

GENERAL ISSUES IN ELABORATING THE PARIS RULEBOOK



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The Paris Agreement establishes a new multilateral architecture guiding countries' climate change efforts under the U.N. Framework Convention on Climate Change (UNFCCC). Parties are currently negotiating more detailed rules and procedures for implementing the agreement, including provisions addressing transparency, accounting, compliance, use of market-based mechanisms, and periodic assessment of collective progress. These more detailed rules and procedures—known colloquially as the Paris “rulebook”—are to be adopted in late 2018 at COP 24 in Katowice, Poland. This brief identifies and discusses a set of cross-cutting issues that apply across the full range of decisions to be adopted. These cross-cutting issues are structure, precision, bindingness, differentiation, timing, and inter-linkages among different elements of the Paris rulebook.

The 2015 decision formally adopting the Paris Agreement, called Decision 1/CP.21, calls on the first meeting of the Paris parties, known as CMA-1, to adopt rules, modalities, procedures and guidelines elaborating various provisions of the agreement. (CMA-1 opened at COP 22 in 2016, following the agreement's early entry into force, and parties decided there to extend the meeting through COP 24 to allow more time to negotiate the implementing decisions.)

Broadly speaking, the Paris Agreement creates a framework blending bottom-up and top-down features: Countries' individual commitments are nationally determined, but are subject to rules and procedures that are internationally agreed. The agreement also reflects a set of fundamental understandings: The agreement is applicable to all; it will be implemented in the context of equity and common but differentiated responsibilities and respective capabilities in light of different national circumstances; developed countries will take the lead on economy-wide targets and climate finance; and there will be no differentiation of countries' obligations based on annexes (lists) of countries, as was the case in the Kyoto Protocol.

Within this broad framing, each of provision of the

agreement raises its own distinctive issues. But there are several common issues as well. These include:

- What should be the structure of the overall package?
- How detailed (i.e., precise) should the rules be, and how much should they leave to national decision-making?
- On those issues where the agreement authorizes binding rules, to what extent should they be binding?
- Should the rules apply uniformly or be differentiated and, if the latter, on what basis and in what ways?
- When should the rules apply, and how might their application be synchronized, where necessary?
- What are the inter-relationships and linkages among the different parts of the Paris rulebook?

As a general matter, these questions are unlikely to be answered “horizontally” – i.e., in a manner that applies uniformly across all provisions of the agreement. Rather, the response to each will be tailored to the particular needs of each provision.

STRUCTURE

An overarching issue in the development of the Paris rulebook is its overall structure. The rulebook could take the form of:

- A single, lengthy CMA decision, like 1/CP.21, with different sections addressing the various parts of the Paris Agreement. A precedent for this approach is the Cancun Agreements, which addressed all of the elements of the Bali Action Plan in a single decision. Like the Cancun Agreements, the CMA decision could include annexes setting forth the rules, modalities, procedures and guidelines on particular issues.
- Individual decisions for each part of the Paris Agreement, such as mitigation, adaptation, finance, transparency, the global stocktake, and implementation and compliance. This was the approach taken for the Kyoto Protocol in the Marrakech Accords. These decisions could be covered by an overarching decision (like 1/CMP.1) that ties the overall package together.
- Separate decisions for individual issues within broader provisions. For example, rather than adopt a single decision on mitigation, the CMA could develop separate decisions on different aspects of nationally determined contributions, or NDCs (e.g., features, information, and accounting).

In theory, with careful drafting, the content of the Paris rulebook could remain the same, regardless of its structure. But, in practice, the structure of the overall package could affect its contents and durability:

- Adopting a single decision could make it easier to address linkages between the different parts of the rulebook (or might at least make those linkages more obvious).
- Adopting separate decisions for different issues would allow parties to develop each according to its own logic, with its own preamble, level of precision, and extent of bindingness. This could make it easier to tailor the degree of bindingness and precision to each part of the rulebook as appropriate. Also, adopting multiple decisions may prove necessary if not all elements of the rulebook are ready for adoption at CMA-1. Finally, such a structure could also make it easier to update the rules in the future, in particular, if rules need to be updated at different

times, as is likely. The more adaptable and easy the rules are to amend and update, the more durable and relevant the Paris rulebook will be.

PRECISION

Whatever the overall structure of the Paris rulebook, the rules established with respect to each of its elements could be more or less detailed. For each element, the CMA could:

- Establish detailed substantive rules.
- Establish minimum substantive rules and allow parties to nationally determine any additional rules.
- Establish procedural rather than substantive rule, for example, requiring parties to elaborate and report on nationally determined rules.
- A combination of these, for example, establish minimum substantive rules, plus procedural rules requiring parties to report on their implementation of the substantive rules, and on their elaboration and implementation of nationally determined rules.

More detailed rules would provide greater international discipline, and lend themselves to more precise application. However, such rules might also be more difficult to negotiate and be seen by some as undercutting the nationally determined character of parties' contributions.

BINDINGNESS

The individual elements of the Paris rulebook could vary in their legally binding character. The bindingness of each element will depend on two factors: Does the Paris Agreement authorize the CMA to adopt binding rules? If so, does the CMA choose to exercise its authority to make a rule legally binding, or use language that makes a provision hortatory or optional?

In general, the CMA does not have authority to adopt legally binding decisions. However, the Paris Agreement authorizes the CMA to adopt binding rules on certain issues. With respect to mitigation, for example, the agreement gives the CMA authority to adopt binding rules pursuant to Articles 4.8, 4.9, and 4.13 (addressing NDC information, updating and accounting), using similar language in each provision (the parties "shall do [x] "in accordance with" relevant CMA decisions in

Articles 4.8 and 4.9, and “in accordance with” “guidance” adopted by the CMA under Article 4.13).

In cases where the agreement gives the CMA authority to adopt a binding rule, a follow-on issue is whether the CMA wishes to exercise that authority. The CMA has considerable latitude to calibrate a rule’s bindingness through its choice of verb. For example, it can:

- Make a rule legally binding by providing that parties “shall” act in accordance with it.
- Recommend that parties use a rule, by providing that parties “should” follow it.
- Identify a rule but make its use optional, by providing that parties “may” follow it.
- Identify a rule, and generate an expectation that countries “will” follow it.

The CMA could also calibrate a rule’s bindingness through its use of contextual and discretionary language, for instance, “as appropriate,” “in so far as practicable,” “to the extent resources permit,” and “tailored to national circumstances.”

DIFFERENTIATION

Article 2.2 provides that the Paris Agreement “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” Some commitments are explicitly differentiated. For example, the agreement requires that developed countries “shall provide financial resources” for mitigation and adaptation in developing countries, and that the needs and capacities of particular categories of parties, such as least developed and small island countries, should be taken into account.

In a few cases, the agreement explicitly contemplates differentiation in the implementation of a common obligation. For example, Article 13.2 provides that developing countries that need it shall be provided flexibility in the implementation of the Article 13 transparency framework. In most cases, however, the agreement’s authorization to the CMA to develop rules does not explicitly provide for differentiation, and any differentiation in the rules will be tailored to the specificities of each issue area, as in the Paris Agreement. In general, options regarding differentiation include:

- No differentiation.

- Differentiation based on type of NDC. For example, the CMA might specify different informational elements or accounting rules for absolute targets, BAU targets, intensity targets, peaking targets, and policies and measures.
- Differentiation based on differences between parties. For example, a transparency rule might apply differently (or not at all) to particular categories of parties (such as least developed or small island countries, given their distinct status under the agreement) or based on agreed measures of capacity (such as GDP per capita) or other criteria (percentage of global emissions).
- Differentiation in relation to the provision of support—for example, the provision of scaled-up financial resources and targeted capacity-building support to least developed or small island countries.
- Differentiation that is implicit or self determined, as for instance in the use of language (such as “to the extent possible”) that gives parties some discretion in how they apply the rules.

In some cases, a rule may reflect a unique blend of these general approaches. For example, Article 13 establishes, without defining, a category: developing countries requiring flexibility “in light of their capacities.” In the absence of a defined list of such countries, the rules could allow each developing country full discretion in determining whether it fits within this category, or could elaborate criteria that they must apply in making that determination.

LINKAGES

There are many actual and potential inter-linkages between different elements of the Paris rulebook. Some linkages are explicit (as for instance the global stocktake informing parties’ updating of their NDCs), and others may be implicit (as for instance between Articles 13 and 15, and between Articles 14 and 15). These linkages include:

- Design linkages: The Paris Agreement provides for several types of international review, including technical expert review, the multilateral consultative process, the global stocktake, and the implementation and compliance mechanism. What should be the relationship between them? How should the

technical expert review, for example, feed into the multilateral consultative process, and what is the relationship of both to the global stocktake and the implementation and compliance mechanism?

- Information linkages: The global stocktake, for instance, is to be informed by the transparency framework and take into account adaptation and support. How should the CMA's guidance to parties and agreement bodies provide for the necessary information flows?
- Functional linkages: Both Article 4.13 and Article 6.2 provide for the development of accounting rules. Should a single set of accounting rules be developed for both provisions? If separate rules are developed, how do parties ensure they are compatible, and what should be the relationship between them?

TIMING

In considering timing, it is important to distinguish two issues: (1) when decisions and rules are adopted, and (2) when they apply. Some rules may be necessary to operationalize the Paris Agreement while others may not be. Regardless of whether individual decisions and rules are adopted at the same or different times, they could be:

- set to apply at different times.
- synchronized to apply at the same time.
- set to apply at different times in the case of some, and synchronized in the case of others.
- some synchronized, some set to apply at different times, and some left to national determination.

For instance, informational requirements, if any, specific to economy-wide emission targets would apply to developing countries only when they take on such targets. But the general informational requirements relating to the fairness and ambition of NDCs, if any,

would apply to all parties at the same time. Similarly, informational requirements developed in relation to NDCs could be applied only to future NDCs or to current ones as well, or their application to current NDCs could be left to national determination.

More generally, rules relating to information, accounting and transparency (of action and support) could be synchronized to ensure a smooth and coherent flow of information to the global stocktake and to the compliance and implementation mechanism. Parties could also develop common time frames for NDCs to enhance synchronicity and coherence in information flows. However, such synchronicity may be perceived as detracting from the nationally determined character of parties' contributions.

RELATIONSHIPS AMONG THE ISSUES

Finally, what are the interrelationships among the issues discussed in this paper? In principle, precision, bindingness, differentiation and timing are independent variables, so the parties could combine them any way they wish. But, in practice, Parties may view them together in the context of an overall package. Some parties may prefer precise, binding rules for clarity and ease of application and to elicit buy-in from relevant domestic actors. Such rules could be complemented by support to enhance receptivity and capacity to implement them.

Others may seek to trade precision and bindingness off against each other, as both of these affect the degree to which a rule limits a party's flexibility. The could insist, for instance that more precise rules be non-binding or binding rules be less precise. Similarly, the more precise and binding a rule, the more some parties may seek to differentiate it. Parties may also stagger the application of more precise binding rules so as to permit some parties more time to implement them.



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