

## Article 13 of the Paris Agreement: Reflecting “Flexibility” in the Enhanced Transparency Framework

Sue Biniac (IDDRI)

One of the key pillars of the Paris Agreement is Article 13’s enhanced transparency framework. Intended to build “mutual trust and confidence” and promote “effective implementation,” the framework was an essential element of a Paris package that, in various ways, sought to balance “nationally determined” elements with internationally agreed guidelines and mechanisms, non-legally binding elements with binding elements, and individual Party review with aggregate review. Substantively, the transparency framework will play important roles in tracking progress of individual/collective climate actions, helping to strengthen domestic capacity, providing valuable input into global stocktakes, and potentially attracting investment.

At COP 24 this fall, the Parties to the Paris Agreement are to adopt modalities, procedures, and guidelines (“MPGs”) to elaborate Article 13. These MPGs will need to address several issues, including with respect to: various types of reporting; the operation of “technical expert reviews;” and the design of the “facilitative, multilateral consideration of progress.”

This paper addresses in particular how the MPGs might reflect Article 13’s direction to the Parties to provide “flexibility” in the implementation of its provisions to “those developing country Parties that need it in the light of their capacities.”

### DISCUSSION

The topic of flexibility related to the transparency framework is a potentially challenging one. Among other things, the framework involves many elements; the elements are varied and raise quite different issues; in many of the elements, technical details abound; and there are strong interests among Parties in both maximizing transparency and ensuring that Parties are not unduly stretched beyond their capacities.

At the same time, it appears possible to simplify the task by dividing it into questions of “what” (i.e., which element of the framework and what type of flexibility), “who” (which Parties can take advantage of flexibility), and “when” (for how long does flexibility apply). At each stage, one might also think about “why,” i.e., consider the purpose of both the transparency framework itself and the inclusion of flexibility options within it.

It should also be noted that there is likely to be a relationship among the issues of what, who, and when. For example, if flexibility is broad, either substantively or time-wise (the “what” and the “when”), the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) might be reluctant to make it available to too many Parties (the “who”).

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Institut du développement durable  
et des relations internationales  
27, rue Saint-Guillaume  
75337 Paris cedex 07 France

## “WHAT”

The transparency framework includes seven basic elements (as well as various sub-elements, referred to as “provisions”):

- reporting on greenhouse gas inventories;
- reporting on tracking progress in implementing and achieving nationally determined contributions (NDCs);
- reporting on climate change impacts and adaptation;
- reporting on support provided and mobilized;
- reporting on support needed and received;
- technical expert reviews; and
- facilitative, multilateral consideration of progress.

These elements are quite different. For example, reporting may raise different capacity issues than review; certain reporting is mandatory (such as on tracking progress), while other reporting (such as on adaptation) is not; and certain provisions (such as IPCC guidelines for reporting on inventories) already reflect substantial consideration of capacities that may or may not need to be supplemented. Thus, each element of the transparency framework (and potentially each provision) needs to be examined individually to see whether it implicates capacity issues that require flexibility (or additional flexibility).

Where capacity limitations necessitate the provision of flexibility, the nature of flexibility should be considered, such as whether it relates to scope, frequency, and/or level of detail, as well as whether there should be a “floor” (such as reporting no less frequently than every X years).

In some cases, the Paris Agreement and Decision 1/CP.21<sup>1</sup> provide guidance.

- The Decision provides that flexibility is to be provided with respect to scope/frequency/level of detail regarding reporting (paragraph 89).
- The Decision provides that flexibility is to be provided with respect to the scope of review (paragraph 89).
- Article 13 and the Decision provide certain “floors,” for example, Article 13.7 contains requirements concerning the provision of information, and paragraph 90 of the Decision provides that certain reporting may not fall below a frequency of every two years, except for Least Developed Countries (LDCs) and Small Island Developing States (SIDS). In addition, paragraph 92(e) provides that the MPGs should take into account the need to ensure that Parties

maintain at least the frequency and quality of reporting in accordance with their obligations under the Convention.

- Under paragraph 92 of the Decision, the Ad Hoc Working Group on the Paris Agreement (APA), in drawing up its recommended MPGs, is to balance the need for flexibility against several other objectives, such as facilitating improved reporting and transparency over time, the need to promote transparency, accuracy, completeness, consistency, and comparability, etc.

Beyond these constraints, the CMA has discretion to decide precisely what type of flexibility, if any, should apply to each element and provision (such as, within reporting on inventories, reporting on particular sectors or gases). It might also set out certain additional “floors,” for example, that, even when a Party uses flexibility, its report must always contain Y and Z or must always be timely, transparent, and accurate.

In order to discourage “backsliding,” the MPGs might also include a proviso to the effect that a Party that has provided X in the past may not (or should not) take advantage of flexibility that would result in not providing X. This notion is reflected in paragraph 92(e) of the Decision, as noted above.

## “WHO”

Article 13 makes clear that the MPGs should accord flexibility to “those developing country Parties that need it in the light of their capacities.” It provides guidance on certain aspects of the issue:

- Flexibility does not apply to all Parties (only “those developing countries that...”).
- Flexibility applies to those developing country Parties “that need it in the light of their capacities,” as opposed to other reasons.
- The “special circumstances” of LDCs and SIDS are to be recognized.

Beyond that, the CMA has discretion to decide who is eligible for one or more types of flexibility.

There are three basic ways, with variations, in which the CMA might approach this question.

First, the CMA could take a **category-based approach**.

- For example, it might decide that one or more particular groups of Parties are, by definition, in need of flexibility in light of their capacities. The group(s) might include LDCs, SIDS, or other categories, if it were considered that all such Parties require flexibility in the light of their capacities.

1. <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>

- The CMA would not have to take an all-or-nothing approach, i.e., according all types of flexibility to all categories. Rather, it would have the discretion to decide that, for example, one group of Parties would be accorded flexibility with respect to element X of the transparency framework, while two groups would be accorded flexibility with respect to element Y.

Second, the CMA could take a **criteria-based approach**.

- The CMA could set forth specific criteria for one or more types of flexibility.
- The criteria could either be positive (e.g., developing country Parties that...) or negative (e.g., developing country Parties other than...), or potentially a combination.
- The criteria could be strict (i.e., must be met), normative (i.e., should be met), or a combination.
- It could be combined with a category-based approach, e.g., flexibility might be accorded to LDCs, SIDS, and developing country Parties that [...].

Third, the CMA could take a **self-selection approach**.

- Each developing country Party could decide whether it was a “developing country Party that needed flexibility in light of its capacities.”
- It might decide that it had capacity constraints related to all the provisions where flexibility was afforded or just certain ones.

Either a criteria-based approach or a self-selection approach might be combined with a requirement that a Party indicate either *how* it meets the criteria or, in the case of self-selection, *why* it needs a particular flexibility due to its capacities; it might also indicate *for how long* it anticipates the need for such flexibility. Such an indication could also play a role in promoting the necessary capacity-building assistance for Parties (such as through the Capacity-Building Initiative for Transparency<sup>2</sup>).

Technical expert review (TER) teams might be given no role with respect to the “who” aspect of flexibility, i.e., Parties alone would decide for themselves whether they met any applicable criteria or needed one or more flexibilities in the light of their capabilities. Alternatively, the CMA might provide teams with the ability to comment on, for example, whether a Party met any applicable criteria or make a recommendation concerning a Party’s future use of a flexibility.

2. <https://www.thegef.org/topics/capacity-building-initiative-transparency-cbit>

In any event, it would seem important for a Party to state clearly *which* flexibilities it is electing. Otherwise, it would be difficult, if not impossible, for a TER to know against which standards a Party’s reports should be considered.

## “WHEN”

One of the tenets of the transparency framework, as set forth in the Decision (paragraph 92) is “the importance of facilitating improved reporting and transparency over time.”

In an effort to facilitate improvement over time, the CMA might set one or more time limits on the use of particular types of flexibility.

Were the CMA to take a category-based approach to “who,” as discussed above, the CMA might link that approach to revisiting the question of needs/capabilities at a particular point in the future or on a periodic basis.

## A POTENTIAL WAY FORWARD

As noted, there is an obvious relationship among the various pieces of transparency/flexibility. An appropriate balance will be vital; too little flexibility could underserve those developing country Parties with relevant capacity limitations, while too much flexibility could underserve the goals of the transparency framework (and, in turn, the larger goals of the Paris Agreement).

One way to balance the interests might be as follows:

- If history is any guide, it would be difficult to create entirely new categories of Parties. A criteria-based approach related to capacity could be workable, but would require further consideration. The most viable approach may be to provide for developing country Parties to “self-select” whether they have capacity limitations that require the use of one or more types of flexibility.
- At the same time, such an approach, which would provide developing country Parties with national discretion to use various forms of flexibility, would need to be coupled with a series of counterweights (or “boundaries” on flexibility) that help to ensure the robustness of the transparency framework.
- These could include features such as the following:
  - A Party that decided to use one or more types of flexibility would need to indicate both *which* areas of flexibility it was electing to use and *why* it needed such flexibility in the light of its capacity.

- TER teams would not second-guess a Party’s decisions or indications in this regard. However, they could comment on them in the context of noting “areas of improvement” and/or capacity-building needs.
  - The CMA would determine areas of flexibility on a provision-by-provision basis, i.e., one type of reporting might provide for flexibility, while another might not. Flexibility would be accorded only where the relevant provision implicated capacity (i.e., not all aspects of the transparency framework necessarily raise capacity issues) and did not already provide sufficient discretion to accommodate capacity limitations (e.g., IPCC inventory guidelines may, at least in certain respects, already provide substantial discretion).
  - Where flexibility is provided, the type of flexibility might vary from provision to provision. As far as possible, each type of flexibility would contain a “floor” below which reporting/review would not go. As noted, the Agreement and Decision set forth certain floors; others could be added.
  - There would be no “backsliding,” i.e., Parties would not report or be reviewed in a manner that was less robust than their past reporting/review.
  - Certain flexibilities would be time-bound; in all cases, there would be an expectation of continuous improvement over time.
- These types of elements, when combined with self-selection, have the potential to add up to a balanced “self-selection plus” approach. If, however, it were not possible to agree on such counterweights, it would likely be necessary to address the issue of “who” through a narrower criteria-based approach. ■