



Utrecht University

CENTRE FOR  
WATER, OCEANS AND  
SUSTAINABILITY LAW

*Overlapping Obligations:*

*CORSIA and the EU Aviation ETS in the “Fit for 55” Package*

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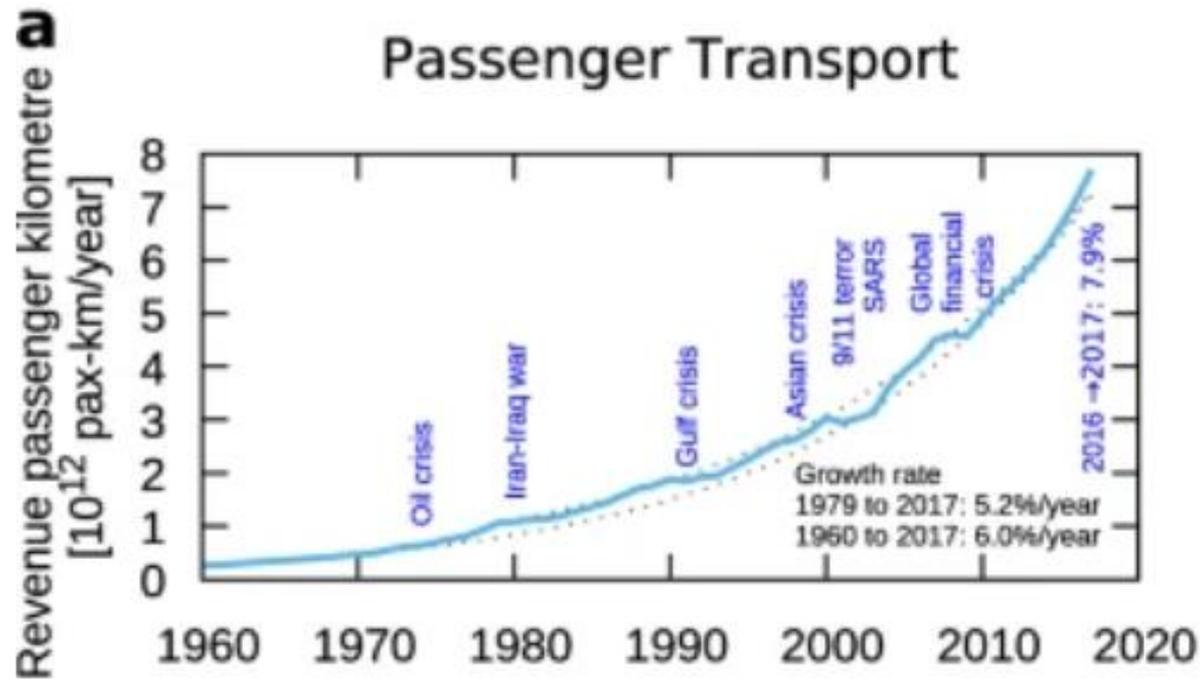
Major new study reveals that aviation could consume up to one-sixth of the remaining temperature budget to limit warming to 1.5°C.

Aviation is responsible for more global warming than implied by its carbon footprint alone.

According to new research funded published today, aviation could consume up one-sixth of the remaining temperature budget required to limit warming to 1.5°C by 2050. The article, published in Environmental Research Letters, suggests that emissions produced by the aviation industry must be reduced each year if the sector's emissions are not to increase warming further.

Source: UK Research and Innovation: <https://www.ukri.org/news/aviations-contribution-to-global-warming-higher-than-expected/>

# Increase in emissions from aviation transport



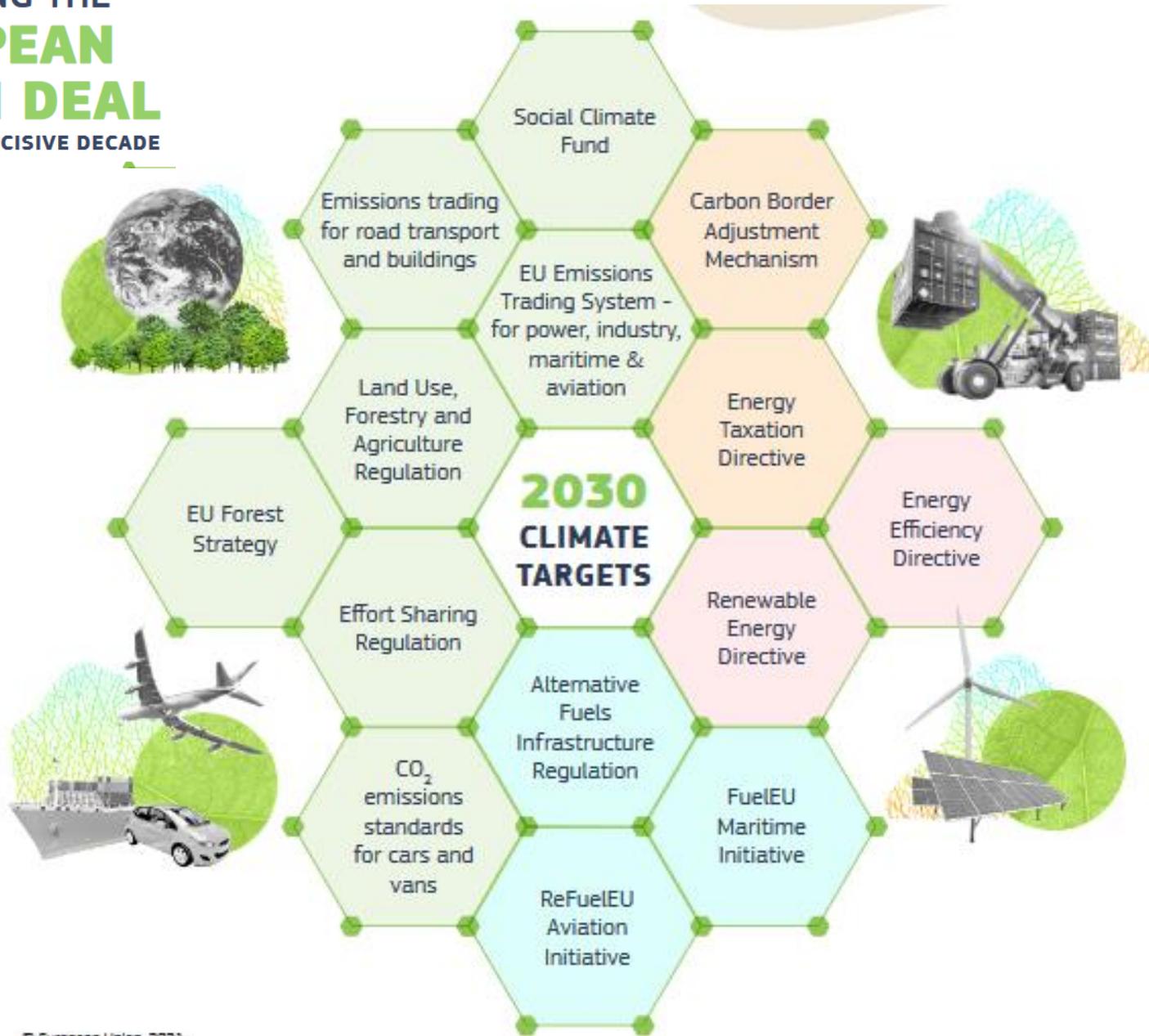
Grewe et al, (2021) 'Evaluating the climate impact of aviation emission scenarios towards the Paris agreement including COVID-19 effects' [Nature Communications](#)

# High EU Climate Ambitions



# DELIVERING THE EUROPEAN GREEN DEAL

THE DECISIVE DECADE



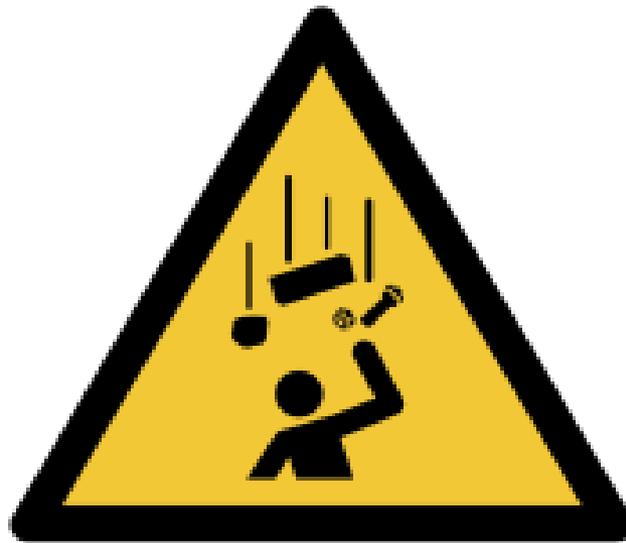
# 2021 Commission Proposal

‘as regards aviation's contribution to the Union’s economy-wide emission reduction target and appropriately implementing a global market-based measure’

(COM/2021/552 final)



How did we get here?



# EU 'ultimatum strategy' and the ICAO

“The Sixth Community Environment Action Programme provided for the Community to identify and undertake specific actions to reduce greenhouse gas emissions from aviation if no such action were agreed within the ICAO by 2002...”



# In the meantime ... unilateral EU Aviation Directive

Directive 2008/101/EC, extending scope of EU emissions trading scheme (ETS) to include international aviation

- Severe political & industry push-back
- *Air Transport Association of America case*



# Conditional stop-the-clock puts pressure on ICAO

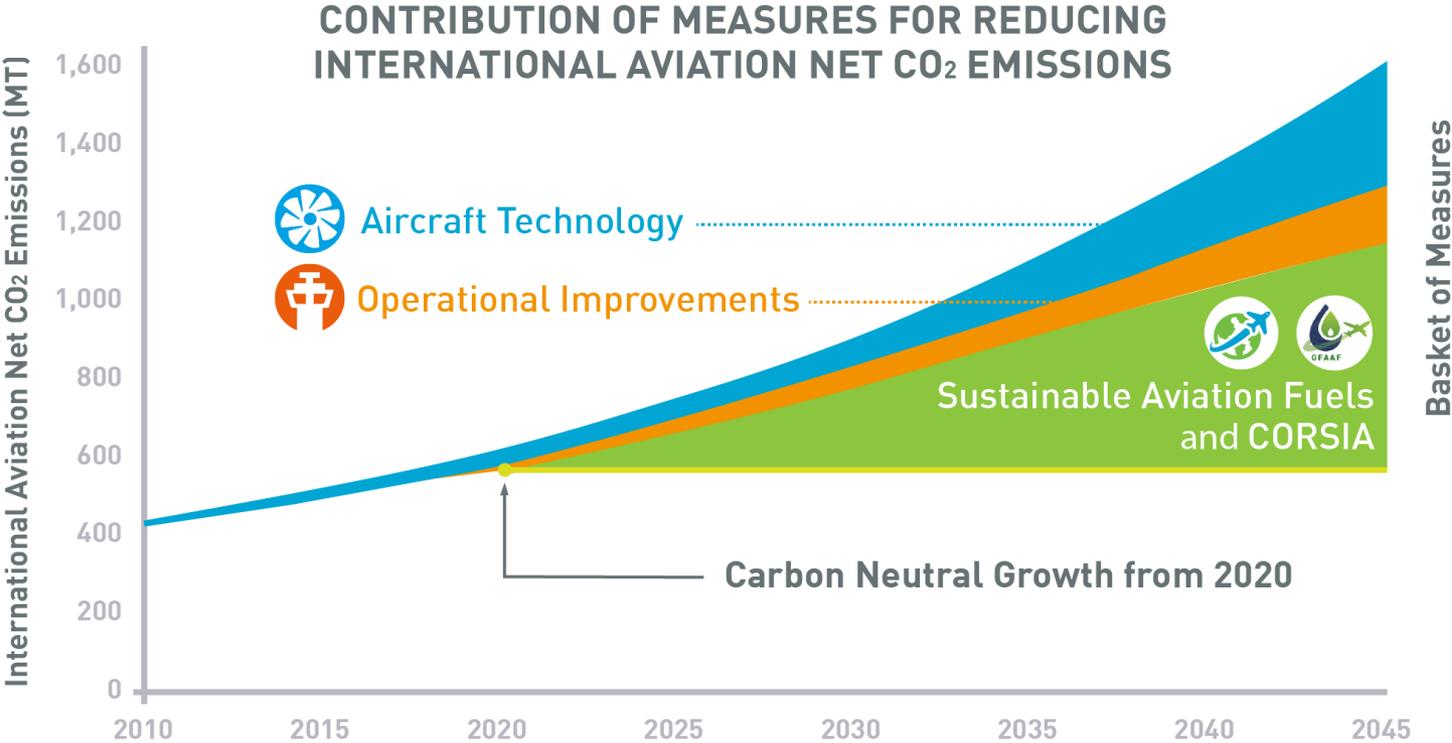
Regulation 412/2014 *temporarily paused* the implementation of the full scope of the Aviation Directive until 2016:

- in an ‘endeavour[...] to secure a future international agreement’ in a ‘mutually supportive’ and non-conflicting manner within the ICAO.
- ‘desirable’, ‘in order to sustain the momentum reached at the 38th Session of the ICAO Assembly in 2013 and facilitate progress at the upcoming 39th Session in 2016’.

# ICAO Resolution A38-18



# ICAO Basket of Measures



# Phase and Routes-Based Approach



- Pilot Phase and First Phase voluntary
- Second Phase obligatory for states with above share of aviation activities (Revenue Tonne-Kilometres)

??

**MY WORK HERE IS DONE**



# EU statement at cop 25 Madrid 2019

‘the current global targets and measures envisaged’  
by the IMO and ICAO ‘**even if implemented in full,  
would fall short of the necessary emissions  
reductions**’ for the EU’s goal of decarbonisation by  
2050.’



# Regulation 2017/2392



‘amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021’:

“The Commission shall ... **examine the ambition and overall environmental integrity of the global market-based measure, including its general ambition in relation to targets under the Paris Agreement, the level of participation, its enforceability, transparency, the penalties for non-compliance, the processes for public input, the quality of offset credits, monitoring, reporting and verification of emissions, registries, accountability as well as rules on the use of biofuels ...**”

# 2021 Commission Impact Assessment

Impact assessment accompanying proposal for directive amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target

- Decision: unilateral exemption of ETS-covered flights from CORSIA
- Apply EU ETS for flights between EEA states & flights to Switzerland and the UK
- Apply CORSIA for other 'international flights'



# Double Burdens: Offsetting

## Cancellation of CORSIA eligible emission units

- Baseline year 2019 (avoid effects of Covid-19)
- Emission Unit Criteria (EUC) (incl. do not net harm, additional, not counted twice)
- Emissions report verified by third party, accredited by a national authority
- Emissions and Verification reports submitted to state in which operator is registered
- ICAO member states conduct order of magnitude checks and submit emissions report to ICAO

# Double Burdens: Cap and Trade

- Fixed number of emission allowances
- Some allowances granted for free / remaining allowances auctioned
- Significant decrease in free-allowances envisioned by 2021 Commission Proposal: full auctioning from 2027
- Monitoring plans & emission reports to be submitted to competent authorities
- Emission reports to be submitted for verification to accredited verifiers

# More Stringent EU Standards: Examples

More limited choice of **accepted monitoring methods** available to operators

- Method 'A' or 'B', while CORSIA SARPs also recognise Block-off / Block-on, Fuel Uplift and Fuel Allocation with Block Hour, considered to be simpler.

Accreditation of verifiers

- Under ETS, each state may appoint **only one accreditation body**, and verifiers may only request accreditation in state of establishment.
- CORSIA: verifiers may seek accreditation in other states

Simplified Reporting

- **EU's Small Emitters Tool (SET)**: 'small operators' with annual emissions of less than 25,000 tonnes may estimate their fuel consumption.
- **ICAO CO<sub>2</sub> Estimation and Reporting Tool (CERT)**: operators with annual emissions below 50,000 tonnes.

# Divergencies in Scope

1. '[T]o incentivise full implementation', operators will only be exempt from CORSIA offsetting requirements on routes to countries not implementing the ICAO scheme until 2026 (rec. 20 and art. 1(9)).
  - After 2027: no exception made for states with **annual aviation activities below a certain threshold**, which are not obliged to participate in phase 2 of CORSIA
2. LDCs and SIDS are in principle exempted from offsetting requirements without a time limitation.
  - **Qualification:** the exemption of LDCs and SIDS is not envisaged to include 'states whose GDP per capita equals or exceeds the Union average' (rec. 21)
  - No exemption is made for **LLDCs**

# Commission Discretion?

- Commission authorised to *exempt* flights from CORSIA offsetting requirements in cases of a ‘significant distortion of competition’ harming EU-based airlines (art. 1(9)).
- Such distortion may arise from ‘less stringent’ application of CORSIA in a third country’s domestic law, or the latter’s failure to enforce the measure in an equal manner.



Who has the mandate to regulate?





# UN Climate Change Regime

## **UNFCCC**

Framework  
Convention

Core goals and  
principles

Division Annex I &  
non-Annex I, II and  
non-Annex  
countries

## **Kyoto Protocol**

Extended up to  
2020

Binding emissions  
targets for Annex I  
countries

+ Financial  
assistance  
obligations for  
Annex II countries

## **Paris Agreement**

From 2020  
onwards

Voluntary  
reduction  
commitments

Ratcheting up  
every 5 years



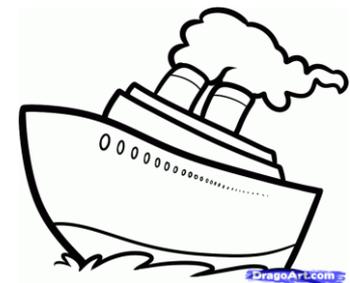
# UNFCCC: Objective

- Article 2: 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**.



# Limited Scope of Kyoto Protocol ... & Paris Agreement?

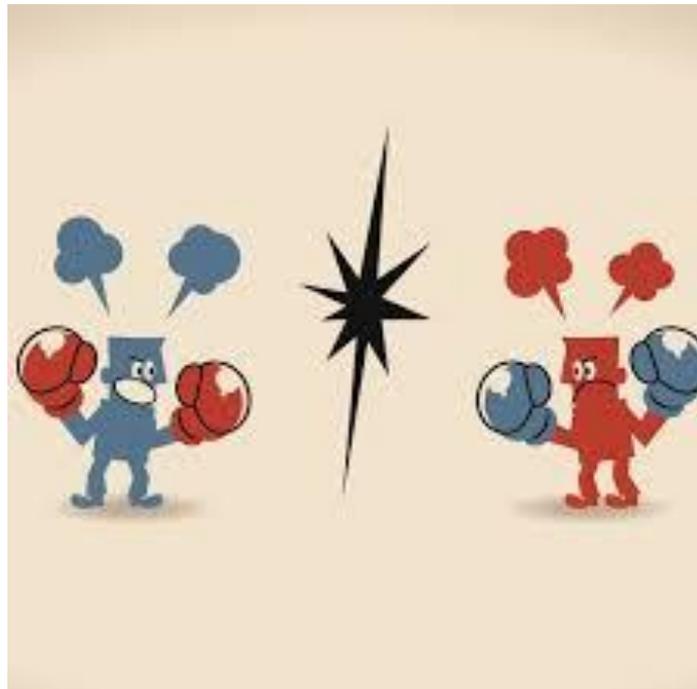
Article 2(2) KP: The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol **from aviation** and marine bunker fuels, working through the **International Civil Aviation Organization** and the International Maritime Organization, respectively.



# ICAO exclusivity clause

## ICAO Resolution 40-19 (para 18):

‘the CORSIA is **the only global market-based measure** applying to CO<sub>2</sub> emissions from international aviation.’



# EU Response

- The EU interprets exclusivity clause ‘in light of the Chicago Convention as well as in line with certain Contracting Parties’ legal obligations to pursue efforts to limit the temperature increase in line with the Paris Agreement on climate change’.
- The EU notes that it is a principle of the Chicago Convention that parties may apply their laws within their territory, as long as this is done on a non-discriminatory basis. This competence extends to environmental measures like the ETS at issue.



# Chicago Convention

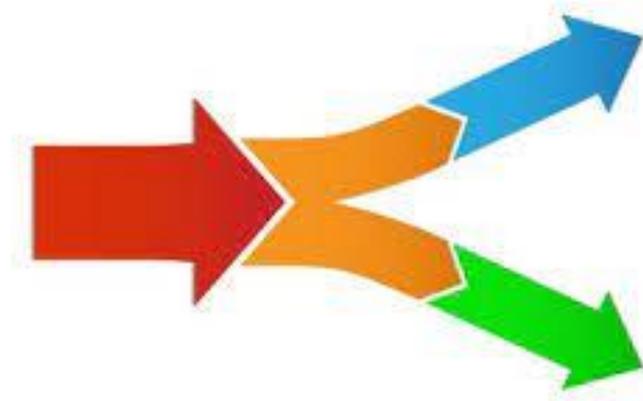
- Article 1: exclusive sovereignty over the airspace above its territory
- Article 6: concessionary principle of market access
- Article 11 entry and exit requirements be 'applied to the aircraft of all contracting States without distinction as to nationality'.
- Article 15: national treatment requirement for charges for the use of airports or air navigation facilities

Final paragraph precludes 'fees, dues or other charges' imposed 'in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon'.

# 'Necessary' diverging standards...?

Article 38 Chicago Convention: 'any Contracting State' '*which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard*' must immediately notify the differences to the ICAO'.

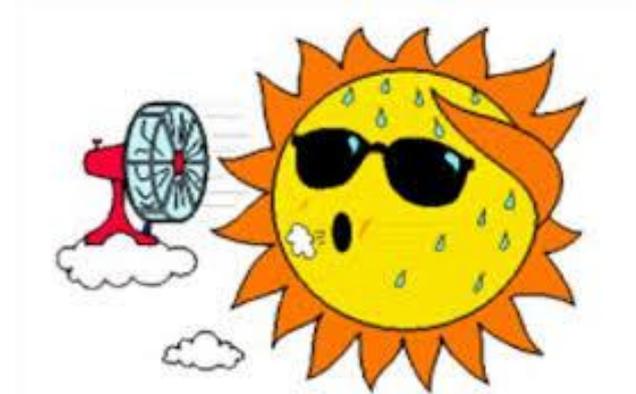
→ The EU continues to make use of this opportunity to '*preserve the Union acquis and future policy space, as well as the Union level of climate ambition...*'.



# Paris Agreement: Article 2 Goals

1. This Agreement, aims to [...]

**(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;**



Is there a real **conflict** between  
**multilateralism** and **climate**  
**protection**?

