Centre for International
Governance Innovation

CIGI Papers No. 200 — November 2018

Article 6.2 of the Paris Agreement

How to Oversee the International Transfers of Mitigation Outcomes

Géraud de Lassus Saint-Geniès

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Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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About the Author

Géraud de Lassus Saint-Geniès is a post-doctoral fellow with CIGI's International Law Research Program and a Social Sciences and Humanities Research Council post-doctoral fellow at McGill University's Faculty of Law. His research interests include climate law and governance, environmental law, transnational regulatory processes, and the link between culture and sustainable development. Géraud holds an LL.D. from Laval University's Faculty of Law and from Université Paris 1 Panthéon-Sorbonne.

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Acronyms and Abbreviations

CMA	Conference of the Parties serving as the meeting of the Parties to the Paris Agreement
COP24	twenty-fourth session of the Conference of the Parties
FVA	framework for various approaches
GHGs	greenhouse gases
ITMOs	internationally transferred mitigation outcomes
MOs	mitigation outcomes
MPGs	modalities, procedures and guidelines
NDCs	nationally determined contributions
NMM	new-market mechanism
PCA	Permanent Court of Arbitration
SBSTA	Subsidiary Body for Scientific and Technological Advice
UNFCCC	United Nations Framework Convention on Climate Change

Executive Summary

Article 6.2 of the Paris Agreement allows its parties to use "internationally transferred mitigation outcomes" to achieve their mitigation targets. Article 6.2 also states that where engaging in these transfers, parties shall "promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting." However, the Paris Agreement does not specify how to ensure these requirements are met when parties engage in international transfers of mitigation outcomes, and states have different views on this issue in the ongoing negotiations on the implementation of the Paris Agreement. This paper discusses the different oversight options that are currently contemplated to ensure that parties act consistently with article 6.2 requirements and assesses their legal and political implications.

Introduction

In 2015, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement.[1] This international treaty established the parameters of a new climate regime applicable to all states based on a system of nationally determined contributions (NDCs). NDCs are national climate plans in which parties to the Paris Agreement must indicate, among other things, the mitigation pledges they intend to achieve. Such pledges are non-legally binding, but parties are obliged to implement domestic mitigation measures "with the aim of achieving" them.[2]

However, acting on their own territory is not the only option available to parties for achieving their mitigation pledges. According to article 6.2 of the Paris Agreement, they can also engage in "cooperative approaches" to transfer "mitigation outcomes" (MOs) and use these "internationally transferred mitigation outcomes" (ITMOs) toward their NDCs.[3] The Paris Agreement does not define what "cooperative approaches" and ITMOs are, nor does it specify how MOs might be produced. Because of the open-ended language of article 6.2 and the general permissiveness of international law,[4] it can be inferred that MOs can be achieved by a variety of means, including mechanisms and actions administered at the national level or managed on a direct bilateral basis between two states outside the Paris Agreement.

Under article 6.2, a state could then "import" MOs (which could, for instance, correspond to a certain amount of unreleased greenhouse gases [GHGs]) generated on the territory of another state (through its domestic policies or a bilateral agreement) and use these "foreign" MOs to meet its mitigation pledge under the Paris Agreement. The rationale for allowing such international transfers is to help parties meet their NDCs in a cost-effective way. Acquiring MOs could enable them to benefit from the low-cost mitigation opportunities that may exist in other countries and that would facilitate the achievement of their targets. In that sense, cooperative approaches could lead to "higher ambition" in mitigation actions.[5]

That said, allowing parties to produce and transfer MOs through their own means, and at the same time recognizing that MOs can count toward the achievement of NDCs under the Paris Agreement, entails two major challenges. The first is to ensure that environmental integrity is preserved. To that end, it must be guaranteed that each transfer of MO is accompanied by a corresponding mitigation of GHG emissions that actually occurred. The second challenge is to ensure that the same MO is not counted twice and used simultaneously as an NDC compliance instrument by the party who issued the MO and the party who acquired the MO.

These challenges are reflected in the language of article 6.2, which states that where engaging in "cooperative approaches that involve the use of [ITMOs] towards [NDCs]," parties "shall:" "promote sustainable development;" "ensure environmental

1 UNFCCC, *Adoption of the Paris Agreement*, 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L.9/Rev.1 [*Paris Agreement*].

2 *Ibid*, art 4.2.

3 *Ibid*, art 6.2.

4 As stated by the Permanent Court of Justice in the 1927 S.S. *"Lotus"* case, "[r]estrictions upon the independence of States cannot [...] be presumed." Permanent Court of International Justice, *The Case of the S.S. "Lotus"*, Series A, No 10, 7 September 1927 at 18.

5 *Paris Agreement*, *supra* note 1, art 6.1.

integrity and transparency, including in governance;" and "apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with the guidance adopted by the Conference of the Parties serving as the meeting of the parties to [the Paris Agreement] [(CMA)]."[6] As the word "shall" indicates, these requirements are legally binding and parties must comply with them. However, the Paris Agreement does not specify how to ensure that article 6.2 requirements are met when parties engage in cooperative approaches, and states have different views on this issue in the ongoing negotiations on article 6.2 guidance.

Some consider that a specific body should be created under article 6.2 to verify that parties comply with the requirements.[7] Others hold that it is for the parties themselves to make sure that they satisfy the requirements, and that information on how these requirements are fulfilled should be reported under the transparency framework of article 13.[8] In the negotiations, these two options are referred to as the article 6.2 body option and the article 13 option.[9] This divergence of views on the oversight arrangement needed for article 6.2 appears today as one of the main points of contention in the discussions on the implementation of this provision.[10] This oversight issue has the potential to become a sticking point in the negotiations on article 6.2 and, more broadly, in the implementation of the Paris Agreement.

Beyond its technical dimension, this issue touches upon a more fundamental and controversial question, which is to what extent states can be trusted to properly observe the rules of the UN climate regime. Obviously, this is a sensitive question, which relates to the level of trust that UNFCCC parties place in each other. Another element of complexity is that many states consider the discussions on oversight arrangements as closely linked to the discussions on other provisions of the Paris Agreement (especially on article 13), which take place in other negotiation groups. Further progress on the oversight issue could then depend on progress made on other agenda items of the Paris Agreement work program and vice versa. Such linkages tend to favour wait-and-see attitudes in each of the different negotiation groups, thus reinforcing the risk of deadlocks. At COP24, where the negotiations on the implementation of the Paris Agreement are expected to conclude,[11]

6 Pursuant to paragraph 36 of Decision 1/CP.21 of the Paris Agreement, *supra* note 1, the Subsidiary Body for Scientific and Technological Advice (SBSTA), a permanent subsidiary body of the UNFCCC, is requested to "develop and recommend" the guidance referred to under article 6.2 for consideration and adoption by the first session of the CMA. Therefore, the negotiations on the elaboration of the article 6.2 guidance take place within the SBSTA. These negotiations are expected to conclude in December 2018 at the twenty-fourth session of the Conference of the Parties (COP24), with the adoption of all the implementation decisions of the Paris Agreement by the CMA. See *Preparations for the entry into force of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, Dec 1/CP.22, 22nd Sess, UN Doc FCCC/CP/2016/10/Add.1 (2017) [Dec 1/CP.22].

7 For example, South Africa is of the view that "[t]he governance institutional structure [for article 6.2] should be subject to rules established by the CMA or a body under the CMA." UNFCCC, *Submission by South Africa on guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* (2017) at 1.

8 In its submission, Japan noted that "[p]romoting sustainable development and ensuring environmental integrity and transparency, including governance, should be carried out under the responsibility of the Parties engaging in the cooperative approaches." UNFCCC, *Japan's Submission on SBSTA item 12(a): Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* (2017) at 1.

9 SBSTA, *Draft CMA decision containing draft guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* [*Draft CMA Decision on Article 6.2*], Annex I; *Draft guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* [*Draft guidance on Article 6.2*], SBSTA48.2.DT.i12a (2018) at 6–8. This draft negotiating text was made available at the end of the second part of the forty-eighth session of the SBSTA (SBSTA 48.2), held in Bangkok from September 4 to 9, 2018. The article 6.2 body option and the article 13 option are included in a subsection of the section on "Governance" entitled "Oversight" (Annex I, para VII.B at 6). These options were already included in the two informal notes previously prepared by the co-chairs of the contact group on article 6.2 in November 2017 at SBSTA 47 (*Draft elements for SBSTA agenda item 11 [a]. Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement*, [2017]) and in May 2018 at SBSTA 48.1 (*Revised informal note containing draft elements of the guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* [2018]).

10 There is currently no agreed definition of the expression "oversight" in the draft guidance on article 6.2. The Paris Agreement does not refer to this expression, which appears to be new language in the UN climate regime. Oversight seems to be a specific notion of the framework for cooperative approaches and must presumably be understood as something different than "transparency" (referred to in article 13).

11 Dec 1/CP.22, *supra* note 6. That said, negotiations on the implementation of article 6.2 could also be extended beyond COP24. Indeed, the draft CMA Decision on article 6.2 adopted in Bangkok already provides the possibility for the SBSTA to continue its work on cooperative approaches in 2019. See *Draft CMA Decision on Article 6.2*, *supra* note 9, Annex II, *Draft containing draft work plan of follow-up work to be carried out in 2019*.

the design of an oversight arrangement for article 6.2 could very well turn into a crucial issue.

This paper discusses the two options (i.e., the article 6.2 body option and the article 13 option) that are currently contemplated to oversee the international transfers of MOs under article 6.2. It examines their legal implications, the challenges they pose, as well as their potential advantages and drawbacks. The analysis is based on the submissions made by the parties, the informal notes prepared by the co-chairs of the contact group in which negotiations on article 6.2 are taking place and on the current version of the draft guidance on article 6.2. It should be noted that, at this point, the article 6.2 body option and the article 13 option only represent possible options in the way forward. Their inclusion in a draft negotiating text does not prejudge what parties may or may not ultimately agree on for article 6.2 at COP24 in December 2018.[12]

This paper suggests that the establishment of a body under article 6.2 could be a more suitable option to effectively ensure that the requirements of this provision are met. However, this option may be more difficult to achieve, for both legal and political reasons. To contextualize the discussion, the paper starts with some general comments on article 6.2.

Background Information on Article 6.2

The current negotiations on article 6.2 of the Paris Agreement find their origins in discussions that took place within the UNFCCC around 2010 on the future of market mechanisms in the climate regime. At that time, the members of the UNFCCC were working on a new legal framework applicable after 2012 (i.e., the end of the first commitment period of the Kyoto Protocol), as provided for by the 2007 Bali Action Plan. In this plan, states had agreed to discuss "opportunities for using markets, to enhance cost-effectiveness of, and to promote, mitigation actions."[13] However, they had not agreed on whether these market mechanisms would be administered at the international level or domestically.

Some parties (such as the United States, Canada and New Zealand) wanted to minimize UN oversight and give maximum flexibility to the parties by allowing for the use of nationally managed mechanisms under the UNFCCC. For these parties, the experience of the Kyoto Protocol had revealed the complexity of implementing effective market mechanisms at the international level. Other parties (such as the European Union) argued that environmental integrity and accountability could only by assured with centralized oversight within the UNFCCC. Therefore, they expressed a preference for a market mechanism operated at the international level.[14]

What was really at stake in these discussions was the role that multilateralism had to play in the field of market mechanisms. For some parties to the UNFCCC, the function of international cooperation was only to define a framework to enable for the transfer of nationally issued emission units. For others, the function of international cooperation was to define mechanisms through which emission units that could be used for compliance purposes under the UNFCCC could be produced and to specify how parties could use these mechanisms to generate and trade international emission units.

Because of this divergence, specific negotiations were launched in 2011 both on a "new-market mechanism" (NMM) and on a "framework for various approaches" (FVA).[15] While the NMM was envisioned as a "UNFCCC-run market mechanism much like the mechanisms under the Kyoto Protocol," the discussions on the FVA aimed at creating "a system for enabling the recognition under the UNFCCC of units from mechanisms [...]

12 In the draft guidance on article 6.2, the subsection on oversight contains a total of six different options. One of them would be to not establish any oversight arrangement at all. Another option would be to establish an "Article 6 technical expert review" to review the consistency of the cooperative approaches with the guidance of article 6.2 included in the CMA decision. For the moment, however, the discussions have been mainly focused on the article 6.2 body option and the article 13 option.

13 *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December*, Dec 1/CP.13, 13th Sess, UN Doc FCCC/CP/2007/6/Add.1 (2008) at para 1(b)(v).

14 A Howard, "Voluntary Cooperation (Article 6)" in Daniel Klein et al, eds, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: Oxford University Press, 2017) at 181–83.

15 *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Dec 2/CP.17, 17th Sess, UN Doc FCCC/CP/2011/9/Add.1 (2012) at para II, E.

operated and administered outside the UNFCCC."[16] The work on FVA and NMM did not produce any tangible outcome inside the UNFCCC.[17] However, from 2012, the issues addressed in these two agenda items were brought in the negotiation process leading to the adoption of the Paris Agreement. As no consensus could be reached on which approach to prioritize, provisions reflecting both the logic of the NMM and the logic of the FVA were included in the Paris Agreement.

The idea to establish an NMM was consecrated in article 6.4 of the Paris Agreement. This provision provides for the creation of an international mechanism similar to the Clean Development Mechanism established by article 12 of the Kyoto Protocol. The rules, modalities and procedures for this mechanism will be developed by the CMA, which will also designate a body to supervise its functioning.[18] As such, this mechanism will be entirely administered within the Paris Agreement according to a top-down approach. The discussions on the FVA led to the elaboration of article 6.2 of the Paris Agreement, which is based on a combination of internationally and nationally determined elements, and top-down and bottom-up approaches.[19]

Article 6.2 does not seek to regulate how MOs are produced, what the nature of ITMOs is, to whom they can be transferred and what type of cooperative approaches can be implemented. The wording of article 6.2 suggests that all these elements are at the discretion of the parties and are to be nationally determined — or at least determined outside the scope of the Paris Agreement. But on the other hand, article 6.2 sets forth three international legally binding requirements that parties must satisfy in order to use ITMOs toward their NDCs. Article 6.2 also provides that parties shall "promote sustainable development," "ensure environmental integrity and transparency" and "apply robust accounting [...], consistent with guidance adopted by the CMA." This means that, to a certain extent, international guidance must regulate parties' behaviour.

Thus, article 6.2 relies on two distinct approaches: the need to give parties flexibility to choose for themselves the most appropriate way, according to their national situation, to engage in cooperative approaches and to produce MOs; and the need to have international guidance that defines what parties must do in order to be able to use ITMOs toward their NDCs. These are potentially opposing approaches in the sense that the more precise the CMA guidance will be, the less discretion parties will have for choosing how to conduct their cooperative approaches.

Therefore, the challenge in the negotiations on article 6.2 is to find the right balance (i.e., the balance that will be accepted by all states) between what must be defined at the international level, in the CMA guidance, and what can be left to the discretion of the parties. A key element in that equation is to determine how the "shall" requirements, referred to in article 6.2, need to be addressed and detailed in the CMA guidance.

Generally speaking, developed countries tend to attach more importance to the preservation of parties' flexibility on this issue and are of the view that the CMA guidance should contain few elements detailing how to comply with the "shall" requirements. On the contrary, developing countries are more concerned about the development of precise international rules and tend to support the inclusion of specific provisions in the CMA guidance to indicate what parties should do to meet the article 6.2 requirements.[20] As the next section will highlight, the question of how the "shall" requirements, referred to in article 6.2, should be addressed and detailed in the CMA guidance is closely linked to the oversight arrangement issue.

16 Kati Kulovesi, "Negotiations on the New Market Mechanism and the Framework for Various Approaches: What Future Role for the UNFCCC in Regulating the Carbon Market?" (2012) 6:4 Carbon & Climate L Rev 373 at 380.

17 In June 2016, the SBSTA 44 agreed to conduct its next consideration of the FVA and the NMM at SBSTA 50, in June 2019. SBSTA, *Report of the Subsidiary Body for Scientific and Technological Advice on its forty-fourth session, held in Bonn from 16 to 26 May 2016*, UN Doc FCCC/SBSTA/2016/2 (2016).

18 *Paris Agreement*, *supra* note 1, arts 6.4, 6.7.

19 Susan Biniaz, "Analyzing Articles 6.2 and 6.4 of the Paris Agreement along a 'Nationally' and 'Internationally' Determined Continuum" in Robert N Stavins & Robert C Stowe, eds, *Market Mechanisms and the Paris Agreement*, (Cambridge, Mass.: Harvard Project on Climate Agreements, 2017) 55.

20 Wolfgang Obergassel & Friederike Asche, "Shaping the Paris Mechanisms Part III: An Update on Submissions on Article 6 of the Paris Agreement" (2017) Wuppertal Institut, JIKO Policy Paper No 05/2017 at 14–15.

The Link between the Choice of an Oversight System and the Translation of Article 6.2 Requirements into the CMA Guidance

According to article 6.2, "where engaging in cooperative approaches that involve the use of [ITMOs] towards [NDCs]," parties "shall:" "promote sustainable development;" "ensure environmental integrity and transparency, including in governance;" and "apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with the guidance adopted by [CMA]."

The guidance is very explicit that parties must comply with these three requirements when they engage in cooperative approaches that involve the use of ITMOs toward NDCs. However, there is an ambiguity over the requirements that need to be addressed and detailed in the CMA guidance. It is not clear if the CMA has only a mandate to develop guidance on "robust accounting," or if the mandate also extends to "environmental integrity and transparency" and "sustainable development." This point is important because if the CMA has only a mandate to develop guidance on "robust accounting," this means that parties will not have to act in accordance with the CMA guidance to "promote sustainable development" and to "ensure environmental integrity and transparency." Parties will then have a large discretionary authority to determine for themselves how to comply with these requirements.

As for the promotion of sustainable development, states seem to accept the idea that parties should retain the national prerogative to decide how to comply with this requirement.[21] The draft guidance on article 6.2 does not contain options indicating what parties should do in order to promote sustainable development when they engage in cooperative approaches. There is only one sub-paragraph that states that cooperative approaches "[shall][should]" be "consistent with the Sustainable Development Goals and the sustainable development objectives of the host Party."[22] Because of the intrinsic variability of the concept of sustainable development,[23] it would probably be difficult to go beyond this general indication.

The situation is more contentious regarding the requirement of environmental integrity and transparency. Some states argue that each party should have the responsibility to report how environmental integrity and transparency are ensured when a cooperative approach is carried out, and that no specific guidance should be adopted on the subject.[24] Others consider that guidance on environmental integrity and transparency must be developed, and that the CMA has to regulate the "quality" of ITMOs considered for use, as well as the "quality" of the cooperative approaches through which ITMOs are generated, transferred and tracked.[25]

Even if the CMA has a clear mandate to develop guidance on "robust accounting," states also disagree on what should be the guidance on that matter. Some states support the creation of an ITMO-centralized registry administered by the UNFCCC Secretariat and consider that transactions of ITMOs between parties should be coordinated via this centralized registry.[26] Others are in favour of a more flexible approach and believe that "[w]hile international agreement on rules for accounting, tracking and reporting is crucial to prevent double counting, the supporting governance arrangements at the national level for implementing these rules could vary."[27]

21 Andrei Marcu, "Issues for Discussion to Operationalise Article 6 of the Paris Agreement" (2017) International Centre for Trade and Sustainable Development Background Paper at 6.

22 *Draft guidance on Article 6.2*, *supra* note 9 at para 41(e).

23 See for instance Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23:2 European J Intl L at 382.

24 UNFCCC, *Japan's Submission on SBSTA item 10 (a): Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* (2017) at 1.

25 UNFCCC, *Submission of views on the content of Article 6.2 guidance and Article 6.4 rules, modalities and procedures, presented by the Republic of the Maldives on behalf of the Alliance of Small Island States* (2017) at 4 [*Maldives Submission*].

26 UNFCCC, *Submission by the Republic of Mali on behalf of the African Group of Negotiators on Guidance on Cooperative Approaches referred to in Article 6, paragraph 2, of the Paris Agreement* (2017) at 4.

27 *Submission on Art. 6 of the Paris Agreement: Liechtenstein, Mexico, Monaco, Switzerland* (2017) at 1.

Interestingly, the draft guidance on article 6.2 contains a section VIII entitled "Participation requirements and responsibilities," which states that parties may participate in cooperative approaches, providing they meet certain requirements. According to this section, parties to the Paris Agreement would only be allowed to participate in cooperative approaches if, among other things: they have a registry or access to a registry that meets certain requirements (paragraph 38[f]); their cooperative approach "has requirements to mitigate leakage risk" (paragraph 38[k][ii]); they have a process to ensure that the ITMOs that will be created "do not result in environmental harm" (paragraph 38[l][ii]) and "do not adversely affect human rights" (paragraph 38[l][iii]); and their cooperative approach contributes "to the transition in the host Party to a low carbon development economy" (paragraph 41[a]).[28]

Although all these elements are just listed as options for the moment, many developing countries see these requirements as what parties may have to do in order to ensure environmental integrity and transparency and to apply robust accounting. As this illustrates, depending on how article 6.2 requirements will be translated into CMA guidance, parties will have more or less flexibility to decide themselves what they must do to act consistently with this guidance.[29]

This level of flexibility is an important element in the debate over the oversight arrangements needed for article 6.2. Indeed, if the CMA guidance gives great flexibility to the parties to determine themselves how to meet the article 6.2 requirements, it could be more difficult to justify the need for a specific body whose role would be to verify that parties act consistently with CMA guidance. In that case, the recourse to the transparency mechanisms of the Paris Agreement might seem more appropriate. Conversely, the inclusion of participation requirements (or eligibility criteria) in the CMA guidance is likely to reinforce the legitimacy of a supervisory body under article 6.2 because the conformity to the participation requirements would have to be controlled. Since the rationale for creating an article 6.2 body is to ensure that parties "act consistently with CMA guidance in order to comply with the shall requirements,"[30] the less elements the CMA guidance will contain, the more difficult it will be to justify the creation of such a body.

In the submissions communicated by the parties on article 6.2, it can be seen that those supporting the article 6.2 body option are generally those who consider that CMA guidance should play an important role.[31] States considering that oversight should be carried out through the transparency framework of the Paris Agreement are generally those who believe that CMA guidance should play a limited role and should allow for great flexibility to enable states to choose how to comply with the requirements of article 6.2.[32]

The Article 13 Option

The fact that article 6.2 does not specify how to ensure that parties comply with the three "shall" requirements when they engage in cooperative approaches is not, in the system established by the Paris Agreement, something abnormal. The other provisions of the Paris Agreement that contain mandatory obligations do not state specific procedures to verify that parties comply with these obligations either.[33] One might consider that it is precisely the function of the transparency framework established by article 13 to verify how parties fulfill their obligations. Under the transparency framework, parties are required to regularly communicate individual information on how they implement the agreement. The details of this transparency framework, whose purpose is "to provide a clear understanding of climate action,"[34]

28 *Draft guidance on Article 6.2*, *supra* note 9 at 9–10.

29 Since the CMA has a mandate to adopt "guidance" and not "rules modalities and procedures," one could assume that the content of the guidance will not be overly prescriptive. That said, article 6.2 provides compulsory requirements and clearly states that parties must act "consistently" with the guidance elaborated by the CMA. This suggests that the CMA has a central role to play in regulating the cooperative approaches and the ITMOs. However, because the wording of article 6.2 is highly ambiguous, parties can find both valid legal arguments in this provision to justify a more or less extended role for the CMA guidance.

30 UNFCCC, *Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* (2017) at 2.

31 See UNFCCC, *Submission by South Africa on guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement* (2017) [*South Africa Submission*].

32 See UNFCCC, *Submission to SBSTA on Article 6.2 of the Paris Agreement* (2017) (New Zealand) [*New Zealand Submission*].

33 See for instance *Paris Agreement*, *supra* note 1, arts 4.2, 4.5, 9.1.

34 *Ibid*, art 13.5.

will be determined in "modalities, procedures and guidelines" (MPGs) adopted by the CMA at COP24.[35]

While the framework established by article 13 represents the natural vector to communicate and assess individual party information on the implementation of the Paris Agreement, it must be noted that article 13 does not explicitly refer to article 6.2. From a legal perspective, this point leads to the question of whether consistency with article 6.2 requirements could be reviewed through the transparency framework.

According to article 13.7(b), "Each Party shall regularly provide [...] information necessary to track progress made in implementing and achieving its [NDC]." Since article 6.2 indicates that ITMOs represent NDCs' compliance instruments, reporting information on the ITMOs used toward NDCs might be necessary to track "progress made in implementing and achieving" the NDCs. In that sense, article 4.2 (stating that "Each Party shall" maintain the NDC "it intends to achieve") appears closely connected to article 6.2.

Article 6.2 can also be considered closely linked to article 4.13. Article 6.2 refers to the need to apply "robust accounting" when ITMOs are used toward NDCs, and article 4.13 provides that parties shall account for their NDCs in accordance with the guidance that will be adopted by the CMA. Because ITMOs are NDCs' compliance instruments, accounting of ITMOs is "an aspect of NDC accounting more generally."[36] Therefore, it could be said that reporting information on how parties account for their NDCs under article 13.7(b) should logically encompass information on how they account for their ITMOs.[37]

Thus, even if article 13 was not originally meant to verify parties' compliance with article 6.2 requirements, it seems that the nexus between article 4 (to which article 13 explicitly refers)[38] and article 6.2 (to which article 13 does not refer) is tight enough to support the idea that information on how parties comply with article 6.2 guidance could be reported under article 13.7(b) and reviewed under the transparency framework. What information should be reported and how it should be done could be detailed in the article 6.2 guidance and/or in the article 13 MPGs. In either case, it would seem logical that both the guidance and the MPGs make reference to each other to ensure coherence between the ITMOs and transparency frameworks.

Article 13.11 provides that the information submitted by each party under the transparency framework shall undergo a technical expert review.[39] In the section of the draft guidance on article 6.2 devoted to the article 13 option, it appears that it would be during this technical review that the consistency with article 6.2 guidance would be reviewed.[40] Article 13.12 states that the technical expert review "shall consist of a consideration of the Party's support provided, as relevant, and its implementation and achievement of its [NDC]" and "shall also identify areas of improvement for the Party."

Given the mandate and the nature of this technical expert review, it seems reasonable to believe that it would be legally possible to assess whether parties acted consistently with article 6.2 guidance, and whether they provided adequate information to make that determination, under the transparency framework. Moreover, because this framework is the "main mechanism to hold States accountable for doing what they say they will do"[41] in the Paris Agreement, overseeing international transfers of MOs through the reporting and review processes of article 13 is certainly an approach that is in line with the general architecture of the Paris Agreement.

35 *Ibid*, art 13.13.

36 Daniel Bodansky, "Elaborating the Paris Agreement: Information and Accounting" (2017) Center for Climate and Energy Solutions Factsheet at 4.

37 The current status of the negotiations on article 4.13 shows that the issue of how to account for ITMOs and how to avoid double counting could be addressed in the CMA guidance on article 4.13. See UNFCCC, Ad Hoc Working Group on the Paris Agreement, *Draft conclusions proposed by the Co-Chairs, Addendum: Informal notes prepared under their own responsibility by the co-facilitators of agenda items 3-8 of the Ad Hoc Working Group on the Paris Agreement*, FCCC/APA/2018/L.2/Add.1 (2018) at 21. See also UNFCCC, Ad Hoc Working Group on the Paris Agreement, *Revised additional tool under item 3 of the agenda*, APA1.6.IN.i3 (2018) at 28.

38 *Paris Agreement*, *supra* note 1, arts 13.5, 13.6.

39 This provision also states that "Each Party shall participate in a facilitative, multilateral consideration of progress with respect to (...the) implementation and achievement of its [NDC]." For the moment, the possibility to verify that the article 6.2 requirements are met through the facilitative multilateral consideration of progress has not been mentioned in the negotiations. In any case, this consideration of progress appears to be a political process that is not well suited to undertake such examination.

40 *Draft guidance on Article 6.2*, *supra* note 9 at para 18.

41 Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017) at 242, 374.

Nevertheless, the article 13 option raises several questions. For instance, what would happen if an expert review team finds that a party engaged in a cooperative approach that involves the use of ITMOs does not comply with article 6.2 guidance? Would the expert review team be authorized not to take into account the ITMOs acquired by this party to assess the progress made in the implementation of its NDC? Another related question is whether the expert review team would have the authority to perform an *ex ante* control. With an *ex ante* control, only those parties whose compliance with article 6.2 guidance has been certified by the expert review team could use ITMOs toward their NDCs.[42]

The answers to these questions probably depend on how the technical expert review's mandate (i.e., considering "the implementation and achievement" of a party's NDC and "identifying areas of improvement") is interpreted. That said, article 13.3 states that the transparency framework shall "be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty." Not taking into account ITMOs that have already been transferred for tracking the implementation of a party's NDC or allowing the expert review team to perform an *ex ante* control would arguably contravene the letter and the spirit of article 13.3.

This brings up the question of the potential linkage between article 6.2 and article 15. Article 15 created a "mechanism to facilitate implementation of and promote compliance with the provisions" of the Paris Agreement.[43] Article 15.2 provides that this mechanism consists of a committee that is facilitative in nature, and which shall function in a manner that is non-adversarial and non-punitive.

In the text of the agreement, no explicit link is established between article 6, article 13 and article 15. That said, in the draft guidance on article 6.2, the section devoted to the article 13 option indicates that the expert review team could submit the review of the consistency with article 6.2 guidance to the committee referred to in article 15.2.[44] If so, one could wonder what this committee would be authorized to do if a party was found not to comply with the requirements of article 6.2, since the committee is supposed to be non-adversarial and non-punitive. Because denying a party the right to use an ITMO would certainly be considered as a punitive measure, it is more likely that the committee's action will take the form of technical assistance.

In sum, while the article 13 option offers more flexibility to the parties, this option also carries the risk of letting parties that do not meet the article 6.2 requirements use ITMOs toward their NDCs. If that were the case, cooperative approaches could be subjected to criticisms, as was the case with the Clean Development Mechanism of the Kyoto Protocol,[45] which could, in turn, potentially harm the credibility of the NDC system.

However, flexibility in the management of cooperative approaches is also an important element for the success of international transfers of MOs. Indeed, if the expert review team has the authority not to take into account ITMOs for tracking progress in NDC implementation, parties — and, more importantly, private entities authorized by the parties — could just turn away from article 6.2. Cooperative approaches will probably require important financial investments and call for the development of complex legal frameworks. If the overall investment appears too risky and surrounded by too many uncertainties, parties and private entities could simply decide not to conduct cooperative approaches, thus making the achievement of the NDCs more difficult.

The Article 6.2 Body Option

With the article 13 option, the responsibility to ensure that cooperative approaches are carried out consistently with article 6.2 guidance lies with

42 This possibility is currently contemplated in the section devoted to the article 13 option of the *Draft guidance on Article 6.2*, *supra* note 9 at paras 23, 24.

43 *Paris Agreement*, *supra* note 1, art 15.1.

44 *Draft guidance on Article 6.2*, *supra* note 9 at para 27(b).

45 See for instance Christina Voigt, "The Deadlock of the Clean Development Mechanism: Caught Between Sustainability, Environmental Integrity and Economic Efficiency" in Benjamin J Richardson et al, eds, *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Cheltenham, UK: Edward Elgar, 2009) at 235–61. See also Camille Parrod, "The Clean Development Mechanism and its Sustainable Development Premise: the Inadequacy of the Kyoto Protoco to Guarantee Climate Justice" in Robert V Percival et al, eds, *Global Environmental Law at a Crossroads* (Cheltenham, UK: Edward Elgar, 2014) at 177–92.

the parties. With the article 6.2 body option, this responsibility lies within a specific body.[46] The draft guidance on article 6.2 indicates that the function of this body would be to perform an *ex ante* control to verify that parties meet specific participation requirements (for example, having a process to ensure that ITMOs created do not result in environmental harm and do not adversely affect human rights; and having a registry that meets certain requirements), in order to certify their preparedness to engage in cooperative approaches.[47]

The draft guidance on article 6.2 also indicates that the *ex ante* control could be completed by a periodic and *ex post* review.[48] In addition, the article 6.2 body could approve the creation of ITMOs and oversee a "third-party review of the environmental integrity of ITMOs at creation."[49] These elements correspond to views of some parties for which certain requirements need to be fulfilled before and after the launch of any cooperative approach.[50]

While the creation of a supervisory body may represent a promising avenue to ensure that parties act consistently with article 6.2 guidance, this option raises many legal and institutional challenges. To begin with, it must be noted that article 6.2 does not give an explicit mandate to the CMA to implement a supervisory body (unlike article 6.4). However, it could be argued that the CMA is authorized to ensure that the "shall" requirements are met and that the implementation of a supervisory body is only intended to serve this purpose. Also, according to article 16.4(a) of the Paris Agreement, the CMA is authorized to establish "subsidiary bodies as deemed necessary for the implementation of this Agreement." The creation of a body under article 6.2 could then, theoretically, be seen as a valid exercise of this power.

But on the other hand, entrusting a body to certify that parties are allowed to use ITMOs reverts to limiting access to cooperative approaches. The language of the Paris Agreement does not address this issue. The emphasis is on the voluntary and cooperative nature of the cooperative approaches, thus making it less likely that the existing text was meant to lead to multilateral oversight. Some parties have already flagged this concern. For instance, Russia outlined that "introducing additional restrictions limiting access of countries to participation in [the article 6.2] mechanism would probably be counterproductive" and noted that it "would make sense to avoid interpreting this article too broadly and including therein tasks and criteria that do not directly relate to them."[51]

An argument could also be that the establishment of an *ex ante* and/or *ex post* control would not be compatible with the bottom-up nature of article 6.2 and, more generally, with the ethos of the Paris Agreement. Because the logic underpinning article 6.2 is to allow a great deal of flexibility to the parties to choose how to engage in cooperative approaches, this provision can be seen as a counterweight to the article 6.4 centralized mechanism. If a too rigid and centralized oversight system is implemented under article 6.2, the overall balance between article 6.2 and article 6.4 will be affected. Moreover, as mentioned above, too strict an oversight system could also have a chilling effect, and parties could simply choose not to use ITMOs to achieve their NDCs, which will make the achievement of some mitigation pledges more difficult.

Implementing an article 6.2 body also raises challenges in terms of institutional architecture and linkages between the different mechanisms of the Paris Agreement. For instance, the relationship between the article 13 technical expert review and the body would have to be specified. If parties already submit information on how they follow article 6.2 guidance to the article 6.2 body, would this information also have to be reported under article 13.7(b)? Another possibility (which is not mentioned in the draft guidance on article 6.2) would be that information collected through article 13.7(b), as well as through the review process, serve as an input for the body's work.

The relationship between the body and the Article 15 Committee, if any, would also have to be clarified. In one of its submissions, the Alliance of Small Island States mentioned that an oversight system under article 6.2 would have to ensure that whenever there are "problems, issues or concerns" with the requirements set forth in that provision, "systems are in place to address these

46 *Draft guidance on Article 6.2, supra* note 9 at para 17.

47 *Ibid* at paras 23, 24.

48 *Ibid* at para 25.

49 *Ibid* at para 26.

50 See *South Africa Submission, supra* note 31 at 4.

51 *Submission by the Russian Federation, Issues relating to Article 6 of the Paris Agreement* (2017) at 2.

problems, issues or concerns.[52] But the question arises as to whether such "problems, issues or concerns" would have to be addressed by the article 6.2 body or by the Article 15 Committee. For instance, should the body find that a party has failed to meet the requirements of article 6.2, could this finding trigger a procedure under the mechanism established by article 15 to assist that party in addressing the issues raised by the body? Another question is whether the work of the body should serve as an input to inform the global stocktake referred to in article 14.

As these elements show, creating an article 6.2 body involves addressing many issues. But the main barrier might be at the political level. As New Zealand highlighted in one of its submissions, several parties have so far "expressed a strong view that no central oversight body or system is mandated or even necessary for Article 6.2 activities (unlike 6.4)."[53] Considering this, consensus on the article 6.2 body option is likely to be hard to reach.

However, if this option is pursued, it might be advisable to provide for an appeal procedure where a party is found not to act consistently with article 6.2 guidance. Indeed, the determination to not allow a party to transfer or acquire ITMOs could have serious economic consequences for that party. An appeal procedure could help to bolster the legitimacy of the control performed by the body and enable the concerned parties to defend their case.

By way of comparison, it is interesting to note that appeal procedures do exist within voluntary emission reduction certification programs. For example, the legal framework regulating the Gold Standard certification process provides for an appeal mechanism if a party disagrees with a final decision made by Gold Standard in connection with the certification of carbon units. To that end, this non-state actor has partnered with the Permanent Court of Arbitration (PCA).[54] While a similar partnership with the PCA appears unlikely for article 6.2, a determination to not allow a party to issue or use ITMOs could be appealed, for instance, either to a specific committee within the article 6.2 body or to the CMA directly.

Regardless of whether a body is implemented under article 6.2, it could also be useful to provide for a mechanism to assist the parties in settling the disputes that may arise in relation to their cooperative approaches. For instance, a party could decide to unilaterally withdraw from a cooperative approach, in contravention of the pre-agreed framework that established the cooperative approach. If so, to which platform would the aggrieved party elevate its grievance?[55] Of course, parties can always provide for a dispute resolution mechanism in the framework that governs their cooperative approach. However, practice demonstrates that this may not always be the case.

For instance, the California-Quebec-linked carbon market, which is an initiative that could qualify as a cooperative approach under article 6.2, does not provide for any dispute resolution mechanism. In 2013, California and Quebec signed an agreement on the harmonization and integration of their respective cap-and-trade programs, which states that "Parties shall resolve differences by using and building on established working relationships."[56] As such, there is no independent third party dispute resolution mechanism that can resolve litigation within this initiative.

To facilitate the development of cooperative approaches and to reduce the risk of uncertainties regarding how potential disputes could be adjudicated, the CMA could develop an in-house dispute resolution mechanism under article 6.2. This mechanism could take the form of an optional arbitration procedure. In the legal framework governing their cooperative approaches, parties could simply opt-in and accept to submit any potential dispute that may arise in the course of their cooperative approach to this arbitration procedure. The creation of such a mechanism could contribute to limit the situations in which disputes relating to ITMOs would be adjudicated outside the Paris Agreement. To a certain degree, it could also prevent some states from being pressured to submit potential disputes to the courts of the other states with which they are conducting a cooperative approach.

52 See *Maldives Submission*, *supra* note 25 at 5.

53 See *New Zealand Submission*, *supra* note 32 at 4.

54 Gold Standard, online: <www.goldstandard.org/project-developers/standard-documents>.

55 Peter Zaman & Adam Hedley, *The Regulatory Framework to Support Carbon Market Linkage – A Concept Paper*, Reed Smith, (26 April 2016) at 7.

56 Government of Quebec, Office of the Premier, "Agreement between the California Air Resources Board and the *Gouvernement du Québec* concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions" (25 September 2013).

Conclusion

Finding an oversight system to ensure that parties act consistently with article 6.2 requirements is a delicate issue. On the one hand, too flexible an oversight system could undermine the credibility of ITMOs as NDCs' compliance instruments. Questions could arise as to whether the requirements relating to sustainable development, environmental integrity and transparency, as well as to robust accounting, are indeed met by the parties. Such questions could then lead to tarnish the image of the Paris Agreement and increase distrust among its parties.

On the other hand, too rigid an oversight system could increase the transaction costs associated with cooperative approaches and create uncertainty regarding the use of ITMOs. As one author highlighted, article 6 can only be effective if its governance system ensures "*predictability* and *stability* of the policy."[57] An *ex ante* control and a certification process performed by a body under article 6.2 are likely to hamper this predictability and stability, as well as to discourage parties from engaging in cooperative approaches. The achievement of NDCs might then be more difficult for some states.

But pure laissez-faire might also entail its own legal and political uncertainties. In the absence of a certification process, the use of ITMOs by a party may always be contested by other parties on the ground that the requirements of article 6.2 have not been properly met. Solving a dispute of this kind would certainly be a complex task, and the prospect of facing similar challenges could dissuade parties from developing cooperative approaches. Therefore, it could be argued that any ITMO officially sanctioned by an article 6.2 body would appear as the outcome of a multilaterally agreed rule-based process and, as such, would benefit from a legal status that will make such challenges less likely.

At this stage of the negotiations, it is still too early to conclude which option will be pursued to oversee international transfers of MOs. All that can be said is that neither of the two options appears entirely satisfactory. The transparency framework of the Paris Agreement places too much emphasis on the respect of national sovereignties. Conversely, the article 6.2 body option seems to contravene the bottom-up dimension of article 6.2, which is designed to allow for flexibility at the national level and to deviate from the plain language of this provision. Of course, there is always a third option, which would be to not define any oversight arrangement at all.[58]

Whatever choice states make regarding this issue, the key challenge with article 6.2 is to ensure the integrity of the ITMOs (especially their environmental integrity) without undermining the attractiveness of cooperative approaches. How parties will address this challenge at COP24 is likely to play an important role in the future success or failure of article 6.2.

57 Andrei Marcu, "Governance of Article 6 of the Paris Agreement and Lessons Learned from the Kyoto Protocol" CIGI, Fixing Climate Governance Series Paper No 4, 4 May 2017 at 1 [emphasis in original].

58 *Draft guidance on Article 6.2*, *supra* note 9, Option F at 7 ("no oversight arrangements"). However, other avenues could also have been pursued to manage this oversight issue and find a middle ground between over- and under-regulation. For instance, a possibility would have been to "externalize" the certification process currently contemplated in the article 6.2 body option outside the UN climate regime. Arguably, some intergovernmental structures (such as the World Bank) or even private bodies (such as independent rating agencies) could be quite capable of reviewing the consistency of cooperative approaches with the CMA guidance on article 6.2.

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Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

@cigionline