

Transparency Under the Paris Rulebook: Is the Transparency Framework Truly Enhanced?

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Abstract

In December 2018, COP 24/CMA 1.3 adopted the Modalities, Procedures and Guidelines for the Transparency Framework under Article 13 of the Paris Agreement. Commenting on this decision, this article reviews and assesses the rules on transparency in the UNFCCC regime as they will apply during the coming years. Two main themes are identified: differentiation and progression. With regard to differentiation, while the Transparency Framework seeks to apply the same rules to all countries, bifurcation remains in place, in some important respects. With regard to progression, the article identifies four aspects in which the adoption of a uniform set of rules has come at the expense of the stringency of the rules applicable to Annex I parties.¹

Keywords

Paris Rulebook; Enhanced Transparency Framework; reporting; verification; Biennial Transparency Reports; Facilitative, Multilateral Consideration of Progress.

1. Introduction

One of the major tasks of the Ad Hoc Working Group on the Paris Agreement (APA) was the adoption of the Modalities, Procedures, and Guidelines (MPGs)² for the Transparency Framework for Action and Support established under Article 13 of the Paris Agreement.³ The MPGs were adopted by CMA 1.3 on the recommendation of the COP 24, in December 2018. The parties to the Paris Agreement are to follow these MPGs starting with an initial Biennial Transparency Report due at the end of 2024.

This article reviews the transparency arrangements under the Paris Agreement as defined by the MPGs. The application of a common framework to developed and developing countries represents an important step forward. Flexibility is provided to those developing countries which, in their own assessment, need it, but it is confined to non-critical provisions. Beyond this step toward the uniformization of transparency arrangements, however, progress remains limited, and some of the arrangements that are applicable to developed-country parties will be softened. It is not obvious that the

¹ I would like to thank all the participants in the APCEL Workshop on the Implementation Rules for the Paris Agreement held on 24-25 January 2019 at the Faculty of Law of the National University of Singapore, and in particular Christina Voigt, Jake Werksman, and Alexander Zahar, for helpful comments and suggestions.

² Decision -/CMA.1, *Modalities, Procedures and Guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement*, FCCC/CP/2018/L.23 (2018) (henceforth, MPGs).

³ See Paris Agreement, art. 13(13), and Decision 1/CP.21, *Adoption of the Paris Agreement*, FCCC/CP/2015/10/Add.1 (2015), paras. 91-96.

Transparency Framework, as defined by these MPGs, will really provide information in a sufficiently clear and reliable way as to embarrass a state which fails to implement mitigation action consistent with the mitigation target communicated in its NDC.

The article is organized as follows. Section 2 guides the reader through the intricate arrangements on transparency under the UNFCCC, the Kyoto Protocol, and the Paris Agreement. Section 3 explores how the Transparency Framework, as implemented by the MPGs, reduce the ambit of differentiation between developed- and developing-country parties. Section 4 assesses how the transparency arrangements under the UNFCCC regime as a whole enhance or, in some cases, reduce transparency on the mitigation action of, in particular, Annex I parties.

2. Background

Information on states' net greenhouse gas emissions and on the action they implement or envisage to implement is essential to international cooperation. States are less likely to violate their treaty commitments or other obligations on climate change mitigation, or otherwise seek to free-ride on the efforts of other states, if their conduct is well documented and well understood. Transparency facilitates mutual understanding by states; it also enables a range of domestic political and legal processes that push national governments to comply with their international commitments. Accordingly, efforts have been made to promote transparency under the UNFCCC, the Kyoto Protocol, and, now, the Paris Agreement.

2.1. Transparency Arrangements Under the UNFCCC and the Kyoto Protocol

Article 12 of the UNFCCC requires each party to communicate information on the implementation of the Convention to the COP through the Secretariat. The information to be provided includes a 'national inventory of anthropogenic emissions by sources and removals by sinks', a general description of steps taken or envisaged to implement the Convention, and 'any other information that the Party considers relevant to the achievement of the objective of the Convention'.⁴ In line with the approach to differentiation in the UNFCCC,⁵ Article 12 contains more specific provisions applicable only to Annex I parties, including the communication of 'a detailed description of the policies and measures' adopted to implement the party's mitigation commitment and 'a specific estimate of the effects' of such policies and measures.⁶ Annex II parties are to provide, in addition, details on measures taken to provide support to developing-country parties.⁷ The first communication was to be made within six months of the entry into force of the UNFCCC for an Annex I party, within three years for a developing-country party, and at the party's discretion for a Least-Developed Country.⁸

⁴ UNFCCC, art. 12(1). See also *ibid.*, art. 4(1)(a).

⁵ UNFCCC, art. 3(1).

⁶ UNFCCC, art. 12(2). See also *ibid.*, art. 4(2)(b).

⁷ UNFCCC, art. 12(3).

⁸ UNFCCC, art. 12(5).

Subsequent COP decisions adopted further modalities applicable to National Communications⁹ and, for Annex I parties, to annual greenhouse gas inventories.¹⁰ A principle followed in these decisions was that more stringent requirements were to apply to Annex I parties than to non-Annex I parties and, a fortiori, to LDCs. The Kyoto Protocol built on this bifurcated regime by requiring Annex I parties to incorporate supplementary information in their National Communications and annual greenhouse gas inventory in order to track their compliance with their quantified emission-limitation and reduction commitments.¹¹ Yet, the gap between the requirements applicable to Annex I and non-Annex I parties was progressively reduced. For instance, with regard to the frequency of submissions, the Cancun Agreements called on non-Annex I parties (other than LDCs and SIDS) to communicate their National Communications every four years,¹² in line with the requirement applicable to Annex I parties.¹³

To ensure the reliability and quality of the information reported by parties, the COP had the task of assessing the implementation of the Convention ‘on the basis of all information made available to it in accordance with the provisions of the Convention’,¹⁴

⁹ See, in particular, Decision 9/CP.2, *Communications from Parties included in Annex I to the Convention: guidelines, schedule and process for consideration*, FCCC/CP/1996/15/Add.1 (1996); Decision 10/CP.2, *Communications from Parties not included in Annex I to the Convention: guidelines, facilitation and process for consideration*, FCCC/CP/1996/15/Add.1 (1996); Decision 6/CP.3, *Communications from Parties included in Annex I to the Convention*, FCCC/CP/1997/7/Add.1 (1997); Decision 4/CP.5, *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: UNFCCC reporting guidelines on national communications*, FCCC/CP/1999/6/Add.1 (1999); and Decision 17/CP.8, *Guidelines for the preparation of national communications from Parties not included in Annex I to the Convention*, FCCC/CP/2002/7/Add.2 (2002). See also INCFCCC, Decision 9/2, *Guidelines and procedures for first communications*, A/AC.237/55 (18 February 1994). On-going negotiations for a revision of the guidelines applicable to Annex I parties will be continued at the 50th Session of the Subsidiary Body for Implementation in June 2019: see SBI, *Report of the Subsidiary Body for Implementation on its forty-sixth session, held in Bonn from 8 to 18 May 2017*, FCCC/SBI/2017/7 (2017), para. 14, and *Draft guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: UNFCCC reporting guidelines on national communications* (2017), <https://unfccc.int/sites/default/files/revision_of_Annex_i_nc_guidelines_.pdf>.

¹⁰ Decision 3/CP.5, *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual inventories*, FCCC/CP/1999/6/Add.1 (1999); Decision 18/CP.8, *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual inventories*, FCCC/CP/2002/7/Add.2 (2002); Decision 15/CP.17, *Revision of the UNFCCC reporting guidelines on annual inventories for Parties included in Annex I to the Convention*, FCCC/CP/2011/9/Add.2 (2011); and Decision 24/CP.19, *Revision of the UNFCCC reporting guidelines on annual inventories for Parties included in Annex I to the Convention*, FCCC/CP/2013/10/Add.3 (2013).

¹¹ See Kyoto Protocol, art. 7; and Decision 15/CMP.1, *Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol*, FCCC/KP/CMP/2005/8/Add.2 (30 November 2005).

¹² Decision 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, FCCC/CP/2010/7/Add.1 (2010), para. 60(b).

¹³ See, e.g., Decision 9/CP.16, *National communications from Parties included in Annex I to the Convention*, FCCC/CP/2010/7/Add.2 (2010), para. 5.

¹⁴ UNFCCC, art. 7(2)(e).

and thus, by implication, on the basis of a review national reports.¹⁵ COP 1 decided that Annex I parties' National Communications would undergo in-depth review by Expert Review Teams,¹⁶ and COP 5 extended this review process to annual inventories.¹⁷ The Secretariat was to produce a synthesis of National Communications and their review reports for consideration by the COP.¹⁸ The modalities of the technical review of National Communications and annual greenhouse gas inventories have since been reviewed several times, the latest being in 2014;¹⁹ however, their application remains limited to Annex I parties. The review process was extended to cover supplementary information reported by Annex I parties under the Kyoto Protocol.²⁰ ERTs could raise questions of implementation in relation to the Kyoto Protocol, which were referred to the Kyoto Protocol's Compliance Committee.²¹

In 2007, the Bali Action Plan put a new emphasis on the need for 'measurable, reportable and verifiable'²² action on climate change mitigation as part of a 'comprehensive process to enable the full, effective and sustained implementation of the Convention'.²³ Three years later, the Cancun Agreements adopted new reporting arrangements to assess the efforts made by parties to implement their voluntary mitigation commitments (Cancun pledges). Accordingly, Annex I parties would submit Biennial Reports, and non-Annex I parties would submit Biennial Update Reports.²⁴ BRs undergo International Assessment and Review (IAR) consisting of a 'technical review of information' (technical review) and a 'multilateral assessment of the implementation of quantified economy-wide emission reduction targets'.²⁵ By contrast, BURs undergo a less demanding process: International Consultation and Analysis (ICA), consisting of a technical analysis and a 'facilitative sharing of views'.²⁶ ICA is

¹⁵ See the discussion in Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford, UK: Oxford University Press, 2018), 152.

¹⁶ Decision 2/CP.1, *Review of first communications from the Parties included in Annex I to the Convention*, FCCC/CP/1995/7/Add.1 (1995).

¹⁷ See Decision 6/CP.5, *Guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention*, FCCC/CP/1999/6/Add.1 (1999). See also Decision 19/CP.8, *UNFCCC guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention*, FCCC/CP/2002/7/Add.2 (2002).

¹⁸ *Ibid.* para. 4(c).

¹⁹ See, generally, Decision 13/CP.20, *Guidelines for the technical review of information reported under the Convention related to greenhouse gas inventories, biennial reports and national communications by Parties included in Annex I to the Convention*, FCCC/CP/2014/10/Add.3 (2014).

²⁰ See Kyoto Protocol, art. 8; and Decision 22/CMP.1, *Guidelines for review under Article 8 of the Kyoto Protocol*, FCCC/KP/CMP/2005/8/Add.3 (2005); and Decision 4/CMP.11, *Implications of the implementation of Decisions 2/CMP.7 to 4/CMP.7 and 1/CMP.8 on the previous decisions on methodological issues related to the Kyoto Protocol, including those relating to Articles 5, 7 and 8 of the Kyoto Protocol, Part II: implications related to review and adjustments and other related issues*, FCCC/KP/CMP/2015/8/Add.1 (2015).

²¹ Decision 27/CMP.1, *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, FCCC/KP/CMP/2005/8/Add.3 (2005), part VI.

²² Decision 1/CP.13, *Bali Action Plan*, FCCC/CP/2007/6/Add.1 (2007), para 1(b)(i).

²³ *Ibid.*, para 1.

²⁴ Decision 1/CP.16, *supra* note 12, paras 40(a) and 60(c). See also Decision 2/CP.15, *Copenhagen Accord*, FCCC/CP/2009/11/Add.1 (2009), Annex, paras. 4-5.

²⁵ Decision 2/CP.17, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, FCCC/CP/2011/9/Add.1 (2011), para. 23. See also *ibid.*, Annex II.

²⁶ *Ibid.*, Annex IV, para. 3.

conducted ‘in a manner that is non-intrusive, non-punitive and respectful of national sovereignty’.²⁷ One of the outcomes of the technical analysis of BURs is the identification, by a Team of Technical Experts in consultation with the party concerned, of ‘capacity-building needs in order to facilitate reporting’ in BURs.²⁸

There are thus two parallel transparency arrangements under the UNFCCC (Table 1): one, mandatory, directly under Article 12 of the UNFCCC (National Communications for all parties and technical review for Annex I parties only); the other, not legally binding, under the Cancun Agreements (BRs and IAR, including technical review, for Annex I parties; and BURs and ICA, including technical analysis, for non-Annex I parties).²⁹ ‘Technical analysis’ was understood to refer to a facilitative process far less stringent than a ‘technical review’.³⁰

Table 1: Synthesis of current transparency arrangements under the UNFCCC (with references to applicable guidelines).

Transparency arrangements directly under the UNFCCC:

	<i>Annex I Parties:</i>	<i>Non-Annex I Parties:</i>
Reporting ³¹	National Communication (quadrennial) ³² Annual greenhouse gas inventory ³⁴	National Communication (quadrennial) ³³ N/A
Verification ³⁵	Technical review ³⁶	N/A

Additional transparency arrangements under the UNFCCC and the Cancun Agreements:

	<i>Annex I Parties:</i>	<i>Non-Annex I Parties:</i>
Reporting ³⁷	Biennial Report ³⁸	Biennial Update Report ³⁹

²⁷ Ibid., recital 7 before para. 56, and Annex IV, para. 1. See also Decision 20/CP.19, *Composition, modalities and procedures of the team of technical experts under international consultation and analysis*, FCCC/CP/2013/10/Add.2/Rev.1 (2013).

²⁸ Decision 20/CP.19, supra note 27, Annex, para. 15(c).

²⁹ See generally Alexander Zahar, *International Climate Change Law and State Compliance* (Routledge, 2015), 28-62; Sebastian Oberthür, ‘Compliance under the Evolving Climate Change Regime’, in *The Oxford Handbook of International Climate Change Law*, ed. Cinnamon P. Carlarne, Kevin R. Gray, and Richard Tarasofsky (Oxford: Oxford University Press, 2016) 128-133.

³⁰ Decision 2/CP.17, supra note 25, Annex IV, para. 3(a).

³¹ See UNFCCC, arts. 4 and 12.

³² See Decision 4/CP.5, supra note 9. For countries that are also parties to the Kyoto Protocol, see also Kyoto Protocol, art. 7, and Decision 15/CMP.1, supra note 11.

³³ See Decision 17/CP.8, supra note 9, and, on frequency, Decision 1/CP.16, supra note 12, para. 60(b).

³⁴ See Decision 24/CP.19, supra note 10.

³⁵ See UNFCCC, art. 7(2)(e).

³⁶ See Decision 13/CP.20, supra note 19, Annex, parts I, II, III, and V.

³⁷ See Copenhagen Accord, supra note 24, paras. 4-5; and Decision 1/CP.16, supra note 12, paras. 40 and 60(c).

³⁸ See Decision 2/CP.17, supra note 25, Annex I. See also Decision 19/CP.18, *Common tabular format for “UNFCCC biennial reporting guidelines for developed country Parties”*, FCCC/CP/2012/8/Add.3 (2012); and Decision 9/CP.21, *Methodologies for the reporting of financial information by Parties included in Annex I to the Convention*, FCCC/CP/2015/10/Add.2 (2015).

³⁹ See Decision 2/CP.17, supra note 25, Annex III.

Verification ⁴⁰	International Assessment and Review, including a technical review and a multilateral assessment ⁴¹	International Consultation and Analysis, including a technical analysis and a facilitative sharing of views ⁴²
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2.2. The Paris Agreement's Transparency Framework

Article 13 of the Paris Agreement establishes an ‘enhanced transparency framework for action and support’ in order ‘to build mutual trust and confidence and to promote effective implementation’.⁴³ This framework is to ‘be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on parties’.⁴⁴ Accordingly, each party must ‘regularly’ provide ‘a national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases’ and ‘information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4’.⁴⁵ In addition, each party ‘should’ also, ‘as appropriate’, provide information on adaptation.⁴⁶ Lastly, developed-country parties ‘shall’ provide information on support provided to developing-country parties,⁴⁷ whereas the latter ‘should’ provide information on support received and on unfulfilled support needs.⁴⁸

Article 13 leaves room for differentiation. It emphasizes the need to take into consideration ‘the special circumstances of the least developed countries and small island developing States’.⁴⁹ It also indicates that flexibility in the implementation of the Transparency Framework would be provided ‘to those developing country Parties that need it in the light of their capacities’.⁵⁰ The COP decision on the adoption of the Paris Agreement elaborated that this flexibility may relate to the scope, frequency, and level of detail of reporting.⁵¹ In order to support developing-country parties to meet the enhanced transparency requirements, the same COP decision established a ‘Capacity-building Initiative for Transparency’, to be implemented by the GEF.⁵²

Article 13 extends, for the first time, a technical review process to developing-country reporting. Information provided on mitigation and on any support provided to developing countries is to undergo a Technical Expert Review (TER), followed by a Facilitative, Multilateral Consideration of Progress (FMCP).⁵³ However, Article 13 also

⁴⁰ See Copenhagen Accord, *supra* note 24, para. 4-5; and Decision 1/CP.16, *supra* note 12, paras. 44 and 63.

⁴¹ See Decision 2/CP.17, *supra* note 25, Annex II. For the guidelines for the technical review, see Decision 13/CP.20, *supra* note 19, Annex, parts I, II and IV.

⁴² See Decision 2/CP.17, *supra* note 25, Annex IV. See also Decision 20/CP.19, *supra* note 27.

⁴³ Paris Agreement, art. 13(1).

⁴⁴ *Ibid.*, art. 13(3).

⁴⁵ *Ibid.*, art. 13(7).

⁴⁶ *Ibid.*, art. 13(8).

⁴⁷ *Ibid.*, art. 13(9).

⁴⁸ *Ibid.*, art. 13(10).

⁴⁹ *Ibid.*, art. 13(3).

⁵⁰ *Ibid.*, art. 13(2).

⁵¹ Decision 1/CP.21, *supra* note 3, para. 89.

⁵² *Ibid.*, para. 84.

⁵³ Paris Agreement, art. 13(11).

emphasizes that the TER ‘shall pay particular attention to the respective national capabilities and circumstances of developing country Parties’.⁵⁴ For those developing countries that need it, the TER ‘shall include assistance in identifying capacity-building needs’.⁵⁵

The MPGs clarify a number of vague directives agreed to in the Paris Agreement and the COP’s adoption decision, for instance with regard to the nature and extent of the flexibility provided to developing-country parties, to the scope of the reporting commitments, and to the TER modalities. The MPGs are expected to be supplemented with a decision to be adopted at CMA 3, in 2020, which will define common reporting tables and tabular formats, as well as templates for various reports and the modalities for the training of technical experts.⁵⁶ All parties except LDCs and SIDS are required to communicate their first Biennial Transparency Report (BTR) under the Paris Agreement by the end of 2024.⁵⁷ At that time, the Transparency Framework will supersede the reporting arrangements of the Cancun Agreements (second part of Table 1) but co-exist with the other reporting arrangements under the UNFCCC, as shown in Table 2.⁵⁸ COP 24 decided that the parties to the Agreement must follow the MPGs when reporting their annual greenhouse gas inventory under the UNFCCC, and ‘may’ follow the MPGs when reporting overlapping information required by the two treaties in their National Communications. The technical review of the submissions of Annex I parties (i.e. under the UNFCCC) is to follow the MPGs.

Table 2: Synthesis of the transparency arrangements applicable from 2024 onwards to the parties to the Paris Agreement (with references to applicable guidelines).

Transparency arrangements directly under the UNFCCC:

	<i>Annex I Parties:</i>	<i>Non-Annex I Parties:</i>
Reporting	National Communication (quadrennial) ⁵⁹ Annual greenhouse gas inventory ⁶¹	National Communication (quadrennial) ⁶⁰ N/A
Verification	Technical review ⁶²	N/A

⁵⁴ Ibid., art. 13(12).

⁵⁵ Ibid., art. 13(11). This provision builds on the experience of the ICA. See above note 28.

⁵⁶ See MPGs, supra note 2, para. 12.

⁵⁷ Ibid., para. 3.

⁵⁸ See Decision 1/CP.21, supra note 3, para. 98; Decision -/CP.24, *Preparation for the implementation of the Paris Agreement and the first session of the Conference serving as the meeting of the Parties to the Paris Agreement*, FCCC/CP/2018/L.27 (2018), paras. 39-41 (henceforth, *Preparation for the Implementation of the Paris Agreement*).

⁵⁹ See note 32, supra. However, parties may submit their National Communication and their BTR as a single report in accordance with the MPGs for those subjects that are also covered by the National Communication reporting guidelines, with supplemental chapters following the UNFCCC Guidelines. See Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 43.

⁶⁰ See above note 33. See also note 59, supra.

⁶¹ See MPGs, supra note 2, Annex, part II, in accordance with Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 42.

⁶² See MPGs, supra note 2, Annex, part VII, in accordance with Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, paras. 42 (annual greenhouse gas inventory) and 43(c) (National Communication).

Additional transparency arrangements under the Paris Agreement:

	<i>Developed- and Developing-Country Parties:</i>
Reporting ⁶³	Biennial Transparency Reports ⁶⁴
Verification ⁶⁵	Technical Expert Review ⁶⁶
	Facilitative, Multilateral Consideration of Progress ⁶⁷

The BTRs are intended to contribute to documenting the action of parties for consideration by the Global Stocktake under Article 14 of the Paris Agreement.⁶⁸ In addition, recommendations by the TER teams may have implications for the initiation of procedures under Article 15 of the Paris Agreement.⁶⁹

3. Differentiation: Steps Toward Uniform Transparency Arrangements

The Paris Agreement contributes to a trend towards unifying the transparency arrangements applicable to all parties. The Transparency Framework applies the same requirements to all parties, in contrast with the separate rules for Annex I, Annex II, and non-Annex I parties under the UNFCCC. Rather than bifurcation, uniformity becomes the guiding principle, although subject to the qualification that ‘flexibility’ will be granted to those developing-country parties that need it in light of their capacity. It is also subject to exceptions—parts of the rules where bifurcation remains applicable to different groups of parties.

3.1. Provision of Flexibility to Developing-Country Parties in Light of Capacity

The provision of flexibility to those developing-country parties that need it in light of their capacity was inscribed into the Paris Agreement.⁷⁰ A particularly sensitive task for the APA was to define the modalities of this flexibility.⁷¹

While the Paris Agreement does not specify how a need for flexibility is to be determined,⁷² the MPGs provide that such need is to be determined by a developing

⁶³ See Paris Agreement, art. 13(7)-(10).

⁶⁴ See MPGs, *supra* note 2, Annex, parts I-VI.

⁶⁵ See Paris Agreement, art. 13(11)-(12).

⁶⁶ See MPGs, *supra* note 2, Annex, part VII.

⁶⁷ See *ibid.*, Annex, part VIII.

⁶⁸ See Decision -/CMA.1, *Matters relating to Article 14 of the Paris Agreement and paragraphs 99-101 of decision 1/CP.21*, FCCC/CP/2018/L.16 (2018), para. 37(a). See, generally, Alexander Zahar, ‘Collective Progress in the Light of Equity Under the Global Stocktake’, this issue.

⁶⁹ See Decision -/CMA.1, *Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement*, FCCC/CP/2018/L.5 (2018), para. 22(b) (mode 3). See, generally, Christina Voigt, Jacob Werksman, and Gu Zihua, [Article 15 Committee article], this issue.

⁷⁰ Paris Agreement, art. 13(2).

⁷¹ See, e.g., Yamide Dagnet and Kelly Levin, ‘Transparency (Article 13)’, in *The Paris Agreement on Climate Change*, ed. Daniel Klein et al. (Oxford: Oxford University Press, 2017), 305.

⁷² See the discussion in Harro van Asselt et al., *Transparency of Action and Support under the Paris Agreement*, ed. Anju Sharma (European Capacity Building Initiative, October 2016), <https://eurocapacity.org/downloads/Transparency_in_Paris_Agreement.pdf>, 6-7.

country itself.⁷³ The MPGs exclude any review of this act of national determination: the TER is prohibited from reviewing it,⁷⁴ and the question is also beyond the scope of the FMCP.⁷⁵ The determination by a developing-country party that it needs flexibility would most likely not be addressed within the Transparency Framework or the UNFCCC regime,⁷⁶ but rather through domestic political or legal processes.

Nevertheless, in order to reduce the risk of an abusive reliance on flexibility, the MPGs impose certain conditions. First, the party must clearly indicate the provision(s) in relation to which flexibility is required.⁷⁷ Second, it must ‘concisely clarify capacity constraints’ justifying the need for flexibility.⁷⁸ Lastly, it must ‘provide self-determined estimated time frames for improvements in relation to those constraints’.⁷⁹ These requirements indicate that the application of flexibility should be exceptional and temporary. The TER is to verify that these formal procedural requirements have been fulfilled,⁸⁰ although it must not review the justifications or time frames.⁸¹ Nevertheless, a transparent submission on these justifications and time frames could facilitate domestic debates or litigation. Thus, while the Transparency Framework does not review a developing-country party’s determination of a need for flexibility, it does facilitate review of such a claim in other forums.

The MPGs define the provisions in relation to which flexibility is available,⁸² sometimes in the minute detail.⁸³ No flexibility is available with regard to the reporting requirements necessary to assess a party’s progress toward the achievement of its NDC’s mitigation targets.⁸⁴ Likewise, no flexibility is allowed on the frequency of reporting,⁸⁵ with the MPGs confirming the principle of biennial reporting for all countries except LDCs and SIDS, a principle already agreed upon at COP 16.⁸⁶ Flexibility is available for technical provisions regarding the national greenhouse gas inventory,⁸⁷ reflecting the challenges that a fully developed MRV system can present to a developing country. Flexibility in the review and oversight processes is limited to the

⁷³ MPGs, supra note 2, Annex, para. 6.

⁷⁴ Ibid., paras. 6 and 149(e).

⁷⁵ Ibid., para. 189.

⁷⁶ It cannot be excluded that discussions on the use of flexibility could, for instance, take place under the Global Stocktake. See the article by Alexander Zahar in this issue.

⁷⁷ MPGs, supra note 2, Annex, para. 6.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid., para. 146(a).

⁸¹ Ibid., para. 149(d).

⁸² Ibid., para. 5.

⁸³ See, for instance, *ibid.*, para. 192(c), regarding the delay for a party to ‘make best efforts to respond’ to written questions on the FMAP.

⁸⁴ Ibid., paras. 59-103. The only exceptions concern estimations and projections of the effects of actions, policies, and measures: see *ibid.*, paras 85 and 92-102.

⁸⁵ Compare with Decision 1/CP.21, supra note 3, para. 89.

⁸⁶ See Decision 1/CP.16, supra note 12, paras 40(a) and 60(c), and Decision 2/CP.17, supra note 25, paras. 12 and 39. See also MPGs, supra note 2, Annex, para. 3(f), committing parties to maintain at least the frequency of reporting that had been achieved under the Convention.

⁸⁷ MPGs, supra note 2, Annex, paras. 25, 29, 32, 34, 35, 48, 57, and 58.

kind of technical expert review chosen (centralized as opposed to in-country)⁸⁸ and the timelines for the TER⁸⁹ and the FMCP.⁹⁰

Moreover, when available, flexibility is generally limited. For instance, a developing-country party that determines that its needs flexibility with regard to the reporting of individual greenhouse gases must nevertheless report on the three main ones (CO₂, CH₄, and N₂O) and on any other gases that are included in its NDC.⁹¹ Other provisions ‘encourage’ the party that determines that it needs flexibility to comply with the relevant requirement to its full extent.⁹²

While a developing-country party that determines that it needs flexibility is to provide ‘self-determined estimated time frames for improvements’,⁹³ there is no explicit requirement for the party to comply with or limit those time frames. The party could, in principle, keep extending its demand for flexibility for as long as it wishes. Still, in light of the general requirement that ‘the efforts of all Parties will represent a progression over time’⁹⁴ and the recognition of ‘the importance of facilitating improved reporting and transparency over time’,⁹⁵ developing-country parties must refrain from claiming the need for flexibility in relation to reporting requirements that they have been able to fulfil in previous reports. Moreover, even though neither the Paris Agreement nor the MPGs define ‘developing country Party’, any state that has previously followed the reporting requirements for developed-country (i.e. Annex I) parties should refrain, in accordance with the principle of progression, from demanding flexibility under the Transparency Framework.

3.2. The Persistence of Bifurcation in Certain Aspects of Transparency

While the Transparency Framework advances the application of a uniform set of rules, it does not do away with bifurcation between groups of parties. It persists in three main ways. First, in accordance with the Paris Agreement, bifurcation is kept between developed- and developing-country parties in relation to provision of support,⁹⁶ including reporting on it.⁹⁷ Thus, developing-country parties are encouraged to provide information on support needed and received.⁹⁸ The TER is to assist in identifying capacity-building needs for those developing-country parties that need it,⁹⁹ in line with the current practice of technical analysis under the ICA. In addition, while developed-country parties are required to provide support to developing-country parties¹⁰⁰ and

⁸⁸ *Ibid.*, para. 159

⁸⁹ *Ibid.*, para. 162(c) and 162(f)

⁹⁰ *Ibid.*, para. 192(c).

⁹¹ *Ibid.*, para. 48.

⁹² *Ibid.*, paras. 29, 34, 35, 85, 92, and 159.

⁹³ *Ibid.*, para. 6.

⁹⁴ Paris Agreement, art. 3.

⁹⁵ MPGs, *supra* note 2, Annex, para. 3(b). See also Decision 1/CP.21, *supra* note 3, para. 92(a).

⁹⁶ Paris Agreement, arts. 9(1) and 11(3).

⁹⁷ Paris Agreement, arts. 9(5), 9(7), and 13(9)-(10).

⁹⁸ MPGs, *supra* note 2, Annex, para. 130.

⁹⁹ *Ibid.*, para. 146(e). See also Paris Agreement, art. 13(11).

¹⁰⁰ See, in particular, Paris Agreement, arts. 9(1) and 9(3).

report on it,¹⁰¹ developing-country parties that provide such support are only encouraged to report on it, and, in doing so, they are only encouraged to follow the MPGs.¹⁰² With the rapid expansion of South-South cooperation,¹⁰³ this differentiation will impede the achievement of the purpose of the Transparency Framework to ‘provide a full overview of aggregate financial support provided to inform the global stocktake’.¹⁰⁴

As the above bifurcation is anchored in the Paris Agreement,¹⁰⁵ it is unlikely to evolve through the review of the MPGs scheduled for 2028¹⁰⁶ or any other CMA decision short of an amendment to the Paris Agreement. Alternatively, evolution could take place if developing-country parties providing a substantial amount of support to other such parties were considered as having ‘graduated’ into being developed-country parties.

Second, bifurcation is maintained to the benefit of LDCs¹⁰⁷ and SIDS,¹⁰⁸ a total of 68 states¹⁰⁹ responsible for a small fraction of global greenhouse gas emissions.¹¹⁰ Bifurcation for the benefit of LDCs is built into the UNFCCC¹¹¹ and has been implemented in the guidelines on National Communications.¹¹² The transparency arrangements under the Cancun Agreements extended that benefit to SIDS.¹¹³ For its part, the Paris Agreement recognized ‘the special circumstances’ of LDCs and SIDS.¹¹⁴ The COP’s adoption decision entailed that LDCs and SIDS would report ‘at their

¹⁰¹ Paris Agreement, arts. 9(5) and 13(9); MPGs, supra note 2, Annex, paras. 10(d) and 118.

¹⁰² MPGs, supra note 2, Annex, paras. 10(d) and 118.

¹⁰³ See Decision 20/CP.19, supra note 27, Annex, para. 15(c).

¹⁰⁴ Paris Agreement, art. 13(6).

¹⁰⁵ See, in particular, *ibid.*, art. 13(9).

¹⁰⁶ See MPGs, supra note 2, para. 2.

¹⁰⁷ The list of LDCs (currently 47 countries) is compiled by the UN Committee for Development Policy of the UN Economic and Social Council with the endorsement of the UN General Assembly. Countries are included or excluded based on economy- and development-related criteria. See UN Committee for Development Policy, ‘List of Least Developed Countries (as of December 2018)’ <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf>; and, generally, UN Committee for Development Policy, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (3rd ed., October 2018), <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/2018CDPhandbook.pdf>.

¹⁰⁸ An unofficial list of 28 SIDS was adopted by the UN Conference on Trade and Development ‘for analytical purposes only’. See UN Conference on Trade and Development, ‘UNCTAD’s Unofficial List of SIDS’, <<https://unctad.org/en/pages/aldc/Small%20Island%20Developing%20States/UNCTAD%C2%B4s-unofficial-list-of-SIDS.aspx>>. The list does not include Singapore, presumably due to its high income per capita, but it does include the Bahamas.

¹⁰⁹ This includes 47 LDCs and 28 SIDS, of which 7 are LDCs.

¹¹⁰ Greenhouse gas emissions from LDCs in 2014 represented 3.1% of global greenhouse gas emissions excluding LULUCF, or 5.6% of global emissions including LULUCF, while the emissions of SIDS was significantly lower, according to CAIT Climate Data Explorer, World Resources Institute, <<http://cait.wri.org/>>, accessed on 1 February 2019.

¹¹¹ See UNFCCC, art. 12(5).

¹¹² See Decision 17/CP.8, supra note 9, Annex, para. 7.

¹¹³ See Decision 1/CP.16, supra note 12, para. 60. See also Decision 2/CP.17, supra note 25, paras. 41(a), (f) (on reporting), and 58(b) and (d) (on participation in the ICA).

¹¹⁴ Paris Agreement, art. 13(3).

discretion’,¹¹⁵ a rule that the MPGs duly incorporated.¹¹⁶ The MPGs also provide for flexibility to the benefit of LDCs and SIDS in relation to central elements of the Transparency Framework, both within the TER, by permitting them to ‘participate in the same centralized review as a group’,¹¹⁷ and within the FMCP, by permitting them, again, to participate as a group.¹¹⁸

Third, bifurcation between Annex I and non-Annex I parties will persist due to the continued application of some transparency arrangements under the UNFCCC to the parties to the Paris Agreement, as indicated in Table 2. Thus, Annex I parties that are parties to the Paris Agreement must continue to provide annual greenhouse gas inventories under the Convention for the years in which no BTR is due under the Agreement.¹¹⁹ Moreover, all parties to the Agreement must continue to submit a National Communication under the UNFCCC every four years.¹²⁰ The technical review process defined by the MPGs will extend to the annual greenhouse gas inventory and the National Communications of Annex I parties.¹²¹

4. Progression and Regression in the Transparency Arrangements Applicable to Annex I Parties

As stated in the Paris Agreement, the Transparency Framework is to ‘enhance the transparency arrangements under the Convention’.¹²² This relates to the broader idea, expressed in Article 3 and discussed above, that the efforts of the Parties ‘will represent a progression over time’.¹²³ Accordingly, both the COP’s adoption decision and the MPGs affirm ‘the importance of facilitating improved reporting and transparency over time’.¹²⁴ Such improvements may relate to the MPGs themselves,¹²⁵ or they may relate to the practice of states, which are encouraged to report on ‘areas of improvement’ in their successive BTRs.¹²⁶ Besides calling for progression, the COP’s adoption decision and the MPGs hint at a principle of non-regression, by highlighting the need to

¹¹⁵ Decision 1/CP.21, supra note 3, para. 90. See also MPGs, para. 4, and Annex, para. 3(a). The ‘special circumstances’ of these parties are recognized in the Paris Agreement, art. 13(3).

¹¹⁶ MPGs, Annex, para. 11; see also para. 4.

¹¹⁷ Ibid., Annex, para 157.

¹¹⁸ Ibid., Annex, para 194.

¹¹⁹ Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 42. From 2024 onward, Annex I parties must use the MPGs adopted under the Paris Agreement to develop their annual inventories under the Convention.

¹²⁰ See Decision 1/CP.16, supra note 12, para. 60(b); and Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 43.

¹²¹ Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 43(c).

¹²² Paris Agreement, art. 13(3).

¹²³ Paris Agreement, art. 3.

¹²⁴ Decision 1/CP.21, supra note 3, para. 92(a); MPGs, supra note 2, Annex, para. 3(c).

¹²⁵ A first review of the MPGs is scheduled to take place ‘no later than 2028’. See MPGs, supra note 2, para. 2.

¹²⁶ Ibid., Annex, para. 7. This information, however, will not be subject to a technical expert review: *ibid.*, para. 8. See also *ibid.*, para. 146(d).

‘ensur[e] that Parties maintain at least the frequency and quality of reporting in accordance with their respective obligations under the Convention’.¹²⁷

There is no doubt that the Transparency Framework imposes enhanced transparency arrangements on developing-country parties by extending a number of rules to them—rules previously limited to Annex I parties. However, progression for developed-country parties compared with the present arrangements under the UNFCCC and the Cancun Agreements is less obvious. While some of the arrangements in the MPGs enhance transparency (in particular reporting) beyond pre-existing requirements, other MPG provisions may lower the quality of information on Annex I-party mitigation action, if only marginally—an apparent contradiction with a strict reading of the non-regression principle.

4.1. Progression in the Reporting Requirements Applicable to Annex I Parties

In some respects, the MPGs introduce enhancements in transparency arrangements applicable to Annex I parties, in particular on reporting. First, while Annex I parties ‘may’ explain in National Communications why policies and measures listed in previous ones are no longer in place,¹²⁸ the MPGs recommend (‘should’) that such explanation be included in the BTRs.¹²⁹ The language is more stringent, while the frequency of reporting on discontinued mitigation action increases from once every four years to once every two years. This reflects the understanding that states should constantly enhance mitigation action,¹³⁰ and, therefore, should account for the repeal of existing measures (as it may indicate regression in mitigation action).

Secondly, the Transparency Decision requires each party, when reporting information following the period to which an NDC applies, to ‘provide an assessment of whether it has achieved the target(s)’ on climate change mitigation included in the NDC.¹³¹ Building on this, the TER is to include ‘consideration of the Party’s implementation and *achievement* of its NDC’ in relation to climate change mitigation.¹³² This provision provides more clarity than previous reporting arrangements on the achievement of pledges for mitigation action: no institutional arrangement was established for states to report on, or for technical reviews to ‘consider’, the achievement of the Cancun pledges, while the Kyoto Protocol relied on the Compliance Committee to make this

¹²⁷ Decision 1/CP.21, supra note 3, para. 92(e); and MPGs, supra note 2, Annex, para. 3(f). It has also been suggested that the principle of non-regression should be recognized in general international environmental law. See, e.g., UN Secretary-General, *Gaps in international environmental law and environment-related instruments: Towards a global pact for the environment*, A/73/419 (2018), para. 22.

¹²⁸ *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: Reporting Guidelines on National Communications*, FCCC/CP/1999/7 (1999) (adopted in application of Decision 4/CP.5, supra note 9), para. 26. No comparable information was mentioned in the UNFCCC biennial reporting guidelines for developed-country parties in Decision 2/CP.17, supra note 25, Annex I (in particular, para. 6).

¹²⁹ MPGs, Annex, para. 87.

¹³⁰ See Paris Agreement, art. 6 and 4(3).

¹³¹ MPGs, Annex, para. 70.

¹³² MPGs, Annex, para. 146(b), emphasis added.

assessment.¹³³ Remarkably, it also extends a State's accountability beyond the legal requirements of the Paris Agreement: while the Parties to the Paris Agreement have the obligation to take measures with the aim of achieving the mitigation objectives contained in their NDCs¹³⁴—an obligation of conduct¹³⁵—the Transparency Framework also holds them accountable for the achievement of these objectives. While this provision cannot change the nature of the legal obligations arising from the Paris Agreement, scrutiny of the achievement of the mitigation target could be a source of considerable public embarrassment for states failing to achieve this target.

Third, the MPGs contain far more detailed requirements than previous guidelines on the reporting of support that developed-country parties provide to developing-country parties,¹³⁶ whether in relation to BRs¹³⁷ or National Communications.¹³⁸ This comes in addition to *ex ante* reporting on projected levels of public financial resources to be provided to developing-country parties under Article 9(5) of the Paris Agreement as implemented under a different CMA decision.¹³⁹ The MPGs also impose more detailed provisions on developing-country parties for their reporting of support needed and received.¹⁴⁰ Thus, the MPGs follow the direction indicated in the Paris Agreement toward more transparency in relation to support.¹⁴¹

Lastly, the MPGs recommend ('should') that parties 'provide information related to climate change impacts and adaptation ... as appropriate.'¹⁴² This goes beyond previous reporting requirements. The BRs and BURs were not intended to include any information on climate change adaptation. The adaptation information that the MPGs recommend for inclusion¹⁴³ is far more extensive than the information that parties are required to report on in National Communications.¹⁴⁴ In particular, the MPGs recommend that 'each interested Party' provide, 'as appropriate, information related to enhancing, understanding, action and support ... to avert, minimize and address loss and damage.'¹⁴⁵ Reporting on impacts and adaptation is not part of the information to be

¹³³ See Decision 13/CMP.1, Annex, paras. 37 and 49. Compare with Aarti Gupta and Harro van Asselt, 'Transparency in Multilateral Climate Politics: Furthering (or Detracting From) Accountability?', *Regulation and Governance* (forthcoming), <<https://doi.org/10.1111/rego.12159>>, at 13.

¹³⁴ Paris Agreement, art. 4(2).

¹³⁵ See the discussion in Benoit Mayer, 'Obligations of conduct in the international law on climate change: A defence', 27(2) *RECIEL* 130 (2018).

¹³⁶ *Ibid.*, paras. 118-129.

¹³⁷ Decision 2/CP.17, supra note 25, Annex I, paras. 13-22.

¹³⁸ *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: Reporting Guidelines on National Communications*, supra note 128, para. 50-56.

¹³⁹ See Decision -/CMA.1, *Identification of the information to be provided by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement*, FCCC/CP/2018/L.15 (2018); and Zhang Hao, 'Implementing Climate-Finance Provisions under the Paris Agreement' (this issue).

¹⁴⁰ See MPGs, supra note 2, paras. 130-145; cf. Decision 2/CP.17, supra note 25, Annex III, paras. 14-16. See also Decision 17/CP.8, supra note 9, Annex, paras. 49-55.

¹⁴¹ See Paris Agreement, arts. 9(5), 9(7), 13(6), 13(9).

¹⁴² MPGs, Annex, para. 104.

¹⁴³ *Ibid.*, paras. 106-117.

¹⁴⁴ See *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: Reporting Guidelines on National Communications*, supra note 128, para. 49; and Decision 17/CP.8, Annex, paras. 28-36.

¹⁴⁵ MPGs, Annex, para. 115.

reviewed in the TER of the BTR;¹⁴⁶ however, as far as Annex I parties are concerned, it may be reviewed as part of the National Communication.¹⁴⁷

4.2. Regression in the Transparency Arrangements Applicable to Annex I Parties

In some other respects, the application of common transparency arrangements to developed- and developing-country parties will lead to regression in certain aspects of the transparency arrangements applicable to the former. Four cases are discussed below. They concern reporting on long-term trends in greenhouse gas emission reduction, the permissible justifications for using rudimentary methods to estimate greenhouse gas sources and removals in key categories, the principles guiding technical review, and the mode of technical review.

A step backward can be observed in reporting on long-term trends in greenhouse gas emission reduction. Under the guidelines for the preparation of National Communications, Annex I parties are required ('shall') to 'provide information on how they believe their policies and measures are modifying longer-term trends in anthropogenic GHG emissions and removals consistent with the objective of the Convention'.¹⁴⁸ There is no such requirement under the Paris Agreement's Transparency Framework, as the MPGs only recommend ('should') that each party provide such information 'to the extent possible'.¹⁴⁹ This would be of minor importance if developed-country parties were to continue to submit National Communications in addition to the BTRs under the Paris Agreement.¹⁵⁰ However, the COP 24 rules permit parties to the Paris Agreement, when submitting a National Communication and BTR as a single report, to follow the MPGs 'for information also covered by the national communication reporting guidelines'.¹⁵¹ This decision also allows parties to the UNFCCC that are not parties to the Paris Agreement to use the Transparency Framework MPGs to meet their reporting commitments under the UNFCCC.¹⁵² Thus, the requirement to report on long-term trends in greenhouse gas emission reduction will likely, in practice, be downgraded to an MPG recommendation.

Another step backward concerns the available justifications for using rudimentary methods to estimate of greenhouse gas sources and removals in key categories. The MPGs allow any party—whether developed or developing—to invoke 'lack of resources' as a ground to use a tier 1 method (i.e. the simplest method) to estimate greenhouse gas sources and removals in its key categories, even when the relevant sectoral decision tree contained in IPCC Guidelines for National Greenhouse Gas

¹⁴⁶ Ibid., para 150.

¹⁴⁷ Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 43(c).

¹⁴⁸ *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: Reporting Guidelines on National Communications*, supra note 128, para. 25.

¹⁴⁹ MPGs, supra note 2, Annex, para. 89.

¹⁵⁰ Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 39; and Decision 1/CP.21, supra note 3, para. 98.

¹⁵¹ Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 43(a).

¹⁵² Ibid. para. 44.

Inventories recommends a higher tier (more accurate) method.¹⁵³ This provision reflects the general considerations suggested by the IPCC Guidelines, which recognize—without distinguishing between developed and developing countries—that ‘inventory compilers may be unable to adopt a higher tier method due to lack of resources’.¹⁵⁴ The negotiation history confirms that the MPG provision was developed ‘in accordance with the IPCC Guidelines’,¹⁵⁵ although this phrase was removed at an advanced stage of the negotiations. Nevertheless, as far as Annex I parties are concerned, this provision is more permissive than the rules on annual inventories under the UNFCCC. The guidelines on the latter recommend that Annex I country Parties ‘make *every effort*’ to use the method recommended by the relevant decision tree in the IPCC Guidelines when estimating emissions and removals in their key categories, unless ‘national circumstances *prohibit*’ it.¹⁵⁶ The recognition that a state may be unable to report at a higher level of accuracy due to resource constraints is more in line with the reporting arrangements presently applicable to developing countries for the inventory contained in their National Communications.¹⁵⁷ For parties to the Paris Agreement, the MPGs will, in practice, override the guidelines on annual inventories under the UNFCCC, including in relation to annual inventories under the UNFCCC communicated in years when a BTR is not due under the Paris Agreement.¹⁵⁸ It would have been preferable for the excuse to have been limited to developing-country parties that need flexibility in light of their capacity.

A third step backward is on the principles guiding technical review. The TER’s guiding principles are more restrictive on the work of the reviewer than those applicable to the technical review process under the UNFCCC. The tone was set in the Paris Agreement, according to which the Transparency Framework is to ‘be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties’.¹⁵⁹ The MPGs build on this language, not only as a general ‘guiding principle’ for the Transparency Framework as a whole,¹⁶⁰ but also as an express limitation to the scope of the TER.¹⁶¹ This contrasts with the principles applicable to the technical review of the annual inventories, BRs, and National Communications of Annex I parties under the UNFCCC. Although the latter was to be conducted ‘in a facilitate, non-confrontational, open and transparent manner’,¹⁶²

¹⁵³ MPGs, Annex, para. 23, emphasis added.

¹⁵⁴ See also IPCC, *2006 IPCC Guidelines for National Greenhouse Gas Inventories* (Simon Eggleston et al., eds, IGES 2006), vol. I, sect. 4.1.2.

¹⁵⁵ See *Draft text produced under the APA Co-Chairs’ responsibility on APA 1.7 agenda item 5, ‘Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement’* (Version 8/12/2018, 12:22), <https://unfccc.int/sites/default/files/resource/APA1_7_DT_i5v3.pdf>, para. 7.

¹⁵⁶ Decision 24/CP.19, supra note 10, Annex, para. 11, emphasis added.

¹⁵⁷ See Decision 17/CP.8, supra note 9, Annex.

¹⁵⁸ See Decision -/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 42. Regarding the possibility that UNFCCC parties that are not parties to the Paris Agreement use the MPGs to meet their reporting commitments under the UNFCCC, see *ibid.*, para. 44.

¹⁵⁹ Paris Agreement, art. 13(3).

¹⁶⁰ MPGs, Annex, para. 3(a).

¹⁶¹ *Ibid.*, para. 148.

¹⁶² Decision 13/CP.20, supra note 19, Annex, para. 5(a). See also Decision 22/CMP.1, supra note 20, Annex, paras. 2(a) and 4.

emphasis was also put on the need for ‘a thorough, objective and comprehensive technical review of all aspects of implementation of the Convention’.¹⁶³ Moreover, the IAR of BRs was to be implemented ‘taking into account national circumstances, in a rigorous, robust and transparent manner’.¹⁶⁴ The express requirement of the Paris Agreement that review and assessment are to be ‘non-intrusive’, ‘non-punitive’, and ‘respectful of national sovereignty’ is inherited from the ICA of BURs of non-Annex I parties,¹⁶⁵ but in the new context it is applied to all parties. Likewise, the explicit exclusion of any ‘review of the adequacy’ of a party’s mitigation action or provision of support in the MPGs¹⁶⁶ builds on the requirement applicable to the technical analysis of BURs of non-Annex I parties.¹⁶⁷ No equivalent provision was included in the guidelines on the technical review of reports submitted by Annex I parties under the UNFCCC.¹⁶⁸ Because the TER, as defined by the MPGs, will prevail over previous technical review processes,¹⁶⁹ its less demanding principles will override the more demanding principles applicable to the technical review of reports by Annex I parties under the Convention.

A fourth step backward concerns the mode of technical review. The MPGs introduce a new type of ‘simplified review’, which will be conducted by the UNFCCC Secretariat itself (not by experts from the UNFCCC’s Roster of Experts), for the review of annual inventories submitted in a year in which a biennial transparency report is not due.¹⁷⁰ The frequency of in-country reviews will moreover be slightly decreased for most Annex I parties,¹⁷¹ reflecting an increasing reliance on centralized reviews (reviews of multiple parties at the same time). Up to once in every five years, the technical review of a BTR will be conducted through a desk review (where the experts conduct the review remotely from their home country),¹⁷² a procedure that is currently limited to the review of annual inventories.¹⁷³ Lead reviewers have suggested that desk reviews, which provide fewer opportunities for facilitation of compliance, are ‘most effective when the

¹⁶³ Decision 13/CP.20, supra note 19, Annex, para. 5(a).

¹⁶⁴ Decision 2/CP.17, supra note 25, Annex II, para. 1. This is in spite of this framework being adopted without a specific basis in a treaty, hence having much less legitimacy to curtail states’ sovereign rights.

¹⁶⁵ See Decision 13/CP.20, supra note 19, para. 63; Decision 2/CP.17, supra note 25, Annex IV, para. 1; and Decision 20/CP.19, supra note 27, second and third preambular paragraphs, and Annex, paras. 1 and 15.

¹⁶⁶ MPGs, supra note 2, Annex, para. 149(c) and (d).

¹⁶⁷ See Decision 1/CP.16, supra note 12, para. 64; Decision 2/CP.17, supra note 25, Annex IV, para. 2; and Decision 20/CP.19, supra note 27, Annex, paras. 1 and 15.

¹⁶⁸ See, e.g., Decision 13/CP.20, supra note 19, Annex.

¹⁶⁹ Decision 13/CP.24, *Preparation for the Implementation of the Paris Agreement*, supra note 58, para. 42.

¹⁷⁰ MPGs, supra note 2, Annex, para. 161. The technical review of annual inventories under the UNFCCC involves an initial assessment by the Secretariat followed by a review by the ERT. The latter is conducted annually as a centralized review or as an in-country review. See Decision 13/CP.20, supra note 19, Annex, paras. 60 and 63.

¹⁷¹ At present, in-country reviews are normally undergone for each BR that coincides with a National Communication, hence once every four years (assuming that parties report on time). See Decision 13/CP.20, supra note 19, Annex, para. 18. By contrast, the MPGs provide for two in-country reviews in a ten-year period. See MPGs, supra note 2, Annex, para. 158(b). This is a further step away from the ‘general rule’ that reviews should ‘include visits of review teams’, as suggested in Decision 6/CP.3, supra note 9, para. 3(a).

¹⁷² MPGs, supra note 2, Annex, para. 160.

¹⁷³ Decision 13/CP.20, supra note 19, Annex, para. 63. Desk reviews could, however, be conducted prior to a centralized or in-country review.

GHG inventories are sufficiently advanced and there are no major problems or gaps'.¹⁷⁴ These changes will save resources while expanding to a much larger number of states a relatively heavy review process constrained by the scarcity of available experts on the roster,¹⁷⁵ but they will also inevitably reduce the stringency of the review process and the opportunities to build capacity and facilitate compliance.

While none of these regressions will have major consequences, they are nevertheless causes for concern. The application of a common framework to almost all states fosters important progression in the reporting requirements applicable to non-Annex I parties, but it has also led, in some respects, to the application of less demanding arrangements to Annex I parties, in breach of the principle of progression.

5. Conclusion

The Transparency Framework established under the Paris Agreement, as implemented through the MPGs, represents a leap forward. For the first time, reporting by developing-country parties other than LDCs and SIDS will undergo a technical review. Achievement of the NDC will be documented in BTRs and considered by the TER, which will render national authorities politically and, possibly, legally accountable at the domestic level.

The legal regime created by the Paris Agreement has been characterized as a *crème brûlée*: a layer of hard procedural obligations atop a base of softer, substantive norms.¹⁷⁶ Yet, the MPGs suggest something more akin to a *millefeuille*, made of successive layers, some hard, consisting of international law obligations potentially enforceable through international litigation (i.e. the procedural obligations and an obligation of conduct), some soft, such as the achievement of the NDC mitigation target, and documented under the Paris Agreement, with the expectation that domestic political or legal process will push for compliance. The unavailability of classical international law remedies in relation to the softer normative layers is of little practical importance given the relatively low effectiveness of such remedies: international adjudication remains unlikely. Rather, transparency is instrumental in enabling an objective assessment of compliance and possible political or legal sanctions in other forums.

¹⁷⁴ *Conclusions and recommendations of the Fourteenth meeting of the greenhouse gas inventory Lead Reviewers* (8-9 March 2017, Bonn, Germany), available at <https://unfccc.int/sites/default/files/ghg_lrs_14th-meeting_conclusions.pdf>, para. 9.

¹⁷⁵ See e.g. *Fifth meeting of Lead Reviewers for the review of Biennial Reports and National Communications of Developed Country Parties: Conclusions and recommendations* (2018), <<https://unfccc.int/sites/default/files/resource/LR5-Conclusions-ForWeb-06032018.pdf>>, para. 6; and *Fifteenth meeting of greenhouse gas inventory Lead Reviewers: Conclusions and recommendations* (2018), <http://unfccc.int/files/national_reports/Annex_i_ghg_inventories/review_process/application/pdf/ghg-lrs-2018-conclusions_recommendations.pdf>, para. 18.

¹⁷⁶ Jonathan Pickering et al., 'Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement's "Crème Brûlée" Approach enhance Ecological Reflexivity?', *Journal of Environmental Law* (2018), <<https://doi.org/10.1093/jel/eqy018>>.

On the other hand, room for progress remains in relation to at least two aspects of transparency. One is the lack of a requirement on reporting on long-term low-greenhouse-gas-emission development strategies. The softening of the requirement on information on longer-term trends in greenhouse gas emissions in the MPGs¹⁷⁷ is inconsistent with the promotion of ‘long-term low greenhouse gas emission development strategies’ in the Paris Agreement.¹⁷⁸ The transparency framework should extend to providing information on how a state envisages that it will cease greenhouse gas emissions in the long-term, in order to allow observers to assess the consistency of short- and medium-term mitigation action with this long-term strategy.

Overall, room for improvement remains with regard to the transparency of the framework itself. If transparency arrangements under the UNFCCC and the Paris Agreement are to shame states into implementing ambitious mitigation action, they must provide information in an easily accessible format. The intended audience must not be limited to a narrow circle of experts: the system must be transparent to non-experts, observers, and domestic stakeholders, including national decision-makers and judges, in order to facilitate debates on national mitigation action. Unfortunately, the MPGs and other decisions adopted at COP 24 do little to simplify the transparency regime. The co-existence of BTRs under the Paris Agreement with annual inventories by Annex I parties and National Communications by all parties further hinders understanding of these arrangements by non-specialists. The use of jargon—and its expansion in the MPGs—does not help. Even the most audacious non-specialist reader will be puzzled by the varying terminology to refer to what states do to mitigate climate change: ‘actions, policies and measures’ under the BTRs,¹⁷⁹ ‘mitigation actions’ under the BRs and BURS,¹⁸⁰ and ‘policies and measures’ under National Communications;¹⁸¹ or ‘technical review’¹⁸² now rendered as ‘technical expert review,’¹⁸³ among other examples. In the medium term, the BTR and TER templates, which are to be adopted at CMA 3,¹⁸⁴ could be an opportunity to ensure that substantive information is reported prominently and in an accessible language, while, in the longer term, merging transparency arrangements under the UNFCCC and the Paris Agreement would promote greater readability.

¹⁷⁷ See above note 148.

¹⁷⁸ Paris Agreement, art. 4(19).

¹⁷⁹ MPGs, Annex, para. 80.

¹⁸⁰ Decision 2/CP.17, supra note 25, Annex I, para. 6.

¹⁸¹ *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: Reporting Guidelines on National Communications*, supra note 128, para. 13, building on the language of the UNFCCC, arts. 4(2) and 12(2).

¹⁸² Decision 2/CP.17, supra note 25, Annex II, para. 6.

¹⁸³ Paris Agreement, art. 13(12).

¹⁸⁴ MPGs, para. 12(b).