

What is the Legal Basis for the Use of Certified Emission Reductions after 2020?

A Legal White Paper¹

1 May 2018

1. Questions presented

- (a) Is there a legal basis for the institutions of the CDM to remain operational after 2020?
- (b) If so, is there a legal basis for the CDM's Certified Emission Reductions (CERs) to be used for purposes other than compliance with obligations under the KP, e.g., for compliance with contributions under the Paris Agreement, or for compliance with the International Civil Aviation Organization (ICAO)'s Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)?

2. Legal conclusions

- (a) **The institutions of the CDM.** Article 12.1 of the KP establishes the institutions of the CDM.ⁱ There is no provision in the KP terminating these institutions.ⁱⁱ As explained more fully below, legal views are mixed as to whether Article 12 allows for the ongoing operation of the CDM's institutions absent extension of the KP Article 3 commitment periods.
- (b) **The emissions units generated by the CDM.** The *only* use that the KP establishes for CERs is stated in KP Article 12.3(b): "Parties included in Annex I may use [CERs] to contribute to compliance with part of their quantified emission limitation and reduction commitments [QELRCs] under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties [CMP] to this Protocol."ⁱⁱⁱ Since the KP Article 3 commitments do not extend past 2020, *there is no legal basis for use of Kyoto Protocol CERs for any other compliance purpose after 2020.* The CMP has authorized a platform for voluntary cancellation of CERs; however, because the Doha Amendment amending Article 3 of the Protocol to establish a second commitment period (KP2) from 2013-2020 has not entered into force, ***there is currently no clear legal basis for any compliance use of CERs,*** except possibly by KP Parties that are provisionally applying the Doha Amendment and willing to assume that the Amendment will enter into force.
- (c) The CMP is the principal body with legal competence to decide if the CDM may be used for purposes other than those stated in KP Article 3. The Parties to the Paris Agreement also have responsibilities to decide whether these new uses are consonant with the goals of the Paris Agreement post-2020. To date, the CMP has not authorized any use of CERs other than the platform for voluntary cancellation and KP2 compliance, and the Paris Agreement Parties also have not spoken to the validity of these uses. With regard to the Kyoto Protocol, the clearest solution would be an amendment to Article 12 of the Kyoto Protocol authorizing use of CERs for other specified purposes, e.g., for meeting nationally determined contributions under the Paris Agreement, or for meeting airlines' obligations under CORSIA, and a parallel decision by the Parties to the Paris Agreement bringing these units into the framework of Article 6 of the Paris Agreement, from whence, in accordance with the guidance and accounting and transparency frameworks the Paris Agreement adopts, they could be used for the specified purposes. Short of amendment of the KP, the CMP may also wish to consider whether its role in such a shift could also be effectuated via a CMP Decision.

3. Discussion

Purpose of the CDM. KP Article 2 establishes the “purpose” of the CDM: “The purpose of the CDM *shall be* to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, *and* to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3” of the Kyoto Protocol.^{iv} The use of the word “shall” connotes that the purpose is mandatory, i.e., that *both* prongs of the CDM’s purpose must be met. That is, if there is no possibility for the CDM to assist Parties included in Annex I in achieving compliance with their commitments under Article 3 (because there are no further commitments under Article 3 post-2020, or post-2012), and if both prongs of the CDM’s purpose must be met, then there is no legal basis for the *operation* of the CDM until 2020 in the absence of entry into force of the Doha Amendment. And there is no legal basis for the CDM’s operation post-2020, unless/until the CMP establishes another purpose.

If only one prong of its purpose is met, is that sufficient to justify the CDM’s operation? In 2010, in response to questions pertaining to the possibility of a “gap” in Kyoto commitment periods if the KP CMP failed to amend Article 3 in time to ensure Article 3’s continuous temporal application (or if such amendments were adopted but failed to enter into force in time), the Secretariat of the Kyoto Protocol issued a legal memorandum noting the two prongs of the purpose.^v The memorandum discussed whether both prongs of the purpose must be met such that if there were a gap, the CDM could not continue operation. The Secretariat concluded that if only the first prong – that is, assisting Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention - were met, the CDM could continue to issue CERs after expiry of KP CP during the gap.

This memorandum, while highly significant on the questions considered in this White Paper, is not fully dispositive, since (a) it concluded only that the CDM could continue to issue CERs during the gap (presumably on the assumption that the gap would be rectified by adopting and entry into force of amendments extending Article 3 into a new commitment period), and (b) it was very careful not to draw any conclusions about *uses* of CERs other than those specified in Article 12.

In the Doha Amendments and their accompanying Decisions, the CMP decided that a Party included in Annex I may participate in ongoing project activities under Article 12 and in any project activities to be registered after 31 December 2012, but only Parties with QELRCs may transfer and acquire CP2 CERs.^{vi} The CMP also established a voluntary cancellation platform and encouraged the Executive Board to *explore* options for other uses,^{vii} but to date it has not approved any other such uses.^{viii}

If only one prong of its purpose is met, does that provide a legal basis for the use of CERs for purposes other than assisting Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3 of the Kyoto Protocol?

If the CMP decides to extend the CDM’s authority to continue validating and registering CDM projects, certifying emission reductions or removals, and issuing CERs, the *use* of such CERs for purposes other than KP Article 3 compliance is arguably *ultra vires*^{ix} from the perspective of the KP. The legal basis for such extra-KP use would depend first, on whether the KP CMP adopted an amendment/decision^x approving such use, and second, on whether other agreements and institutions established such a legal basis.

- (i) **CERs toward NDCs under PA 6.2.** There is currently no legal basis upon which CERs can be used by Paris Parties toward NDCs, unless (a) the CMP so decides, and (b) two or more Paris Parties decide to deem CERs to be internationally transferred mitigation outcomes (ITMOs) under PA Article 6.2 and to follow “robust accounting, to ensure, inter alia, the avoidance of double claiming,” consistent with guidance of the Conference of the Parties to the UNFCCC serving as the Meeting of the Parties to the Paris Agreement (CMA).
- (ii) **CERs and PA 6.4.** Under PA Article 6.7, the CMA could adopt, for the mechanism established under PA Article 6.4, rules, modalities and procedures to recognize CERs under this mechanism, provided that provisions were included to ensure that the use of the CERs meets the Article 6.4(d) aim of delivering an overall mitigation in global emissions. (Allowing these CERs to be used on the same basis as for KP Article 3 would not deliver that overall mitigation.) But unless and until the CMA does so, and the CMP authorizes that use, PA Article 6.4 on its own affords no legal basis upon which CERs can be used to fulfil an NDC.
- (iii) **CERs towards CORSIA obligations.** In October 2016, by Resolution A39-3, the Assembly of the International Civil Aviation Organization (ICAO) adopted the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). The Assembly charged its 36-Member Council to develop, with the technical contribution of its Committee on Aviation Environmental Protection (CAEP), the Standards and Recommended Practices (SARPs) and related guidance material for Emissions Unit Criteria (EUC) to support the purchase of appropriate emissions units by aircraft operators under the scheme, taking into account relevant developments in the UNFCCC and Article 6 of the Paris Agreement, for adoption by the Council as soon as possible but not later than 2018.^{xi} The EUC require that emissions units used in CORSIA “Are only Counted Once towards a Mitigation Obligation.”^{xii} The Assembly in 2016 decided that “emissions units generated from mechanisms established under the UNFCCC and the Paris Agreement are eligible for use in CORSIA, provided that they align with decisions by the Council, with the technical contribution of CAEP, including on avoiding double counting and on eligible vintage and timeframe.”^{xiii}

While ICAO itself has legal capacity to define what it means by “only counted once towards a mitigation obligation,” ICAO *does not have legal capacity to define the validity of “emissions units generated from mechanisms established under the UNFCCC”* – only the Conference of the Parties to the UNFCCC, the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, and the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA) have that legal competence. Moreover, the KP CMP and PA CMA also have competence to issue relevant definitions which their Parties must follow. Since all CERs that have been, or could be, certified by the CDM originate in the territories of nations that are Parties to the KP, and since the great majority of ICAO Member States are also Parties to the UNFCCC and/or the KP and/or are also Parties and/or signatories to the Paris Agreement, the legal status of CERs under the KP, as well as any guidance the CMA issues, will be relevant to, and respected by, ICAO.^{xiv} Accordingly:

- i. **CERs originating from projects registered before 2013:** If the Kyoto Protocol is amended to provide that these may be used for CORSIA, or if the KP CMP adopts a decision authorizing their use for CORSIA, then

they could be, provided that the Technical Advisory Body established under A39-3.20(d) and the Council determine that they align with decisions of the Council, with the technical contribution of CAEP, including on avoiding double counting and on eligible vintage and timeframe including provisions on double-counting. To the extent that the EUC are adopted by the Council, these units would need to align with the EUC. No such decisions have yet been taken by either the CMP or the Council.

- ii. **CERs originating from projects registered after 2012 and before 2020:** If both prongs of the CDM purpose from KP Article 2 are mandatory, then these units may not be used for CORSIA, since there is no legal basis for them under the KP, given that the Doha Amendment has not entered into force. If only one prong is mandatory, and the KP CMP adopts a decision authorizing their use for CORSIA, then they could be, provided that the Technical Advisory Body established under A39-3.20(d) and the Council determine that they align with decisions of the Council, with the technical contribution of CAEP, including on avoiding double counting and on eligible vintage and timeframe including provisions on double-counting. To the extent that the EUC are adopted by the Council, these units would need to align with the EUC. No such decisions have yet been taken by either the CMP or the Council.

Conclusion

There is currently no legal basis for the use of Certified Emission Reductions (CERs) issued by the Clean Development Mechanism of the Kyoto Protocol for compliance purposes post-2020. To provide such a legal basis, the Parties to the Kyoto Protocol could amend Article 12 of the Kyoto Protocol authorizing use of CERs for other specified purposes, which might include meeting nationally determined contributions under the Paris Agreement, and/or meeting airlines' obligations under CORSIA, and the Parties to the Paris Agreement could adopt a parallel decision recognizing the validity of these in light of the goals of the Paris Agreement. In the absence of such an amendment, a decision by the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol that post-2020, the CERs may be used for purposes other than those under Article 3 of the KP, i.e., for purposes of the Paris Agreement and CORSIA, paired with a decision by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement affirming the validity of these in light of the goals of the Paris Agreement, would help lift the cloud of legal uncertainty that otherwise hovers over the CERs.

ⁱ KP Article 12.1 (“A clean development mechanism is hereby defined.”)

ⁱⁱ See KP.

ⁱⁱⁱ KP Article 12.3(b). Article 12.8 provides that “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.” But the only “use” of CERs recognized in the KP is KP Article 12.3(b).

^{iv} KP Article 12.2 (emphasis added).

^v See UNFCCC, LEGAL CONSIDERATIONS RELATING TO A POSSIBLE GAP BETWEEN THE FIRST AND SUBSEQUENT COMMITMENT PERIODS (2010), available at <http://unfccc.int/resource/docs/2010/awg13/eng/10.pdf>.

^{vi} Decision 1/CMP.8 ¶13.

^{vii} Decision 6/CMP.11 ¶¶4, 7, and 3/CMP.12.

^{viii} The UNFCCC COP has also welcomed voluntary cancellation by Parties and stakeholders, of CERs valid for KP CP2. Decisions 1/CP.19 and 1/CP.21 ¶106, (“Encourages Parties to promote the voluntary cancellation by Party and non-Party stakeholders, without double counting, of units issued under the Kyoto Protocol, including certified emission reductions that are valid for the second commitment period.” Paragraph 106 almost immediately follows a paragraph, under the same prior-to-2020 heading, as follows: “105. Resolves to ensure the highest possible mitigation efforts in the pre-2020 period, including by: (a) Urging all Parties to the Kyoto Protocol that have not already done so to ratify and implement the Doha Amendment to the Kyoto Protocol; (b) Urging all Parties that have not already done so to make and implement a mitigation pledge under the Cancun Agreements;...” The fact that the encouragement to promote voluntary cancellation of CERs is qualified by the caveat that the encouragement applies to CERs “that are valid for the second commitment period,” coupled with the urging to ratify the Doha Amendment, lends support to the legal view that the CERs are “valid for the second commitment period” only to the extent that there is a second commitment period, and that in the absence of entry into force of the Doha Amendment, no such validity attaches to those CERs.

^{ix} “Ultra vires” means beyond one’s legal power or authority.

^x The question whether such a decision would need to be taken by amendment or by decision of the CMP is an important one, but is not considered here.

^{xi} ICAO Assembly Resolution A39-3, Para. 20(c). https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf

^{xii} https://www.icao.int/Meetings/CORSIAHQ17/Documents/5-1_Explanation_Emissions%20Units%20and%20Registries_V02.pdf. Note that the no double-counting requirement of CORSIA applies to all emissions units which may be considered for eligibility under CORSIA, including “emissions units generated from mechanisms established under the UNFCCC and the Paris Agreement,” which “are eligible for use in CORSIA, provided that they align with decisions by the Council, with the technical contribution of CAEP, including on avoiding double counting and on eligible vintage and timeframe.” ICAO Assembly Resolution A39-3, Para. 21. https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf

^{xiii} ICAO Assembly Resolution A39-3, Para. 21. https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf. Since Assembly Resolution 39-3 para.21 does not speak to emissions units generated from mechanisms established under the Kyoto Protocol, but only under the UNFCCC and Paris, there is a question as to whether CERs established under the KP can be considered to be “generated from mechanisms established under the UNFCCC.”

^{xiv} ICAO A39-3 paragraph 20(c) directs “the Council to develop, with the technical contribution of CAEP, the SARPs and related guidance material for Emissions Unit Criteria (EUC) to support the purchase of appropriate emissions units by aircraft operators under the scheme, taking into account relevant developments in the UNFCCC and Article 6 of the Paris Agreement,” and to do so not later than 2018. https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf