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The Heart of the Paris Rulebook: Communicating NDCs and Accounting for Their Implementation

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Abstract

Nationally Determined Contributions play a critical role in the architecture of the Paris Agreement. Parties are required to prepare and communicate their NDCs and to undertake domestic efforts to meet their mitigation commitments, facilitated in some cases by support and finance from other parties. The focus of this article is on key elements of the five-year cycle that deal with the content and process of NDCs, specifically the portion of the Paris Rulebook on the communication of NDCs and the accounting for their implementation. The article concludes that while the basics appear to be in place, there are a number of gaps and uncertainties that may result in implementation challenges.

Keywords

Paris Agreement; Paris Rulebook; Nationally Determined Contributions; NDC communication, implementation, and accounting; NDC Registry.

1. Introduction

Nationally Determined Contributions play a critical role in the architecture of the Paris Agreement. Parties are required to prepare and communicate their NDCs and to undertake domestic efforts to meet their mitigation commitments, facilitated in some cases by support and finance from other parties. Parties are then to report to the international community on their efforts and their progress toward their commitments. After Technical Expert Review teams (TER teams) review these national efforts against the content of the NDCs, countries discuss their efforts in a multilateral process (the Facilitative, Multilateral Consideration of Progress, or FMCP). The final process element in the five-year review cycle is the multi-year Global Stocktake, which shifts the focus from individual NDCs toward the collective goals set out in the Paris Agreement.¹ Once the Global Stocktake is concluded (with a CMA decision, which is followed by a special event, under the auspices of the UN Secretary-General, to encourage increased ambition through revised NDCs), the next five-year cycle starts with the filing of enhanced NDCs.

The focus of this article is on elements of the five-year cycle that deal with the communication and implementation of NDCs, specifically the rules negotiated by the Ad Hoc Working Group on the Paris Agreement (APA) that make up the portion of the Paris Rulebook on the communication and registration of NDCs and the accounting for

¹ Note that Alexander Zahar argues in his contribution to this special issue that a reasonable legal argument can be made that the Global Stocktake can also consider individual efforts. For a detailed assessment of the Article 15 rules, see his contribution to this special issue.

their implementation.² Discussion of other rules affecting NDCs, in particular under the Paris Agreement's Articles 13, 14, and 15 (respectively, the Transparency Framework, Global Stocktake, and committee to facilitate implementation and promote compliance with the Agreement) are the focus of other contributions to this special issue on the Paris Rulebook.

The negotiators at COP 24/CMA 1.3 had before them a broad range of issues relevant to mitigation efforts and NDCs. In addition to the issues covered here and in other contributions to this special issue, issues on the agenda with some connection to the preparation of NDCs included the Talanoa Dialogue; the IPCC's 1.5°C report and the ambition of NDCs with a starting date of 2020; the issue of common timeframes for mitigation targets; the impact of response measures; and negotiations on the implementation of cooperative approaches to mitigation (including emission trading) under Article 6 of the Paris Agreement.³ The outcomes on the Talanoa Dialogue and the IPCC's 1.5°C report will be briefly discussed below, as they represent an important signal for future NDCs, due to be prepared following the completion of the first Global Stocktake in 2023. No final agreement was reached at COP 24/CMA 1.3 on the other issues mentioned, but some progress was made nonetheless, and efforts to resolve them will continue. Most critically, the expectation is that negotiations on Article 6 will be concluded in 2019, though the prospect for an agreement is unclear, as is the path forward in the event that no agreement is reached.⁴

In this article, the rules on the communication of NDCs are covered first, followed by the rules on accounting for NDC implementation. The article assesses the substance of the rules developed at COP 24/CMA 1.3 against the relevant provisions of the Paris Agreement and the COP 21 Decision.⁵ This is followed by a discussion of the gaps, as well as of the issues and challenges that may arise from the rules developed.

2. NDC Communication and Accounting

This section offers an overview of the rules on the communication (including preparation and registration) and accounting agreed to under the Paris Rulebook.⁶ The rules negotiated at COP 24/CMA 1.3 are then assessed against Article 4 of the Paris

² Draft decision -/CMA.1: Matters relating to the implementation of the Paris Agreement, available at <https://unfccc.int/sites/default/files/resource/cp24_auv_3cma1_final.pdf> (advance unedited version) (hereinafter COP 24 Decision).

³ Ibid.

⁴ For a good overview of key issues going into the final stages of the negotiations, see Kelly Levin, 'The Interplay between Accounting and Reporting on Mitigation Contributions under the Paris Agreement', 12 *CCLR* 203 (2018). For an overview of Article 4 of the Paris Agreement, see Herald Winkler, 'Mitigation in the Paris Agreement: Article 4', in Daniel Klein, et al. (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford: Oxford University Press, 2017). See also Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).

⁵ Paris Agreement, Article 4; and Decision 1/CP.21, *Adoption of the Paris Agreement*, FCCC/CP/2015/10/Add.1 (2015), paras 22-30 (hereinafter COP 21 Decision).

⁶ Draft decision -/CMA.1, *Further Guidance in Relation to the Mitigation Section of Decision 1/CP.21* (2018) (hereinafter NDC Guidance). Note that the use of the term "guidance" does not resolve the legal status of these rules, nor whether there is an expressed or implicit expectation that a particular rule be followed. As will be discussed below, this depends to some extent on the language in the Paris Agreement, and on the language used with respect to individual rules within the NDC Guidance agreed to.

Agreement and paragraphs 22 to 31 of the COP 21 Decision.⁷ The purpose is to determine consistency with the agreement reached in Paris, to identify any significant gaps, and to explore the extent to which the Paris Rulebook substantially advances parties' understanding of what is required. The first part of this section provides an overview of the guidance on the communication and registration of NDCs. This is followed with an overview of the guidance on accounting for the implementation of NDCs.

2.1. NDC Preparation: Communication and Registration

The key elements of the rules negotiated for the communication and registration of NDCs include the following: the substance of what is expected to be included in an NDC;⁸ whether the NDC Guidance applies to mitigation elements of NDCs only, or to other elements of NDCs;⁹ any differentiation among parties in terms of their obligations under Article 4;¹⁰ support to be provided to developing countries for the implementation of Article 4;¹¹ how the NDC Guidance affects NDCs already filed, NDC updates to be filed by 2020, and subsequent updates and new NDCs;¹² when the NDC Guidance is to be reviewed or revised;¹³ and the establishment of the NDC Registry at COP 25.¹⁴

The substance of what is expected to be included in an NDC is largely contained in Annex I to the NDC Guidance.¹⁵ The complexity in determining what the NDC Guidance requires arises largely from the flexibility parties have in the nature of their mitigation commitments. The rules deal with this flexibility first by identifying common elements that apply regardless of the nature of the commitment, and second by trying to clarify what methodologies and metrics are appropriate for different types of mitigation commitments.

The most relevant provisions of the Paris Agreement for the preparation and communication of NDCs can be found in Article 4.2 to 4.12. Also relevant are paragraphs 22 to 30 of the COP 21 Decision.¹⁶ The aim of the NDC Guidance, Annex I, on communication is to ensure adequate information is provided by each party to understand the nature of the mitigation commitments made and to be able to track their implementation. The language is frequently vague and high-level, at least in part because of the self-determined nature of NDCs and the broad range of mitigation commitments they contain.

⁷ Paris Agreement, article 4; and COP 21 Decision, paras 22-30.

⁸ NDC Guidance, Annex I.

⁹ NDC Guidance, para. 11.

¹⁰ NDC Guidance, paras 4, 5, 7, and 8. Of course, the main form of differentiation provided is that developing countries are able to choose, at least initially, whether to present their mitigation action in the form of an absolute economy-wide emission reduction target or in some other form. Much of the flexibility in communicating and accounting for NDCs relates back to this basic choice.

¹¹ NDC Guidance, paras 3-6.

¹² NDC Guidance, para. 21.

¹³ NDC Guidance, para. 23.

¹⁴ *Draft decision -/CMA.1, Modalities and Procedures for the Operation and Use of a Public Registry Referred to in Article 4, Paragraph 12, of the Paris Agreement* (2018) (hereinafter Registry Modalities).

¹⁵ NDC Guidance, Annex I.

¹⁶ COP 21 Decision, paras 22-30.

Annex I avoids the use of language that directly signals the legal nature of the direction it provides. It does not use terms such as “shall”, “should”, or “may”, but rather simply lists the information to be included. At the same time, by linking to mandatory, legally binding language in Article 4.8 through paragraph 10 of the NDC Guidance, it is clear that there is an expectation that the elements listed in Annex I will be provided. A reasonable interpretation, given the link to Article 4.8, would be that, except where discretionary language is used, the elements set out in Annex I are mandatory. One factor that could be argued to weigh against such an interpretation is paragraph 27 of the COP 21 Decision, as it uses “may” when it lists elements elaborated in Annex I. However, given that Annex I does not pick up the discretionary language from the COP 21 Decision, the more reasonable interpretation is that the elements of Annex I are mandatory unless they are specifically designated as voluntary.

While developed countries have committed to economy-wide absolute targets, other parties have, at least initially, considerable flexibility in how to frame their mitigation commitments. Metrics and methodologies for absolute targets are well established from past experience under the Kyoto Protocol. This is not the case for other types of mitigation commitments provided for in the Paris Agreement.¹⁷ This means that while the basic elements, such as reference year, target, and timeframes have to be provided by all, there is considerable flexibility that flows from the self-determined nature of mitigation commitments, especially for developing countries. In other words, the basic elements may be mandatory, but the self-determined nature of the mitigation commitments creates considerable flexibility in the information that needs to be provided about those elements.

Developing countries have the option to frame their mitigation commitments as reductions compared to business as usual, or as intensity targets, rather than absolute emission reductions, or even as commitments to make reductions in specific economic sectors or to implement specific emission-reduction policies. Flexibility is not limited to developing countries. Developed countries also have some flexibility in how to express their mitigation commitments, including on the base year, the timeframe for the target, and the choice between a single- or multi-year target.

Given the agreement reached in Paris, this flexibility on mitigation targets had to be accommodated in the guidance on the preparation of NDCs. Every effort was made to offer the needed flexibility without formally establishing a separate set of NDC communication rules for developed and developing countries. This has resulted in rules that are worded using language that, at times, lacks specificity and detail. Ultimately, the rules largely confirm the use of existing methodologies and metrics for parties relying on economy-wide absolute targets, and establish broad principles aiming to achieve the basic objective set out in Article 4.8 of the Paris Agreement for parties using other mitigation targets. The legal obligation set out in Article 4.8 is to provide the information necessary to ensure the clarity, transparency, and understanding of mitigation commitments made.

¹⁷ Christina Hood and Carly Soo, ‘Accounting for Mitigation Targets in Nationally Determined Contributions under the Paris Agreement’, OECD/IEA Climate Change Expert Group Paper 2017/0 (Paris: Organization for Economic Cooperation and Development and International Energy Agency, 2017). See also Cynthia Elliott, Kelly Levin, Joe Thwaites, Kathleen Mogelgaard, and Yamide Dagnet, ‘Designing the Enhanced Transparency Framework: Reporting under the Paris Agreement’, Working Paper (Washington, DC: Project for Advancing Climate Action Transparency, 2017).

The guidance on reference points for mitigation commitments serves to illustrate the challenge.¹⁸ A reference point itself is a required element, but there is considerable flexibility in how this requirement may be met depending on the nature of the commitment made. For economy-wide absolute targets, the reference point is to be a base year, such as 1990 or 2005,¹⁹ against which efforts to reduce emissions will be measured for a future year or multi-year commitment period. For targets based on improvements compared to a business-as-usual scenario, the reference point is to be the level of emissions predicted for a given future year or commitment period in the absence of mitigation action. Emission-intensity commitments can take many forms. They can be framed as an improvement over actual emission intensity at a given time, or as a fixed emission-intensity target of emissions per unit of economic output (as opposed to a target relative to past, current, or business-as-usual emission intensity). A similar range of options arises for mitigation commitments that are linked to specific sectors, such as transportation, electricity, agriculture, or buildings.

The implication of the NDC Guidance is that it does not offer detailed rules or consistent reference points, but rather allows parties to select and communicate, among the many options, a reference point together with a clear articulation of the commitment in relation to it. This basic expectation is supplemented with requirements to be clear about the sources of data to be used, the timeframes, whether the target is a single- or multi-year target, and the circumstances under which the reference point may be updated.²⁰ Ultimately, the NDC Guidance reinforces the requirement in Article 4.8 of the Paris Agreement that an NDC is to be prepared and communicated in a manner that ensures its clarity, transparency, and understanding, and is consistent with the language in paragraph 27 of Decision CP.21.

Each party is to describe the target it commits to and its scope, including sectors, gases, categories, and pools covered, as applicable, in accordance with IPCC guidelines.²¹ Parties are expected to identify mitigation co-benefits from adaptation action and from economic diversification plans expected to contribute to their mitigation efforts. Essentially, this provision is needed because some parties are expected to express their mitigation effort in whole or in part in the context of adaptation and economic diversification efforts that have mitigation co-benefits, rather than as mitigation efforts separate from adaptation and economic diversification. The NDC Guidance makes it clear that those parties are required to report on the mitigation co-benefits of their efforts in the same manner as other parties report on their (direct) mitigation efforts.²² There is an expectation that information about the impacts of response measures will also be included, though the guidelines do not specify whether such impacts are domestic or international.²³

Each party is required to explain how its NDC was developed, the process the party undertook, and its implementation plan. The information to be provided includes institutional arrangements for the development of the NDC, public participation,

¹⁸ NDC Guidance, Annex I, para. 1.

¹⁹ Or any other year chosen by the party.

²⁰ NDC Guidance, Annex I, para. 1.

²¹ NDC Guidance, Annex I, para. 3.

²² NDC Guidance, paras 13 and 19; NDC Guidance, Annex I, paras 3.d and 4.d.

²³ NDC Guidance, Annex I, para. 4.d.

engagement with local and indigenous communities, gender-responsive engagement, and consideration of contextual matters, such as geography, climate, economy, sustainable development, and poverty eradication, among other issues.²⁴

Parties are to declare whether they intend to rely on cooperative approaches under Article 6 to meet their mitigation commitments.²⁵ Parties are required to explain assumptions and methodological approaches for major elements of their NDC, such as greenhouse gas emissions and removals, implementation of policies and measures, sector- or category-based actions, harvested wood products, and the age-class structure of forests. The guidance does not prescribe specific methodologies or assumptions to be applied, though it does at times limit methodologies to those assessed by the IPCC and approved by the CMA. As with other elements of the NDC Guidance, the overall focus is on providing details on the legal obligation to provide information to ensure clarity, transparency, and understanding, not on prescribing approaches to improve consistency or comparability among NDCs.²⁶ To reiterate, the legal obligation is set out in Article 4.8, with Annex I providing detail on what is expected in order to meet that obligation, suggesting that compliance with non-discretionary elements of Annex I is mandatory.

Each party is required to include information about the fairness and ambition of its NDC and how the NDC contributes to the collective goals of the regime, particularly Article 4.1 of the Paris Agreement and Article 2.1.a of the UNFCCC. Each party is also required to explain how its NDC is fair and ambitious in light of its national circumstances, what it factored into its fairness consideration, how the party has ensured progression and the highest possible ambition in its mitigation commitments, and, for developing countries, how the party has ensured progression toward absolute economy-wide targets.²⁷ For NDCs filed or updated after the completion of a Global Stocktake, under Article 14, a party is required to show how its NDC has been informed by the Global Stocktake in accordance with Article 4.9.²⁸ Ultimately, the obligation to justify the ambition of an NDC on equity grounds is clearly established in the NDC Guidance. What is not clear is whether there is a sufficient basis for TER teams, the FMCP, or the Article 15 Committee to assess the adequacy of a party's analysis, as there are no parameters provided for the consideration of fairness, ambition, or national circumstances.

A controversial issue during the course of the negotiations was whether the NDC Guidance, Annex I, would apply only to mitigation elements of NDCs or also to other elements, such as adaptation. The issue arose because the parties had decided that only

²⁴ NDC Guidance, Annex I, para. 4.

²⁵ NDC Guidance, Annex I, para. 5g. Of course, the rules for Article 6 were not finalized at COP 24/CMA 1.3, leaving their role in allowing parties to meet their mitigation commitments uncertain for now. There are, however, general rules in place in the Paris Agreement, the COP 21 Decision, and the NDC Guidance on double counting, environmental integrity, and ambition related to emissions trading that should enable parties to trade emission reductions even without finalized Article 6 rules. Parties would already be bound by Article 4.13 of the Paris Agreement in accounting for any emissions trading between parties. The main question will be whether TER teams will accept the evidence provided by parties on the trades that have taken place. What will not happen without final Article 6 rules will be the creation of a new mechanism to certify emission reductions similar to those certified under the Kyoto Protocol's Clean Development Mechanism.

²⁶ NDC Guidance, Annex I, para. 5.

²⁷ NDC Guidance, Annex I, para. 6.

²⁸ NDC Guidance, Annex I, paras 4(c), 6, 7.

the mitigation element is required, whereas the inclusion in an NDC of other commitments is voluntary. The NDC Guidance appears to deal only with mitigation commitments, but this should not exclude the possibility that some element of the guidance may in the future prove to be relevant to the voluntary inclusion of adaptation, finance, technology, capacity-building, education, or loss-and-damage commitments.²⁹ When the guidance on the preparation and communication of NDCs is reviewed in 2024, the broadening of the scope of NDCs beyond mitigation is sure to be raised again by those parties that fear that the failure to include other issues in NDCs diminishes the importance and attention given to them.³⁰

Differentiation among parties has long been a contentious issue in the climate negotiations, and the Article 4 elements of the Paris Rulebook negotiations were an extension of that debate.³¹ In the end, the NDC Guidance makes reference back to the exceptions carved out under the Paris Agreement, such as flexibility for LDCs and SIDS under Article 4.6 and flexibility for developing countries under Article 4.4. No new categories of parties with specific exceptions were created in the Rulebook. Instead, language such as “as appropriate”, “as applicable”, and “in the light of national circumstances” was inserted to signal the need for flexibility, but without differentiating among parties.³²

To deal with the concerns of developing countries regarding fairness, the need for support to be provided to developing countries for the implementation of Article 4 received considerable attention in the NDC Guidance, building on the requirement set in Article 4.5 of the Paris Agreement. The importance of support is signaled in relation to the preparation of NDCs, reporting obligations, and the effort needed to implement ambitious commitments.³³ While the need for support is repeatedly expressed, the sources of support are not as clearly set out. Rather, consistently with the provisions of Article 4 of the Paris Agreement, there is merely a general reference to the regime’s financial mechanisms and to other Convention bodies.³⁴

The parties needed to decide on the application of the guidance developed at COP 24/CMA 1.3 to updates of the first NDCs (as many parties had already filed them), as well as to new NDCs filed after December 2018. The decision, consistent with paragraph 32 of the COP 21 Decision, encourages parties to apply the guidelines to new NDCs and updates, but requires their application only from the second NDC onward.³⁵

²⁹ NDC Guidance, para. 11.

³⁰ NDC Guidance, para. 23.

³¹ See, for example, Lavanya Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’, 65 *ICLQ* 1 (2016); Christina Voigt and Felipe Ferreira, ‘Differentiation in the Paris Agreement’, 6 *Climate Law* 58 (2016); Sandrine Maljean-Dubois, ‘The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?’, 25(2) *RECIEL* 151 (2016); and Meinhard Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’, 6 *Climate Law* 1 (2016).

³² See NDC Guidance, paras 8, 10, 12, 13, and 15; NDC Guidance, Annex I, paras 1-6.

³³ NDC Guidance, preamble, paras 4-6.

³⁴ NDC Guidance, para. 5.

³⁵ NDC Guidance, paras 9, 10. This raises the important legal question on what constitutes a party’s second NDC. This issue is taken up under Section 3, below.

The UNFCCC Secretariat established an interim NDC Registry following the adoption of the Paris Agreement.³⁶ At COP 24/CMA 1.3, in accordance with Article 4.12 and paragraph 29 of the COP 21 Decision, parties agreed on the key design elements of the permanent registry, and on a process for finalizing and approving it. The Secretariat has been asked to design a registry, in line with the guidance provided, in time for the June 2019 subsidiary body meetings, with a view to approving it at COP 25/CMA 2. The interim Registry will continue to serve as the registry for NDCs until COP 25/CMA 2.³⁷

2.2. NDC Accounting

It is useful to think of NDC accounting as consisting of two stages. First, as discussed in the previous section, the NDC Guidance sets out the information that parties are expected to include in their NDCs on how they intend to account for the implementation of their NDCs. Second, the NDC Guidance includes directions on the reporting of the implementation of NDCs through biennial reporting, including a structured summary, under Article 13.³⁸ The focus in this section is on the implementation phase of NDCs.

Under Article 4.13 of the Paris Agreement and paragraph 31 of the COP 21 Decision, parties are legally obliged to account for the implementation of their NDCs. Neither the Agreement nor the Decision provide clear direction on when or how frequently parties are to account for the implementation of their NDCs. Article 13 of the Paris Agreement requires parties to report regularly on progress. Paragraph 91 of the COP 21 Decision suggests that most parties will be expected to provide this information on a biennial basis. The guidance on NDC accounting in the Paris Rulebook does not offer any further clarity on the timing of the accounting requirement, although for most parties the expectation is that reporting will take place on a biennial basis.³⁹

The approach to the legal nature of the obligations under Annex II of the NDC Guidance is similar to that for Annex I. The foundation for Annex II is Article 4.13 of the Paris Agreement, which uses “shall” to signal a legally binding obligation. Paragraphs 31 and 32 of the COP 21 Decision call for further guidance, but do not predetermine whether such guidance will be mandatory or discretionary. Annex II avoids the use of “shall”, “should”, and “may”, but does set out the information to be provided to comply with the legally binding obligation in Article 4.13. Some elements of Annex II are then specifically designated with discretionary language, such as “strive to”, leading to the conclusion that the elements that are expressed in non-discretionary language are mandatory in nature.

The basic principles behind the guidance on accounting and reporting on the implementation of NDCs are straightforward. They include requirements for consistency with the approaches used to prepare and communicate NDCs, consistency with the relevant provisions of the Paris Agreement,⁴⁰ and, as much as possible and

³⁶ COP 21 Decision, para. 30.

³⁷ Registry Modalities, Annex.

³⁸ NDC Guidance, para. 20. For an overview of the reporting and review process under Article 13, see Benoit Mayer’s contribution to this special issue.

³⁹ The issue is further explored in Benoit Mayer’s contribution to this special issue on the implementation of Article 13, as this is where parties are directed on the timing and frequency of their reporting obligations under the Paris Agreement.

⁴⁰ Particularly Article 4.13 of the Paris Agreement and para. 31 of the COP 21 Decision.

appropriate to the circumstances, the principle of following or building on approaches used under the UNFCCC and assessed by the IPCC, as adopted by the CMA.⁴¹ The decision makes specific reference to the legal obligation in Article 4.13 of the Paris Agreement to promote environmental integrity, transparency, accuracy, completeness, comparability, and to ensure the avoidance of double counting.⁴² Parties are required to follow the further guidance set out in Annex II of the NDC Guidance in accounting for their NDC efforts.⁴³ The guidance is to be reviewed in 2027, with a view to adopting any amendments in 2028.⁴⁴

As with Annex I, Annex II identifies the required elements to be included, but does not prescribe specific methodologies or metrics to be used for these elements.⁴⁵ The stated preference is for parties to account for emissions and removals using methodologies and common metrics “assessed” by the IPCC and “adopted” by the CMA. The use of “assess” in reference to the IPCC is noteworthy. On the one hand, it makes clear that it is the CMA that approves methodologies and metrics, not the IPCC. On the other hand, “develop” is not used, confirming that the methodologies and metrics are not expected to be developed by the IPCC, but rather will be developed elsewhere and assessed by the IPCC in an effort to inform the decision of the CMA on whether to adopt them. The guidance does not specify who will develop the methodologies or metrics, leaving it open to any existing or new methodologies or metrics to be assessed by the IPCC and then adopted by the CMA.⁴⁶

Even with the flexibility to use any methodologies and metrics assessed by the IPCC and adopted by the CMA, the NDC Guidance still offers other options. Parties may also draw on existing approaches under the UNFCCC, or develop their own, but must provide information on how they have done so. An advantage of relying on UNFCCC guidance could be that less justification and information may be needed than in the case of a party using its own, unapproved, methodology, but this is not clearly articulated. The NDC Guidance simply states that where emissions or removals cannot be accounted for by using IPCC guidelines, parties can use their own, but must provide information on the methodologies used. There is no further clarity on what information is required. The reference to IPCC guidance in this instance is not qualified with a specific reference to approval by the CMA, although the latter is included in the introductory language of paragraph 1 of Annex II.⁴⁷

The remainder of paragraph 1 provides directions on accounting related to forest sinks. Topics covered include emissions and subsequent removals from natural disturbances, accounting related to harvested wood products, and the effect of the age-class structure of forests on accounting for emissions and removals from forest sinks.⁴⁸ The focus for all three topics is on following IPCC guidance, but with flexibility for natural

⁴¹ NDC Guidance, paras 14, 15.

⁴² NDC Guidance, paras 14, 18.

⁴³ NDC Guidance, para. 16; NDC Guidance, Annex II, discussed below.

⁴⁴ NDC Guidance, para. 21.

⁴⁵ NDC Guidance, Annex II. The one area where the use of methodologies and common metrics assessed by the IPCC and approved by the CMA appears to be required is with respect to absolute economy-wide mitigation targets.

⁴⁶ NDC Guidance, paras 15, NDC Guidance, Annex II, para. 1.

⁴⁷ NDC Guidance, Annex II, para. 1.b.

⁴⁸ NDC Guidance, Annex II, para. 1.e-g.

disturbances and age-class structure.⁴⁹ The flexibility for harvested wood products is more narrow, as parties can choose among the various IPCC approaches, but in this case there is no broader flexibility to develop another approach.⁵⁰

Where does this leave the question of common metrics and methodologies and the requirement to follow approved metrics and methodologies developed by the IPCC or under the UNFCCC? There is a strong preference for common metrics and methodologies to describe the required elements, but also some flexibility. When considered in combination with the language in paragraph 31 of the COP 21 Decision, the most reasonable interpretation is that the use of CMA-approved methodologies and common metrics is required, unless the party can demonstrate that no existing approved methodology or metric applies to the particular mitigation contribution it is making.

The second key issue in the guidance on accounting is consistency with the preparation and communication of a party's NDC.⁵¹ Parties are to "maintain consistency in scope and coverage, definitions, data sources, metrics, assumptions, and methodological approaches". The guidance stipulates that "parties maintain" or "parties provide information", suggesting these elements are required. There are a few instances of discretionary language. Subparagraph 2.b states that a party's approaches to accounting "should be consistent" with those adopted in its NDC. Furthermore, parties commit to "strive to avoid overestimating or underestimating" emissions or removals in their accounting.⁵² Given the link to Article 4.13 of the Paris Agreement, the elements of Annex II dealing with consistency with the NDC would appear to be mandatory, with the exception of those using "should" or "strive to".⁵³

Reference points in the NDC can be updated by making technical changes, in light of changes to a party's inventory or to improve accuracy, while maintaining methodological consistency. Any changes are required to be "transparently reported".⁵⁴ Finally, the guidance restates the commitment in paragraph 31 of the COP 21 Decision to strive to include all categories of emissions and removals, and to provide an explanation in the case that a category is not included.⁵⁵

Ultimately, the guidance offered in the Paris Rulebook offers some additional clarity on the required elements for the preparation and implementation of NDCs, but stops short of directing parties on methodologies and metrics, meaning that the rules may not be enough to ensure consistency and comparability. There is considerable repetition of language already agreed to in Paris, with some additional detail provided. In the next section, a selection of gaps and legal issues arising from the guidance on NDC preparation and implementation are briefly explored.

3. Gaps and Future Challenges

⁴⁹ NDC Guidance, Annex II, para. 1.e. The conclusion that there is flexibility is based on the use of the term "as appropriate".

⁵⁰ NDC Guidance, Annex II, para. 1.f

⁵¹ NDC Guidance, Annex II, para. 2.

⁵² NDC Guidance, Annex II, paras 1, 2, 3.

⁵³ NDC Guidance, Annex II, paras 2.b-d, 3.b.

⁵⁴ NDC Guidance, Annex II, para. 2.e.

⁵⁵ NDC Guidance, Annex II, paras 3, 4.

The most obvious challenge associated with the NDC communication and accounting rules under the Paris Rulebook is that they do not always offer a clear direction for the work of TER teams and the Article 15 Committee. For developed-country parties and other parties with absolute economy-wide targets, this is not much of an issue. There is clear guidance on the methodologies to be used, and years of experience with their application. For parties that have framed their mitigation commitments in other ways, this may be a problem. On issues such as fairness and ambition in light of national circumstances, the lack of clarity on methodologies and approaches will likely prove challenging for TER teams and the Article 15 Committee. Without clarity on which approaches are permitted, issues may arise where parties express the required elements in a manner that is not satisfactory to other parties, TER teams, or the Article 15 Committee. In such cases, it will be challenging for the teams or the Committee to determine when to accept the approaches taken and when to insist that parties follow IPCC, UNFCCC, or other credible methodologies because the chosen approach is deemed inappropriate.

An interesting question arises in relation to the interpretation of these and other parts of the Paris Rulebook, namely whether there are principles or other considerations that could inform the interpretation of these provisions by the TER teams or Article 15 Committee, and thereby inform the manner in which parties carry out some of their tasks, such as the fairness considerations and equitable contribution toward the collective goals of the Paris Agreement in the NDC Guidance. Among possible candidates for principles and related considerations are the preambular provisions of the Paris Agreement, foundational principles enshrined in the UNFCCC, and broader principles of international law. The principles enshrined in the Agreement, including its preambular language on human rights, gender, just transition of the workforce, indigenous peoples, development, and climate justice, would seem to provide the most obvious source to inform the work of the TER teams and Article 15 Committee.⁵⁶

There are a number of notable gaps in the Article 4 rules agreed to at COP 24/CMA 1.3, including key provisions of the Paris Agreement that are neither referenced nor elaborated on in the Paris Rulebook. For example, there is no guidance on adjustments to NDCs made in accordance with Article 4.11. The accounting rules do not elaborate on, or even mention, the obligation in Article 4.2 to pursue domestic mitigation measures with the aim of achieving the objectives set in the NDCs. Similarly, there is no elaboration or reference to the commitment to promote comparability and consistency which is set out in Article 4.13 of the Paris Agreement. In fact, as discussed in the previous section, it is difficult to see how consistency and comparability are enhanced through the NDC Guidance, as it does little to make either the NDC commitments themselves or the accounting of their implementation more consistent or comparable. The main hope for consistency and comparability appears to be the expectation that all parties will move toward absolute economy-wide targets over time.

⁵⁶ For an overview of the preambular language in the Paris Agreement and its legal significance, see María Pia Carazo, 'Contextual Provisions (Preamble and Article 1)', in Daniel Klein, et al. (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford: Oxford University Press, 2017). See also, Sébastien Duyck, Erika Lennon, Wolfgang Obergassel, and Annalisa Savaresi, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-based Approach', 12 *CCLR* 191 (2018).

There is no reference in the NDC Guidance to require parties to report on successes and challenges in implementing their NDC. This would have been an opportunity to look beyond the binary issue of whether or not parties are on track to meet their NDC commitments to also consider why parties may be falling short of, or exceeding, their commitments, thus offering important lessons for themselves and for other parties looking to avoid mistakes and emulate successes. Of course, there is nothing to prevent these lessons from being explored under the provisions of the Rulebook relating to Articles 13 and 14 of the Paris Agreement, but the NDC Guidance does provide an important context for what is to follow, as it is the starting point of the review cycles under the Agreement. Not spelling out the expectation that parties are to reflect on successes and failures is a missed opportunity in this regard.

There is an issue with the requirement that the NDC Guidance is voluntary for the first NDC, but then must be applied to the second NDC filed by a party. The first NDC is clearly the NDC filed by a party at the time of ratification. Of course, that NDC will, in many cases, simply be the INDC filed prior to Paris. In that case, a revised NDC is expected to be filed by 2020. Paragraphs 23 and 24 of the COP 21 Decision imply a different treatment of the revised NDC depending whether it contains mitigation commitments based on a 2025 or 2030 mitigation target, referring to one as a “new” NDC and the other as an “update”. This may or may not have been the intention of the difference in language between paragraph 23 and 24; however, it suggests, respectively, a 2024 and 2029 application date of the NDC Guidance for NDCs with a 2025 and 2030 mitigation target. A further source of confusion is that the application dates are related to the NDCs, whereas the accounting rules apply to the reporting of the implementation of NDCs, not their communication.

The Talanoa dialogue is not, of course, a Global Stocktake under Article 14 of the Paris Agreement. Nevertheless, it can be viewed to some extent as a trial run of the Global Stocktake, given that it serves a function similar to the stocktake in terms of its role in encouraging an increase in ambition of NDCs. Similarly, the IPCC’s 1.5°C report was prepared at the direction of the COP, with the clear understanding that it was gathering important information about the global goal in the Paris Agreement, to strive to keep global average temperature increase to within 1.5°C. It is perhaps surprising, therefore, that at COP 24/CMA 1.3, where parties received the outcomes of both initiatives, there was limited direction given on how the outcomes should inform the NDCs to be filed or updated by 2020. The COP 24 decision does invite parties to consider the outcomes of the Talanoa Dialogue in preparing their NDCs in their effort to enhance their pre-2020 implementation and ambition.⁵⁷ Such an invitation is not made regarding the IPCC report. The only document that offers a direct plea for raising the ambition of mitigation commitments is the Talanoa Call for Action by the Presidents of COPs 23 and 24.⁵⁸

On a related point, the link between NDC preparation and the result of the (preceding) Global Stocktake can best be described as tenuous.⁵⁹ In light of this, along with the failure to establish a strong link between the Talanoa outcome and the preparation of the

⁵⁷ COP 24 Decision, “V. Talanoa Dialogue”, at paras 35 and 37, where the COP takes note of the “outcome, inputs and outputs” of the Talanoa Dialogue and invites parties to consider them in preparing their NDCs and in their efforts to enhance pre-2020 ambition.

⁵⁸ See Talanoa Call for Action by the Presidents of COP 23 and COP 24, 12 December 2018, <<https://unfccc.int/sites/default/files/resource/Talanoa%20Call%20for%20Action.pdf>>.

⁵⁹ NDC Guidance, Annex I, para. 4.c.

NDCs by 2020 in the decision acknowledging the Talanoa report, there is reason to be concerned about the effectiveness of the transition from the Global Stocktake to the enhancement of NDCs. The first test of the effectiveness of this process will be the filing of revised NDCs by 2020. If they fail to significantly close the ambition gap, there will be an opportunity for the CMA to adopt stronger language following the first Global Stocktake. Furthermore, the requirements in the NDC Guidance on communication to explain the fairness and ambition of NDCs will become more and more difficult if the Global Stocktake points to an inadequate global effort, and the NDCs are not significantly enhanced in response. Only time will tell how effective these elements of the five-year review cycles will be in closing the ambition gap.

4. Conclusion

The NDC Guidance is primarily about how parties will communicate their mitigation commitments in their NDCs, and how they will keep track of progress and report on that progress during the course of implementing their commitments. At the reporting stage of the five-year review cycle, the transparency mechanism takes over with the review of information submitted by the TER teams, followed by the FCMP and the Global Stocktake. The primary role of the NDC Guidance is to ensure that adequate information is available on parties' mitigation commitments and their implementation. While there are gaps and areas of uncertainty discussed in the previous section, the NDC Guidance should, even if it could have offered much more clarity and detail, generally be up to the task.

The rules, including methodologies and metrics, have been clear for some time for parties that have set absolute economy-wide targets. The Paris Rulebook does not depart from this experience under the UNFCCC and Kyoto Protocol. Where things are less clear are with respect to developing-country parties that have chosen to express their mitigation efforts in some other form. Given the broad range of approaches, it is difficult to predict to what extent the adequacy of methodologies and metrics used to describe and track mitigation commitments will become a problem for TER teams or the Article 15 Committee.

An interesting result of the approach taken to methodologies and metrics, by relying on those assessed by the IPCC and approved by the CMA for absolute economy-wide targets that are mandatory for developed-country parties, and by allowing flexibility for other forms of mitigation targets, is the creation, essentially, of a bifurcated system, at least for the time being. This bifurcation will diminish as appropriate, rigorous methodologies and common metrics for alternative approaches to mitigation commitments are assessed by the IPCC, approved by the CMA, and applied by parties. As more developing-country parties take on absolute, economy-wide targets, this bifurcation will disappear.

The flexibility, and the resulting uncertainty, is not limited to methodologies for mitigation targets. The lack of guidance on fairness and ambition may also prove challenging for TER teams and the Article 15 Committee to deal with. The lack of agreement on guidance on these issues is not surprising, given their long history under

the regime, but that does not diminish the challenges this uncertainty may create for the regime.⁶⁰

The bottom line is that the NDC Guidance does address some of the essential elements of NDC communication and accounting, but, on close examination, offers limited progress beyond the elements already agreed to in Paris. Whether the progress made at COP 24/CMA 1.3 will be enough to offer the foundation for the important work under Articles 13-15 to encourage ambition in line with the collective goals of the Paris Agreement will depend on the work of TER teams in ensuring the adequacy of the information provided, the work of the Article 15 Committee to make use of the systemic-issues trigger to address major problem areas, and the effectiveness of the Global Stocktake in using the information gathered to motivate adequate ambition.

⁶⁰ See Daniel Bodansky and Lavanya Rajamani, “The Issues that Never Die”, 12 *CCLR* 184 (2018).