A Global Perspective or Domestic Chicanery?

EPA's New Aircraft Rule

Norman A. Dupont and Sage P. Ertman

In the book *One Thousand and One Nights*, a wealthy landowner, Barmecide, pretends to give a beggar a benefit in the form of a lavish dinner, but in fact the "feast" was an illusion. Even the washing of hands before the feast was a mere empty gesture—there was no water provided by a servant, just an imaginary rubbing of hands. The tale gives us the word "barmecide"—meaning "one giving only the illusion of abundance or some benefits." This article examines the U.S. Environmental Protection Agency's (EPA's) adoption of a "standard" set by a UN affiliate, the International Civil Aviation Organization (ICAO), for aircraft emissions of greenhouse gases (GHGs). Considering that EPA's adoption of this standard results in *no* net decrease in GHG emissions from aircraft, is it in reality a barmecide purporting to convey a benefit when in fact none was conveyed?

The International Standard for GHG Emissions from Large Commercial Aircraft

In 1944, 52 nations signed the Convention on International Civil Aviation—the Chicago Convention—so "that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically." ICAO, Convention on International Civil Aviation (Dec. 7, 1944). In 1947, ICAO was established as a specialized agency of the United Nations with a core mandate of achieving "the highest possible degree of uniformity in civil aviation regulations, standards, procedures, and organization." ICAO website, *History of ICAO and the Chicago Convention*.

ICAO currently has 193 participating member nations, including the United States, who help ICAO develop international Standards and Recommended Practices. Although ICAO has often focused on noise-related impacts from aircraft, more recently it has also addressed GHG emissions. For example, in 2017, the ICAO published a volume related to standards for carbon dioxide (CO_2) emissions from international aircraft. ICAO, Annex 16, Environmental Protection Volume III—Aeroplane CO_2 Emissions (July 2017).

Notably, ICAO is not a global regulator. Its standards never supersede national requirements, and sovereign nations, even if they are parties to the convention, always enforce the local and national regulations governing domestic operators of aircraft and airports. *See* ICAO website, *About ICAO.* The Chicago Convention provides that member nations may adopt domestic standards that are more or less stringent, that are different in character, or that comply by different means than the ICAO's.

Transmogrification of International ICAO Standards to a U.S. National Regulation

EPA's regulatory authority over pollution from aircraft comes from section 231 of the Clean Air Act. 42 U.S.C. § 7551. That section provides that EPA shall first conduct an assessment of "(1)(A) the extent to which such emissions affect air quality in air quality control regions throughout the United States, and (B) the technological feasibility of controlling such emissions." If the administrator finds an impact under the initial study, then section 231 gives the administrator power to "issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7571(a)(2)(A). Unlike other aspects of the Clean Air Act that leave room for states (for example, in regulating vehicle emissions), regulation of airplane emissions is exclusively a federal prerogative. *Id.* § 7573.

Section 231 does not refer to international considerations in setting U.S. air standards. Nevertheless, since 1982 EPA has used ICAO standards to set U.S. airplane emissions standards.

Published in *Natural Resources & Environment* Volume 37, Number 4, Spring 2023.

In 1982, EPA adopted a final rule revising its initial 1973 emissions rules for aircraft. In its preamble to the rule, EPA noted that, in June 1981, the ICAO adopted engine emissions standards for many of the same types of engines previously covered by the prior (1973) EPA rules and stated, "[w]ith the establishment of the international standards, the U.S. now has an obligation to frame national standards to be as compatible as possible with the ICAO standards, *consistent with U.S. environmental goals and with EPA's responsibilities under Section 231 of the Clean Air Act*." EPA, Final Rule: Control of Air Pollution from Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 47 Fed. Reg. 58,462 (Dec. 30, 1982) (emphasis added). EPA then noted that its final rule provided "amended U.S. standards [that] are not identical in every respect to the ICAO standards, [but] they are in no case incompatible with [ICAO] requirements." *Id*. at 58,264.

Nevertheless, EPA diverged from and imposed a stricter "implementation date" than did ICAO. In its 1982 Final Rule, EPA selected an "implementation date" of January 1984, whereas the ICAO standard provided an implementation date of January 1986. EPA justified its more rigorous implementation date in part by noting that in meetings with industry representatives, they estimated that "virtually all" affected engines would meet that earlier deadline. *Id*. at 58,467. The Final Rule also diverged from the ICAO standard by *not* regulating two gases, nitrogen oxide (NO_x) and carbon monoxide (CO). In that respect, therefore, EPA adopted a regulation less stringent than the ICAO's 1981 standard.

In 2005, EPA again referenced ICAO standards to justify a new rule adopting the ICAO limitations on NO_x, but it chose to use an older (and now outdated) ICAO standard from 1999 despite knowledge of a newer standard. This was again a departure from the ICAO, which had published a more stringent NO_x standard in 2005 with an effective date in 2007. EPA, Final Rule: Control of Air Pollution from Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 70 Fed. Reg. 69,664 (Nov. 17, 2005).

Then, in 2016, just as the ICAO was putting the finishing touches on its next CO_2 emissions standard for larger commercial aircraft, EPA announced its endangerment finding for commercial aircraft CO_2 emissions. This finding, which mirrors section 231(a)(2)(A) of the Clean Air Act, was the formal determination of the need for a CO_2 standard. The 2016 endangerment finding applied to six "well-mixed" gases, including CO_2, and noted that this finding required EPA to "promulgate aircraft engine emissions standards" at a future date. EPA, Final Rule: Finding That Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated to Endanger Public Health and Welfare, 81 Fed. Reg. 54,422, 54,423 (Aug. 15, 2016). EPA acknowledged that such future standards "may require improved emissions performance over the *status quo*. . . ." *Id*. at 54,425.

EPA worked with the Federal Aviation Administration (FAA) to coordinate U.S. efforts in advocating for the ICAO standards adopted in 2016 and formally promulgated in 2017. In the past, ICAO had set aircraft engine emissions standards for various pollutants such as NO_x, although all such standards are "technology-following standards"—i.e., most aircraft already meet the standards.

EPA Adopts the International Standard in an "End of the Trump Term" Rush

EPA waited four years after the adoption of the 2016 ICAO standard to propose GHG emissions standards for aircraft. In August 2020, EPA emphasized in its summary of proposed rulemaking that "[t]he standards proposed in this rule are the equivalent of the ICAO standards, consistent with U.S. efforts to secure the highest practicable degree in aviation regulations and standards." EPA, Proposed Rule: Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures, 85 Fed. Reg. 51,556 (Aug. 20, 2020). EPA also admitted that its proposed standards would have no impact on the baseline of projected CO_2 emissions: "the proposed GHG standards are not expected to result in reductions in fuel burn and GHG emissions beyond the baseline." *Id*. at 51,583. When it came to a cost-benefit analysis, therefore, the EPA staff simply concluded there would be no real cost impacts for U.S. aircraft manufacturers: "Thus, we do not project a cost . . . *or benefit for* the proposed GHG standards . . . ." *Id*. (emphasis added).

Just as the ICAO was putting the finishing touches on its next CO_2 emissions standard for larger commercial aircraft, EPA announced its endangerment finding for commercial aircraft CO_2 emissions.

EPA acted with unusual alacrity in this rulemaking. Industry's intention to comply with the ICAO standard regardless of U.S. regulation largely explains the speed of this GHG regulation under the Trump administration. In September 2020, EPA held an oral public hearing on its proposed adoption of the ICAO standard. The commentators were divided. While environmental groups such as the Environmental Defense Fund, Ceres, and the Center for Biological Diversity urged more stringent regulations, industry-related groups such as the National Association of Manufacturers, the Aerospace Industries Association, and GE Aviation supported the prompt adoption of the proposed rule. EPA, *Public Hearing Transcript: Proposal—Control of Air Pollution from Airplanes and Airplane Engines*

(Sept. 17, 2020). Notably, a representative from the Aerospace Industries Association commented about industry participation in the international ICAO standard-setting process: "AIA members work directly with ICAO's Committee on Aviation Environmental Protection to develop environmental standards . . . that deliver environmental benefit but *that are also technologically feasible and economically reasonable*." *Id.* at 25 (remarks of David Hyde).

Barely two and a half months after receipt of public comments, and nine days before the end of the Trump administration's term, EPA acted. On January 11, 2021, EPA promulgated the ICAO-equivalent final rule (Aircraft Rule). EPA, Final Rule: Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures, 86 Fed. Reg. 2136, 2151 (Jan. 11, 2021) [hereinafter Aircraft Rule]. EPA rejected more stringent alternatives than the ICAO standard and instead formally adopted that standard wholesale "[i]n order to promote international harmonization of aviation standards and to avoid placing U.S. manufacturers at a competitive disadvantage that would result if EPA were to adopt standards different from the standards adopted by ICAO." *Id.* at 2144. The EPA's "business as usual baseline" projected that "even independent of the ICAO standards, nearly all airplanes produced by U.S. manufacturers will meet the ICAO in-production standards." *Id.* at 2139. It summarily announced that "[t]he EPA is not projecting emission reductions associated with these GHG regulations." *Id.*

The D.C. Circuit panel specifically focused on the D.C. Circuit's 2007 decision regarding a challenge to EPA's 2005 rule regulating NO_x emissions issued under section 231.

EPA had considered two more stringent alternatives to the ICAO standard. As to the first, EPA concluded that it would have no additional benefit beyond the ICAO standard. Regarding the second, EPA conceded that it would have an additional benefit but nevertheless rejected this alternative because "the additional emission reductions are relatively small from this alternative and do not justify deviating from the international standards and disrupting international harmonization." *Id.* at 2145.

Importantly, the alternative that EPA rejected was one the United States proposed to the ICAO some four years earlier. However, the ICAO did not accept that U.S. proposal in 2016. EPA, *Airplane Greenhouse Gas Standards Technical Support Document* 131 (2020) (discussing "Scenario 3").

Thus, although EPA in the text of the Final Rule suggested it had considered alternatives, it appears that the primary alternative, designated as Scenario 3 before the ICAO, had been rejected almost five full years before the Final Rule. Thus, EPA's "consideration" of this Scenario 3 in 2021 was not a genuine evaluation of a realistic alternative but rather window dressing to cover the fact that the United States had effectively rejected Scenario 3 in meetings with the ICAO back in 2016. EPA, in using the ICAO's own assumptions, concluded that Scenario 3 would have resulted in a cumulative reduction in the United States of 110 metric tons of CO_2. *Id.* at 146. Nevertheless, in its new Aircraft Rule, EPA underscored its concern for the domestic aircraft industry: "We anticipate U.S. manufacturers would be at a significant disadvantage if the U.S. failed to adopt standards that are harmonized with the ICAO standards for CO_2 emissions. . . . The action . . . will help ensure . . . acceptance of U.S. manufactured airplanes worldwide." Aircraft Rule, *supra*, at 2138. "EPA reasonably exercised that discretion here, and its selection and balancing of appropriate considerations is entitled to deference."

The Elephant in the Room—Litigation, Argument, and Deference

After EPA issued its final rule, the lawsuits followed. Two separate lawsuits, one brought by the State of California, 11 other states, and the District of Columbia and a second filed by NGO groups, The Center for Biological Diversity, Friends of the Earth, and the Sierra Club, were consolidated before the U.S. Court of Appeals for the D.C. Circuit (Case Nos. 21-1018 and 21-1021). Industry representatives—The Boeing Company and the Aerospace Industries Association of America, Inc.—intervened in the consolidated cases. The United States initially suggested in an early filing that the Biden administration might reconsider the final rule and obtained a stay for that purpose, but then later stated that the new administration would stand behind the Aircraft Rule, and the initial stay was lifted.

A three-judge panel of the D.C. Circuit heard oral arguments on the consolidated cases on October 6, 2022. The judges' questions focused on two principal points: (1) whether there were in fact any statutory standards at all limiting the administrator's discretion to set a standard under section 231 and (2) whether EPA's determination to put off future regulations was a reasonable one, particularly in light of prior precedent. The panel specifically focused on the D.C. Circuit's 2007 decision regarding a challenge to EPA's 2005 rule regulating NO_x emissions issued under section 231. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221 (D.C. Cir. 2007). In that case, the court held that section 231 contained a broad delegation of authority to the administrator that "is both explicit and extraordinarily broad." *Id.* at 1229. However, the court stopped short of concluding that section 231 allows the administrator to issue a standard that results in no net improvement whatsoever. Instead, it concluded in *dicta*: "Moreover, to the extent that § 231 requires rules promulgated thereunder to tighten emission standards, the Final Rule in fact does so by 16%"—i.e., a 16% reduction in NO_x emissions. *Id.* at 1230. The *Nat'l Ass'n* court did not hold that section

231 explicitly required that there be a reduction of emissions under that section; rather, it left that question open for another day.

After oral argument, the *California v. EPA* panel ordered that the consolidated cases be submitted for decision, and there is no date certain as to when it will decide the case. There is, however, an "elephant in the room" about EPA's claims for administrative discretion. As then-judge, now Justice Gorsuch put it, the "elephant in the room" is the continued viability of the *Chevron* doctrine and its standard for administrative discretion. At oral argument, EPA argued explicitly that it had wide administrative discretion to make a determination as to aircraft emissions—that as a matter of law it could select an option that resulted in absolutely no net decrease in emissions from aircraft, notwithstanding its prior endangerment finding.

Justice Gorsuch recently reiterated his long-held concerns about the scope of the *Chevron* doctrine in a case involving a single U.S. former serviceman:

> The same goes for other Americans who still find themselves caught in *Chevron*'s maw from time to time. No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect them. At this late hour, the whole project deserves a tombstone that no one can miss.

Buffington v. McDonough, 143 S. Ct. 14, 22 (Nov. 7, 2022), *certiorari denied* (Gorsuch, J., dissenting).

A Day Late and a Standard Short

A day after oral argument in the D.C. Circuit, ICAO's 41st Assembly on October 7, 2022, adopted a "long-term global aspirational goal" of net-zero carbon emissions from aircraft by 2050. ICAO, *Report of the Executive Committee on Agenda Item 17, Assembly—41st Session* (Oct. 6, 2022). However, ICAO's aspirational goal does not adopt stricter standards, is nonbinding, and contains no mandates, committing only to continuing to lead, study, cooperate, and so forth. In the face of undisputed evidence of climate change and its dramatic impacts on the world, this aspirational goal of the ICAO for some future reduction of aircraft GHG emissions is nothing but a barmecide.

The EPA has recently repeated its wholesale deference to the international standards of ICAO in yet another rule, this time regulating (at the ICAO level) aircraft emissions of fine particulate matter. As EPA again conceded about its new rule, "the standards in this final rule are technology following to align with ICAO's standards and are not expected to, in and of themselves, result in further reductions in PM from these engines." EPA, Final Rule: Control of Air Pollution from Airplanes and Airplane Engines: Emission Standards and Test Procedures, 87 Fed. Reg. 72,312 (Nov. 23, 2022). As to the potential effects of this adoption of the ICAO standard on economically disadvantaged communities located near major domestic airports, EPA simply concluded that "we do not anticipate the standards to result in an improvement in air quality for those who live near airports where these aircraft operate." *Id.* at 72,314. Not surprisingly, this second rule related to PM 2.5 emissions produced a second round of lawsuits filed by the State of California and NGO representatives. Those lawsuits, also pending in the U.S. Court of Appeals for the D.C. Circuit, are currently being held in abeyance pending the court's ruling on the first set of consolidated suits on the GHG emissions rule.

Carte Blanche Adoption of International Standards—Is It Really That Easy?

On its face, the airplane GHG emissions regulation must have looked easy to the Trump-era staff officer at EPA's Office of Air Regulation. Why not take an existing international standard that had already passed muster with the regulated aircraft industry and simply adopt it? Add to that consideration the statement that EPA was attempting to harmonize domestic regulation with international standards to achieve a truly global perspective and that current slogan word, "harmony." What could go wrong? We will have to await the D.C. Circuit's opinion to answer this rhetorical question. There is, however, ample evidence in the current administrative record to suggest that simply adopting an international standard and applying it to domestic rules may not be as straightforward or environmentally efficacious as EPA has suggested.

Mr. Dupont is a partner at Ring Bender LLP in Costa Mesa, California, and is the Publications Service Group officer for the ABA Section of Environment, Energy, and Resources. Mr. Ertman is an associate at Ring Bender LLP in Portland, Oregon. They may be reached at ndupont@ringbenderlaw.com and sertman@ringbenderlaw.com, respectively.