

THE PARIS RULEBOOK: BALANCING INTERNATIONAL PRESCRIPTIVENESS WITH NATIONAL DISCRETION

LAVANYA RAJAMANI AND DANIEL BODANSKY*

Abstract This article discusses the importance of the recently concluded Paris Rulebook, the extent to which it limits national discretion, instils discipline and generates ambition and accountability, and the challenges that lie ahead in implementing the 2015 Paris Agreement. It discusses, in particular, the rules on mitigation, transparency, the global stocktake and the implementation and compliance mechanism, in order to highlight the choices Parties made on three overarching issues that have long bedevilled the climate change regime—prescriptiveness (the level of detail of the rules), legal bindingness (the extent to which particular rules are legally binding) and differentiation (the extent to which particular rules accommodate differences between Parties or apply uniformly to all Parties).

Keywords: public international law, Paris Rulebook, bindingness, prescriptiveness, differentiation, flexibility, operationalising the Paris Agreement.

I. INTRODUCTION

The latest round of UN climate negotiations, held in Katowice, Poland, in December 2018, produced a set of decisions¹ to operationalise most elements of the 2015 Paris Climate Agreement.² The adoption of the so-called Paris Rulebook represents a significant diplomatic achievement in the current geopolitical context, demonstrating continuing political support for the Paris Agreement despite the headwinds created by President Trump's announced intention to withdraw the United States from the

* Professor of International Environmental Law, Faculty of Law, University of Oxford and Yamani Fellow in Public International Law, St Peter's College, Oxford, lrjajamani@gmail.com; Regents' Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, Daniel.bodansky@asu.edu. We are grateful to Susan Biniarz, Harald Winkler and the anonymous ICLQ reviewers for comments on an earlier version of this article.

¹ The full set of decisions agreed to in Katowice is available at 'Katowice Climate Package' (UNFCCC) <<https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package>>.

² UNFCCC, 'Decision 1/CP.21: Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1, 21, Annex (hereinafter 'Paris Agreement'). Notably, Parties were unable to agree on rules for the market mechanisms under Article 6 of the Paris Agreement. Negotiations continue on these, with the goal of adopting a decision at the next Conference of Parties in December 2019.

Agreement in 2020,³ and the equivocation on the Agreement by the newly-elected Brazilian President, Jair Bolsonaro.⁴ In largely completing the Paris Rulebook in the face of deep political divisions, States did what was necessary to keep the Paris Agreement on track. But whether the Paris Agreement will be successful in combating global warming remains an open question, particularly given the dire warnings in the Intergovernmental Panel on Climate Change's (IPCC) Special Report on 1.5°C,⁵ and the evidence in the 2018 United Nations Environment Programme (UNEP) Gap Report of the inadequacy of current climate efforts.⁶ Characterised by UN Secretary-General António Guterres as 'an ear-splitting wake-up call to the world',⁷ the IPCC report underscores the catastrophic climate impacts likely beyond a temperature rise of 1.5°C, as well as the need for rapid, far-reaching and unprecedented transitions and deep greenhouse gas (GHG) reductions across sectors.⁸ The UNEP Gap Report, meanwhile, highlights just how far States are from adopting policies to achieve this temperature goal.⁹

This article discusses the significance of the recently concluded Paris Rulebook, the extent to which it limits national discretion, instils discipline and generates ambition and accountability, and the challenges that lie ahead in implementing the 2015 Paris Agreement. Rather than discuss the entire Paris Rulebook,¹⁰ the article focuses on a few key elements, in particular, the decisions on mitigation, transparency, the global stocktake, and the implementation and compliance mechanism, in order to highlight the choices Parties made on three overarching issues that have long bedevilled the climate change regime—prescriptiveness (the level of detail of the rules), legal bindingness (the extent to which particular rules are legally binding) and differentiation (the extent to which particular rules accommodate differences between countries or apply uniformly to all countries).

This article concludes that, in general, the Paris rules are faithful to the central features of the Paris Agreement, namely:

- National determination rather than multilateral negotiation of Parties' substantive commitments to reduce emissions.
- An emphasis on transparency rather than legal bindingness as the engine to promote ambition and accountability.

³ Office of the Spokesperson, U.S. Department of State, 'Communication Regarding Intent to Withdraw from Paris Agreement' (4 August 2017) <<https://www.state.gov/communication-regarding-intent-to-withdraw-from-paris-agreement/>>.

⁴ F Maisonnave, 'Brazil to review Paris Agreement status, says Bolsonaro environment minister' (Climate Home News, 9 December 2018) <<https://www.climatechangenews.com/2018/12/09/brazil-review-paris-agreement-status-says-bolsonaro-environment-minister-pick/>>.

⁵ IPCC, *Global Warming of 1.5°C* (2018) Summary for Policymakers.

⁶ UNEP, *Emissions Gap Report 2018*, Executive Summary.

⁷ 'Global Warming Report, an "Ear-Splitting Wake-up Call" Warns UN Chief' (UN News, 8 October 2018) <<https://news.un.org/en/story/2018/10/1022492>>.

⁸ Illustrating the difficulties of the road ahead, the Katowice conference was unable to agree on language endorsing the IPCC Special Report. Instead it merely expressed its 'appreciation and gratitude' to the IPCC and 'welcomed the completion' of the Report. UNFCCC, 'Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018' (19 March 2019) FCCC/CP/2018/10/Add.1, paras 25–26.

⁹ UNEP *Emissions Gap Report 2018* (n 6).

¹⁰ Notable elements of the Paris Rulebook not discussed in this article include the decisions on adaptation, finance and other means of support.

- A nuanced approach to differentiation.

The Paris Rulebook leaves Parties with extensive discretion to define their NDCs, and adds considerable flesh on the bones of the Paris Agreement's informational requirements, transparency framework, global stocktake process, and implementation and compliance mechanism. The Paris Rulebook also recognises the capacity constraints developing countries face, and in the transparency framework provides carefully circumscribed flexibility to developing countries based on their capacity needs.

With the adoption of most elements of the Paris Rulebook, the UN climate change regime can now focus on implementation of the Paris Agreement. For the past two decades, the regime has witnessed an almost continuous process of negotiation, beginning with the adoption of the Bali Action Plan in 2007, and continuing through the negotiation of the 2009 Copenhagen Accord, the 2010 Cancun Agreements, the 2011 Durban Platform, the 2015 Paris Agreement and now the 2018 Paris Rulebook. Although Parties in Katowice were unable to agree on the rules for the market mechanisms under Article 6 of the Paris Agreement, and negotiations on these continue, the adoption of the rest of the Paris Rulebook largely completes the negotiating process and allows a shift in focus from negotiation to implementation. The choices made by Parties in Katowice offer insights into the challenges that lie ahead.

II. THE PARIS PARADIGM

The 2015 Paris Agreement represents a paradigm shift in the international community's efforts to regulate climate change. Unlike the 1997 Kyoto Protocol, which opted to start with deep, legally binding emission reduction commitments by limited participants, the Paris Agreement chose, of political necessity, to begin with broad participation at the cost of shallow, self-determined mitigation contributions. What might be referred to as 'the Paris paradigm' takes a hybrid approach to the issues of bindingness, prescription and differentiation. It consists of four elements:

- First, nationally determined contributions (NDCs) by Parties to reduce their greenhouse gas emissions, which Parties are not legally-obligated to achieve.
- Second, internationally negotiated, binding, procedural obligations, to ensure that all Parties are contributing to emissions mitigation in a transparent and accountable manner.
- Third, an 'ambition cycle' to promote stronger action over time.
- Fourth, a nuanced approach to differentiation tailored to each issue area, which in the context of mitigation is based on self-differentiation of NDCs, and in the context of transparency, flexibility based on need.¹¹

The NDCs submitted by Parties in the context of the Paris Agreement cover an impressive 99 per cent of global emissions, but their aggregate effect falls considerably short of the emissions pathways consistent with the Agreement's long-term temperature goal of 'well below 2°C',¹² much less the aspirational 1.5°C

¹¹ For a detailed discussion of differentiation in the Paris Agreement see C Voigt and F Ferreira, 'Differentiation in the Paris Agreement' *Climate Law Special Issue* (2016) 6, 58; and L Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) ICLQ 493.

¹² Paris Agreement, art 2.1(a).

goal.¹³ The Paris Agreement seeks to address this initial discrepancy by setting strong expectations of progression over time toward greater ambition, leading first to a peaking of emissions and then to zero net emissions in the second half of the century,¹⁴ so that the regime would be both broad in terms of participation and deep in terms of the necessary GHG commitments.¹⁵

This ‘direction of travel’ is bolstered by processes that comprise what has come to be called the Paris Agreement’s ‘ambition cycle’—the binding obligation on each State to communicate an NDC every five years,¹⁶ the normative expectation of ‘progression’ and ‘highest possible ambition’ in each successive NDC,¹⁷ and a global stocktake to assess collective progress towards long-term goals, the outcomes of which will inform the next round of NDCs.¹⁸ For this ambition cycle to be successful, transparency is essential about both Parties’ contributions and their actual performance. Accordingly, the Paris Agreement complements the ambition cycle with reporting requirements relating to information accompanying Parties’ NDCs,¹⁹ information on the implementation and achievement of NDCs and the provision of finance,²⁰ and processes of expert and peer review.²¹ Together, these requirements and processes are intended to generate the pressure and momentum necessary to scale up ambition over time. And States, it is hoped, will ‘learn by doing’ and create the policy environment, epistemic communities, and institutional architecture to trigger and implement ever-more ambitious contributions over time, as well as to shift investment patterns.

III. THE IMPORTANCE OF THE PARIS RULEBOOK

The Paris Agreement’s transparency requirements, review processes, and ambition cycle are crucial to the integrity, rationale and spirit of the Paris Agreement. However, they were only sketched out in the Paris Agreement. In some instances, they required further elaboration in order to limit national discretion, instil discipline, and generate ambition and accountability; in others, they required further detail to be operationalised.

The Paris Rulebook, negotiated over three years from 2015 to 2018, mostly by the Ad Hoc Working Group on the Paris Agreement, with assistance from the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI), seeks to fill both these needs. It consists of various modalities, procedures and guidelines that (1) elaborate the Parties’ obligations under the Paris Agreement, and (2) flesh out the Agreement’s procedures and mechanisms, including

¹³ See UNFCCC, ‘Aggregate Effect of the Intended Nationally Determined Contributions: An Update, Synthesis Report by the Secretariat’ (2 May 2016) FCCC/CP/2016/2.

¹⁴ Paris Agreement, art 4.1. The Agreement recognises, however, that peaking will take longer for developing countries, and that efforts to reach zero net emissions will take place on the basis of equity and in the context of sustainable development and efforts to eradicate poverty.

¹⁵ On ‘deep-then-broad’ vs ‘broad-then-deep’ approaches, see D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (Oxford University Press 2017) 26.

¹⁶ Paris Agreement, art 4.2 read with art 4.9.

¹⁷ *ibid*, art 4.3. Art 4.3 also places expectations in relation to NDCs reflecting Parties’ ‘common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’.

¹⁸ *ibid*, art 14.

¹⁹ *ibid*, art 4.8.

²⁰ *ibid*, art. 13.7.

²¹ *ibid*, art 13.11.

the technical expert review process, the global stocktake, and the implementation and compliance mechanism.

In negotiating the Paris Rulebook, Parties' long-standing differences resurfaced over the issues of legal bindingness, prescription and differentiation.²² Specifically, Parties disagreed on the extent to which the Paris Rulebook should be:

- *Legally binding*: On many issues, the Paris Agreement authorises its Meeting of the Parties to adopt binding rules. But whether Parties would choose to exercise that authority in the Paris Rulebook remained an open question during the negotiations. This debate was reflected in disagreement about how to characterise the object of the negotiations—as the 'Paris Rulebook' or the 'Paris Guidelines'.²³
- *Prescriptive*: There is a direct trade-off between the level of detail in the rules and the autonomy that Parties enjoy: the more detailed the rules, the less left to national discretion and vice versa. In the Paris Rulebook negotiations, some Parties sought detailed rules to promote greater rigour and accountability. Others resisted detailed rules, preferring instead to leave the constructive ambiguity in the Paris Agreement's terms untouched, or to use discretionary language that, in effect, left operational choices and details to States.
- *Differentiated*: Finally, States disagreed about the extent to which the Paris rules should be common or differentiated and, if the latter, on what basis, how, and for how long? Although the Paris Agreement took a nuanced approach to differentiation that did not make use of the UNFCCC annexes, some large developing States tried unsuccessfully to reintroduce bifurcated differentiation between developed and developing countries in the Paris Rulebook.

On all three of these issues, despite efforts by those unhappy with the balance struck in the Paris Agreement to shift the outcome, the Paris Rulebook remains faithful to the basic approach of the Paris Agreement, prescribing detailed, legally binding procedural rules, leaving Parties with discretion regarding substance, and addressing differentiation through specified flexibilities in the transparency rules for developing countries with capacity constraints.

IV. BALANCING NATIONAL DISCRETION AND DISCIPLINE IN INFORMATION REQUIREMENTS AND ACCOUNTING FOR NDCS

The Paris Agreement is fundamentally driven by 'national determination'. The core obligation relating to mitigation in Article 4.2 is a procedural obligation (to 'prepare, communicate and maintain' NDCs), coupled with an obligation of conduct (to pursue

²² We posed and discussed the issues of legal bindingness, prescription and differentiation in the lead up to the Katowice conference in D Bodansky and L Rajamani, 'The Issues That Never Die' (2018) 12(3) CCLR 184. For a general discussion of these three issues, see Bodansky, Brunnée and Rajamani (n 15) Ch 1.

²³ This tension was reflected in the UN press release about the Katowice outcome, which referred to 'the adopted guidelines package, called the "rulebook" by some'. UN News, 'At COP24, Countries Agree Concrete Way Forward to Bring the Paris Climate Deal to Life' (15 December 2018) <<https://news.un.org/en/story/2018/12/1028681>>.

domestic measures ‘with the aim of achieving the objectives’ of those NDCs). Parties have the discretion to choose their contributions as well as their domestic measures based on national circumstances and constraints. The Paris Agreement places normative expectations on Parties’ subsequent NDCs—in particular, ‘highest possible ambition’, ‘progression’ and ‘common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’²⁴—but does not define these terms, thus leaving application of them, by default, to national determination. It also recommends (‘should’) that developed country Parties continue taking the lead by undertaking economy-wide absolute emission reduction targets and encourages developing country Parties to move over time towards such targets.²⁵

The discretion Parties currently enjoy in formulating NDCs is reflected in the breathtaking variety of NDCs on display, which differ in terms of type, timing, and coverage. Of the 169 NDCs submitted through 4 April 2016, when the UNFCCC Secretariat prepared its Synthesis Report, about a third are absolute economy-wide GHG mitigation targets, 45 per cent reflect a deviation from business as usual, 20 per cent are policies and actions, and 4 per cent are emissions intensity targets.²⁶ The reference points for the target-based NDCs vary—for instance, the European Union (EU) has committed to a 40 per cent domestic reduction in GHG emissions by 2030 compared to 1990,²⁷ while Australia has committed to a 26 to 28 per cent reduction below 2005 levels by 2030.²⁸ The scope and coverage of greenhouse gases also varies—while most include carbon dioxide, and many include methane, only some include other gases.²⁹ Moreover, several contributions are conditional—for instance, on the use of market mechanisms (such as New Zealand’s)³⁰ or on the availability of support (such as India’s).³¹ All these variations make it challenging to aggregate the efforts of countries and compare them to each other.

The decision accompanying the Paris Agreement tasked the Ad Hoc Working Group on the Paris Agreement with developing further guidance on three issues relating to mitigation: (1) the features of NDCs, (2) the information that Parties are to provide when communicating their NDCs to promote clarity, transparency and understanding (ICTU) (Article 4.8) and (3) accounting of NDCs (Article 4.13).³²

²⁴ Paris Agreement, art 4.3.

²⁵ *ibid*, art 4.4.

²⁶ UNFCCC Synthesis Report (n 13). As of 10 August 2019, 184 NDCs have been submitted but the UNFCCC has not yet updated its analysis of the aggregate effect of NDCs in the light of these additional NDCs.

²⁷ ‘Submission by Latvia and the European Commission on behalf of the European Union and Its Member States; Intended Nationally Determined Contribution of the EU and Its Member States’ (Latvia Presidency of the Council of the European Union, 6 March 2015) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf>>.

²⁸ ‘Australia’s Intended Nationally Determined Contribution to a New Climate Change Agreement’ (August 2015) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Australia/1/Australia%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf>>.

²⁹ UNFCCC Synthesis Report (n 13).

³⁰ ‘Submission to the ADP: New Zealand’s Intended Nationally Determined Contribution’ (7 July 2015) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/New%20Zealand/1/New%20Zealand%20INDC%202015.pdf>>.

³¹ ‘India’s Intended Nationally Determined Contribution: Working Towards Climate Justice’ (1 October 2015) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf>>.

³² Decision 1/CP.21 (n 2) paras 26, 28 and 31.

A. Features of NDCs

To instil greater discipline in the NDC process by limiting the substantive discretion Parties currently enjoy in defining their mitigation contributions, some countries sought to define additional features of NDCs that might be required or at least recommended—for instance, that NDCs should be quantified or quantifiable³³ and contain an unconditional component.³⁴ Others argued that prescribing features would be inconsistent with the self-determined nature of Parties' mitigation contributions.³⁵ In the end, this latter view prevailed. The Katowice decision on mitigation left the relative silence of the Paris Agreement on 'features' untouched. It noted merely that features of NDCs are 'outlined in the relevant [unspecified] provisions of the Paris Agreement'³⁶ and postponed further consideration of the issue to 2024,³⁷ presumably so that Parties can draw on any lessons learned from the first Global Stocktake in 2023.

B. Information Accompanying NDCs

The Paris Agreement requires each Party, when submitting its NDC, to provide the information necessary for clarity, transparency and understanding (referred to in the negotiations as ICTU for short).³⁸ This requirement was intended to remedy a defect in the Copenhagen Accord pledging process, which resulted in pledges that did not address important issues such as timing or coverage. Unless NDCs are clear, transparent, and understandable, it is impossible to know what a country's contribution is or whether or not it has achieved it.

A significant issue post-Paris was whether the Paris Rulebook would specify the informational elements necessary for clarity, transparency and understanding in greater detail or leave it up to each Party to decide what information is necessary to make its NDC clear, transparent and understandable. The Paris Agreement authorised its Meeting of Parties to adopt binding guidance on ICTU (by providing that Parties 'shall' provide information 'in accordance' with decisions of the Meeting of Parties)³⁹, but the decision accompanying the Paris Agreement did not exercise this authority to adopt binding guidance; instead, it merely identified various types of information that 'may' be necessary for a Party to include, leaving Parties with substantial discretion.⁴⁰

In this respect, the Paris rules strengthen the Paris Agreement's informational requirements in two important ways, first by elaborating these requirements in

³³ 'Submission on APA Agenda item 3, Further guidance in relation to mitigation section of decision by the Republic of the Maldives on behalf of the *Alliance of Small Island States*' (12 April 2017) <https://unfccc.int/files/bodies/apa/application/pdf/167_321_131367464782415559-aosis_submission_apa_agenda_item_3_.pdf>.

³⁴ See UNFCCC, 'APA agenda item 3—Further guidance in relation to the mitigation section of decision 1/CP.21' (13 November 2017) <https://unfccc.int/sites/default/files/apa_3_informal_note_final_version.pdf> 4.

³⁵ See eg UNFCCC, 'Item 3: Further guidance in relation to the mitigation section of decision 1/CP.21', Turkey (28 April 2017) <https://unfccc.int/files/bodies/apa/application/pdf/submissions_apa_item_3.pdf> 116.

³⁶ UNFCCC, 'Decision 4/CMA.1: Further guidance in relation to the mitigation section of decision 1/CP.21' (19 March 2019) FCCC/PA/CMA/2018/3/Add.1, 6, para 19.

³⁷ *ibid.*, para 20.

³⁸ Paris Agreement, art 4.8.

³⁹ *ibid.*

⁴⁰ Decision 1/CP.21 (n 2) para 27.

considerable detail in an annex; second, by stating that Parties ‘shall provide’ the information in Annex I as applicable to their NDC.⁴¹ Annex I lists specific pieces of information that Parties need to provide as applicable, such as quantifiable information on their reference points, time frames for implementation, gases covered, planning processes, assumptions and methodological approaches, how they consider their contribution fair and ambitious, and how it contributes to the objective of the regime.⁴² By strengthening the normative force as well as enhancing the specificity of the informational requirements placed on Parties, the Paris rules seek to limit national discretion and instil rigour and discipline.

However, although Annex I provides much greater specificity about the types of information that must accompany an NDC than previous decisions,⁴³ it still permits Parties some discretion, by requiring Parties to provide the enumerated information only ‘as applicable’ to their NDC.⁴⁴ This caveat allows Parties to determine their informational requirements through their choice of NDC. Further, to avoid any disincentive for Parties to update their first NDCs in 2020, Parties are ‘strongly encouraged’ but not required to provide the information specified in Annex I when updating their first NDC. Instead the new information is legally required only for Parties’ second and subsequent NDCs.⁴⁵

The qualification, ‘as applicable’ to their NDC, also addresses the issue of differentiation. Although Article 4.8 of the Paris Agreement requires ‘all Parties’ to provide the information necessary for clarity, transparency and understanding, without any differentiation between developed and developing country Parties, some developing countries argued that they should be allowed to provide ‘less amounts of information or lower levels of detail’.⁴⁶ In response, developed countries argued that there was no justification for lower standards of clarity, transparency and understanding for developing countries than for developed countries, and that any capacity constraints in relation to ICTU requirements should be addressed through support for developing countries, as provided by Article 4.5, rather than through lower standards. The Paris Rulebook mitigation decision addresses the issue of differentiation in two ways. First, it includes various recitals underscoring the importance of support,⁴⁷ recognising that Parties have ‘different starting points, capacities and national circumstances’⁴⁸ and recalling that developed countries are to take the lead with economy-wide absolute emission reduction targets.⁴⁹ Second, and more tangibly, the Paris Rulebook carries over in its informational rules, the self-differentiated approach to NDCs that had unlocked the issue of differentiation in the Paris Agreement. By self-differentiating their NDCs, Parties are also able, in effect, to self-differentiate their ICTU requirements, at least to some degree. Notably, differentiation stems from the nature of the NDC a Party has chosen for itself, not from the category of Party to which it belongs.

⁴¹ Decision 4/CMA.1 (n 36) para 7.

⁴² *ibid*, Annex I.

⁴³ UNFCCC, ‘Decision 1/CP.20: Lima Call for Climate Action’ (2 February 2015) FCCC/CP/2014/10/Add.1, para 14; Decision 1/CP.21 (n 2) para 27.

⁴⁴ *ibid*, para 7.

⁴⁵ *ibid*, para 7.

⁴⁶ UNFCCC, ‘LMDC Submission on Further Guidance for the Nationally Determined Contributions under the Paris Agreement’ <http://unfccc.int/files/bodies/apa/application/pdf/214_321_131351691309535690-lmdc_submission_on_further_guidance_for_the_ndcs_under_the_paris_agreement_-_final.pdf>.

⁴⁷ Decision 4/CMA.1 (n 36) preambular recitals 3–4 and paras 1–4.

⁴⁸ *ibid*, preambular recital 4.

⁴⁹ *ibid*, para 5.

With respect to another long-standing bone of contention between developed and developing countries—that is, equity—the Paris Rulebook preserves the position of all sides. The annex requires Parties to report on how they have addressed the issues of fairness and ambition,⁵⁰ but does not require specific types of information to substantiate a Party's narrative, since this would have required agreement on indicators of fairness, which has proved impossible in the negotiations. Thus, a Party's explanation of why it considers its NDC to be fair and ambitious is self-determined and based on self-selected benchmarks.⁵¹ Nevertheless, although the guidance on ICTU does not prescribe or limit what Parties may say about fairness and ambition, the mere requirement that they are to provide an explanation enables more focused criticism by others.⁵²

C. Accounting for NDCs

The Paris Agreement requires Parties, in mandatory terms ('shall'), to account for their NDCs, in order to 'promote environmental integrity, transparency, accuracy, completeness, comparability, and consistency, and ensure the avoidance of double counting'.⁵³ It also authorised but did not require its Meeting of Parties to adopt binding guidance on accounting.⁵⁴ Further, the decision accompanying the Paris Agreement offered a blueprint for the contents of such accounting guidance. It called for the development of guidance that 'ensures' that Parties: 'account' for emissions and removals in accordance with IPCC methodologies and metrics; 'ensure' methodological consistency; 'strive to' include all categories of emissions and removals in their NDCs; and provide an explanation if they do not.⁵⁵

There is a considerable overlap between accounting of NDCs under Article 4.13 and tracking progress in achieving NDCs under Article 13.7, and the Paris Rulebook elaborates accounting rules in greater detail pursuant to Article 13.7 than Article 4.13.⁵⁶ With respect to Article 4.13, the Paris Rulebook modestly elaborates in an annex the elements of the Paris decision blueprint on accounting, specifying particular types of information that Parties are to provide and methods that they are to use. Although the annex does so with minimal use of auxiliary verbs (such as 'shall' or 'should'), the mitigation decision states that 'Parties shall account for their nationally

⁵⁰ *ibid.*, Annex I, Section 6.

⁵¹ For example, a study of Parties' first round of NDCs found that most Parties' claims regarding equity were either unsubstantiated or drawn from analysis by in-country experts. Few of the NDCs submitted referred to independent evidence in relation to equity claims, and none of these considered the consequences of their approach if extended to all countries. For instance, while many countries chose to justify the fairness of their NDCs by reference to their 'small share' of global GHG emissions, none of the countries extended this analysis to other countries. If they had, they would have realised that the emissions of individual 'small share' NDCs add up to 24 per cent of annual global emissions, which negates the argument that merely because a country has a 'small share' of global emissions, it should not be expected to take ambitious action. H Winkler *et al.*, 'Countries Start to Explain How Their Climate Contributions Are Fair: More Rigour Needed' (2018) 18(1) *International Environmental Agreements: Politics, Law and Economics* 99.

⁵² In this respect, the requirement that each Party say why its NDC is fair and ambitious in light of its national circumstances serves the same function as the requirement that judges give reasons for their decisions, which allows others to argue that a judge's reasoning is faulty.

⁵³ Paris Agreement, art 4.13.

⁵⁴ *ibid.*

⁵⁵ Decision 1/CP.21 (n 2) para 31.

⁵⁶ See Section V.A. below.

determined contributions in accordance with the guidance contained in [the] annex',⁵⁷ making the guidance as a whole mandatory beginning with Parties' second NDC.⁵⁸

In keeping with the overall effort to balance legal bindingness with Party autonomy, the rules offer Parties flexibility in various ways despite their mandatory nature. The most specific requirement is that Parties account for anthropogenic emissions and removals using the methodologies and metrics in the 2006 IPCC guidelines,⁵⁹ but these guidelines give Parties flexibility to use estimation methods at three levels of detail, from tier 1 (the default method) to tier 3 (the most detailed method).⁶⁰ This means Parties can use methods tailored to their resources and focus on those categories of emissions and removals that contribute most significantly to national emission totals and trends.⁶¹ Moreover, if a Party's NDCs cannot be accounted for using the IPCC methodologies, the Party is permitted to use 'nationally appropriate' methodologies, as long as these are consistent with IPCC methodologies and are transparently explained.⁶²

Beyond the requirement to use IPCC methodologies, the other provisions of the mitigation decision and accounting annex allow Parties even great flexibility. In general, they simply reiterate the broad accounting principles in the Paris decision blueprint,⁶³ and allow each Party to choose how it implements these principles, so long as it is transparent about its accounting methodologies—for example, by providing information about methodologies used to track progress in implementing policies and measures,⁶⁴ and about methodological changes.⁶⁵ Finally, although the annex mostly avoids using auxiliary verbs, in some instances it does so to soften the obligation. Thus, Parties are to 'strive' to avoid overestimating or underestimating projected emissions and removals used for accounting and to include all categories of anthropogenic emissions and removals in their NDC.⁶⁶ Where a Party includes a particular category, it is required to continue including the category, and if it does not include a particular category of emissions or removals, it is to provide an explanation.⁶⁷ Thus, in relation to accounting for NDCs, the rules contain a strong push for Parties to use IPCC methodologies and metrics and to transparently explain their choices. But the rules also permit a Party to use its own methodologies if its NDC requires it to do so. The 'self-determined' nature of NDCs and the wide variation in NDCs that this leads to permit Parties to retain discretion in relation to accounting as well.

Ultimately, both in relation to ICTU and accounting, notwithstanding efforts in the rules to limit national discretion and instil discipline, the 'nationally determined'

⁵⁷ Decision 4/CMA.1 (n 36) para 13.

⁵⁸ *ibid.*, para 14.

⁵⁹ *ibid.*, Annex II, para 1(a) read with UNFCCC, 'Decision 18/CMA.1: Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement' (19 March 2019) FCCC/PA/CMA/2018/3/Add.2, Annex, para 20.

⁶⁰ J Penman *et al.*, *2006 IPCC Guidelines for National Greenhouse Gas Inventories*, Overview <https://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/0_Overview/V0_1_Overview.pdf> 8.

⁶¹ *ibid.*

⁶² Decision 18/CMA.1 (n 59) Annex, para 22; Decision 4/CMA.1 (n 36), Annex II, para 1(b).

⁶³ Decision 1/CP.21 (n 2) para 31. In effect, most of the accounting guidance in the Paris Rulebook is set forth in Part II of the annex to the transparency decision, Decision 18/CMA.1 (n 59) (discussed in Section V.A.1 below), rather than in the mitigation decision.

⁶⁴ Decision 4/CMA.1 (n 36) Annex II, para 1(c).

⁶⁵ *ibid.*, Annex II, para 2(e).

⁶⁶ *ibid.*, Annex II, para 3(b).

⁶⁷ *ibid.*, Annex II, paras 3–4.

nature of Parties' NDCs continues to give Parties considerable leeway, and will likely make assessment, aggregation and comparison of NDCs challenging.

V. GENERATING AMBITION AND ACCOUNTABILITY

The Paris Agreement relies on three elements—the enhanced transparency framework, the global stocktake, and the implementation and compliance mechanism—working in tandem, to generate ambition and accountability.

A. Transparency

The Paris Agreement's 'enhanced' transparency framework consists of three components:

- Obligations to report on emissions inventories, progress in implementing and achieving NDCs and, for developed country Parties, support provided to developing countries.
- Technical expert review.
- Facilitative multilateral consideration of progress—that is, peer review by States.

The Paris Agreement tasked its Meeting of Parties to develop 'common' modalities, procedures and guidelines for the enhanced transparency framework.⁶⁸ At 35-pages long, the resulting decision is by far the longest section of the Paris Rulebook, reflecting the central role of the enhanced transparency framework in the Paris paradigm. As in other areas of the Paris Rulebook, the rules reflect complex trade-offs between bindingness, prescription and differentiation. In general, they establish comparatively strong reporting requirements but more modest review processes, with specified flexibility for developing countries based on their capacity needs.

1. Reporting

The Paris Agreement requires each Party to submit a national inventory report as well as 'the information necessary to track progress in implementing and achieving' its NDC.⁶⁹ This information is to be provided in a 'structured summary'⁷⁰ that makes the extent to which Parties are implementing and achieving their NDCs accessible, transparent, and comparable. The decision accompanying the Paris Agreement further provided that, except for least developed countries and small island developing States, all Parties must submit this information biennially.⁷¹

An annex to the Katowice decision on transparency elaborates in considerable detail Party's reporting obligations.⁷² With respect to emission inventories, a key issue was whether the Paris Rulebook would require developed as well as developing country Parties to report their emission inventories using the 2006 IPCC guidelines. The transparency annex requires all Parties to use the 2006 guidelines,⁷³ although as noted

⁶⁸ Paris Agreement, art 13.13

⁷⁰ Decision 18/CMA.1 (n 59) para 77.

⁷² Decision 18/CMA.1 (n 59) Annex.

⁶⁹ *ibid*, art 13.7.

⁷¹ Decision 1/CP.21 (n 2) para 90.

⁷³ *ibid*, Annex para 20.

earlier, the IPCC guidance allows for some self-differentiation among Parties through the choice of tiers. The annex also sets forth detailed rules on key category analysis for inventories, time-series consistency and recalculations, uncertainty assessment, assessment of completeness, and quality assurance/quality control, making it one of the most prescriptive elements of the Paris Rulebook.

The Paris rules relating to tracking the implementation and achievement of NDCs offer a more subtle example of the trade-off between prescriptiveness, which strengthens tracking, and discretion/flexibility, which privileges national autonomy. These rules acquire particular salience in light of the fact that the Paris Agreement does not oblige Parties to achieve their NDCs. If tightly framed, however, the rules on tracking of progress have the potential to generate some measure of accountability.

Since Article 4.2 of the Paris Agreement contains an obligation of conduct for Parties to pursue domestic mitigation measures, with the aim of achieving the objectives of their NDC, each Party is required to provide information on both its NDC and its domestic measures.⁷⁴ The requirement to provide a description of a Party's NDC against which progress will be tracked parallels the requirements on ICTU discussed above. As with those requirements, the transparency rules require Parties to provide the specified information 'as applicable'.⁷⁵

In a more significant concession to national determination, the Paris rules permit each Party to choose its own qualitative or quantitative indicators to track progress toward implementation and achievement of its NDC.⁷⁶ The rules set forth a list of illustrative indicators that a Party 'could include, as appropriate',⁷⁷ but do not prescribe which ones Parties are to adopt. Instead, the theory is that requiring Parties to identify indicators, and to provide specific information in relation to each indicator,⁷⁸ will allow criticism by others both of a Party's approach to assessing its progress and of its performance against its own self-selected standards.

2. *Technical expert review*

The information provided by Parties pursuant to Article 13 is subject to a technical expert review that (1) considers the consistency of the information with the Paris rules, the implementation and achievement of a Party's NDC, and the support provided to the Party, and (2) identifies areas of improvement for a Party in relation to its compliance with transparency-related commitments.⁷⁹ This review can take the form of a desk review, but is undertaken in-country at regular intervals.⁸⁰ The technical expert review is also tasked with assisting countries that need it with identifying their capacity-building needs.⁸¹

The modalities and procedures for technical expert review also illustrate the extent to which States chose to preserve their autonomy in relation to NDCs. The rules prohibit technical expert review teams in mandatory language ('shall not') from making 'political judgments' or reviewing the 'adequacy or appropriateness' of a Party's NDC, domestic actions, or support provided.⁸² Technical expert review teams are also prohibited from reviewing a developing country's decision to apply flexibility (see section 3 below), or to

⁷⁴ *ibid.*, Annex, Part III.B and Part III.D.

⁷⁶ *ibid.*, Annex, para 65.

⁷⁹ *ibid.*, Annex, para 146.

⁸² *ibid.*, Annex, para 149.

⁷⁷ *ibid.*, Annex, para 66.

⁸⁰ *ibid.*, Annex, para 156 and 158.

⁷⁵ *ibid.*, Annex, para 64 chapeau.

⁷⁸ *ibid.*, Annex, paras 65–68.

⁸¹ *ibid.*

assess whether such a country possesses the capacity to implement the provision in question without flexibility.⁸³

In a similar vein, the rules also permit Parties considerable say in the type of review that they will undergo. Parties are required to undergo an in-country review in certain circumstances, as for instance for their first biennial transparency report, and for the report that contains information on the Party's achievement of its NDC.⁸⁴ However, these in-country reviews can take place only with the 'consent of, and in close coordination with, the Party subject to review'⁸⁵ and developing country Parties that need flexibility can choose to undergo a centralised review instead.⁸⁶

The Paris rules on transparency thus reflect a delicate balance between the prescriptiveness of the requirements placed on Parties and the autonomy retained by Parties in relation to these requirements.

3. Differentiation

In the negotiations for the modalities, procedures and guidelines on transparency, some developing countries sought to extend to the Paris Agreement the UNFCCC's bifurcated transparency system, which establishes different requirements for developed and developing countries.⁸⁷ After a protracted battle, Parties agreed to phase in uniform reporting requirements for developed and developing countries (except least developed countries and small island developing States) in 2024.⁸⁸ In deference to the concerns of developing countries, however, the rules give developing countries that need flexibility in light of their capacities, flexibilities in the 'scope, frequency, and level of detail of reporting, and in the scope of the review'.⁸⁹

The flexibilities set forth in the transparency rules involve a careful balance of international prescription and national autonomy.⁹⁰ On the one hand, they are heavily circumscribed:

- First, not all developing countries are offered flexibilities, only 'those that need it in the light of their capacities'.⁹¹ This is a subset of developing countries, unlike in the UNFCCC,⁹² with an objective limitation—i.e., 'capacities'.
- Second, these flexibilities relate only to certain provisions, rather than applying generally. This limits the scope of application of the flexibilities.
- Third, a developing country that wishes to avail itself of flexibility must identify the specific provision for which it needs flexibility.⁹³
- Fourth, a developing country that avails itself of one of the specified flexibilities must identify the capacity constraints that justify its application of the

⁸³ *ibid.*

⁸⁴ *ibid.*, Annex, para 158.

⁸⁵ *ibid.*, Annex, para 153.

⁸⁶ *ibid.*, Annex, para 159.

⁸⁷ LMDC Submission (n 46).

⁸⁸ Decision 18/CMA.1 (n 59), para 3.

⁸⁹ *ibid.*, Annex, para 5.

⁹⁰ For an insightful insider's perspective, see S Biniaz, 'The Who, What and When of "Flexibility" in the Paris Agreement's Transparency Framework' *Climate Law Blog* (Sabin Centre for Climate Change Law, 20 December 2018) <<http://blogs.law.columbia.edu/climatechange/2018/12/20/the-who-what-and-when-of-flexibility-in-the-paris-agreements-transparency-framework/>>.

⁹¹ Paris Agreement, art 13.2 and Decision 18/CMA.1 (n 59) Annex, Section I.B, para 3(c) and Section I. C, para 4.

⁹² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art 12.

⁹³ Decision 18/CMA.1 (n 59) Annex, para 6.

flexibility.⁹⁴ This too is a departure from the UNFCCC, which assumed that developing countries face capacity constraints and did not demand justification for differential treatment.

- Finally, developing countries must identify self-determined time frames for improvement in relation to their capacity constraints.⁹⁵ This requirement introduces an element of dynamism into the provision of flexibilities. As national circumstances change and capacity constraints are addressed, flexibilities are no longer needed.

On the other hand, these prescriptions are balanced with significant ‘self-determination’ or autonomy. Developing countries are allowed to self-determine whether they need a specified flexibility in light of their capacities.⁹⁶ While they are required to identify capacity constraints, their decision to apply a flexibility is not reviewable and the rules do not provide any objective benchmarks of capacity.⁹⁷ Moreover, the estimated time frames that developing countries are required to provide for improvements to their capacities are also ‘self-determined’.⁹⁸

B. Global Stocktake

Article 14 of the Paris Agreement requires the Meeting of Parties to periodically ‘take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals’.⁹⁹ This global stocktake plays a key role in the agreement’s ‘ambition cycle’, by providing an assessment every five years of Parties’ collective progress, which is to inform the Parties in updating and enhancing their NDCs and support. Given the fact that the current NDCs of Parties, taken together, do not place the world on a pathway towards the temperature goal identified in the Paris Agreement,¹⁰⁰ the global stocktake process assumes particular significance.

The Paris Agreement provides guidance on the nature, purpose, scope, timing and outcome of the global stocktake, but left the mechanics to be determined by its Meeting of Parties as part of the Paris Rulebook negotiations. The Paris rules operationalise the global stocktake by specifying:

- Its three components (information collection, technical assessment and consideration of outputs).¹⁰¹
- How it will be conducted.
- The bodies responsible for doing so (including in particular SBSTA and SBI).¹⁰²

⁹⁴ *ibid.* ⁹⁵ *ibid.* ⁹⁶ *ibid.* ⁹⁷ *ibid.*, para 6 and para 149(e).

⁹⁸ *ibid.* See generally L Rajamani, *Innovation and Experimentation in the International Climate Change Regime*, Collected Courses of the Hague Academy of International Law/*Recueil des Cours* (forthcoming 2020).

⁹⁹ See generally J Friedrich, ‘Global Stocktake (Article 14)’ in D Klein *et al.* (eds), *The Paris Agreement on Climate Change* (Oxford University Press 2017) 319

¹⁰⁰ UNEP *Emissions Gap Report 2018* (n 6).

¹⁰¹ UNFCCC, ‘Decision 19/CMA.1: Matters relating to article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21’ (19 March 2019) FCCC/PA/CMA/2018/3/Add.2, para 3.

¹⁰² A joint contact group of the SBI and the SBSTA. *ibid.*, para 4.

With respect to scope, the stocktake is to assess collective progress in the thematic areas of ‘mitigation, adaptation and means of implementation and support’. In addition, it ‘may take into account, as appropriate, efforts related to its work’ on social and economic consequences and impacts of response measures, and loss and damage associated with the adverse effects of climate change.¹⁰³ The extension of the thematic areas beyond those identified in the Paris Agreement proved controversial, hence the guarded language relating to loss and damage and to the social and economic consequences of response measures.

The issue of equity, and how it could be operationalised in the stocktake, was predictably contentious in the Rulebook negotiations. Some Parties proposed the use of indicators, principles and benchmarks—such as historical responsibility for increase in temperature, cumulative per capita emissions, capacity to act due to development levels, and sustainable development—to assess progress ‘in the light of equity’. The proponents of this approach, in particular the Africa Group, argued that the application of objective indicators would offer greater precision, rigour and comparability in assessing the extent to which Parties’ contributions, collectively, address equity concerns.¹⁰⁴ However, many developed countries rejected the use and application of such indicators, arguing that it is unclear how indicators could be applied without breaching the Paris Agreement’s provision that the stocktake will assess collective, rather than individual, progress. Further, since there is no multilaterally agreed understanding of equity, indicators could be subjectively selected, applied and deployed to support preferred narratives, rendering the stocktake a contentious exercise.

As a result of these negotiating dynamics, the Paris Rulebook does not identify specific indicators of equity or provide for the use of objective indicators in the stocktake. The rules do, however, provide that ‘equity and the best available science will be considered in a Party-driven and cross-cutting manner, throughout the global stocktake’;¹⁰⁵ that ‘fairness considerations, including equity’, are to form part of the input for the global stocktake;¹⁰⁶ that all inputs are to be ‘discussed in a balanced, holistic and comprehensive manner . . . , taking into account equity considerations and the best available science’;¹⁰⁷ and that the output of the stocktake should also consider equity.¹⁰⁸ But how precisely equity will be taken into account in the global stocktake remains to be seen, given that the Paris Agreement does not permit assessments of the adequacy of individual contributions, including whether they represent a fair share of global emission reductions.

Apart from the issue of equity, the rules specify in considerable detail the inputs to the stocktake, including the types and sources of information that the global stocktake will consider. Relevant types of information include the state of GHG emissions and mitigation efforts undertaken by Parties, the overall effect of Parties’ NDCs and overall progress made by Parties towards the implementation of their

¹⁰³ Decision 19/CMA.1 (n 101) paras 8–10.

¹⁰⁴ ‘Submission by the Republic of Mali on behalf of the African Group of Negotiators On Views on issues discussed under agenda item 6’ (2017) <https://unfccc.int/files/meetings/bonn_nov_2017/application/pdf/compilation_26072017.pdf>.

¹⁰⁵ Decision 19/CMA.1 (n 101) para 2.

¹⁰⁶ *ibid.*, para 36(h).

¹⁰⁷ *ibid.*, para. 27.

¹⁰⁸ *ibid.*, para 13.

NDCs, the state of adaptation efforts, finance flows, and efforts relating to loss and damage.¹⁰⁹ The rules permit such inputs to be sourced from a wide variety of actors, including Parties, the IPCC, the UNFCCC Secretariat, subsidiary bodies, and even ‘non-Party stakeholders and UNFCCC observer organizations’.¹¹⁰

Finally, although the rules elaborate the modalities of the global stocktake in some detail, they also reflect the Paris Agreement’s deference to national autonomy. Consistent with the Paris Agreement, the rules specify that the stocktake will be ‘a Party-driven process’,¹¹¹ will not have an ‘individual Party focus’, and will include only ‘non-policy prescriptive consideration of collective progress’.¹¹²

C. Implementation and Compliance

Article 15 of the Paris Agreement establishes a mechanism to facilitate implementation and promote compliance. It provides broad guidance on the nature of the compliance and implementation mechanism—it should be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive—but tasked the Meeting of Parties to elaborate the mechanism’s modalities and procedures.¹¹³ The rules adopted in Katowice strike a balance between those who sought to limit the new mechanism to a ‘help desk’ function for Parties having implementation and compliance difficulties, and those who wanted the mechanism to play a stronger role in promoting accountability.¹¹⁴

Key issues in the negotiations concerning the implementation and compliance mechanism included:

- The scope of the Committee’s work—whether it should extend to all provisions of the Paris Agreement, or only to those that are legally binding, and if the latter, how this should be determined and by whom.
- How, and by whom, the proceedings may be initiated.
- The outputs of the proceedings.
- How and to what extent the Committee should pay attention to ‘national capabilities and circumstances’.¹¹⁵

The rules for the new mechanism provide an extra layer of accountability, by allowing the Committee to initiate proceedings regarding non-compliance with several binding procedural obligations that would otherwise escape review, including failure by a Party to:

- Submit an NDC every five years.
- Submit a mandatory report on implementation and achievement of a Party’s NDC or on its provision of finance.
- Participate in the facilitative, multilateral consideration of progress.¹¹⁶

¹⁰⁹ *ibid.*, para 35.

¹¹⁰ *ibid.*, para 37.

¹¹¹ *ibid.*, para 10.

¹¹² *ibid.*, para 14.

¹¹³ Paris Agreement, art 15.3.

¹¹⁴ G Zihua, C Voigt and J Werksman, ‘Facilitating Implementation and Promoting Compliance with the Paris Agreement under Article 15 of the Paris Agreement: Conceptual Challenges and Pragmatic Choices’ (2019) 9 *Climate Law* 65–100.

¹¹⁵ Paris Agreement, art 15.2.

¹¹⁶ Decision 19/CMA.1 (n 101), para 22(a).

The rules also authorise the Committee to engage in a ‘facilitative consideration of issues’ if there are ‘significant and persistent’ inconsistencies between a Party’s reports and the transparency rules discussed above,¹¹⁷ and to consider systemic issues that do not concern individual Parties.¹¹⁸

However, while providing additional accountability, the modalities and procedures for the new mechanism are, to a significant degree, deferential to national autonomy. Where the Committee’s proceedings are initiated by a Party with respect to itself, the Party may raise issues relating to any provision of the Paris Agreement,¹¹⁹ whatever its legal character. In contrast, the Committee’s authority to initiate proceedings on its own is carefully circumscribed, as described above, and it may consider inconsistencies between a Party’s reports and the Article 13 rules only with the consent of the State concerned.¹²⁰ Moreover, when the Committee initiates consideration of an issue, it may not address the ‘content of the contributions, communications, information and reports’ of Parties,¹²¹ implying that the compliance proceeding may consider only the breach of the procedural obligation to submit an NDC or report, not the substance of an NDC or report.

The Paris rules identify several possible measures and outputs of a proceeding, most of which, in keeping with the facilitative nature of the mechanism, are soft responses involving ‘dialogue’, assistance, or recommendations.¹²² The Committee is authorised to issue ‘findings of fact’—the most stringent of the measures and outputs Parties could agree on—in relation to the short list of unambiguously binding procedural obligations referred to earlier.¹²³

Finally, with respect to differentiation, the rules are faithful to the approach of the Paris Agreement, which provides simply that ‘the committee shall pay particular attention to the respective national capabilities and circumstances of Parties’,¹²⁴ rather than providing blanket flexibility or special consideration for all developing countries, as some developing countries had sought.¹²⁵ The Article 15 rules build on the Paris Agreement by requiring the Committee to pay particular attention to the respective national capabilities and circumstances of Parties at all stages of its work, and by explicitly recognising the special circumstances of least developed countries and small island developing States.¹²⁶ In doing so, the rules regarding the Article 15 mechanism follow the approach of the Paris Rulebook generally, eschewing a categorical approach to differentiation in favour of a more targeted approach that focuses on the needs and circumstances of individual Parties—for example, what assistance might be provided to help them engage with the Committee.¹²⁷

¹¹⁷ *ibid.*, para 22(b).

¹¹⁸ *ibid.*, paras 32–34.

¹¹⁹ UNFCCC, ‘Decision 20/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’ (19 March 2019) FCCC/PA/CMA/2018/3/Add.2, para 20.

¹²⁰ *ibid.*, para 22(b).

¹²¹ *ibid.*, para 23.

¹²² *ibid.*, para 28.

¹²³ *ibid.*, para 22(a).

¹²⁴ Paris Agreement, art 15.2.

¹²⁵ See ‘LMDC Submission on Modalities and Procedures for the Effective Operation of the Article 15 Committee to Facilitate Implementation and Promote Compliance’ (14 October 2017) <https://unfccc.int/sites/default/files/lmdc_submission_on_art_15_implementation_and_compliance_mechanism_30_sep_2017_-_final.pdf>.

¹²⁶ Decision 20/CMA.1 (n 119) para 19(c); see also para 26.

¹²⁷ Zihua, Voigt and Werksman (n 114).

CONCLUSION

The Paris Rulebook, in line with the Paris Agreement, strikes a delicate balance between prescriptiveness, bindingness and differentiation. The rules leave Parties with discretion to define their NDCs, but add considerable flesh to the bones of the Paris Agreement's informational requirements, transparency framework, global stocktake, and implementation and compliance mechanism. The rules on transparency also provide carefully circumscribed flexibility to developing countries with demonstrable capacity needs.

The rules seek to instil rigour and discipline, and generate ambition and accountability in the climate regime. But, of political necessity, they preserve considerable autonomy, flexibility and discretion for States. As the Paris Agreement is operationalised in the years to come, States could choose to exploit this discretion and create a drag in the process, or they could choose to progressively strengthen their NDCs, enhance the quality of the information they provide at every stage, and trigger a virtuous cycle of ever-more ambitious actions necessary to meet the temperature goal of the Paris Agreement. Which path States choose remains to be seen.