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Climate Finance and Transparency in the Paris Agreement

Key Current and Emerging Legal Issues

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About the Author

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Executive Summary

The success of the Paris Agreement depends in large measure on the legal and operational details of the "enhanced transparency framework" under article 13, including the transparency framework for climate financial support. The transparency framework for financial support will guide how parties are to report the progress toward meeting their commitments to provide financial support for climate action in developing countries and, where support is received, on its use. Developed countries' pledge to provide financial support to developing countries was a cornerstone of the compromise that enabled the virtually consensual global adoption of the Paris Agreement in 2015. This financial pledge will remain crucial throughout the implementation of the Paris Agreement. Transparency on how this financial support is actually going to be delivered is essential to maintain trust and to promote broad compliance with the climate mitigation and climate adaptation commitments under the Paris Agreement. Yet, almost three years after the Paris Agreement adoption, many aspects of the transparency framework for financial support remain unclear.

This paper unpacks key current and emerging legal aspects of climate finance and the transparency framework for financial support in the Paris Agreement, ahead of the twenty-fourth Conference of the Parties (COP24) to the United Nations Framework Convention on Climate Change (UNFCCC), to take place in December 2018 in Katowice, Poland. The paper argues that the transparency framework for support should be designed as an accountability tool for developed countries' obligation to provide financial support to climate action in developing countries. Furthermore, the paper argues that a transparency framework for financial support can only serve to build a comprehensive and effective accountability system if it also covers the financial contributions from emerging economies and high-income developing countries to lower-income developing countries.

Introduction

Adopted by more than 190 parties in 2015, the Paris Agreement[1] departs from the structure of previous international climate agreements. All parties — developed *and* developing countries alike — have now pledged to reduce their greenhouse gas emissions, to adapt to the impacts of climate change, and to steer finance toward a transition to low-carbon and climate-resilient economies. The international consensus behind the Paris Agreement was facilitated by a model that gives more autonomy for each state party to decide on its own climate actions — actions that shall be communicated to other parties through a nationally determined contribution (NDC) pledge. To address the concerns related to the potential lack of individual and collective ambition resulting from this bottom-up model of climate commitments, parties have agreed to create a robust transparency framework. This transparency framework, which requires all parties to regularly communicate their current and projected actions to meet their NDCs, has been coupled with periodic stocktaking of the collective status of global climate action and projected ambition (article 14).

The success of the Paris Agreement depends in large measure on the legal and operational details of the "enhanced transparency framework" under article 13, which includes a transparency framework for climate action and a transparency framework for climate support. The Ad Hoc Working Group on the Paris Agreement was discussing the rules of article 13 during the 2018 UNFCCC intersessional negotiations, to enable parties to vote on the final design of the provision during COP24, to take place in Poland in December 2018. The transparency framework for climate action will guide how parties are to report the progress toward meeting their nationally determined pledges to mitigate greenhouse gas emissions and to adapt to the impacts of climate change. The transparency framework for support will guide how parties are to report the progress toward meeting their commitments to provide support for climate action in developing countries

1 UNFCCC, *Adoption of the Paris Agreement,* 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L.9, arts 2, 9.1, 9.2 [*Paris Agreement*], online: <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> [*Paris Agreement*].

(financial, technological and capacity-building support) and, where support is received, on its use.

Although there is a single provision dedicated to the transparency framework, article 13, in fact, creates different levels of legal obligations, depending on the type of climate action (mitigation, adaptation or support), and whether the party is a developed country or a developing country. An analysis of key legal aspects of the transparency framework for climate mitigation, climate adaptation and climate support helps to clarify what legal and political strategies may be required to ensure effective implementation of the Paris Agreement moving forward.

Notwithstanding some crosscutting elements that are common to both the transparency framework for action and the transparency framework for support,[2] there are at least three distinctions that require policy makers and analysts to consider these two frameworks separately. First, the transparency framework for action is of universal application, covering developed countries and developing countries alike, albeit with built-in flexibility to take into account parties' different capacities. In contrast, the transparency framework for support is mandatory only for developed country parties, while voluntary for developing countries.

Second, the Paris Agreement transparency framework for action will build on a well-developed body of reporting and review rules of greenhouse gas emissions that can be traced back to 1995. Procedural rules for reporting on climate support under the convention have been systematized only since 2013, and are significantly less fleshed out, leaving much of the hard work of rules development for the emerging framework under the Paris Agreement.[3]

A third distinction is related to the different legal nature of the commitments for climate action and the commitments for climate financial support that states are asked to transparently report. Parties to the Paris Agreement decided that the substantive commitments to mitigate greenhouse gases and to adapt to climate change impacts contained in their NDCs were non-legally binding.

2 Harro V Asselt et al, *Transparency of Action and Support under the Paris Agreement* (European Capacity Building Initiative, 2016) at 6.

3 Alexander Zahar, *Climate Change Finance and International Law* (New York: Routledge, 2017).

In contrast, the provision on climate finance remains a legally binding obligation for developed countries. Therefore, besides being important as a tool to build trust among parties and to improve efficacy of action through enhanced learning, policy makers and other stakeholders should also consider the transparency framework for support as a key instrument to promote compliance with state obligations on climate finance.

Another distinction is also warranted when unpacking the legal and political contours of the enhanced transparency framework under article 13. Each aspect of climate support —technology transfer, capacity building and financial support — presents its own particular legal and political characteristics that require attention. For example, there are important differences in the nature of the obligations that developed country parties agreed to when it comes to financial support, capacity building and technology transfer. This paper addresses key legal aspects that are specific to financial support for climate action.

The financial aspect of the transparency framework for support is particularly important for at least three reasons. The first reason is that parties have elevated making financial flows consistent with low-carbon and climate-resilient development to one of the core objectives of the Paris Agreement (alongside climate mitigation and climate adaptation). The language of article 2 on the goals of the Paris Agreement includes a scaled-up provision and mobilization of climate finance for developing countries,[4] while also indicating the priority now accorded to climate finance more generally.

The second reason relates to the fact that financial support to developing countries is considered one of the core elements of the compromise between developed and developing countries that led to the successful adoption of the Paris Agreement in 2015 by more than 190 countries.[5] As trust among parties is an important determinant of compliance with multilateral environmental treaties, clear information on to what extent and how exactly

4 *Ibid*. Halldor Thorgeirsson, "Objective (Article 2.1)" in Daniel Klein et al, eds, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford, UK: Oxford University Press, 2017) at 128.

5 Jorge Gastelumendi & Inka Gnittke, "Climate Finance (Article 9)" in Klein et al, *supra* note 4 at 239; Alexander Thompson, "The Global Regime for Climate Finance: Political and Legal Challenges" in Kevin R Gray, Cinnamon Piñon Carlarne & Richard Tarasofsky, eds, *The Oxford Handbook of International Climate Change Law* (Oxford, UK: Oxford University Press, 2016) at 142.

developed countries are fulfilling their financial commitments is crucial to promote compliance, but also to retain the broad global participation that is a hallmark of the 2015 Paris Agreement. Third, all indications are that the amount of financial resources currently available for climate action in developing countries remains largely insufficient, although the full extent of the finance needed to address climate change is recognizably unknown.[6] More transparency on financial support means more incentives to scale up limited funds.

This paper analyzes key legal aspects related to climate finance support, regulated by article 13 (on transparency) and article 9 (on finance) of the Paris Agreement. Climate finance is here defined narrowly to mean the financial resources provided and mobilized to help developing countries mitigate greenhouse gas emissions and adapt to the impacts of climate change. A broader definition of climate finance would include domestic financial flows for climate action and financial resources flowing between developed countries for climate initiatives. These elements deserve analysis separate from financial support for climate action in developing countries, which is the topic of this paper.[7]

This paper first presents a clarification of the nature of states' climate finance obligations under the Paris Agreement, followed by an analysis of the institutional elements of the transparency framework for support set out by the Paris Agreement (in light of the climate finance obligations). The paper highlights the importance of using the transparency framework of support for two objectives: to broaden the amount of information available on all aspects of climate finance provided and mobilized; and to inform the Paris Agreement's mechanisms to facilitate implementation and to promote compliance with parties' obligations and commitments.

6 World Economic Forum (WEF), *The Green Investment Report: The Ways and Means to Unlock Private Finance for Green Growth* (Geneva, Switzerland: WEF, 2013) at 6; UNFCCC, *Investment and Financial Flows to Address Climate Change* (UNFCCC, 2007); for 2015 estimates in the energy sector alone, see International Energy Agency (IEA), *Energy and Climate Change: World Energy Outlook Special Report* (IEA, 2015).

7 Smita Nakhooda, Charlene Watson & Liane Schalatek, "The Global Climate Finance Architecture" in *Climate Funds Update* (London, UK: Overseas Development Institute, 2014). For broad and narrow working definitions of climate finance by the UNFCCC, see UNFCCC Standing Committee on Finance, *2014 Biennial Assessment and Overview of Climate Finance Flows Report* (2014).

Understanding the Legal Character of Each Provision

The Paris Agreement is a legally binding international instrument that contains both legally binding and non-legally binding substantive provisions.[8] The provisions on signature, ratification, entry into force and withdrawal confirm the intention to make the instrument legally binding upon its parties. Parties must implement the treaty provisions in good faith, independent of the existence of a strong enforcement mechanism.[9] States are more likely to comply with a binding international agreement than with a political one, due to a general understanding that non-compliance with a legally binding treaty has more reputational costs than non-compliance with a political accord.[10]

Although there was consensus to make the Paris Agreement a legally binding instrument upon all parties to it, the same cannot be said of the various substantive provisions of the Paris Agreement, which include provisions regulating the pledges to mitigate greenhouse gas emissions, provisions regulating climate finance contributions and provisions regulating reporting obligations. Parties decided that only some provisions of the Paris Agreement would create legal rights and obligations. Some legal obligations apply to all countries, while other legal obligations apply only to developed countries. It was also agreed that some obligations would apply to a group of states (collective obligations), while other obligations would apply to each state (individual obligations). The substantive provisions of the Paris Agreement also differ in terms of the precision of the obligations or the political commitments they establish. Finally, the substantive provisions also vary in terms of the accountability measures states

8 Daniel Bodansky, "The Legal Character of the Paris Agreement" (2016) 25:2 Rev Eur, Comp & Intl Envtl L 1 at 146, 142; Lavanya Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations" (2016) 28:2 J Envtl L at 337.

9 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

10 Bodansky, *supra* note 8 at 149.

agreed to adopt in order to reinforce the particular legal obligation or political commitment.[11]

The legal nature, the level of precision, the individual or collective nature, and the associated accountability mechanisms of each substantive provision all serve to illustrate the degree of international consensus on the respective issue. From an international law perspective, these four elements also determine the potential consequences of parties' failure to fulfill the commitments enshrined in the particular provision. For example, article 15 of the Paris Agreement creates a facilitative, non-adversarial mechanism to facilitate implementation and promote compliance. It is expected that any compliance committee that is established will treat provisions creating individualized and precise legal obligations differently than provisions creating general political commitments that are not legally binding.

In this context, it is worth discussing the legal nature of the provisions on climate finance under the Paris Agreement, how they compare to provisions regulating climate mitigation and climate adaptation, and how the legal treatment of climate finance has changed since the 1992 UNFCCC.[12]

Climate Finance Obligations: Continuities

The substantive commitments to mitigate emissions and to adapt to the impacts of climate change in the Paris Agreement, contained in parties' NDCs, are not legally binding.[13] This was a departure from the mitigation provisions of the 1992 Convention and the 1997 Kyoto Protocol, which clearly created substantive legal obligations of emissions reductions for developed countries listed in Annex I of the convention.[14] While the mitigation obligations for developed countries under the UNFCCC were broad in nature,[15] the Kyoto Protocol included specific quantified binding emissions reduction targets for developed countries over agreed-upon timelines.[16] The UNFCCC and the Kyoto Protocol did not include binding mitigation obligations for developing countries. Their emissions reductions were to be voluntary, at least initially.

The Paris Agreement ended the rigid dichotomy of earlier instruments of the climate regime that differentiated mitigation action of developed countries and developing countries. All parties to the Paris Agreement, independent of their development stage, committed to submit their NDCs aimed at the global reduction of greenhouse gas emissions. Unlike in the UNFCCC and in the Kyoto Protocol, which had a clear focus on mitigation, parties to the Paris Agreement also committed to "undertake and communicate ambitious efforts" on adaptation.[17] However, neither developed countries nor developing countries have a legal obligation to meet the substantive mitigation and adaptation commitments put forward in their NDCs under the Paris Agreement.[18] With respect to those commitments, parties have obligations to formulate national plans, to report on their national efforts on climate action under the transparency framework for action, and to pursue domestic measures in line with their NDCs.[19] If, despite taking all the steps, parties fail to meet their targets, they will not be in violation of a legal obligation.

11 *Ibid*.

12 UNFCCC, 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994) [UNFCCC].

13 *Ibid* at 146.

14 UNFCCC, *supra* note 12; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005) [*Kyoto Protocol*].

15 UNFCCC, *supra* note 12, art 4.2 ("Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention").

16 *Kyoto Protocol*, *supra* note 13, art 3.1 ("The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012").

17 *Paris Agreement*, *supra* note 1, art 3.

18 Bodansky, *supra* note 8 at 146.

19 Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (Oxford, UK: Oxford University Press 2017) at 231.

In contrast, the Paris Agreement has maintained the legally binding nature of the provision of climate finance obligations for developed countries, in continuation of their earlier obligations under the convention. Article 4.3 of the 1992 Convention establishes that developed country parties and other developed parties included in Annex II *shall* provide financial support for developing countries to implement their substantive commitments. The obligation of article 4.3 is a collective one, for developed countries listed in Annex II as a group.[20] The collective nature of the financial obligation under the convention differs from the individual nature of the mitigation obligations ("each of [Annex I] Parties" shall adopt mitigation policies).[21] Both the individual mitigation obligations and the collective financial obligations of developed countries under the 1992 Convention were broadly defined, leaving significant discretion for parties to decide on how to individually implement the binding commitments when it comes to timeline, scope and form.

The 1997 Kyoto Protocol made the individual mitigation obligations of developed countries specific, with established qualitative (economy-wide) and quantitative emissions reductions targets set to explicit timelines. In contrast, the collective financial obligations of developed countries would remain very broad in nature, with the Kyoto Protocol setting no timelines and no qualitative or quantitative financial targets. Article 9.1 of the Paris Agreement has maintained both the collective nature and the broad nature of financial obligations. It has also kept the legal obligation to provide climate finance exclusively to developed country parties: "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention."

The only specification, when compared to the financial obligations in the 1992 Convention, is the explicit reference that climate finance will cover both mitigation and adaptation. It is worth noting that climate finance for loss and damage (the significant climate impacts that can no longer be avoided or minimized) was left out of both article 9 (on climate finance) and article 8 (on loss and damage).[22] When it comes to the provision of climate finance, therefore, there is significant continuity with the model adopted in the 1992 Convention, both in terms of the legal nature of the commitments, in terms of which parties are subject to this legal obligation and in terms of a collective rather than individualized obligation.[23]

When it comes to the provision on climate finance, the Paris Agreement maintained the legal dichotomy between commitments by developed country parties and by developing country parties. In fact, preserving this dichotomy has arguably been at the core of the compromise that enabled broad global consensus toward the Paris Agreement.[24] Developing countries would only commit to undertake significant action on climate mitigation and climate adaptation in exchange for developed countries continuing to uphold their exclusive obligation to provide climate finance.[25]

Another noteworthy continuity between the climate finance obligations in the 1992 Convention and those in the 2015 Paris Agreement is the lack of precision when it comes to most aspects of the provision of climate finance, such as what should count as climate finance provided (public versus private funds; grants, loans, bonds and so forth); how much financial support developed countries should provide collectively and how exactly developed countries will share the burden of the collective obligation among themselves; and how developed countries should distribute their financial support toward meeting the mitigation objective and the adaptation objective of the Paris Agreement.

This lack of precision, reflecting the absence of political consensus among parties, has left wide discretion for developed countries as to how they are to fulfill their obligations related to the provision of financial support. Parties can, however, agree to more precise guidelines when they

20 For a discussion on the collective nature of financial climate obligations, see Zahar, *supra* note 3.

21 For the different legal implications of collective versus individual obligations, see Zahar, *ibid*.

22 Agreement on the sources of finance for loss and damage has been elusive in the negotiations to operationalize the Paris Agreement rulebook. See the reports and documents from COP23 at United Nations Climate Change, "COP 23", online: <https://unfccc.int/process-and-meetings/conferences/un-climate-change-conference-november-2017/sessions-of-negotiating-bodies/cop-23>.

23 Zahar, *supra* note 3.

24 *Ibid*.

25 *Ibid*.

negotiate the rules for reporting climate finance under the transparency framework for support.

Climate Finance Obligations: Changes

This general continuity hides important political changes that have already produced some legal consequences, and that may signal future legal changes in the climate regime. One change has been the gradual expansion in the number of parties with financial obligations under the climate regime over the years. Under the 1992 Convention, only the group of developed countries listed in Annex II was under the obligation to provide climate finance. Nevertheless, in practice, virtually all developed countries have consistently provided some form of financial support to climate action in developing countries since 1992, even those that were not listed under Annex II. The Paris Agreement has officially expanded the number of parties with legal obligations to provide climate finance to include all developed countries, catching up with state practice.[26]

Although the Paris Agreement did not create climate finance obligations for high middle-income developing countries and emerging economies, this was discussed during negotiations.[27] Despite the resistance of developing countries to this potential legal change, there are signs indicating that the climate regime is gradually evolving in the direction of emerging economies, or high middle-income countries with comparatively strong financial capacity, politically accepting to give some financial support for climate action in other developing countries. The Paris Agreement has clearly separated the *provision* of climate finance (understood to include public financial flows from developed to developing countries, although this is not defined in the agreement) from the *mobilization* of climate finance (meaning private sources mobilized by public interventions), giving each element of climate finance a different legal treatment.[28]

The exclusive obligation of developed countries applies only to the provision of climate finance under article 9.1. Yet article 9.2 encourages other parties "to provide or continue to provide such support voluntarily," a formulation that was absent from previous legal instruments and decisions in the climate regime. When it comes to the mobilization of climate finance "from a wide variety of sources, instruments and channels," parties agreed in article 9.3 that it would be "a global effort," albeit with developed countries committing to continue taking the lead.

This separation and different legal treatment between climate finance provided and climate finance mobilized reflects a compromise. Developing countries wanted to maintain the exclusive obligation of developed countries to provide and to mobilize climate finance.[29] Developed countries advocated for keeping the obligation to provide climate finance, albeit expanding it to more parties, while mobilization of climate finance would be a common effort under equal legal treatment. The middle ground was to include distinct paragraphs for provision and for mobilization of climate finance. While the former remains an exclusive obligation of developed countries, the latter became a universal commitment, although still politically differentiated due to the leadership role expected from developed countries.

In practice, several developing countries, including China and Brazil, have pledged to provide and to mobilize financial support for climate action in other developing countries. In 2015, China pledged US$3.1 billion to a "South-South Climate Fund" that will support climate action in other developing countries.[30] Estimates are that, as a share of GDP, China's pledge overtakes the pledges of many developed countries, including the United States,

26 It is worth noting that the Paris Agreement has not included a definition of developed countries, leaving the decision as to which countries will fall into this group to political self-determination and collective political agreement.

27 Gastelumendi & Gnittke, *supra* note 5 at 244.

28 *Ibid* at 242.

29 Gastelumendi & Gnittke, *supra* note 5 at 243.

30 Ed King, "China makes 'watershed' $3.1 billion climate finance offer", *Climate Home News* (25 September 2015). Lina Li et al, "China and its Climate Leadership in a Changing World: From Passive Follower to Constructive Shaper of the Global Order" (2017) Climate Diplomacy Discussion Paper.

Canada and Australia.[31] Three developing countries that are part of the Group of 20 — Indonesia, Mexico and Korea — have provided voluntary contributions to the Green Climate Fund,[32] as did six developing countries.[33] Eight developing countries have provided financial contributions to the Global Environmental Facility, one of the operating entities of the financial mechanism under the UNFCCC. This movement toward universalization of climate finance provided and mobilized for developing countries thus reflects both a shifting political understanding and emerging state practice.

Considering the clear need for greater resource mobilization for climate action in developing countries, one might expect that the group of emerging economies and other high-income developing countries will be under increasing pressure to contribute their share of financial support for global climate action; as their share of global greenhouse gas emissions grow, so do their financial capabilities as compared to lower-income developing countries with significantly fewer climate responsibilities and lower financial capabilities. This gradual expansion in the number of parties offering financial support for their peers would be in line with the gradual organic evolution of the principle of common but differentiated responsibilities under the climate regime, beyond the North-South divide.[34]

In the inception of the climate regime under the UNFCCC in the 1990s, the idea was that developed countries would take the lead by taking early emissions reduction actions and by providing the bulk of international finance for climate action in developing countries, in order to account for their historical contributions to climate change and their greater financial and technological capabilities. Yet emerging economies, with their growing emissions and their improving financial capabilities, were expected to make significant contributions over time to account for their rising responsibilities and capabilities. Although, for a long time, developing countries resisted any formal legal change in the principle of differentiation in the climate regime, in practice, many emerging economies and other developing countries adopted substantial domestic policies to reduce emissions.[35] State practice has therefore contributed to a gradual evolution of the principle of differentiation beyond the North-South divide, based on voluntary action by a group of key developing countries. This state practice was recognized in the Paris Agreement.

A similar process may be happening in the area of climate finance. A group of developing countries is increasingly providing financial support to other developing countries. Although these developing country parties are contributing voluntarily, this opens the way for a discussion on the future expansion in the number of legally mandated providers of climate finance, based on the principle of common but differentiated responsibilities and capabilities, which considers both the unequal contributions to global greenhouse gases and financial capabilities. And there is no question that a country with the largest share of current emissions (i.e., China), which is also the second largest economy in the world in absolute GDP numbers (although not per capita GDP), has more responsibility and capabilities than a small island nation such as Fiji or a least-developed country such as Malawi.

Most probably, this evolution toward expanding the number of legally mandated financial providers will only happen if parties can agree on a burden-sharing arrangement that requires developed countries to contribute with a proportionally greater share of financial support when compared to emerging economies and high-income developing countries. From a legal perspective, however, only developed countries are currently under the substantive legal obligation to provide climate finance.

Another relevant change has been the political determination of a numeric collective goal for the provision of climate finance. Until the 2009 Copenhagen Accord, there was no indication as to how much financial support was involved in developed countries' financial obligations under the climate regime. The text of the Copenhagen

31 Joe Thwaites & Niranjali Manel Amerasinghe, "Fact-Checking Trump on Climate Finance" (June 2017), online: World Resources Institute <www.wri.org/blog/2017/06/fact-checking-trump-climate-finance>.

32 Swati Agarwal et al, *Brown to Green: The G20 Transition to a Low-Carbon Economy* (Berlin: Climate Transparency, 2017).

33 Thwaites & Amerasinghe, *supra* note 32.

34 Lavanya Rajamani, "Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics" (2016) 65:2 ICLQ 493.

35 See Climate Action Tracker for a comparative assessment of the climate pledges and contributions of developed countries and developing countries over the years, online: <http://climateactiontracker.org/countries/brazil.html>.

Accord included the following wording: "Developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries."[36] This collective goal was in addition to a collective sum of US$30 billion for the period of 2010 to 2012, known as "Fast-Start Finance."[37] Parties to the Paris Agreement could not reach a consensus to include the numeric indication in the text of the legal instrument, placing the collective quantified goal in the text of the Decision of the Conference of the Parties that established the Paris Agreement instead.[38]

Strictly speaking, therefore, developed countries have no collective legal obligation to provide the specific amount of US$100 billion a year as a floor, as this remains a political pledge. Individually, developed countries do not have any obligations to provide any specific amount either, be it in absolute terms or in terms of GDP share. However, article 9.3 of the Paris Agreement establishes that the financial obligation should represent "a progression beyond previous efforts," which shows that there is a political expectation not only that developed countries must collectively deliver on the US$100 billion, but also that this goal should be seen as a floor. The Paris Decision extends the US$100 billion commitment to 2025 and establishes a process for the COP serving as the meeting of parties to the Paris Agreement to agree on a new collective goal after 2025.[39] The decision does not mention that the post-2025 collective goal is exclusive to developed countries, leaving room for a political agreement to expand the basis of contributors to this collective financial commitment.

In sum, although there have been significant political advances in terms of financial commitments, from a legal standpoint there is more continuity than change between the UNFCCC and the Paris Agreement when it comes to substantive obligations related to the provision of climate finance. From a legal perspective, developed countries still have exclusive collective obligations to provide finance with low levels of precision, leaving wide discretion for each of them to decide on the quantity, the timing and the channels they will use. Developed countries also have discretion as to how much finance they will channel to adaptation and how much to mitigation, although they are expected to respect a "balance" that is left undefined.

The Paris Agreement has, however, created a significantly more robust transparency framework for financial support under the Paris Agreement, which will contribute to facilitate implementation and to promote compliance with climate finance obligations, and may encourage the gradual legal expansion in the number of providers over time. It is important to understand the legal nature of the provisions of the transparency framework for support as well.

Enhanced Transparency Framework for Support: Institutional Elements

Article 13 of the Paris Agreement establishes a single "enhanced transparency framework for action and support" to "build mutual trust and confidence and to promote effective implementation." The transparency framework is described as crucial for the success of the Paris Agreement, as it is expected to foster shared understandings of the NDCs and collective learning, to marshal domestic support for national climate action and to hold parties accountable for the implementation of their NDCs.[40]

From a legal perspective, there are differences between the two elements of the broad transparency framework (the transparency framework for action and the transparency framework for support). The transparency framework for action establishes a universal obligation of conduct that binds all parties to regularly provide information on the implementation of their voluntary pledges for climate action: "each party shall provide information." All parties, developing and developed alike, are legally bound, although

36 *The Conference of the Parties Takes Note of the Copenhagen Accord of 18 December 2009*, Dec/CP.15, UNFCCC at 3.

37 Smita Nakhooda et al, *Mobilising International Climate Finance: Lessons from the Fast-Start Finance Period* (ODI, World Resources Institute, Institute for Global Environmental Strategies & Open Climate Network, 2013).

38 Meinhard Doelle, "The Paris Agreement: Historic Breakthrough or High Stakes Experiment?" (2016) 6:1-2 Climate Law 1.

39 Zahar, *supra* note 3 at 73.

40 Asselt et al, *supra* note 2.

there is a built-in flexibility system for those developing countries that indicate challenges to implementing this obligation of conduct.[41]

This universal model breaks with the previous dichotomy on reporting rules for climate action under the 1992 Convention. Developed countries were required to submit information on their climate mitigation and climate support in national communications (every four to five years) and later in biennial reports, according to agreed-upon guidelines. Since the 2007 Bali Action Plan, developing countries were requested to submit "biennial update reports," an update of their quadrennial national communications. All countries are now mandated to report on the implementation of their climate action pledges at least every two years and to undergo expert review of those efforts, under the same guidelines, only with the possibility of some flexibility for those developing countries that face reporting challenges.[42]

The transparency framework for support, on the other hand, is clearly legally binding only for developed countries, while voluntary for developing countries. Article 13.9 makes this dichotomy explicit: "developed country Parties *shall*, and other Parties that provide support *should*, provide information on financial, technological transfer and capacity-building support provided to developing county Parties." Articles 9.5 and 9.7 (on communication of *ex ante* climate finance and communication of *ex post* climate finance, respectively) reinforce that developed countries are the only ones mandated to biennially communicate indicative, quantitative and qualitative information on financial support, as well as information on support provided and mobilized through public interventions for developing countries. Other parties are only encouraged to report.

As wealthier developing countries are voluntarily providing climate finance (and other types of South-South climate support) to other developing countries in increasing numbers, and as they have now committed to the global efforts to mobilize climate finance under article 9.3, this lack of universality in the obligation related to financial support may prevent the transparency framework for support from establishing a full overview of aggregate financial support under the climate regime and from adequately facilitating implementation. On the demand side of climate finance, the transparency framework for support has failed to create binding obligations to report. Article 13.10 establishes that developing country parties should provide information on financial and other support needed and received. There is no mandatory requirement for developing countries to clearly articulate and to communicate their financial needs or to report how they are using the finance received. Better information on how recipients are using climate finance could counter the political position by some sectors in donor countries against providing finance for climate action abroad, based on the argument that climate funds are unaccounted for.

The political resistance of developing countries to commit to reporting obligations is based on the fear of being overburdened, without having the financial capabilities, or having limited technical capacity to fulfill those obligations. However, this is exactly the objective of the built-in flexibility mechanism enunciated in article 13.1, as well as the provisions in articles 13.14 and 13.15, which respectively establish that "support shall be provided to developing countries for the implementation of [reporting obligations]," and "support shall also be provided for the building of transparency-related capacity of developing country Parties on a continuous basis."

Leaving the reporting voluntary may serve as a disincentive for developing countries to establish national systems to assess their needs for financial support. It also undermines the objectives of building trust and promoting effective implementation of climate action, as having access to information on financial flows received and information on the use of these financial flows legitimizes the process among finance providers, besides promoting efficiency. State practice of extensive reporting on climate finance provided, needed and received by all parties may reduce the limitations associated with this still lopsided aspect of the transparency framework on support.[43] From a strictly legal standpoint, however, the transparency framework of financial support

41 Discussions are only about whether "built-in flexibility" means there should be one set of reporting rules for all countries, or different sets for different countries depending on their national circumstances. Sumit Prasad, Karthik Ganesan & Vaibhav Gupta, "Enhanced Transparency Framework in the Paris Agreement" (2017) CEEW Working Paper, online: <http://ceew.in/pdf/CEEW%20-%20Enhanced%20Transparency%20Framework%20in%20the%20Paris%20Agreement%2012May17.pdf>.

42 Jennifer Huang, "Post-Paris Transparency Under the United Nations Framework Convention on Climate Change" (2016) 18:3 ABA Intl Envtl L & Resources L Committee Newsletter.

43 UNFCCC, *supra* note 1 at para 90.

maintains the model of bifurcated substantive financial obligations along a North-South divide. A best-practice model of creating robust reporting guidelines for developing countries would be a useful tool to ensure accountability for climate finance mobilized, provided and needed, consistent with the current voluntary nature of the obligation.

A second issue is whether the transparency framework of support has incorporated provisions that help to make developed country parties' broad substantive obligations of providing financial support more precise. Article 13 does not include clear language that reduces the discretion of developed countries in determining what they are to consider in their definition of climate finance provided. The definition on what and how to report on climate finance provided and mobilized was left to the negotiations of the modalities, procedures and guidelines (MPGs) that will operationalize the transparency framework for support.[44] These negotiations will build on the reporting experience prior to the Paris Agreement.

However, unlike reporting rules on greenhouse gas emissions, which were first created in 1994 and have been well developed over the years, finance reporting guidelines were largely neglected until after the Copenhagen Accord in 2009. Only in 2012, during COP18 in Doha, did parties agree to set up an instrument for *ex ante* information by individual developed country parties on their efforts to mobilize climate finance to meet the collective goal of US$100 billion per year by 2020.[45] One year later, during COP19 in Warsaw, developed countries agreed to submit biennial reports on their updated strategies to scale up climate finance, including quantitative and qualitative information.[46]

Notwithstanding these recent advances, reporting rules for financial support remain significantly underdeveloped when compared to reporting rules for mitigation.[47] More recently, there have been concerted efforts to develop more robust accounting guidelines for tracking and reporting public and private climate finance. These efforts have been undertaken by the Standing Committee on Finance, a body of the UNFCCC,[48] as well as external institutions such as the Organisation for Economic Co-operation and Development.[49] Many technical and political challenges remain to determine what will be counted as climate finance, and what other information developed countries and developing countries will be requested and encouraged to report.

Current reporting guidelines serve to reinforce the significant discretion developed countries still have over how much financial support they will supply, and under what conditions. There is, however, a greater level of precision than before 2007. Parties are required to describe their "national approach" for tracking climate finance provided and mobilized, including the assumptions and methodologies underlying this approach; identify the channels used to transfer finance; separate adaptation finance from mitigation finance in reports; indicate how they judge their contribution as fair according to their responsibilities and capabilities; and demonstrate how their support is responsive to developing country needs.[50] It is well recognized that the lack of standardized reporting guidelines has led to dissonant reports that prevent an assessment of the levels of global climate finance available, as well as the comparability of efforts by individual developed countries.[51]

States are currently negotiating the development of more detailed MPGs for reporting on climate action under article 13, and will need to finish this process during COP24 in 2018. In the case of climate finance reporting, parties do not have the same solid ground to build on as they do with mitigation reporting guidelines, making the task more challenging. Besides, parties still need to bridge their differences on many aspects related to climate finance while

44 Gastelumendi & Gnittke, *supra* note 5 at 247.

45 *Agreed outcome pursuant to the Bali Action Plan*, Dec I/CP.18, FCCC/CP/2012/8/Add.1 at para 67; Gastelumendi & Gnittke, *supra* note 5 at 241.

46 *Long-term climate finance*, Dec 3/CP.19, FCCC/CP/2013/10/Add.1 at para 10; Gastelumendi & Gnittke, *supra* note 5 at 241.

47 Zahar, *supra* note 3 at 75.

48 UNFCCC Standing Committee on Finance, *2014 Biennial Assessment and Overview of Climate Finance Flows Report*, online: <http://unfccc.int/cooperation_and_support/financial_mechanism/standing_committee/items/8034.php>.

49 Randy Caruso & Jane Ellis, *Comparing Definitions and Methods to Estimate Mobilised Climate Finance* (Paris: OECD/IEA, 2013); Barbara Buchner, Jessica Brown & Jan Corfee-Morlot, *Monitoring and Tracking Long-term Finance to Support Climate Action* (Paris: OECD/IEA, 2011).

50 Romain Weikmans et al, *Towards Transparency: 2016 Adaptation Finance Transparency Gap Report*, White Paper, online: AdaptationWatch <https://static1.squarespace.com/static/56410412e4b09d10c39ce64f/t/581af8272e69cfd82f8a834a/1478162481457/Adaptation+Watch+Report+2016+Digital+FIN.pdf>.

51 Jane Ellis & Sara Moarif, "Enhancing transparency of climate finance under the Paris Agreement: Lessons from experience" (2017) OECD/IEA Climate Change Expert Group Paper No 2016/03.

negotiating the MPGs. These differences were on vivid display during the twenty-third Conference of the Parties (COP23) in 2017, with developing countries, including China, insisting on the creation of different sets of transparency MPGs for developed countries, while developed countries argued for a universal set, with flexibility rules for those countries that claim lack of reporting capacity.[52]

Conclusion

The purpose of the framework for transparency of support is explicitly "to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14."[53] The aim is to "build mutual trust and confidence and to promote effective implementation."[54] This is a key aspect of the implementation of the Paris Agreement, which has not received detailed scrutiny from legal experts. Considering the specificities of the transparency framework for support, parties should pay special attention to a few aspects when discussing the operationalization of the MPGs.

The first one is that due to the legal nature of the climate finance obligations for developed countries, the transparency framework for support also has a legal function, besides serving as an instrument to build trust and to promote implementation with non-binding commitments. Despite the absence of an explicit linkage, the information on financial support under the framework may inform the compliance element of the mechanism to facilitate implementation and to promote compliance created by article 15 of the Paris Agreement. Both the facilitation of implementation and the promotion of compliance will be non-adversarial and non-punitive. The MPGs should be designed with a view to allow information on finance provided to inform the promotion of compliance, which is one way to increase trust and ensure accountability for developed countries.

Furthermore, in order to ensure clarity and a full overview of climate finance under the Paris Agreement, the transparency framework for support has to be as comprehensive as possible. Currently only developed countries have binding obligations, both substantively and procedurally, for providing and for reporting on climate finance. However, by using robust standards to report on the climate finance they are providing and mobilizing voluntarily, developing countries will contribute to the accuracy and the consistency of information on climate finance. The MPGs should be designed in a way to encourage developing countries to provide information on finance needed, received and used, in order to build trust and to provide clarity on the full extent of climate finance under the Paris Agreement.

Most issues related to the articles on climate finance and transparency of support were still under intensive negotiations during the UNFCCC intersessional negotiations that took place in April and May 2018 in Bonn. This session happened in preparation for COP24, scheduled for December 2018, when parties will finalize the Paris rulebook. It is unlikely that parties will solve all their differences in time for COP24. This should not prevent parties from continuing to pursue the long-term vision they created for the transparency framework for support, which is to serve as a tool to build trust among themselves.

Trust can be defined as "the reliance on the character, the ability and the strength of an individual or a system."[55] The more each party is able to transparently demonstrate how they are implementing their commitments, how they are complying with their legal obligations and how they are supporting global climate action, the more trust the other parties will have in the ultimate success of the Paris Agreement.

52 See United Nations Climate Change, *supra* note 22.

53 *Paris Agreement*, *supra* note 1, art 13.6.

54 *Ibid*, art 13.1.

55 *Merriam-Webster Dictionary*, s.v. "trust", online: <www.merriam-webster.com/dictionary/trust>.

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