

MEMORANDUM OF LAW

To: Interested Parties
From: Annie Petsonk, International Counsel, Environmental Defense Fund (EDF)
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QUESTION PRESENTED: Do the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC) and the Meeting of the Parties to the Paris Agreement (CMA) have the legal competence to establish the terms upon which emission reductions may be transferred for use in the International Civil Aviation Organization (ICAO)'s Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)?

ANSWER: Yes. The COP and the CMA not only have the legal competence to establish the terms upon which emission reductions may be transferred for use in CORSIA, they have a legal responsibility to do so in order to maintain the integrity of the UNFCCC and the Paris Agreement, and to fulfill their respective mandates under those agreements.

I. The Convention and the Paris Agreement mandate responsibilities to the COP and the CMA with regard to stabilizing *global* greenhouse gas concentrations and limiting the *global* temperature increase – no sector is carved out of the COP/CMA Responsibilities.

The Objectives of the Convention and the Paris Agreement are to stabilize *global* greenhouse gas concentrations in the atmosphere, and to limit the *global* temperature increase, and no emitting sector is exempt or carved out from these objectives.¹

The Convention establishes the COP as its supreme body; the Paris Agreement establishes that the COP will serve as its supreme body; and both instruments mandate responsibilities to the COP and the CMA to pursue their objectives. Nothing in the Paris Agreement or the UNFCCC carve out any emitting sector from the purview of the COP/CMA responsibilities.

¹ Article 2 of the Convention provides, "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner." (emphasis added)

Article 2.1(a) of the Paris Agreement provides, "1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

- (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;"

Article 7.2 of the Convention specifies broad powers and mandates for the COP. It provides, “The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention *and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.* To this end, it shall: ...

(d) Promote and guide, *in accordance with the objective and provisions of the Convention, the development and periodic refinement of comparable methodologies, to be agreed on by the Conference of the Parties, inter alia, for preparing inventories of greenhouse gas emissions by sources and removals by sinks, and for evaluating the effectiveness of measures to limit the emissions and enhance the removals of these gases;*

(e) Assess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, *the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved;*” ...

(g) Make recommendations on any matters necessary for the implementation of the Convention; ...

(l) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies; and

(m) Exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.

Thus, it is wholly within the competence and responsibility of the COP to prepare comparable methodologies – including guidance on cooperative approaches – that enable evaluation of the effectiveness of measures to limit emissions, even if those measures are, like CORSIA, developed by another UN body. The COP can ask ICAO for information to help it assess whether the objective of the Convention is being met. And because using a single set of reductions twice – once to meet UNFCCC/Paris objectives, and a second time to meet CORSIA responsibilities -- would undermine “the achievement of the objective of the Convention,” it is wholly within the COP’s purview to exercise the function of requiring corresponding adjustments in the case of transfers to CORSIA. Moreover, the COP has the responsibility to assess the extent to which progress towards the objective of the Convention is being achieved. That responsibility covers all progress. There is no carve-out preventing the COP from assessing actions undertaken by other UN bodies that address greenhouse gas emissions – in fact, the COP is specifically required to seek and utilize information from ICAO.

II. The Convention and the Paris Agreement grant other UN bodies observer status, and the COP has directed Annex I Parties to pursue limitation of bunker fuel emissions in ICAO and IMO,

but neither the COP nor the CMA has ceded its responsibilities with regard to the overall objectives of the climate agreements.

Both the Convention and the Paris Agreement expressly grant other UN bodies the right to participate in meetings of the Convention and the Paris Agreement as observers.² But nothing in the Convention or the Paris Agreement relinquishes to these other bodies the core responsibilities of the COP and the CMA with regard to evaluating the effectiveness of measures to limit emissions or assessing the extent to which progress toward the objective of the Convention is being achieved.

In 1997, after the COP failed to reach agreement on a methodology for allocating to national totals the emissions of greenhouse gases from ships and aircraft in international transport, the COP directed, in Article 2.2 of the 1997 Kyoto Protocol, that “The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.” But nothing in this Article 2.2 relinquishes the COP’s responsibilities for undertaking decisions necessary to promote the effective implementation of the Convention. Ensuring rigorous accounting for reductions, including reductions used in CORSIA, falls squarely within the effective implementation of the Convention, particularly with regard to the COP’s mandate to assess “the extent to which progress towards the objective of the Convention is being achieved.” In fact, without rigorous accounting for all transferred reductions, including those used in CORSIA, it will not be possible for the COP to make this assessment.

Moreover, while the ICAO Assembly in 2016 formally “recogniz[ed] that the work related to a global MBM scheme for international aviation and its implementation will contribute to the achievement of the goals set out in the Paris Agreement,”³ it did not and could not arrogate to itself the determination of the extent to which a global MBM scheme in fact helps progress toward the objective of the Convention. That responsibility lies with the COP.

III. It is within the legal purview and responsibility of the CMA, in implementing the Framework for Transparency of Action and the Global Stocktake under the Paris Agreement, to require rigorous accounting, including corresponding adjustments, for reductions used in CORSIA, because absent such bookkeeping, the CMA will not be able to take full stock of climate change action in light of the objective of the Convention.

² UNFCCC Article 7.6: “6. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers.” Paris Agreement Article 16.8: “8. The United Nations and its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not party to the Convention, may be represented at sessions of the Conference of the Parties serving as the meeting of the Parties to this Agreement as observers.”

³ ICAO Assembly Resolution 39-3, preambular paragraph 13 (2016).

Article 13.5 of the Paris Agreement provides: “The purpose of the framework for transparency of action is to provide a clear understanding of climate change action *in the light of the objective of the Convention* as set out in its Article 2, *including* clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, *to inform the global stocktake under Article 14.*” (emphases added)

Nothing in Article 13.5 requires the Framework for transparency of action to exclude actions undertaken in ICAO. While Article 13.7 directs reporting by Parties, Article 13.8 specifically encourages United Nations specialized organizations and agencies, which could include ICAO, to support these efforts.

Moreover, Article 13.5 specifically directs that the purpose of this understanding is to inform the global stocktake under Article 14. Article 14, in turn, provides that “1. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.” Article 14 also provides that the stocktake shall inform Parties in enhancing their actions and in enhancing international cooperation. So, the stocktake must take into account international cooperation – including cooperation with ICAO – in order to assess collective progress. The CMA cannot complete its stocktaking responsibilities without transparency and rigorous bookkeeping for transfers to CORSIA, because in the absence of such bookkeeping, it will not be able to discern the net climate benefit, if any, of the international cooperation under CORSIA.

While some have suggested that corresponding adjustments of transfers to CORSIA can only be required for units originating within the scope of NDCs, Article 13.5 makes clear that transparency of action is much broader, since it encompasses all climate change action in light of the objective of the Convention. Had Article 13.5 been intended to cover only reductions originating inside NDCs, it would have said so. Instead it uses the term “including” before “tracking of progress towards NDCs (and adaptation actions,” specifying that those are two items among the full panoply of climate change actions about which understanding is needed in order to inform the global stocktake. That broader purview necessarily includes reductions originating outside of NDC scopes, since those reductions can also help achieve the objective of the Convention – and allowing them to be used twice (once in the Paris context, and again toward CORSIA goals) would not.

Conclusion

Articles 2 and 7 of the UNFCCC, and Articles 2, 13, 14, and 16 of the Paris Agreement, make clear that it is entirely within the legal purview and responsibility of the Conference of the Parties to the UNFCCC, on its own and when it is serving as the Meeting of the Parties to the Paris Agreement, to require transparent accounting, including corresponding adjustments, when emission reductions are transferred from UNFCCC/Paris Parties to airlines participating in CORSIA. Indeed, it would not be possible for the COP/CMA to fulfill their responsibilities toward assessing, stocktaking, and achieving the objectives of the instruments without such transparent adjustments.