts in global emissions are required’. See paras. 1 and 2. The EU agrees that ‘to prevent the most severe impacts of climate change, the scientific evidence shows that the world needs to limit global warming to no more than 2°C above the pre-industrial temperature.’ (at: [http://ec.europa.eu/clima/policies/brief/eu/index_en.htm](http://ec.europa.eu/clima/policies/brief/eu/index_en.htm)).
34 Many commentators point out correctly that unilateralism is not an all or nothing concept but that it operates on a spectrum. For an example see D. Bodansky, ‘What’s so Bad About Unilateral Measures to Protect the Environment’ (2000) 11 EJIL 339.
36 Kyoto Protocol, Article 2.2. Advocate General Kokott in Case C-366/10 concluded that ICAO’s competence to take measures to limit of reduce GHGs is not exclusive and that to conclude otherwise would be contrary to the objectives of the UNFCCC and of the Kyoto Protocol. The question of whether the EU should act unilaterally is, according to the Advocate General, a question of expediency which it is for the political authorities of the EU to make a judgment about (see supra n. 12, paras. 175-188 of the Advocate General’s Opinion in this case).
The organization has failed to take any meaningful steps to regulate international aviation emissions.

By including aviation in its ETS, the EU has adopted a unilateral measure of far-reaching significance. The EU has acted to define unilaterally the ‘system boundary to govern aviation emissions.’ In the absence of international agreement, the EU has settled upon a framework that allocates responsibility for aviation emissions to the departure state. Where a departure state fails to take responsibility for regulating aviation emissions, by adopting measures to reduce the climate change impact of ETS-covered flights, the EU as the arrival state asserts a right to step in. It is for the EU to decide, following consultation with the relevant state, whether to grant an ETS-exemption for EU-arriving flights. It is because of the way in which the EU has chosen to draw the system boundary for aviation that its decision is controversial. It is because of this that the measure is said by some to be extra-territorial and to infringe the sovereignty of other states.

Extra-Territorial: The dominant system boundary in the global regulation of GHG emissions is production-based. This allocates responsibility for GHG emissions to the state where these emissions are generated or produced. If emissions are generated in the production of steel in China, it is China that incurs responsibility for these regardless of where the resulting steel is consumed. The influence of this production-based system boundary is apparent in the claim that the EU’s aviation decision is extra-territorial. The EU’s emissions trading scheme now extends to emissions that are generated abroad. Hence, viewed through the lens of a production-based system boundary, which posits the place in which the emissions are generated as the relevant territorial connecting factor, the EU’s decision adopts an extra-territorial approach.

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37 The idea of a system-boundary in this setting is drawn from G.P. Peters, ‘From Production-Based to Consumption-Based National Emission Inventories’ 65/1 Ecological Economics 13.
38 The departure state means the state in which the airport from which the flight departs is situated. The Subsidiary Body for Scientific and Technical Advice of the UNFCCC has recommended that four methodologies for allocating responsibility between states for aviation emissions be examined further, but so far no agreement has been reached.
39 This is by no means uncontested. There is increasing pressure to integrate an element of consumption-based accounting into climate change. See, e.g., Steven J. Davis and Ken Caldeira, ‘Consumption-based accounting of CO2 emissions’ PNAS 2010 : 0906974107v1-200906974.
However, as is clear from the discussion of unilateralism above, the EU has (rightly\textsuperscript{40}) rejected a production-based system boundary for aviation, in favour of an alternative approach. While this alternative approach does seek to allocate responsibility for aviation emissions even where these occur above the High Seas, it does not eschew territoriality but insists rather upon the relevance of a different territorial factor than that privileged by the dominant production-based approach. The territorial connecting factor to which the EU attaches importance is access to the EU aviation market, whether as a departing or a landing flight. Only flights that depart from or land at an EU airport will be covered in the emissions trading scheme. The aviation decision is extra-territorial when viewed through the lens of a production-based system boundary. However, it is merely differently territorial when viewed through a system boundary that posits market access as key.

This argument is in-keeping with the approach adopted by the Advocate General in the pending Court of Justice case.\textsuperscript{41} She concluded that the assertion that the EU has created an extra-territorial rule is ‘based on an erroneous and highly superficial reading’ of the emissions trading directive.\textsuperscript{42} She found that the directive does not contain any extra-territorial provisions in that it does not lay down any concrete rule regulating the conduct of airlines in airspace outside of the EU, but that the directive merely takes account of ‘events that take place over the high seas or on the territory of third countries’.\textsuperscript{43} The Advocate General argues that while the jurisdictional basis of the directive is territorial, given that it applies only to EU-departing and EU-arriving flights, there is nothing to prevent the EU taking into account those parts of a flight that take place abroad. This, she argues, is in keeping with the proportionality principle and with the ‘spirit and purpose of environmental protection and climate change measures’, in a setting in which ‘air pollution knows no boundaries and [in which] greenhouse gases contribute towards climate change worldwide’, having effects everywhere including in the territory of the EU.\textsuperscript{44} Thus, while according to the Advocate-General the basis of the EU’s jurisdiction is territorial, she also relies upon

\textsuperscript{40} There is widespread recognition that a production-based system boundary is not adequate in relation to aviation as many emissions are generated in areas which are not subject to the jurisdiction of any state, for example over the High Seas.
\textsuperscript{41} Case C-366/10 supra n. 12. The Advocate General issued her Opinion (which is not binding on the Court) on 6th October 2011.
\textsuperscript{42} Ibid, para. 144.
\textsuperscript{43} Ibid, para. 147.
\textsuperscript{44} Ibid, para. 154.
the existence of transnational physical spillover effects to justify the EU’s decision to take into account events that take place abroad.

_Sovereignty-Infringing:_ As with the claim that the EU’s aviation decision is extra-territorial, the argument that the decision is sovereignty-infringing rests upon a prior, and in the case of aviation inappropriate, decision to privilege a production-based system boundary. Viewed from this perspective, emissions generated in the territory of one country necessarily fall within the exclusive jurisdiction and sphere of sovereignty autonomy of that state. Any attempt by the EU to regulate these emissions amounts to an illegitimate external encroachment and an attempt to sap the sovereignty of the relevant state.

Viewed from the EU’s perspective, however, the position is different but no less clear. In the absence of an international agreement establishing the system boundary for aviation emissions, the EU has made its own choice. It is this choice that determines the geographical scope of the EU’s regulatory jurisdiction and the global reach of its regulatory powers. The EU’s choice of system boundary may be viewed as ‘polity-defining’, in that it serves to delineate the border separating inside and outside the EU. As such, the EU’s aviation decision is an expression of EU sovereignty and any attempt to constrain the EU’s decisional autonomy could be viewed as infringing upon its sovereignty.

It is therefore the case that both the EU and the U.S. can put forward a credible claim to jurisdiction over the contested aviation emissions. These two polities have settled upon different system boundaries and consequently they demarcate the limits of their sovereignty authority in very different ways. As a result, the sovereignty claims of the EU and the U.S. clash and overlap, giving rise to ‘border conflicts’ of a kind that are all too familiar inside the EU. These border conflicts cannot be settled through recourse to the concept of sovereignty, because they emerge as a result of there being

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46 Ibid. There have also been high-profile conflicts between the EU and its Member States, the EU and the ECHR and the EU and the UN. For a discussion in the area of human rights see: Sabel, Charles F. and Gerstenberg, Oliver H., _Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order_. European Law Journal, Vol. 16, Issue 5, pp. 511-550.
more than one, plausible and overlapping, sovereignty claims. They may be managed in a variety of different ways: through the exercise of material power (for example, through the imposition of economic sanctions), through litigation (for example, the case pending before the Court of Justice), and through dialogue based upon the concept of contingent unilateralism that was highlighted above.

Thus, by contrast to some other observers we are not willing to condemn the EU on the basis that its aviation decision is unilateral, extra-territorial or sovereignty-infringing. In a policy domain that is essentially unregulated at the international level, the EU is using its market power to avoid regulatory ‘liftoff’ and to achieve ‘juridical touchdown’. It is doing so in an area where ‘domestic’ EU regulation can achieve a substantial global reach and in a way that may encourage similar regulatory action elsewhere. We are, however, critical of the EU’s approach in one important respect. Contrary to the European Commission’s recently expressed view, we believe that the principle of CBDRRC is relevant in relation to the EU’s aviation decision and that there is a danger that this decision will be interpreted and applied in a manner that is not in keeping with it. Needless to say, the contours of this principle remain ill-defined and as a result the EU would enjoy substantial discretion in defining what this principle requires and means. The principle of CBDRRC forms the focus for the remainder of this paper.

4. Evaluating the EU’s Aviation Decision from the Point of View of the Principle of Common but Differentiated Responsibilities and Respective Capabilities

In a statement, the China Air Transport Association condemned the EU scheme as contrary to the principle of common but differentiated responsibilities. India has

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also in a recent submission to the FCCC leveled this charge against the scheme.\textsuperscript{50} In the discussion that follows, we will examine the concept of CBDRRC, consider whether it is relevant in the context of the EU’s aviation decision, consider whether this decision sufficiently reflects this principle and explore how best the decision may be adjusted to ensure that it does. We will conclude this discussion by looking briefly at the nature of the non-discrimination principle and by considering the constraints that this may impose on the EU when determining how to ensure respect for CBDRRC.

i. The Principle of Common But Differentiated Responsibilities and Respective Capabilities

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) has underpinned global efforts to address climate change from the very start. The principle finds expression in the Framework Convention on Climate Change (FCCC), and is the basis of the burden sharing arrangements crafted under the FCCC and its Kyoto Protocol. It is also highlighted in numerous decisions of the FCCC Conference of the Parties (COP) as well as in the controversial and non-binding Copenhagen Accord.\textsuperscript{51} While there is strong agreement on the relevance of the principle, there is little agreement about its meaning and legal status.\textsuperscript{52} While it is unlikely that the principle of CBDRRC has acquired the status of customary international law, it seems equally clear that it ought to be ‘taken into consideration’ and ‘given proper weight’.\textsuperscript{53}

At the heart of the concept of CBDRRC in relation to climate change is the idea of the differential treatment of different countries. In keeping with this, both the FCCC and the Kyoto Protocol require that developed countries take the lead in assuming

\textsuperscript{50} Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties, FCCC/CP/2011/INF.2/Add.1, 7 October 2011, p. 6.

\textsuperscript{51} It is worth noting that Rio Principle 7 which represents a soft law articulation of the principle does not include the phrase ‘and respective capabilities’.

\textsuperscript{52} See L. Rajamani, 'The Reach and Limits of the Principle of Common but Differentiated Responsibilities and Respective Capabilities in the Climate Change Regime’ in Navroz K. Dubash (ed.), Handbook of Climate Change and India: Development, Politics and Governance (Earthscan, UK, forthcoming November 2011).

\textsuperscript{53} See the judgment of the ICJ in \textit{Gabcikovo – Nagymaros (Hungary/Slovenia)}, 1997 ICL REP. 15, 24, at para. 140 discussing the role of the principle of sustainable development.
ambitious greenhouse gas mitigation targets. In keeping with this, only developed country parties have agreed to binding emission reduction commitments under the Kyoto Protocol. In this setting, CBDRRC is predicated upon differentiation in favour of all developing states and upon the uniform treatment of developing states.

The future implications of the CBDRRC principle are contested and unclear. Many developed countries are in favour of replacing the Kyoto Protocol with a new instrument that would substitute a regime of *differentiation in favour of developing countries* with a regime of *differentiation between countries*. This would imply a more flexible and evolving categorization of countries that would permit differences within the developed and developing country blocs to be taken into account in fashioning obligations under a future climate regime. Thus, the U.S. for example insists that CBDR ‘inherently recognizes a spectrum or continuum of effort among all countries, not just between categories of countries’. 54 Many developing countries, on the contrary, would prefer to continue with the current model that rests upon the idea that developed countries should assume binding emission reduction targets whereas developing countries should not. 55

The EU accepts that developed countries must lead the way in cutting GHG emissions, but it also insists that ‘[a] significant contribution from developing countries, and in particular from economically more advanced developing countries, is also essential, as many of them are quickly becoming important emitters’. 56 It proposes that developing countries should limit the increase in their GHG emissions through nationally appropriate actions to 15-30% below a business as usual baseline by 2020, insisting that ‘differing national circumstances and stages of development in developing countries require differentiated actions and levels of ambition’. 57 The EU thus situates itself in the differentiation for all countries camp.

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Increasingly relevant also to the discussion of CBDRRC is the concept of ‘no net incidence’. In 2010, the UN Secretary General’s High-level Advisory Group on Climate Change Finance (AFG) was asked to consider ways of mobilizing climate finance in accordance with the Cancun goal of raising $100 billion per year to 2020. While the AFG recognized that carbon pricing of international transportation emissions could be an important source of revenue, it emphasized the need to ensure that any such a scheme entail no net incidence or net incremental costs for developing countries. The concept of no net incidence has gained some traction in recent discussions at the IMO. It has been suggested that the payment of compensation to developing countries impacted by a universal maritime market-based measure could be a way of ensuring respect for the principle of CBDRRC.

ii. Does the Principle of CBDRRC Apply?

While the Commission Staff Working Document that accompanied the proposal for the aviation decision acknowledged the relevance of this principle, it argued that the proposal was ‘fully in line with the principle of “common but differentiated responsibilities” under the UNFCCC’. This issue of substance is one to which we turn below. More recently, however, the Commission has suggested that the principle of CBDRRC is not engaged by the EU’s aviation decision. It argues that this principle applies to states and to the climate measures they take and that the EU-ETS, by contrast, applies to businesses active in the EU market and not to states.

It is our view that this argument is flawed, both in general and specifically in relation to the inclusion of aviation in the ETS. Our first argument is that the EU’s aviation decision applies not only to businesses but also to states. Our second argument is that, in so far as the EU’s aviation decision does apply to businesses, this is not a reason to

58 See for example, MEPC 62/5/1, para. 3.59. It has been suggested that some of the more advanced developing countries, such as China, may choose not to claim their rebate, thus giving effect to the idea of differentiation between all countries rather than simply between different country blocs.

59 SEC(2006) 1684, p. 52. Among the various arguments presented in the Impact Assessment is one that says that the measure is consistent with this principle because the aviation decision is one adopted by a developed country. This might be thought to suggest not so much that the EU measure is consistent with the principle, but that the principle does not apply.

exclude the application of CBDRRC. In other settings, the EU acknowledges that CBDRRC does apply to state measures, even where these state measures regulate or steer business activities.

Our first argument is relatively straightforward, while our second is more difficult to articulate and to understand. Our first argument rests upon the proposition that, contrary to the Commission’s recent claim, the EU’s aviation decision applies not only to businesses but also to states. This is because it provides for the possibility that EU-arriving flights may be exempted from inclusion in the ETS where their state of departure has itself taken measures to reduce the climate change impact of flights. Thus, the nature of the burden imposed by the ETS on businesses will depend in part upon the behaviour of states and upon whether developed and developing countries have themselves taken measures to reduce the climate change impact of flights. The EU’s aviation decision is also addressed to states.

When it comes to our second argument, it should be stressed that neither the nature nor scope of the EU’s CBDRRC argument is absolutely clear. The Commission accepts that CBDRRC applies to states and to the climate measures that they take. And yet, it does not accept that it applies in the case of the ETS even though this is a measure adopted by a state with a view to influencing the behaviour of business.61 By contrast, the EU does accept that the principle of CBDR is relevant when developing countries take climate measures, even where these developing country climate measures aim similarly to influence the behaviour of business. Thus, for example, the EU accepts that CBDRRC would apply when developing countries set or agree to a sectoral emissions baseline for the purpose of a Sectoral Crediting Mechanism.62 Here, the EU stresses that higher capability developing countries would be expected to set more ambitious sectoral baselines and that this would be in accordance with the

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61 Of course the EU is not a state, but it is a state party to the UNFCCC and the Kyoto Protocol and it may be considered as equivalent to a state for the purpose of the discussion here. There is nothing in the Commission’s argument to suggest that it would argue that does not apply because of the distinctive nature of the EU polity.

62 A sectoral crediting mechanism is one that would define an emissions baseline for a particular sector in a developing country and allow for emissions reductions below this baseline to be available for sale on the international carbon market. For a discussion see L. Schneider & M. Cames, ‘A Framework for a sectoral crediting mechanism in a post-2012 climate regime’ (Öko-Institut, 2009) at: http://www.oeko.de/oekodoc/904/2009-022-en.pdf.
To re-iterate then, the EU accepts that CBDRRC applies to developing country climate measures even where these measures are closely tied to the regulation of business activities within the state.

The implications of the EU’s position may be teased out by way of an example. If the EU were to decide to include imported steel in the ETS, thus imposing a burden on steel manufacturers in both developed and developing countries, the EU would consider that CBDRRC does not apply. By contrast, if states were to conclude a global sectoral agreement for steel, the EU would endorse the relevance of CBDRRC and accept that different countries should be treated differently within this agreement depending upon their respective capabilities. In this example, both the ETS and the global sectoral agreement would impose a burden on developing country steel manufacturers but where the burden flows from the EU measure rather than from the global sectoral agreement, according to EU logic, CBDRRC would not apply.

It is difficult to articulate what the normative basis underpinning the EU’s CBDRRC position might be. If developing country measures imposing a burden on developing country businesses implicate the principle of CBDRRC, it is not clear why EU measures which similarly impose a burden on developing country businesses do not. Differentiation in the case of the former would result in the different treatment of businesses from different states. An absence of differentiation in the case of the latter would result in the equal treatment of businesses from different states. It is not clear to us how the origin of the state measure – EU or developing country – could serve to justify this different result.

There is perhaps one argument that the EU could make. This argument would have to be narrowly tailored to aviation and maritime transport and would not be susceptible to generalization in relation to other business sectors such as steel. The EU argues that its aviation decision does not implicate CBDRRC because it applies to businesses ‘active in the EU’. It is possible that the underlying claim is that the EU measure is a developed country measure that only applies to developed country businesses; with

64 In the SCM example, the EU focuses upon respective capabilities rather than historic responsibilities. This is a point that we discuss below in looking at the substance of CBDRRC.
this latter concept being construed by the EU as those businesses that are active in the EU.

An argument of this kind would be difficult to make in relation to an extension of the ETS to imported steel. For steel, the ‘system boundary’ for allocating responsibility for business emissions to individual states has been globally agreed. Like it or not, the agreed system boundary is ‘production-based’ and accordingly emissions generated in the course of producing steel are allocated to the country of production, regardless of where the steel is ultimately consumed. Consequently, an EU measure imposing a financial or regulatory burden on steel imported from a developing country would impose a burden in respect of emissions which are seen as developing country emissions and businesses which seen as developing country businesses.

For international aviation (and maritime transport) the situation is less clear. As noted previously, no system boundary for international aviation has as yet been agreed. Consequently, there is no agreement on what constitutes a developing country business, developing country emissions or a developing country flight. It is therefore arguably open to the EU to draw up a unilateral system boundary which defines all emissions from EU-departing and EU-arriving flights as EU emissions, and all ETS covered flights as EU-flights. On this basis, it would be open to the EU to argue that its aviation decision does not apply in respect of developing country businesses, developing country emissions or developing country flights. If developing country businesses are not implicated, then CBDRRC does not apply.

In the absence of a settled system boundary it is impossible to refute conclusively an argument of this kind. Nonetheless two skeptical observations may be made. First, if this is the basis of the EU’s argument that CBDRRC does not apply, then it would be helpful for this to be clearly and unequivocally expressed. This argument would imply that the EU is asserting that around 60% of all international aviation emissions are to count as ‘EU emissions’ for the purpose of its argument about the scope of application of CBDRRC. It would be important for the EU to maintain a consistent position on this issue when a system boundary for international aviation is finally

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65 Recall that it would do so on the basis that the flight enters the territory of the EU. Third countries would retain sovereignty over their airspace as the EU would not require airlines to act in any particular way in foreign airspace or seek to enforce its aviation decision outside of EU territory.
agreed, and consequently for the EU to accept that more than half of the world’s international aviations emissions should appear on its emissions account.

Second, although there is no settled system boundary in place, according to the Intergovernmental Panel on Climate Change Guidelines (IPCC) for the preparation of GHG inventories and the UNFCCC reporting guidelines on annual inventories, emissions from international aviation should be calculated as part of the GHG inventories of Annex I Parties, although they are excluded from national totals and are reported separately. The reporting of international transportation emissions is based upon the volume of fuel sold in that country for international transportation by air or by sea (bunker fuels). In the case of aviation, because aircraft do not carry more fuel than required, there is a close correlation between this and the emissions generated by departing flights. While a bunker fuel sales methodology would not yield identical results to a methodology based on the place of departure or arrival of a flight, IPCC recourse to a bunker fuel methodology does serve to highlight that any EU claim that emissions from flights arriving in the EU, as well as flights departing from the EU, should count as EU emissions would be out of keeping with current international practice in this respect.

iii. Does the EU’s Aviation Decision Respect the Principle of CBDRRC?

The final Impact Assessment accompanying the EU proposal to include aviation in the ETS states that the measure is ‘fully in line with the principle of “common but differentiated responsibilities under the UNFCCC”’. There are, however reasons to doubt this conclusion and to question the arguments that the Impact Assessment makes.

It was argued above that the EU’s aviation decision applies both to businesses and to states. As a first step, it is necessary to ask whether this decision leaves any room for differential treatment of developed and developing country businesses or developing and developing states.

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The aviation decision is premised upon the equal treatment of all airlines, regardless of the nationality of the airline, and of the point of departure or arrival or the ETS-covered flight. All airlines whose activities fall within the scope of the aviation decision will incur the same obligation in the form of a requirement to surrender one allowance for each tonne of carbon that they emit.\(^{68}\) While a proportion of these allowances will be issued free of charge,\(^{69}\) a significant number will have to be bought at auction. Thus, the burden of surrendering allowances will bring with it a financial cost.\(^{70}\) This financial cost will be borne in part by developing country airlines and by ETS-covered flights which depart from or arrive in the territory of a developing country. The revenues generated by the purchase of allowances at auction will accrue to the administering EU Member State.\(^ {71}\)

In so far as the aviation decision applies to states as opposed to businesses, the matter is less clear cut. As was noted previously, for a third country to gain exemption from the ETS for EU-arriving flights, it is obliged to take to take measures to reduce the climate change impact of these flights.\(^ {72}\) This requirement is noticeably vague. While the Commission’s original proposal suggested that exemption should be conditional upon the adoption of measures which are at least equivalent to the requirements laid down in the directive, this reference to equivalence was dropped by the Council when it reached political agreement on 21 December 2007, and it does not appear in the Common Position adopted on 18 April, 2008. Neither the Commission nor the European Parliament appear to have opposed this change and there is no discussion in the negotiating history to indicate the thinking behind it. It does, nonetheless, remain the case that a reference to equivalence remains in the directive’s preamble which provides:

> If a third country adopts measures, which have an environmental effect at least equivalent to that of this Directive, to reduce the climate impact of flights to

\(^{68}\) See Annex I for a list of the kinds of flights not included, such as training flights or military flights.

\(^{69}\) See Article 3d(2) Directive 2003/87 (as amended). In the first instance 85% will be issued free of charge. This can only be increased as a result of an amendment to the directive.


\(^{71}\) See Article 3d(4) of Directive 2003/87 (as amended) stating merely that Member States should (but not shall) use aviation revenues to tackle climate change in the EU and abroad.

\(^{72}\) Article 25a Directive 2003/87 (as amended).
the [EU], the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country’s measures, after consulting with that country.73

In the light of this, the correct interpretation of the directive is far from clear. On the one hand, it can be argued that the main body of the directive should be read in the light of its preambular text. On the other hand, it can be argued that given the decision of the legislature to remove this reference to equivalence from the main body of the text, it would be contrary to legislative intent to interpret this instrument in a way that suggests that the equivalence requirement remains.

It is our suggestion that if equivalence is the parameter to be used by the Commission in assessing whether to exempt EU-arrival flights, then this has the potential to be contrary to the principle of CBDRRC. Equivalence can be understood in a wide variety of different ways. For example, equivalence may be evaluated on the basis of effort commensurate with resources or on the basis of outcome regardless of the relative effort made. The preamble to the directive seems to exhibit a preference for a outcome based approach, premised as it is upon equivalence in terms of environmental effect. Although the concept of CBDRRC is vague, the idea that all countries should contribute in equal measure to the environmental goal of climate change mitigation is clearly out of keeping with it.

We recognize that in its application to states, the emissions trading directive can be read in a variety of different ways. Any final evaluation of the EU’s aviation decision from the point of view of CBDRCR will depend upon how the criteria for exemption are defined and applied. No exemption has been granted thus far and no guidance has been issued setting out how the Commission will exercise its powers in this regard. While there are tentative signs that the Commission may regard equivalence in terms of environmental effect as the key parameter in this respect,74 we reserve judgment on this point until the relevance and meaning of this concept in this setting become clear.

74 See e.g. EN E-005387/2011 ‘Answer given by Ms. Hedegaard on behalf of the Commission’ where she states that the Commission is currently in discussion with a number of third countries on what may be deemed equivalent measures and that the Commission’s
What is, however, clear to us is that the understanding of the concept of CBDRRC put forward in the Impact Assessment accompanying the proposal for the aviation decision is flawed. Two primary arguments were relied upon in this Impact Assessment in a bid to justify the proposal from the point of view of CBDRRC. Each of these two arguments will be considered and rejected in turn.

First, the Impact Assessment points out that wealthier people fly more and that the growth in flying is a result of people in wealthy households flying more. It argues that ‘far less than 5-10% of the world’s 6.5 billion inhabitants use air transport at least once per year’, and that any increase in ticket prices resulting from the inclusion of aviation in the ETS will be borne predominantly by wealthier segments of the population both within the EU and globally. The implication is that the CBDRRC principle is concerned with differentiation of the burden imposed on different groups of people as well as differentiation as between states.

While we are very sympathetic to the idea that action on climate change should impose a proportionately greater burden on the rich, it is nonetheless the case that the international law principle of CBDRRC is concerned exclusively with the distribution of the climate change burden between different states. The principle emphasizes the need for developed country leadership rather than leadership by the rich, regardless of whether they live in countries that are rich or poor. The EU’s conception of CBDRRC would be strongly resisted by developing states on the basis that the internal distribution of resources and the internal allocation of the burden of climate mitigation are matters of national prerogative and do not properly form the subject matter of a unilateral determination by another state.

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75 Impact Assessment, p. 36.
76 Impact Assessment. It is anticipated that by 2020, assuming 100% auctioning of allowances, a long-haul, return-trip ticket could cost between 7.9 and 39.6 Euros by 2020 based on 100% auctioning of allowances and an allowance price of 30 Euros per tonne. Given that the allowance price is currently around 12 Euros per tonne and auctioning represents only 15%, this is clearly an over-estimate at the current time. See Impact Assessment, supra n. , p. 34.
Second, the Impact Assessment stresses that a larger proportion of the compliance costs associated with the aviation decision will be borne by Annex I carriers as they generally have a higher market share on the routes covered by the scheme. It suggests that the impact on operators from third countries will be ‘modest’. This is a more serious argument and one which is harder to address. Ultimately though we are convinced that this argument which rests on CBDRRC as fact not legal form is one that should be rejected.

This is an issue that is addressed by Christopher Stone in his important paper on the implications and limits of CBDRRC. He points out that the meaning of differentiation is problematic but concludes that because ‘in some manner of speaking, every agreement differentiates’, it is prudent to follow existing literature and to confine CBDRRC to circumstances in obligations are non-uniform in the way that they are formally verbalized, and to leave aside variations that show up only ‘incidentally’ in the impacts that these obligations have.

Here, we agree with Christopher Stone. Our conviction that he is correct rests less upon a concern that the principle in its incidentally differential impact form would be diluted through over-use, than on a concern that in this form the principle rests upon an uncertain and unjustified normative base. The factors that contribute to the factually differential impact of the aviation decision on different countries may or may not be factors that are conceivably relevant to climate change equity or to the CBDR debate.

To illustrate: 98 ICAO states are not currently covered by the ETS either because they do not have a commercial operator with flights to the EU or because they fall beneath

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78 Ibid. The Impact Assessment suggests that the cost for African airlines for departing flights will be between 2 million Euros and 35 million Euros. The higher figure is based on 40$ auctioning of emissions and an allowance price of 30 Euros. See also the presentation by Artur Runge-Metzger where he points out that 98 ICAO states have no commercial operator which will be included in the EU-ETS, all of which are developing countries. 75 of these states have no commercial operator with flights to the EU and 23 states have commercial operators that fall under the de minimis provisions of the EU-ETS and to which it therefore does not apply. Supra n. 60, slide 24.
80 Ibid, p. 277.
the *de minimis* threshold.\(^{81}\) While four *Least-Developed Countries* (Angola, Bangladesh, Ethiopia and Tuvalu) do have national carriers that will be included in the ETS, many much more economically developed countries do not.\(^{82}\) For just under one-third of the countries that do not have a national carrier which operates flights to the EU, this is because all of their national carriers are subject to a safety-driven EU operating ban.\(^{83}\) Where the country’s airlines are subject to an operating ban of this kind, the differential impact of the EU’s aviation decision is a result of safety considerations rather than a result of the consistent and transparent application of criteria connected to relative levels of economic development or to the GHG emissions profile of the relevant state. Where steps are taken to improve the safety performance of operators originating in a given state, these operators may subsequently be included in the ETS, even in circumstances where the indicators that would be used to guide differential treatment in accordance with CBDR have not similarly changed.

The point here is that while it is certainly relevant for the EU to point out that many of the world’s poorest countries do not have airlines that will be impacted by the EU-ETS,\(^{84}\) evidence of incidentally disparate impact is not enough to demonstrate compatibility with the principle of CBDRRC. Consistent respect for this principle would seem to require the elaboration of criteria for assessing the relative responsibilities of different countries and a process for ensuring that these criteria are consistently and transparently applied.

iv. How Could the EU Reform its Aviation Decision to Ensure Respect for the Principle of CBDR?

Given the uncertain and contested content of the principle of CBDRRC, the EU enjoys broad discretion in defining this principle and in designing mechanisms to ensure respect for it. Different mechanisms for inculcating respect for CBDRRC will

\(^{81}\) See sub-paragraph j of the aviation section of Annex I which exempts flights which, but for this point, would fall within this activity, performed by a commercial air transport operator operating either fewer than 243 flights per period for three consecutive four-month periods, or flights with total annual emissions lower than 10 000 tonnes per year.

\(^{82}\) According to our calculations, nearly 50 countries which are not LDCs will not have national carriers included in the EU-ETS.


\(^{84}\) Note, incidentally, that the EU sees the nationality of the airline operator as the relevant factor in linking airlines with countries for the purpose of making this point.
offer different advantages and disadvantages and a number of key considerations should be kept in mind. Among the most important would be the extent of the emissions reach of the EU scheme, its capacity to be action-forcing on the part of other states, competitiveness and leakage considerations and concerns, and fairness in terms of the capacity of the EU measure to respond appropriately to the very different economic and emissions profile of vastly differently situated developing states.

As a preliminary matter, the EU would have to decide which countries are to count as developing countries, and which airlines, emissions or flights are to count as developing country airlines, emissions or flights.

There is no simple answer to the question of how to classify countries as developing countries or not. In view of the arguments that follow, it is our suggestion that this concept be broadly defined to include all countries other than countries that are classified as high-income countries by the World Bank. Needless to say, this will be a controversial stance, not least because on this basis China, the world’s biggest single GHG emitter, would be included on the developing country list.

A broad definition of developing countries is only realistic because of our preferred method for ascertaining which flights are to be considered developing country flights for the purpose of integrating CBDRRC into the ETS. In a manner that is in keeping with existing IPCC international aviation reporting guidelines as well as with the distinction between departing and arriving flights inherent in the EU-ETS itself, it is our suggestion that developing country flights should understood as those flights which depart from a developing country en route to the EU, regardless of the nationality of the airline operating the flight. On this basis, all flights that depart India for the EU would be classified as developing country flights; including flights operated by Air India and flights operated by Air France. This definition of developing country flights would serve to placate competitiveness concerns, as it is premised upon the equal treatment of all airlines regardless of whether they are registered in a developed or developing country.

Preliminary issues aside, there would be a number of options available to the EU in seeking to address CBDRTC concerns. Three options will be set out and evaluated below. It is crucial to emphasise here that none of the three options set out below is
based upon the differential treatment of developing country airlines, while only the first is based upon differentiation in favour of developing country flights.

First, the EU could choose to exempt all developing country flights from inclusion in the ETS; exempting all flights that depart a developing country and land in the EU. This option would score well from the point of view of competitiveness concerns as all airlines flying the same route would be treated in an identical way. It would, however, greatly reduce the emissions coverage of the EU-ETS and it would undermine the action-forcing quality of the directive, by removing any incentive for developing countries to take their own steps to reduce the climate change impact of flights. The broader the definition of developing countries, the more pronounced these concerns would be.

Second, the EU could interpret and apply the existing exemption for EU-arriving flights on the basis of different thresholds for climate action on the part of different states.\(^85\) In keeping with this, the EU could make exemption contingent upon whether the third country in question has taken appropriate measures to reduce the climate impact of flights. In this vein, the EU could either distinguish between broad categories of countries (least-developed, developing, low-income, lower middle-income, upper middle-income and high income), perhaps using existing World Bank classifications to assist it in this respect.

This second option, based upon differentiation in the conditions for exemption, has much to commend it. The exemption of developing country flights would be partial rather than absolute, and dependent upon appropriate climate mitigation measures being put in place by other states. This option would be complex and contested nonetheless. The question of how to share the climate mitigation burden is at the heart of the disagreements that impede progress in global climate negotiations and, as things stand, no operational principles or criteria to guide the distribution of the

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\(^85\) The legality of doing this is by no means clear-cut. After all, although the equivalence requirement is no longer found in the main body of the emissions trading directive, it is still present in the preambular text. Were an exemption decision based on this approach to be challenge before the CJEU, it would be open to the EU to argue that equivalence is not binding upon it as a benchmark for exemption, or that equivalence should be read in the light of the principle and require action which is equivalent in terms of environmental effect, having regard to the historic responsibilities and current capabilities of the country concerned. Nonetheless, the susceptibility of this approach to legal challenge is certainly as argument militating against this second option.
climate mitigation burden have been agreed. In the absence of internationally agreed principles and criteria, it would fall to the EU to elaborate its own framework for determining what is to count as an appropriate policy contribution on the part of different categories of states. As such, this second option would necessitate the EU making another unilateral determination; this time about the climate mitigation burden in international aviation that should attach to different states.

Third, the EU could ensure that all revenue generated as a result of the inclusion of developing country flights in the ETS should revert to developing countries in order to assist them in addressing the causes and/or the effects of climate change. As things stand, this is not the case. There is at present no obligation attaching to EU Member State to hypothecate ETS revenues. Further, there are currently strict limits on the use of CERs in the aviation sector, implying that at least a proportion of the bought allowances required by airlines will have to be bought at auction rather than ‘earned’ through investment in Clean Development Mechanism projects situated in developing states. Given the concentration of CDM projects in a small number of developing countries, including in China which is an upper middle-income country experiencing sustained and rapid growth, we would favour an hypothecation approach. More concretely, we would favour an approach that commits the revenue generated as a result of developing country flights in the ETS to a global fund dedicated to assisting developing countries to tackle the causes and/or effects of climate change. At the Cancun climate talks a decision was taken to establish a Green Climate Fund and this would be the type of destination that we have in mind for international aviation

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86 The aviation directive states clearly that it is for Member States to determine the use made of revenues generated by the auctioning of allowances. It merely adds that Member States should use these revenues for mitigation and adaptation activities at home and abroad, and in relation to adaptation especially in developing countries. See Article 3d(4) and 10c Directive 2003/87 (as amended).

87 The EU Impact Assessment (supra n. 59) claims that inclusion of aviation would create additional demand for Joint Implementation and Clean Development Mechanism projects, and that ‘there may also be positive effects as such projects imply additional investments in green technologies in developing countries’ (p. 52). There are, however, limits on the volume of CERs that can be used in the aviation sector, as elsewhere in the ETS. Thus, airlines will be obliged to purchase a share of their allowances at auction, with money consequently flowing in the direction of the EU Member States. See Article 11a(8) Directive 2003/87 (as amended). Aircraft operators shall be able to use credits up to an amount corresponding to a percentage, which shall not be set below 1.5 %, of their verified emissions during the period from 2013 to 2020. Also, overall use of credits should not exceed 50% of the emissions reductions achieved in aviation by 2020 relative to a 2005 baseline.
What is crucial here is that this solution would imply a degree of redistribution of resources as between different developing countries. The availability of funding would not depend upon the specific contribution made by a single developing country as a result of the inclusion of international aviation in the ETS, but would depend upon the funding priorities and criteria of the funding instrument itself.

v. CBDRRC and the Non-Discrimination Principle in International Law

Before leaving the topic of CBDRRC and turning to our conclusion, we want to say a few words about the concept of non-discrimination which is sometimes cited as an impediment to ensuring respect for the principle of CBDRRC. The concept of non-discrimination is complex and it is given different expression in different legal spheres. The EU’s aviation decision implicates the principle of non-discrimination on grounds of nationality as between airline operators (Chicago Convention and Open-Skies Agreements), services (GATS) and goods (GATT).

It is in our experience invariably the case that the principle of non-discrimination is not absolute. Where it is not subject to explicit exceptions, courts and dispute settlement bodies will tend to write quasi-exceptions in to the relevant text. For example, even when the non-discrimination principle appears to be unqualified, indirect as opposed to direct discrimination will tend to be viewed as susceptible to objective justification on the basis of a range of legitimate concerns. It is also the case that the concept of discrimination is malleable rather than fixed. Thus, the Appellate Body of the WTO has found that the differential treatment of goods coming from different developing countries need not amount to prohibited discrimination where the

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88 At COP 16 held in Cancun, Mexico, from 29 November to 10 December 2010, the COP adopted decision 1.CP/16 in which it decided to establish a Green Climate Fund. See: http://unfccc.int/cooperation_and_support/financial_mechanism/green_climate_fund/items/5869.php.
89 This is implicit also in Artur Runge-Metzger’s slide denying the applicability of CBDRRC in the context of the EU’s aviation decision. See supra n. 40.
90 See, for example, GATT Article XX.
countries in question are differently situated and where the differences in treatment are based on objective criteria which are consistently and transparently applied.\textsuperscript{92}

It would therefore not be appropriate if the EU were to shy away from the challenge of ensuring respect for CBDRRC on the basis that to do so would infringe the principle of non-discrimination. This is most apparent in relation to the third option for reform set out above. An EU decision to hypothecate the revenue generated as a result of including developing country flights in the ETS would not give rise to nationality discrimination in relation to airline operators, services or goods.

More contentiously perhaps, it is also our view that an EU decision to exempt developing country flights from the ETS,\textsuperscript{93} or to differentiate between states in the substantive conditions for exemption that apply, would be compatible with the non-discrimination principle or fall within one of the explicit or implicit exceptions to this principle. A decision of this kind would distinguish between the treatment of flights departing from different countries. Nonetheless, it would be open to the EU to argue that the different treatment of flights departing from different countries should not be viewed as amounting to discrimination on the basis that the different countries are differently situated when viewed from the perspective of CBDRRC, and that these differences in treatment are based on objective criteria that have been consistently and transparently applied.\textsuperscript{94} If this argument did not succeed, it is possible that differential treatment of developing country flights could be viewed as giving rise to indirect discrimination against developed country airlines. It would nonetheless be open to the EU to respond by asserting that in circumstances such as this, indirect discrimination should be viewed as susceptible to objective justification on the basis that the differences in treatment reflect the demands of the principle of CBDRRC.

\textsuperscript{92} EC – Tariff Preferences (GSP) (WT/DS246/AB/R). Here, the AB interprets the ‘enabling clause permitting different treatment of developed and developing country members. See Decision of 28 November 1979 (L/4903), at: http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm. There is even a hint in Shrimp-Turtle (WT/DS58/AB/R) of a suggestion that treating differently situated countries in an identical way could itself amount to discriminatory treatment, thus implying an obligation to take relevant differences into account (para. 165).

\textsuperscript{93} Recall our definition of developing country flights above and remember that this is based on the place of departure of a flight rather than upon the nationality of the airline operating the flight.

\textsuperscript{94} EC – Tariff Preferences (supra n. 92), para. 173.
While we are not asserting that the EU should not take seriously the constraints that the non-discrimination principle implies, we do believe that the EU should endeavor to play an active role in seeking to shape this principle in a way that reflects the importance of the principle of CBDRRC. In the EC – Tariff Preferences (GSP) case referred to above, the EU was vigorous, convincing and successful in putting forward a hitherto unexpected reading of the non-discrimination principle, which ultimately left room for the differential treatment of different developing countries on the basis of differences in their different development, financial and financial needs. Of course the EU may have to experiment with different options for ensuring respect for the principle of CBDRRC in order to ensure an optimum outcome in terms of legality, fairness (including from the perspective of competitiveness and leakage concerns), environmental effectiveness and political feasibility, but it is our view that it would be a mistake to curtail this experimentation on the basis of a cautious reading of what non-discrimination requires.

5. Conclusion

This paper has highlighted the increasingly global reach of EU climate change law. In a manner that is familiar from other areas of EU environmental law, the EU is seeking to exploit its market power to stimulate environmental action elsewhere. The paper has focussed upon the EU’s aviation decision while recognizing that this is the first, concrete, example of a phenomenon that is gaining ground more generally in EU climate change law.

The focus of our analysis has been on the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC). Although the meaning and implications of his principle remain contested and vague, it requires developed country leadership in tackling the causes and effects of climate change, due not only to the enhanced economic capabilities of developed countries but on the basis of their

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vastly greater historic responsibility for producing GHG emissions as well. We argued that this principle is relevant in the context of the EU’s aviation decision and that although the emissions trading directive is ambiguous in at least one key regard, there is a danger that it will be interpreted and applied in a manner that does not give adequate weight to it. We put forward a number of suggestions as to how the possible tension between the EU’s aviation decision and CBDRRC could be reduced.