



Mitigation Action Plans & Scenarios

RESEARCH PAPER

Negotiating the 2015 Climate Agreement:

Issues relating to Legal Form and Nature

ISSUE 28

Developing
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compatibility

Negotiating the 2015 Climate Agreement:

Issues relating to Legal Form and Nature

Date: 14/05/2015

Country: South Africa

Author:

Lavanya Rajamani, Professor, Centre for Policy Research, New Delhi.

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The following citation should be used for this document:

Rajamani, L., 2015. Negotiating the 2015 Climate Agreement: Issues relating to Legal Form and Nature. Cape Town. MAPS.



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ABSTRACT

The on-going UN negotiations for a 2015 climate agreement have yet to resolve two fundamental legal issues on which the effectiveness of this agreement will hinge. First, they have yet to resolve the precise legal form this agreement will take. Parties agreed in Durban, 2011 to launch work towards a 'protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties' to be adopted in Paris in December, 2015. This formulation, reflective of divergences among Parties, leaves scope for a range of possibilities on legal form, some of which are binding and others are not. Second, Parties have yet to determine, the legal nature of the 'nationally determined contributions' Parties are expected to submit in the context of the 2015 agreement. This article seeks to address these two critical legal issues in the 2015 climate negotiations. In addressing the issue of 'legal form', it identifies the instruments that will likely form part of the Paris package and explores the characteristic features of each with a particular focus on their legal status, significance and influence. In addressing the issue of the 'legal nature' of nationally determined contributions submitted by Parties, the paper considers the nature and scope of contributions, the range of options for 'housing' them, as well as their relationship to the core 2015 agreement. It will also consider the extent to which the legal nature of contributions may be differentiated across types of contributions (such as on mitigation, adaptation, finance or technology) and/or groups of Parties (such as developed and developing).

A decorative graphic in the bottom right corner of the page. It features a stylized world map in dark red, overlaid with a pattern of diagonal lines in shades of orange and yellow. The text "Developing countries exploring pathways to climate compatibility" is written in white, sans-serif font over the map.

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1. INTRODUCTION

The Durban Platform decision that launched negotiations towards a 2015 climate agreement left the legal form of the 2015 climate agreement undetermined. Parties agreed to launch work towards a ‘protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’.¹ Parties chose not to address the legal form of the 2015 agreement at subsequent conferences in Doha, Warsaw and Lima. Indeed, the Warsaw decision that invited Parties to submit intended nationally determined contributions in 2015 leaves the legal form of the 2015 agreement and, explicitly, the legal nature of nationally determined contributions unresolved.² The clause ‘without prejudice to the legal nature of the contributions’ occurs three times,³ twice in one paragraph⁴ and was a product of the final huddle at Warsaw.⁵ The Lima Elements text⁶ and the Geneva Negotiating Text⁷ also contain footnoted disclaimers as to legal form and nature.

However, the leeway to further defer the decisions on legal form and nature, given the rapidly approaching Paris deadline, no longer exists.⁸ Parties must of necessity determine what legal form the core 2015 agreement will take, as well as resolve the legal nature of nationally determined contributions that are expected to form part of the Paris package.

This paper first identifies the instruments that will likely form part of the Paris package, and then explores the characteristic features of each of these instruments with a particular focus on their legal status and significance. In doing so, it will address the issue of ‘legal form’ of the core 2015 agreement. The paper then proceeds to explore the legal nature of the nationally determined contributions that will eventually form part of the Paris package. Parties have begun to submit intended nationally determined contributions in response to the invitation issued by the Conference of Parties (COP) in Warsaw to do so.⁹ These will presumably transform from ‘intended’ to eventual or final contributions in the context of the Paris agreement, and may even be given a different name. For ease of reference, these will be referred to in this paper as ‘nationally determined contributions’. In addressing the legal nature of nationally determined contributions, this paper will consider the nature and scope of contributions, the range of options for ‘housing’ these contributions as well as their

* Professor (International Law), Centre for Policy Research, New Delhi. I am grateful to Shibani Ghosh, Senior Research Associate, Centre for Policy Research for her, as ever, excellent assistance with this paper.

¹ Decision 1/CP.17, ‘Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011’, FCCC/CP/2011/9/Add.1 (15 March 2012) [hereinafter ‘Durban Platform’], para 2.

² Decision 1/CP.19, ‘Further Advancing the Durban Platform’, FCCC/CP/2013/10/Add.1 (31 January 2014) [hereinafter ‘Warsaw ADP Decision’], para 2(b).

³ Ibid, para 2(b) and 2(c).

⁴ Ibid, para 2(b).

⁵ Huddles have been convened ‘spontaneously’ (although some argue these are orchestrated in advance) on the floor of the plenary in the climate negotiations since Durban. Key negotiators gather together to work on the contentious text. Although, in principle, anyone can join the huddle, only those in the inner few rings of the huddle play a decisive role. Participation in huddles demands physical strength and stature, and there have been rumbles of discontent against this mode of resolving differences, which albeit, seemingly accessible, marginalizes many Parties.

⁶ Decision 1/CP.20, ‘Lima Call for Climate Action’, FCCC/CP/2014/10/Add.1 (2 February 2015) [hereinafter ‘Lima Call for Climate Action’], Annex: ‘Elements for a draft negotiating text’.

⁷ Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (8–13 February 2015), Agenda item 3: Implementation of all the elements of decision 1/CP.17 Negotiating text, FCCC/ADP/2015/1 (25 February 2015) [hereinafter ‘Geneva Negotiating Text’].

⁸ Durban Platform, *supra* n 1, para 4: ‘[d]ecides that the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.’

⁹ Switzerland’s intended nationally determined contribution and clarifying information (27 February 2015); Submission by Latvia and the European Commission on behalf of the European Union and its Member States (6 March 2015); Submission by Norway to the ADP, Norway’s Intended Nationally Determined Contribution (27 March 2015); and Submission by Mexico, Intended Nationally Determined Contribution (30 March 2015); US Cover Note, INDC and Accompanying Information (31 March 2015); Contribution of Gabon (1 April 2015); and the Russian Submission (1 April 2015), available at: <<http://www4.unfccc.int/submissions/indc/SubmissionPages/submissions.aspx>>, accessed 14 May 2015.

relationship to the core 2015 agreement. It will also consider in this context the extent to which the legal nature of contributions may be differentiated across types of contributions and/or groups of Parties.

2. CONSTITUENT ELEMENTS OF THE PARIS PACKAGE

The Paris conference is likely to yield a package of instruments comprising a combination of the following: a core 2015 agreement, COP decisions, supplementary instruments (such as information and/or miscellaneous documents, schedules etc.), and one or more political declarations. Each of these has been discussed in turn.

2.1 Core 2015 Agreement

The Durban Platform decision launched a process to develop ‘a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’.¹⁰ This instrument will form the core 2015 agreement and could take various forms.

2.1.1 Protocol

The core 2015 agreement could take the form of a protocol. Such a protocol could have annexes, attachments or appendices that form an integral part of the instrument, as they do with the Kyoto Protocol. Protocols are explicitly recognized in Article 17 of the Framework Convention on Climate Change (FCCC)¹¹ as a method of expanding the climate regime. Article 17 does not provide any guidance on the content of the protocol, including its title. It does however prescribe the procedure for adopting protocols.

Six-month rule: Article 17 requires the text of the protocol to be communicated to the Parties by the Secretariat at least six months before the session at which it is proposed for adoption (the ‘six month rule’).¹² A similar rule applies to proposed amendments to the FCCC¹³ and the Kyoto Protocol.¹⁴ In the case of amendments, however, the notice has to be provided six months before the meeting. Every session consists of several meetings. In the case of a Protocol the text would have to be communicated by end May. The Geneva negotiating text has already been communicated in all six official UN languages thus ‘fulfilling all relevant legal and procedural requirements for COP 21 to adopt a protocol, another legal instrument or agreed outcome with legal force’.¹⁵

Article 17 does not provide any guidance on who may propose a protocol that will be communicated to the Parties.¹⁶ Does the text need to emerge from a multilateral process initiated by Parties such as the Ad Hoc Working Group on the Durban Platform for Enhanced Action, or can a single Party submit a draft text to be communicated to Parties? If both options are possible, can one of these texts function as sufficient notice for the other? That is, is the purpose of the notice

¹⁰ Ibid, para 2.

¹¹ United Nations Framework Convention on Climate Change 1992, 1771 UNTS 107 (hereinafter ‘FCCC’).

¹² Emphasis added.

¹³ FCCC, Article 15(2).

¹⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, 2303 UNTS 148, FCCC/CP/1997/7/Add.1 (hereinafter ‘Kyoto Protocol’), Article 21(3).

¹⁵ Note Verbale from the UNFCCC Secretariat to Parties (19 March 2015), available at: http://unfccc.int/files/essential_background/convention/application/pdf/adp_negotiating_text_english.pdf, accessed 14 May 2015.

¹⁶ FCCC, Article 17(2) reads: ‘the text of any proposed protocol shall be communicated to the Parties’. It does not indicate who may propose a Protocol. In contrast, in the case of amendments FCCC, Article 15(1) specifies that ‘[a]ny Party may propose amendments to the Convention’, before proceeding in Article 15(2) to require such text to be communicated to Parties by the Secretariat.

requirement to provide notice that a treaty has been proposed for adoption, or to provide notice of the substantive ideas presented in the text? The ADP has agreed on a negotiating text that has been circulated by the Secretariat in time to comply with the six-month rule. Other Parties may also submit agreements to be circulated in accordance with this rule, as they did before Copenhagen.¹⁷ If fully crafted texts arrive after the six-month deadline has passed, Parties will need to address this question.

Article 17 also does not provide any guidance on the nature of the text to be communicated six months in advance. Does the text have to be a substantially agreed text or merely a compilation of Parties' proposals? Are there any minimum requirements in terms of structure and coherence in the proposed text? Or is it sufficient merely that it be labeled a negotiating text? If Parties are free to submit and propose fully crafted alternative Protocols or competing amendments for adoption, as appears to be the case, the text referred to must mean draft text, subject to subsequent negotiation. However, if the six-month rule is intended to give Parties time for reflection on the proposed protocol, an unstructured much-bracketed, many-optional text may not serve the purpose. It is worth noting that in the context of the Kyoto Protocol the group tasked with the negotiations provided the chair with a mandate to produce a draft.¹⁸ The draft contained many brackets but it did have a broadly coherent (if not settled) structure that was replicated in the Kyoto Protocol. And, the chair had requested Parties to ensure that 'proposals submitted after the production of the negotiating text should be clearly derived from concepts already included within it and should not contain substantially new elements'.¹⁹ It is worth noting, however, that notwithstanding this instruction, the Brazilian proposal for the Clean Development Fund that transformed into the Clean Development Mechanism was submitted after the negotiating text was circulated.²⁰

In any case, the ADP co-chairs made no such request to the Parties in relation to the Geneva Negotiating Text.²¹ The many-bracketed and many-optional 90-page Geneva text contains the full breadth of Parties' proposals and explicitly notes that the text is 'work in progress'. It is work in progress in that the negotiating text that the Secretariat has circulated does not prejudge the legal form, structure and organization of the agreement or the legal nature of its provisions.²² Indeed, the text does not even indicate agreement on which provisions should appear in the agreement as opposed to in decisions adopted in Paris or thereafter.²³ Parties have, however, accepted this text as the basis for substantive negotiations going forward.²⁴ In this context, it appears the six-month rule will provide Parties with notice that a treaty will be proposed for adoption rather than notice of the substantive ideas in it.

Entry into force: Article 17 provides that any proposed Protocol shall itself establish the requirements for its entry into force.²⁵ The Kyoto Protocol chose a double-trigger entry into force requirement covering both a certain number of Parties

¹⁷ See Draft protocols to the Convention proposed under Article 17 of the Convention before the fifteenth session of the Conference of the Parties at Copenhagen by Japan, Tuvalu, Australia, and Costa Rica. Available at: [file://localhost/<http://unfccc.int/meetings/copenhagen_dec_2009/session:6262.php/view/documents.php>](http://localhost/<http://unfccc.int/meetings/copenhagen_dec_2009/session:6262.php/view/documents.php>), accessed 14 May 2015.

¹⁸ Report of the Ad hoc Group on the Berlin Mandate on the work of its Sixth Session, Bonn (3-7 March 1997), Addendum: Proposals for a Protocol or Another Legal Instrument, Negotiating text by the Chairman, FCCC/AGBM/1997/3/Add.1 (22 April 1997).

¹⁹ Report of the Ad Hoc Group on the Berlin Mandate on the work of its Sixth Session, Bonn (3-7 March 1997), FCCC/AGBM/1997/3, para 18.

²⁰ Joanna Depledge, 'Tracing the Origins of the Kyoto Protocol: An Article by Article Textual History', FCCC/TP/2000/2, 75.

²¹ Geneva Negotiating Text, *supra* n 7.

²² *Ibid*, footnote 1.

²³ *Ibid*.

²⁴ Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (13 February 2015), Closing Plenary, Webcast available at: <http://webtv.un.org/watch/closing-plenary-geneva-climate-change-conference-2015-unfccc/4051829279001>, accessed 14 May 2015.

²⁵ FCCC, Article 17(3).

as well as a certain percentage of global CO₂ emissions from Annex I Parties.²⁶ Since the current phase of negotiations is designed to draw in a wider range of actors and commitments than Kyoto (with the Durban emphasis on ‘applicable to all’),²⁷ any new Protocol will need to have an entry into force requirement designed to reflect this. A new Protocol’s entry into force requirement may need to take existing and emerging Intergovernmental Panel on Climate Change (IPCC) assessments into account in terms of who needs to participate, when and how. It must both incentivize participation as well as enable effectiveness. Entry into force requirements could include a quantitative threshold such as a certain number of Parties and/or a green house gas (GHG) emissions threshold such as a percentage share of global emissions or a certain Gt of CO₂ eq. These requirements could also specifically identify countries that would need to be part of the agreement for it to enter into force, as for instance, China and the US.²⁸ They could set a date at which Parties should aim to have the instrument enter into force.²⁹ They could also create presumptions in favor of acceptance by incorporating ‘tacit acceptance’ clauses such that the agreement would enter into force on a specified date unless before that date a defined number of Parties representing a certain share of global emissions object.³⁰

Entry into force requirements, however, if framed to ensure that all or most of those essential to the success of the Protocol are represented, will likely take several years to be fulfilled. Given the imperatives of science and the urgency of mitigation action on the one hand and the possibility of high threshold requirements for entry into force on the other, it is important to consider incorporating provisions on provisional entry into force and provisional application of any new treaty that is to be negotiated.

Provisional entry into force: A treaty may enter into force provisionally – pending fulfillment of the formal criteria for entry into force – if the text of the treaty provides for it to do so, or if in the absence of such a text, parties agree between themselves to do so. A case in point is Article 42 of the International Coffee Agreement, 2007, which provides, *inter alia*, that if the agreement has not entered into force ‘definitively’ by a certain date, it shall enter into force ‘provisionally’ on that date.³¹ The interests of legal certainty demand that for the Parties that have agreed to bring the treaty into force provisionally, the provisions of the treaty are legally binding. Such provisional entry into force is unusual, however.

Provisional application pending entry into force: Article 25 of the Vienna Convention on Law of Treaties provides for provisional application of a treaty pending its entry into force.³² Again, as with provisional entry into force, the treaty itself may provide for provisional application or the negotiating states may agree to apply the treaty provisionally in advance of entry into force. The General Agreement on Tariffs and Trade (GATT), 1947, is an oft quoted example of provisional application. The GATT was applied provisionally by a Protocol of Provisional Application for nearly four decades.³³ Typically, provisional application is rendered subject to national legal systems.³⁴ In addition, in some cases a

²⁶ Kyoto Protocol, Article 25(1).

²⁷ Durban Platform, *supra* n 1, para 2.

²⁸ See e.g. Comprehensive Nuclear-Test-Ban Treaty 1996, 35 ILM 1439 [hereinafter ‘CTBT’], Article XIV.

²⁹ See e.g. Montreal Protocol on Substances that Deplete the Ozone Layer 1987, 1522 UNTS 3 [hereinafter ‘Montreal Protocol’], Article 16(1).

³⁰ Such clauses have been used to good effect in relation to amendments to the International Regulations for Preventing Collisions at Sea 1972, 1050 UNTS 16, Article VI(4) and (5); the International Convention for the Prevention of Pollution from Ships 1973, 1340 UNTS 184, Article 16(2)(f)(ii) and (iii), and International Convention for the Safety of Life at Sea (SOLAS) 1974, 1184 UNTS 278, Article VIII(vi)(2).

³¹ International Coffee Agreement 2007, available at: <<http://dev.ico.org/documents/ica2007e.pdf>>, accessed 14 May 2015.

³² Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (hereinafter ‘Vienna Convention’), Article 25.

³³ Protocol of Provisional Application of the General Agreement on Tariffs and Trade 1947, 55 UNTS 308. Additional examples include: Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982, 1994, 1836 UNTS 3 (Article 7 provides that the Agreement shall be applied provisionally from a certain date, unless a State notifies the depositary that it will not so apply this agreement. In this version of provisional application, implied consent to provisional application was provided for); and, Energy Charter Treaty 1994, 2080 UNTS 95.

³⁴ For instance, Article 45 of the Energy Charter contains the caveat ‘to the extent that such provisional application is not inconsistent with its constitution, laws or regulations’, *ibid*.

certain degree of flexibility is also explicitly countenanced. The Antarctic Treaty Environmental Protocol, 1991, provides for provisional application such that pending entry into force the treaty is applied 'in accordance with their [states] legal systems and to the extent practicable.'³⁵ Such formulations permit considerable flexibility in application and are therefore attractive to states.

The need for immediate action on climate change in advance of entry into force was recognized during the negotiations leading to the FCCC, hence the discourse at the time on 'prompt start' of the FCCC.³⁶ Although this did not constitute 'provisional application' it did enable prompt entry into force of the FCCC. In the context of the Kyoto Protocol, an article on provisional application was proposed by Australia but eventually not considered.³⁷ The decision adopting the Doha amendment to the Kyoto Protocol also recognizes that, pending its entry into force, Parties may provisionally apply the Kyoto Protocol's second commitment period commitments. And, for those who choose not to apply these provisionally, they will still 'implement their commitments and other responsibilities in relation to the second commitment period, in a manner consistent with their national legislation or domestic processes.'³⁸

2.1.2 Another legal instrument

The core 2015 agreement could also take the form of another 'legal instrument'. In the context of the Berlin Mandate,³⁹ which launched the process that led to the Kyoto Protocol, 'another legal instrument' appeared to refer to the possibility of amendments to the FCCC, which were being considered at the time.⁴⁰ In the context of the Durban Platform decision, 'legal instrument' could refer to any of the legal instruments that the COP is explicitly empowered to adopt – amendments,⁴¹ amendments to the annexes,⁴² and protocols.⁴³ The term 'legal instrument' could also capture other instruments that the COP is implicitly empowered to adopt. Several provisions of the FCCC refer to 'related legal instruments.' For instance, Article 2 applies the objective of the FCCC to the Convention and 'any related legal instruments'. Article 7(2) authorizes the COP to keep under regular review the implementation of the Convention and 'any related legal instruments'. And, Article 14(8) extends the provisions of the FCCC in relation to dispute settlement to 'any related legal instrument' that the COP may adopt. It can be inferred from these references to 'related legal instruments' peppered across the FCCC that the COP is empowered to adopt instruments other than protocols, amendments and amendments to annexes. This suggests that the COP could adopt legal instruments that conform to the definition of treaties⁴⁴ even if they are not called protocols (such as for instance the 'Paris Agreement' or 'Implementing

³⁵ Protocol on Environmental Protection to the Antarctic Treaty 1991, 30 ILM 1455.

³⁶ Abram Chayes and Eugene B. Skolnikoff with David G. Victor, *A Prompt Start: Implementing the Framework Convention on Climate Change*, A Report from the Bellagio Conference on Institutional Aspects of International Cooperation on Climate Change 28–30 January 1992 (Cambridge, MA: Harvard Law School, 1992).

³⁷ Depledge, *supra* n 20, 108.

³⁸ Decision 1/CMP.8, 'Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment)', FCCC/KP/CMP/2012/13/Add.1 (28 February 2013), para 5 and 6.

³⁹ See Decision 1/CP.1, 'Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, sub-paragraph (a) and (b) of the Convention, including proposals related to a Protocol and decisions on follow-up', FCCC/CP/1995/7/Add.1 (6 June 1995) [hereinafter 'Berlin Mandate'], preambular recital 3.

⁴⁰ Report of the Ad Hoc Group on the Berlin Mandate on the Work of its Third Session, held at Geneva from 5 to 8 March 1996, FCCC/AGBM/1996/5 (23 April 1996), and Ad Hoc Group on the Berlin Mandate, Possible Features of a Protocol or Another Legal Instrument, Institutional issues, Note by the secretariat, FCCC/AGBM/1996/4 (13 February 1996).

⁴¹ FCCC, Article 15.

⁴² FCCC, Article 16.

⁴³ FCCC, Article 17.

⁴⁴ Vienna Convention, Article 1(a): '1. For the purposes of the present Convention: (a) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;'

Agreement’).⁴⁵ Indeed, the definition of treaties explicitly provides that ‘whatever its particular designation’ if it satisfies other requirements it would be treaty. As Anthony Aust notes, it is not the name that determines the status of the instrument, rather whether the negotiating states intended the instrument to be binding (or not) in international law.⁴⁶

Parties could choose to apply Article 17 procedures to such other legal instruments, but are not bound to do so, as Article 17 applies specifically only to ‘protocols.’ While most Parties will likely not be in favor of creating new procedures to adopt such legal instruments, the United States, a non-Party to the Kyoto Protocol has significant interests in avoiding the use of the term ‘protocol’, and therefore distancing itself from adopting the 2015 agreement with explicit reference to Article 17. It is worth keeping in mind that neither the Berlin Mandate launching the negotiations for the Kyoto Protocol nor the preamble of the Kyoto Protocol explicitly refers to Article 17. The Paris COP could adopt a legally binding instrument named something other than a protocol without explicit reference to Article 17, while still following the procedures laid out in Article 17.⁴⁷

The United States is advocating that the outcome of the 2015 negotiations take the form of an international legal instrument with some internationally legally binding elements,⁴⁸ the legally binding elements being ones derived directly from the Convention to which they are a Party. They hope, thus, to accept the 2015 agreement through executive action. Although it appears the US may not wish to characterize this legal instrument as a ‘treaty’ (as this term has specific connotations in US Constitutional law) they envision this legal instrument as having ‘final clauses’,⁴⁹ thus signaling that it will indeed be a treaty within the meaning of the Vienna Convention. The presence of these final clauses suggests that this instrument will be one that requires a state’s consent to be ‘bound’.⁵⁰ It would follow logically that this consent to be ‘bound’ applies to the entire treaty rather than particular elements of it. An alternative construction would lead to considerable confusion in relation to which provisions are binding and which are not, and should Parties’ interpret these differently, it will lead to a diversity of practices in relation to implementation of the treaty. However, it is certainly possible, and indeed customary, for instruments to have some elements phrased in hortatory terms and others in mandatory terms, and for some of these to lend themselves to enforcement while others do not.⁵¹

2.1.3 Agreed outcome with legal force

The core 2015 agreement could also take the form of ‘agreed outcome with legal force’. The term ‘agreed outcome with legal force’ in the Durban Platform decision was the result of a ‘huddle’ with the EU and India at its centre.⁵² India, until the final hours of the Durban conference, had insisted that agreeing to a legally binding instrument was a red line that it could not cross. Since the terms ‘protocol’ and ‘another legal instrument’ are interpreted by most as referring to legally binding instruments under the FCCC, a more ambiguous third option was necessary to accommodate India. India argued that it could agree to launch a process towards a ‘legal outcome’ – which would leave the precise legal form of the

⁴⁵ The Vienna Convention does not distinguish between different types of treaties. See, *ibid*.

⁴⁶ A Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge: CUP 2013) 23.

⁴⁷ It is worth noting that the proposals by Parties for under Article 17 that were presented in 2009 and 2010, remain on the agenda, and will be included in the provisional agenda for COP 21. Report of the Conference of the Parties on its twentieth session, held in Lima from 1 to 14 December 2014, FCCC/CP/2014/10 (2 February 2015), 16-17.

⁴⁸ U.S. Submission on Elements of the 2015 Agreement (12 February 2014), available at: <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf>, accessed 14 May 2015.

⁴⁹ *Ibid*, 10-11.

⁵⁰ See Draft articles on the Law of Treaties with Commentaries 1966, 189, available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf>, accessed 14 May 2015.

⁵¹ See *infra* text accompanying n 55- 61.

⁵² See J Vidal and F Harvey, *Durban climate deal struck after tense all-night session*, THE GUARDIAN, 11 December 2011.

instrument open. This formulation – ‘legal outcome’ – lacked the clarity and ambition that many other countries were seeking. Critically, this was not sufficient for the EU to endorse a Kyoto second commitment period. India agreed in the end to substitute the term ‘legal outcome’ with the term, ‘agreed outcome with legal force’. The term ‘agreed outcome with legal force’ is only marginally less ambiguous than ‘legal outcome’, but its creative ambiguity leans in a different direction. While the ambiguity in ‘legal outcome’ creates room for COP decisions, the ambiguity in ‘agreed outcome with legal force’ creates room for a fresh set of possibilities for legal form. Among these is the possibility that an ‘agreed outcome with legal force’ could be interpreted as an outcome that derives legal force from domestic rather than international law. This is reminiscent of the US proposal for an ‘implementing agreement’ in the lead up to Copenhagen that allows for ‘legally binding approaches’ based on targets and actions embodied in domestic law.⁵³ This also accords with views in the ongoing negotiations that the ‘agreed outcome of ADP may include aspirational COP decisions, binding COP decisions, setting up of institutions and bodies covering various aspects of Bali Action Plan and Cancun Agreements with differing degrees of binding-ness under the provisions of domestic and international law under the UNFCCC’.⁵⁴ Such an interpretation would arguably render the Durban mandate fulfilled if the Paris conference resulted in a COP decision that requested, invited or encouraged Parties to impart domestic legal force to their nationally determined contributions. Most Parties, however, view a COP decision alone, however forceful it may be, as an inadequate response to the Durban mandate. It is worth noting that the phrase ‘under the Convention,’ that follows ‘agreed outcome with legal force’ could be interpreted to limit this range of possibilities to those that exist in the FCCC i.e. protocols, amendments and amendments to annexes.

2.1.4 A legally binding core 2015 agreement: Context and consequence

It is evident that the core 2015 agreement could take a range of legal forms, some of which, such as a protocol, could be classed as ‘legally binding’ and others, such as a COP decision, not. The term ‘legally binding’ is often bandied about with evangelical fervour, but is rarely discussed. The term is typically applied to negotiated legal instruments that render a particular state conduct mandatory as well as, at least in principle, judicially enforceable.⁵⁵ Legally binding instruments apply only to those states that have expressed their consent to be bound by means of ratification, acceptance, approval or accession. Legally binding instruments signal the ‘highest expression of political will’. They crystallize international commitments into domestic legislative action, thereby co-opting domestic enforcement mechanisms and generating predictability and certainty in implementation as well as accountability at the domestic and international level. Such commitments typically survive domestic political changes. Legally binding instruments are characterized in the literature as ‘hard law’.⁵⁶ Treaties such as the FCCC and the Kyoto Protocol are binding in this sense.

However, compliance, implementation and effectiveness of legally binding instruments rest on a range of factors.⁵⁷ One such factor is the normative content as well as precision of the provisions within these treaties. The FCCC has numerous provisions that are couched in discretionary and contextual language. For instance, the commitments of industrialized

⁵³ Draft implementing agreement under the Convention prepared by the Government of the United States of America for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/7 (6 June 2009). Admittedly this agreement was proposed as a treaty, as it included final clauses. However, the reason this example is instructive in this context is because it seeks to build international legal commitments based on legally binding domestic targets and actions rather than generate domestic legal commitments based on international legal commitments.

⁵⁴ Submission by India, in Views on a Workplan for the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Submission from Parties, FCCC/ADP/2012/MISC.3 (30 April 2012), 33-34.

⁵⁵ Jutta Brunnée, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 1, 32 (2002), noting however that most norms that are enforceable in principle are often not enforced in practice.

⁵⁶ See, Dinah Shelton (ed), *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (Oxford: OUP 2000) 10-13.

⁵⁷ See, Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE WESTERN RESERVE JOURNAL INTERNATIONAL LAW 387 (2000), defining and distinguishing compliance, implementation and effectiveness. In his view, compliance refers to a state of conformity or identity between an actor’s behaviour and a specified rule. Implementation refers to the process of putting international commitments into practice. Effectiveness is a multi-layered concept, which could refer to the degree to which a given rule induces the desired behavioral change, improves the state of the underlying problem, and achieves its inherent policy objectives. See also Kenneth W. Abbott et al, *The Concept of Legalization*, 54(3) INTERNATIONAL ORGANIZATION 401-419 (2000).

countries relating to technology transfer are peppered with phrases such as ‘as appropriate’ and ‘all practicable steps’.⁵⁸ Although the discretion provided is with regard to the manner or timeframe of performance of a particular obligation, rather than as to performance or non-performance, it nevertheless renders the setting of a standard, a finding of compliance or non-compliance, and the resulting visitation of consequences, a problem-ridden task. This in turn affects compliance with and effectiveness of such provisions. The fact, therefore, that the FCCC is ‘legally binding’ may in these cases offer little comfort.

The Kyoto Protocol, given its targets and time-tables approach, lends itself more readily to standard setting, and it has its own compliance system.⁵⁹ However, even the Protocol contains provisions and terms which defer to the judgment of Parties on what is or is not appropriate in the circumstances, which in turn renders the setting of standards and finding of non-compliance problematic. For instance, the Kyoto Protocol requires developed country Parties to make ‘demonstrable progress’ by 2005 in achieving their identified mitigation commitments.⁶⁰ While non-compliance with mitigation commitments is eventually subject to enforcement through the compliance system, non-compliance with the requirement to demonstrate progress, given the inherent subjectivity of the term, may not lend itself to such action. These examples suggest that although a convention or a protocol may, as it is a legally binding instrument, offer the comfort of presumed rigour, whether in practice its provisions create mandatory obligations, and lend themselves to compliance, implementation and effectiveness is less certain. Provisions, even within legally binding instruments, have differing levels of normativity and precision. In multilateral settings, given domestic political and capacity constraints, Parties choose a finely balanced set of soft⁶¹ and hard obligations (between which there is dynamic interplay) to demonstrate their commitment to addressing a global environmental problem. If divergences between Parties remain wide but a legally binding instrument is being negotiated, states will likely protect themselves by negotiating language providing flexibility, discretion and several interpretative possibilities.

2.1.5 A core 2015 agreement ‘under the Convention’: Context and consequence

The term ‘under the Convention’ in the Durban Platform decision offers several interesting interpretative possibilities. It could, as suggested above, be read as qualifying the legal nature of the instruments referred to. It could also be read as qualifying the content of the legal instrument that eventually emerges. If it is to qualify the content of the legal instrument, there is a further set of possibilities in relation to the extent to which the Convention will govern the content of the core 2015 agreement.

The term ‘under the Convention’ could be read in a narrow technical fashion such that only the provisions that explicitly identify the Convention as applying to ‘related legal instruments’ would apply to the 2015 agreement. This is a short list. It covers the Convention’s objective,⁶² the powers of the COP to review the implementation of the Convention and any related legal instruments,⁶³ and its provision on settlement of disputes.⁶⁴ The Convention’s provision on settlement of disputes, however, applies unless the 2015 agreement provides otherwise. In effect, this interpretation of the term ‘under the Convention’ would render just two or possibly three provisions of the Convention relevant to the 2015 agreement.

⁵⁸ FCCC, Article 4(5).

⁵⁹ See Decision 27/CMP.1, ‘Procedures and mechanisms relating to compliance under the Kyoto Protocol’, FCCC/KP/CMP/2005/8/Add.3 (30 March 2006).

⁶⁰ Kyoto Protocol, Article 3(1) and (2).

⁶¹ Soft law is used in reference to ‘international prescriptions that are deemed to lack requisite characteristics of international normativity,’ but which, nevertheless, ‘are capable of producing certain legal effects.’ See remarks by Gunther Handl in W. Michael Reisman et al, *A Hard Look At Soft Law*, 82 American Society of International Law proceedings 371 (1988).

⁶² FCCC, Article 2.

⁶³ FCCC, Article 7(2).

⁶⁴ FCCC, Article 14(2).

The negotiating context for the term ‘under the Convention’ in the Durban Platform decision, however, suggests that at least the principles of the Convention will continue to be relevant to the 2015 agreement. The term ‘under the Convention’ emerged as a compromise between those that wanted an explicit reference to the principle of common but differentiated responsibility, and those that insisted that any reference to common but differentiated responsibilities must be qualified with a statement that this principle must be interpreted in the light of contemporary economic realities. This reflects the view that economic and political realities have evolved since the FCCC was negotiated in 1992, and common but differentiated responsibilities must be interpreted as a dynamic concept that evolves in tandem with changing economic and other realities.⁶⁵ The EU, for instance, argued that the future agreement must contain a broader spectrum of differentiation in the obligations among Parties than is currently the case under the Convention. India, among other developing countries, argued in response that this would be tantamount to amending the FCCC.⁶⁶ One way out of this impasse was to draft the text such that it was rooted in the Convention – ‘under the Convention’ – thereby implicitly engaging its principles, including the principle of common but differentiated responsibilities. This, it was believed, would hold at bay efforts to reinterpret and qualify this principle. The principles of the Convention have found explicit mention in subsequent COP decisions. The Doha⁶⁷ and Warsaw decisions⁶⁸ contain a general reference to ‘principles’ of the Convention, and the Lima decision contains a reference to the principle of common but differentiated responsibilities in an operational provision, albeit qualified by the clause ‘in light of different national circumstances’.⁶⁹ This negotiating history and context suggests that the narrow technical interpretation of the term ‘under the Convention’ will not prevail. At a minimum, the term ‘under the Convention’ engages the principles of the Convention, in particular the principle of common but differentiated responsibility.

If, however, the term ‘under the Convention’ is interpreted as engaging Convention provisions other than those that explicitly apply to related legal instruments, it is unclear which provisions will apply (and which will not) and on what principled basis. Some Parties have argued that the 2015 agreement must be in accordance with the ‘principles, provisions and structure of the Convention’ and it must not ‘rewrite, restructure, replace, or reinterpret the Convention or its principles or adopt something outside of it’.⁷⁰ This suggests a clear hierarchy between the Convention and the 2015 agreement and in doing so expands the scope for interpretative landmines. In general, if the 2015 agreement is to be subservient to the Convention, every provision in it will have to be checked for its consistency with the Convention. This, given the definitional and interpretational differences over the Convention’s provisions, and lack of clear unambiguous benchmarks, is a problem-ridden task. It is unclear, for instance, what could be construed as ‘rewriting’ or ‘replacing’ the Convention. Does this imply that the Convention could not be amended? Since amendments are provided for in the Convention, a COP decision, such as the Durban Platform decision, could not nullify that possibility. In any case, the Durban Platform decision authorizes the adoption of ‘another legal instrument’ that has in the past been used to signal

⁶⁵ See, e.g. Submission by Australia, in Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, Addendum, Part I, FCCC/AWGLCA/2008/Misc.5/Add.2 (Part I) (10 December 2008), 73; Submission by Japan, in Ideas and proposals on the elements contained in paragraph 1, of the Bali Action Plan, Submissions from Parties, FCCC/AWGLCA/2008/MISC.5 (27 October 2008), 41; and Submission by the United States, in Ideas and proposals on the elements contained in paragraph 1, of the Bali Action Plan, Submissions from Parties, FCCC/AWGLCA/2008/MISC.5 (27 October 2008), 106. It is worth noting that several international tribunals have approached treaties as ‘living instruments’ and applied the ‘evolutionary’ method of treaty interpretation. See generally for a discussion of these, I Van Damme, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* (Oxford: OUP 2009); G Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21(3) EJIL 509-41 (2010).

⁶⁶ The FCCC permits non-Annex I Parties to graduate to Annex I, through amendment to the Annexes, should be wish to do so. See, FCCC, Article 16. Thus far the only cases of such graduation have been Malta and Cyprus, and both have sought such graduation as a consequence of their joining the EU.

⁶⁷ Decision 1/CP.18, ‘Agreed outcome pursuant to the Bali Action Plan’, FCCC/CP/2012/8/Add.1 (28 February 2013), recital to Part I.

⁶⁸ Warsaw ADP Decision, *supra* n 2, recital para 9.

⁶⁹ Lima Call for Climate Action, *supra* n 6, para 3.

⁷⁰ See e.g. LMDC views on identification of elements in ADP Workstream 1 (18 November 2013), para 3, available at: <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp2-3_lmhc_workstream_1_20131118.pdf>, accessed 14 May 2015, and Submission by LMDCs, Submission on Elements of the 2015 Agreed Outcome (9 March 2014), available at: <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_lmhc_ws1_20140309.pdf>, accessed 14 May 2015.

amendments. It is also unclear what would constitute a ‘restructuring’ of the Convention. Some Parties understand the structure of the Convention as based fundamentally on FCCC Article 4, and the categorization of Parties reflected in the Convention’s annexes.⁷¹ Restructuring to them signals a move away from the existing annex-based balance of responsibilities. Yet, even the Kyoto Protocol has annexes that are not identical to those of the FCCC (despite accounting for the absence of those who did not ratify the Kyoto Protocol).⁷² Some variation therefore appears possible, but where and on what basis does one draw the line? It is also unclear what ‘reinterpreting’ the Convention would involve. The notion of ‘reinterpretation’ suggests that there is an existing stable interpretation of the Convention. While this may be true for some provisions, the Convention principles, in particular the principle of common but differentiated responsibilities, have been beset with interpretative disagreements right from the start.⁷³ COP decisions, as discussed below, are relevant factors in interpreting the treaty. And, even the recent Lima decision, by qualifying its reference to the principle of common but differentiated responsibilities with the clause ‘in light of different national circumstances’, has arguably shifted its interpretation.⁷⁴ It could be argued that this qualification introduces a dynamic or evolutionary element to the principles’ interpretation. As national circumstances evolve, so too will the common but differentiated responsibilities of states. Finally, it is unclear what consequences would flow should any inconsistencies, however defined, with the Convention be found. If, for instance, the commitments in the 2015 agreement are not tailored to the categorization of Parties reflected in the Convention’s Annexes, does this imply first that the 2015 agreement is not consistent with the Convention, and if so, that the 2015 agreement has exceeded the Durban mandate and is unlawful?

2.2 Conference of Parties decisions

The core 2015 agreement will likely be accompanied by decisions taken by the Conference of Parties. These could be decisions that flesh out the 2015 agreement or that complement the 2015 agreement. These COP decisions will have considerable operational significance in the climate regime but limited legal status.

COP decisions represent the collective will of the Parties to a multilateral treaty. The FCCC and the Kyoto Protocol authorize the Conference of Parties⁷⁵ to engage in the progressive normative and institutional development of the regime.⁷⁶ COP decisions have enriched and expanded the normative core of the regime by fleshing out treaty obligations,⁷⁷ reviewing the adequacy of existing obligations,⁷⁸ and launching negotiations to adopt further obligations.⁷⁹ COP decisions have also created an elaborate institutional architecture to supervise compliance with obligations.⁸⁰

⁷¹ Submission by LMDs, *ibid*, page 4 (noting that ‘[t]o be consistent with the Convention, ‘contributions’ need to be understood in a differentiated manner that distinguishes between Annex I commitments and non-Annex I actions..’).

⁷² FCCC Annex I contains countries such as Belarus, Cyprus, Malta and Turkey that are not part of Kyoto Annex B.

⁷³ Lavanya Rajamani, *The reach and limits of the principle of common but differentiated responsibilities and respective capabilities in the climate change regime*, in Navroz K. Dubash, ed., *HANDBOOK OF CLIMATE CHANGE AND INDIA: DEVELOPMENT, POLITICS AND GOVERNANCE* (New Delhi: Oxford University Press 2011) 118–29.

⁷⁴ Lavanya Rajamani, ‘Lima Call to Climate Action’ *Progress through Modest Victories and Tentative Agreements*, L(1) ECONOMIC AND POLITICAL WEEKLY 14 (3 January 2015).

⁷⁵ The legal personality of COPs is discussed in R. Churchill and G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94 AMERICAN JOURNAL INTERNATIONAL LAW 623 (2000)

⁷⁶ FCCC, Article 7.

⁷⁷ See e.g. Kyoto Protocol, Articles 6 (2), 12 (7) and 17, and Decision 2/CMP 1, ‘Principles Nature and Scope of the Mechanisms pursuant to Article 6, 12 and 17 of the Kyoto Protocol’, FCCC/KP/CMP/2005/8/Add.1 (30 March 2006)

⁷⁸ Pursuant to FCCC, Article 4(2) (d).

⁷⁹ See e.g. Berlin Mandate, *supra* n 39.

⁸⁰ See Decision 27/CMP.1, *supra* n 59.

Although COP decisions have considerable operational significance and reach in the climate regime, their legal status in international law, however, is less certain. COP decisions are relevant factors in interpreting the treaty.⁸¹ Their precise legal status, however, depends on the enabling clause,⁸² the language and content of the decisions, and Parties' behaviour and legal expectations. All of these are typically prone to varying interpretations. From a formal legal perspective COP decisions are not, absent explicit authorization,⁸³ legally binding on Parties.⁸⁴ And, they are not capable of creating substantive new obligations, since such substantive new obligations, would require state consent expressed through the conventional means (signature/ratification/etc.). The FCCC does not explicitly authorize binding law-making by the COP. The Kyoto Protocol does, but only with respect to a circumscribed set of reporting and accounting obligations.⁸⁵ As such, from a formal legal perspective, COP decisions and Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) decisions (save those explicitly authorized under Protocol Articles 7(1) and 7 (4)) in the climate regime are not legally binding.

Intriguingly, COP decisions in the climate regime, even in the absence of explicit authorization for binding law-making, on occasion use language that is prescriptive (e.g. 'shall'). COP decisions use such prescriptive language not just when they impose requirements on the subsidiary bodies or the Secretariat, which as the supreme body under the Convention it is authorized to do,⁸⁶ but also, more controversially, in relation to Parties.⁸⁷ Further, COP decisions have also put in place rules, and rendered access to certain benefits contingent on compliance with these rules.⁸⁸ To the extent that Parties understand these rules as 'mandatory' and agree to subject themselves to these rules, some have argued that the distinction between binding and non-binding COP decisions is apparent rather than real.⁸⁹ This is a view that at least some Parties share.⁹⁰

The Geneva text currently contains the elements of both the core 2015 agreement as well as the COP decisions that will accompany it. Parties will need to decide what will form part of the core agreement and what will find their way into COP decisions. It would be sensible for Parties to limit the core agreement to the creation of substantive new obligations and institutions, leaving the operational detail to COP decisions. But, given the concern that issues not framed as 'contributions' or otherwise part of the core agreement will be marginalized, it is unlikely such a technically sound approach will prevail.

2.3 Supplementary Instruments

In addition to the core 2015 agreement and COP decisions, it is possible that Parties will employ supplementary instruments to perform particular functions, as they have in the past. Possibilities include information and/or

⁸¹ COP decision may be considered as a 'subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions', Vienna Convention, Article 31(3) (a). See *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, the ICJ noted that while recommendations of the Whaling Commission are not binding, 'when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule' (Judgment of 31 March 2014, para 46).

⁸² The enabling clause in the relevant treaty may authorize a COP decision to be binding, or explicitly require further consent for it to be binding, as for example in the case of Article 18, Kyoto Protocol (mandating that compliance procedures and mechanisms entailing binding consequences shall be adopted by means of an amendment to the Protocol), see, Brunnée, *supra* n 55.

⁸³ Explicit authorization for binding law-making is unusual. Montreal Protocol, Article 2(9) is an oft-quoted example.

⁸⁴ See Brunnée, *supra* n 55, 32.

⁸⁵ Article 7(1) read with Article 7(4), Kyoto Protocol, renders Decision 15/CMP.1 binding in a formal sense. Decision 15/CMP 1, 'Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol', FCCC/KP/CMP/2005/8/Add.2 (30 March 2006).

⁸⁶ FCCC, Article 7.

⁸⁷ See e.g. Decision 7/CP.7, 'Funding under the Convention', FCCC/CP/2001/13/Add.1 (21 January 2002), para 1(b) and (e).

⁸⁸ See e.g. COP decisions under Kyoto Protocol, Article 17 (emissions trading), and, Brunnée, *supra* n 55, 32-33.

⁸⁹ See Brunnée *supra* n 55, 33.

⁹⁰ Submission by India, *supra* n 54.

miscellaneous documents. Both information and miscellaneous documents are official documents in that they have a FCCC document symbol, and they are catalogued and registered. Information documents are issued under a masthead bearing the UN and FCCC logos, while miscellaneous documents are not.⁹¹ Neither information nor miscellaneous documents are translated into the six UN languages.⁹² Information documents offer information and miscellaneous documents contain Parties' views and proposals in relation to agenda items before the COP.⁹³ Information documents are prepared merely as informational tools. They do not require by themselves Parties to engage in particular actions. They can be revised and reissued. An example of an information document oft seen at the climate negotiations is the list of participants.⁹⁴ The most high-profile example of information documents is the documents containing the Cancun pledges⁹⁵ and the Kyoto second commitment period targets.⁹⁶ The Lima decision tasked the FCCC Secretariat with preparing a synthesis report on the aggregate effect of the intended nationally determined contributions communicated by Parties by 1 October 2015.⁹⁷ This, given past precedent,⁹⁸ will likely be an information document. Miscellaneous documents contain Parties' proposals and views, which can change and be captured in later submissions and miscellaneous documents.

National schedules⁹⁹ or country contribution documents¹⁰⁰ that Parties have proposed could be captured in information or miscellaneous documents or they could be classified as a distinct category of documents. If they are to constitute a distinct category of documents, Parties will need to decide whether these would be official/formal or unofficial/informal documents and proceed accordingly. Examples of unofficial or informal are the informal notes produced by the ADP co-chairs. These have an exclusively web presence, and are of interpretational and contextual value but are not consequential for the process. If, however, Parties choose to list national schedules exclusively on the FCCC website, as they have done with intended nationally determined contributions,¹⁰¹ they can sidestep this debate.

2.4 Political Declarations

Another possible component of the 2015 package is one or more political declarations. These could cover some salient or all relevant elements and be in lieu of or in addition to the 2015 agreement. These could emerge from all or a subset of FCCC Parties.

⁹¹ I am grateful to Daniel Klein, UNFCCC Secretariat for taking me through the differences between various documents.

⁹² See Introductory Guide to Documents, available at: <http://unfccc.int/documentation/introductory_guide_to_documents/items/2644.php>, accessed 14 May 2015.

⁹³ See also Guide for Presiding Officers (2011), 20, available at: <http://unfccc.int/resource/docs/publications/guide_presiding_officers.pdf>, accessed 14 May 2015.

⁹⁴ See e.g. List of Participants, FCCC/CP/2014/INF.2 (12 December 2014).

⁹⁵ Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention, Revised note by the secretariat, FCCC/SB/2011/INF.1/Rev.1 (7 June 2011); Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention, Note by the secretariat, FCCC/AWGLCA/2011/INF.1 (18 March 2011).

⁹⁶ Compilation of pledges for emissions reductions and related assumptions provided by Parties, Note by the Secretariat, FCCC/KP/AWG/2010/INF.2/Rev.1 (4 August 2010).

⁹⁷ Lima Call for Climate Action, *supra* n 6, para 16.

⁹⁸ Typically, synthesis of national communications from Parties are captured in information documents. See e.g. compilation and synthesis of sixth national communications and first biennial reports from Parties included in Annex I to the Convention, Executive summary, FCCC/SBI/2014/INF.20 (24 November 2014).

⁹⁹ Submission by Australia, Submission under the Durban Platform for Enhanced Action: The 2015 climate change agreement (26 March 2013), available at: <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_australia_workstream_1_20130326.pdf>, accessed 14 May 2015.

¹⁰⁰ Submission by Independent Association of Latin America and the Caribbean (AILAC), Submission on the legal architecture and structure of the elements of the 2015 agreement, (24 September 2014), available at: <http://unfccc.int/files/bodies/awg/application/pdf/140918_ailac_submission_adp_2_6_legal_architecture_vf.pdf>, accessed 14 May 2015.

¹⁰¹ Lima Call for Climate Action, *supra* n 6, para 16. See also, INDCs as communicated by Parties, available at: <<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>>, accessed 14 May 2015

If a full and final legally binding agreement eludes Parties at Paris, and the outcome is a COP decision, it could be elevated to the status of a ministerial declaration. The Delhi Ministerial Declaration, 2002, is an example.¹⁰² If the Paris outcome is a COP decision elevated to the level of a ministerial declaration then it will likely contain the key elements of the political bargain arrived at, and it will extend the process for a further period of time so as to allow Parties to work out the details of the bargain, as well as to convert it into treaty text.

Since COP decisions require consensus for adoption,¹⁰³ it is not inconceivable that even a COP decision may prove difficult to reach, as it did in Copenhagen. In such a case, a sub set of Parties could arrive at a political bargain on the entire gamut of issues as they did in Copenhagen. If an outcome – legally binding or otherwise – is arrived at on most issues, but a few tricky issues remain. Parties could arrive at a political bargain on the outstanding issues and formalize it as a political declaration. There could be a political declaration on finance, for instance. Political declarations of this type may be easier to secure, but they are relatively weak, as they cannot direct Parties, the Secretariat, the subsidiary bodies and its officers. The Geneva Ministerial Declaration is a case in point.¹⁰⁴ It instructs its own representatives to engage in particular conduct,¹⁰⁵ rather than Parties more generally.

The Copenhagen Accord,¹⁰⁶ the most significant political declaration to emerge from the climate regime, offers valuable lessons on the value of political declarations. The Accord was reached among heads of states of 28 Parties to the FCCC, including all major emitters and economies, as well as many of those representing the most vulnerable and least developed. The COP had neither authorized the formation of a group to negotiate the Accord, nor was it kept abreast of the negotiations as they evolved. Consequently, when the Accord was presented to the COP for adoption it was rejected by a handful of countries from the Bolivarian Alliance, Sudan and Tuvalu, both for the procedural irregularities in negotiating it as well as for its perceived substantive infirmities. As COP decisions require consensus for adoption, the COP could only resolve to ‘take note’¹⁰⁷ of the Copenhagen Accord. The FCCC Secretariat made it clear that the Accord has ‘no formal legal standing’ in the climate change process.¹⁰⁸ Yet the Accord is arguably the most influential document that has emerged from the climate negotiations in the recent past. The true significance of the Accord lies not in its legal character or the consequences that follow its breach, but the use that Parties have put it to in the evolution of the climate regime. First, unlike any other multilateral environmental agreement in living memory, the Copenhagen Accord was negotiated by the heads of state of the world’s largest economies. It thus provides unparalleled political guidance in an area rife with discord.¹⁰⁹ Second, 141 states representing 87.24%¹¹⁰ of global emissions have since associated with the Accord.¹¹¹

¹⁰² Decision 1/CP.8, ‘Delhi Ministerial Declaration on Climate Change and Sustainable Development’, FCCC/CP/2002/7/Add.1 (28 March 2003).

¹⁰³ COP decisions are adopted by consensus (not unanimity), because although the Rules of Procedure provide for voting, Parties are yet to agree on Rule 42 (Voting), of the draft Rules of Procedure. As a result the Rules of Procedure have been applied, with the exception of Rule 42, since 1996. See, United Nations Framework Convention on Climate Change, Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, FCCC/CP/1996/2 (22 May 1996), 2.

¹⁰⁴ Review of the Implementation of the Convention and of decisions of the first session of the Conference of the Parties, Ministerial Declaration, FCCC/CP/1996/L.17 (18 July 1996).

¹⁰⁵ See e.g. *ibid*, para 8.

¹⁰⁶ Decision 2/CP.15, ‘Copenhagen Accord’, FCCC/CP/2009/11/Add.1 (30 March 2010) [hereinafter ‘Copenhagen Accord’].

¹⁰⁷ *Ibid*, preambular recital.

¹⁰⁸ Notification to Parties, Clarification relating to the Notification of 18 January 2010 (25 January 2010), available at: <http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf>, accessed 14 May 2015.

¹⁰⁹ Submission by Japan, in Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions from Parties, FCCC/AWGLCA/2010/MISC.2 (30 April 2010), 66 (noting that the Accord is an ‘extremely important document’ and it provides ‘high level political guidance’), and Submission by New Zealand, in Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions from Parties, FCCC/AWGLCA/2010/MISC.2 (30 April 2010), 72 (noting that ‘it is a clear letter of political intent and unprecedented in its conception.’).

¹¹⁰ US Climate Action Network, *Who’s On Board With The Copenhagen Accord?*, available at: <<http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments>>, accessed 14 May 2015.

Although the Kyoto Protocol has 192 Parties, its emissions reductions commitments only cover a fraction of global emissions.¹¹² Third, the political compromises in the Accord were fleshed out and adopted into the climate process a year later through the Cancun Agreements.¹¹³ The targets and actions communicated by states in connection with the Accord were captured in information documents taken note of by the COP and referred to in the Cancun Agreements. Indeed, the only targets, albeit self-selected, that non-Kyoto Parties accounting for the majority of global emissions currently have are under the Copenhagen Accord and subsequent Cancun Agreements. Finally, the architecture of the Accord – privileging national sovereignty over international obligations, capturing self-selected targets and actions, and focusing on transparency provisions – represents a step change in the evolution of the climate regime, and is likely to provide a template for the design of the 2015 agreement.¹¹⁴ It is worth contrasting the Accord with the Kyoto Protocol which, despite its many innovations¹¹⁵ or perhaps because of these, is unlikely to see much of its architecture survive in the 2015 agreement, except perhaps that relating to the market mechanisms and measurement, reporting and verification.

Political declarations therefore can and do have considerable significance in the climate regime. Indeed, some argue that Parties are more likely to accept higher aspirational targets if they are to adopt what they perceive as non-binding (but what in effect may be mandatory).¹¹⁶

3. LEGAL NATURE OF CONTRIBUTIONS IN THE CORE 2015 AGREEMENT

The core 2015 agreement, as indicated in the Durban Platform decision, will likely cover mitigation, adaptation, finance, technology development and transfer, capacity building and transparency of action and support.¹¹⁷ In relation to these there could be a mix of obligations:

- Procedural obligations, such as a commitment to submit nationally determined contributions, and/or substantive obligations such as commitments to meet certain mitigation or financial targets;
- Obligations of effort or conduct such as an obligation to initiate certain policies and measures and/or obligations of result such as an obligation to achieve defined mitigation or finance targets set to deadlines;
- Hard obligations that lend themselves to enforcement and/or soft obligations that do not;
- Voluntary obligations that could be subject to opt-in or opt-out procedures and/or mandatory obligations that are non-optional;
- Conditional obligations such as mitigation obligations conditional on the provision of support or on action by others and/or unconditional obligations.

¹¹¹ See Copenhagen Accord, available at: <http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php>, accessed 14 May 2015.

¹¹² Japan cited this as the reason for its decision not to adopt second commitment period targets under Kyoto. See, Ministry of Foreign Affairs, Japan's Position Regarding the Kyoto Protocol, 2010, available at: <http://www.mofa.go.jp/policy/environment/warm/cop/kp_pos_1012.html>, accessed 14 May 2015.

¹¹³ Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention', FCCC/CP/2010/7/Add.1 (15 March 2011); and, Decision 1/CMP.6, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session', FCCC/KP/CMP/2010/12/Add.1 (15 March 2011).

¹¹⁴ Submissions by the United States, in Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submission from Parties, FCCC/AWG/LCA/2010/MISC.2 (30 April 2010), 79 (noting that '[t]he Accord text also usefully bows in the direction of national sovereignty').

¹¹⁵ Differentiation in central obligations, and the enforcement branch of the compliance system, to name a few.

¹¹⁶ David G. Victor, *The Use and Effectiveness of Non-Binding instruments in the Management of Complex International Environmental Problems*, 91 AMERICAN SOCIETY FOR INTERNATIONAL LAW PROCEEDINGS 241 (1997)

¹¹⁷ Durban Platform, *supra* n 1, para 5.

The core 2015 agreement, like other multilateral environmental agreements, will likely contain a judicious mix of obligations drawing from this pool, and the legal nature of these obligations will depend on their content, precision, location and language. It is also likely, as with other multilateral environmental agreements, that the core agreement will include provisions phrased in non-mandatory terms, that are not legal obligations. In any case, of particular interest is the legal nature of the ‘nationally determined contributions’ Parties have been invited to submit in 2015.

The Warsaw decision invited ‘all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions, without prejudice to the legal nature of the contributions, in the context of adopting a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’.¹¹⁸ That these intended nationally determined contributions are part of the Paris outcome is evident in that they were solicited ‘in the context’ of adopting an instrument in Paris. However, it is less clear whether national contributions should be contained in the core 2015 agreement or not, and how this will impact the legal nature of these contributions.

The discussion that follows addresses the legal nature of nationally determined contributions rather than ‘intended nationally determined contributions’. Nationally determined contributions, or indeed, whatever they are eventually called, will have a different legal basis than the intended nationally determined contributions sought by the Warsaw ADP decision. And, while intended contributions, until they are finalized, may well remain in legal limbo land, interesting as this limbo land may be, it will not be addressed here.

Nature and scope of contributions: As a first step, it is worth considering the nature and scope of national contributions, and the informational requirements that apply to them, as these will determine how national contributions may best be addressed in the 2015 agreement. The nature of the nationally determined contributions is unclear in several respects. The term contribution is suggestive of a voluntary act, whereas the Convention is built on commitments. ‘Contributions’ may remain contributions in the 2015 agreement, or they could crystallize into commitments for all Parties, as some countries argue they should,¹¹⁹ or into commitments for some and actions for others, as other countries argue they should.¹²⁰ It is also unclear whether nationally determined contributions, whatever form they take, can be conditional. There is a divergence of views on this. Several developed countries believe these contributions should be unconditional, and based on what countries can commit to with their own resources.¹²¹ Nationally determined, in Switzerland’s words, suggests ‘nationally owned’.¹²² However, several developing countries are of the view that national contributions of developing countries, given the context of the Convention, will be conditional on the provision of adequate support.¹²³ If national contributions can be interpreted to be conditional in this way, aggregation of national efforts in order to determine conformity with particular mitigation pathways, and to assess the likelihood of achieving the chosen temperature goal will be difficult.

¹¹⁸ Warsaw ADP Decision, *supra* n 2, para 2(b).

¹¹⁹ See e.g. Submission by Switzerland, Elements of the 2015 Agreement (4 March 2014), available at: [file://localhost/<http://unfccc.int/files/bodies/application/pdf/elements_of_the_agreement_adp_ws1_switzerlands_views.pdf>](http://unfccc.int/files/bodies/application/pdf/elements_of_the_agreement_adp_ws1_switzerlands_views.pdf), accessed 14 May 2015.

¹²⁰ Submission by LMDCs, *supra* n 70, 4. Oral Intervention by Argentina, ADP 2.4, 10-14 March, Bonn, Germany (11 March 2014).

¹²¹ See e.g. Submission by the United States, *supra* n 48; and, Submission by Canada, Views on advancing the work of the Durban Platform (12 April 2013), [file://localhost/<http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_canada_workstream_1_and_2_en_20130412.pdf>](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_canada_workstream_1_and_2_en_20130412.pdf), accessed 14 May 2015.

¹²² Oral Intervention by Switzerland, ADP 2.4, 10-14 March, Bonn, Germany (12 March 2014). See also Submission by Switzerland, *supra* n 119.

¹²³ Submission by LMDCs, *supra* n 70, 4-5. See also, China’s Submission on the Work of the Ad Hoc Working Group on Durban Platform for Enhanced Action (6 March 2014), 2, available at: http://unfccc.int/files/bodies/application/pdf/20140306-submission_on_adp_by_china_without_cover_page.pdf, accessed 14 May 2015.

The term ‘contributions’ also leaves the scope of the contributions open. Since the term is not qualified by ‘mitigation’, contributions could take the form of adaptation, finance, technology transfer or capacity-building contributions. At Lima, there were a range of views cutting across north-south lines, with some states insisting that contributions should only cover mitigation, and others arguing that mitigation and adaptation should be accorded legal and material parity. In addition, many developing countries, including India, argued that if they were required to submit mitigation contributions – which they had been insulated from thus far in the climate regime – there must be a corresponding increase in the provision of technical and financial support. This, in their view, could best be secured by requiring developed countries to submit contributions on finance. Needless to say, this proved difficult to secure. The Lima outcome therefore merely repeats Warsaw language inviting Parties to communicate their intended nationally determined contributions.¹²⁴ In effect, this leaves the scope of contributions to national determination. This in turn implies that states can choose not just which contributions to submit, but also whether to submit adaptation contributions in lieu of mitigation ones. This also leaves open the possibility that states could submit contributions that are conditional on the provision of support. The Lima decision encourages Parties to consider including an adaptation component in their contributions,¹²⁵ but is conspicuously silent on a financial component.

Parties are therefore free to offer a full and diverse range of contributions: some will likely focus on mitigation alone¹²⁶ while others will likely cover all areas;¹²⁷ some will likely be unconditional,¹²⁸ while others will likely contain conditional¹²⁹ and unconditional elements.¹³⁰ In addition, there will likely be little uniformity in the information supplied by Parties in relation to these contributions.

The Warsaw decision had tasked the ADP with identifying the information that must accompany the intended nationally determined contributions Parties would submit in 2015.¹³¹ Given the half-hearted resolution of the scope issue, the Lima decision could not provide detailed guidance on the information that must accompany Parties’ contributions. The Lima outcome therefore listed, albeit in a non-prescriptive manner, the types of information to be provided by Parties while communicating their mitigation contributions. This includes information relating to the base year, time-frames, scope and coverage, assumptions and methodologies, and information that speaks to how a state considers its contribution to be ‘fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention’ in Article 2.¹³² This represents an advance on the non-existent informational requirements that the Cancun pledges are subject to. However, the language used in relation to the provision of such information – ‘may include, as appropriate, inter alia’¹³³ – confers such extraordinary discretion to Parties in the information they are to provide that it is likely to lead to diversity in the types of information provided, as well as the depth and comprehensiveness of the

¹²⁴ Lima Call for Climate Action, *supra* n 6, para 9

¹²⁵ *Ibid*, para 12.

¹²⁶ See e.g. Switzerland’s INDC, Submission by Latvia and the European Commission; Submission by Norway; US Cover Note, INDC and Accompanying Information; and Russian Submission, *supra* n 9.

¹²⁷ See e.g. Gabon INDC, *supra* n 9 above. See also, Joydeep Gupta, *India offers two options for UN climate deal* (3 February 2015), available at: [file://localhost/http://indiadialogue.net/2015/02/03/india-offers-two-options-un-climate-deal/](http://indiadialogue.net/2015/02/03/india-offers-two-options-un-climate-deal/), accessed 14 May 2015.

¹²⁸ See e.g. Submission by Latvia and the EC, *supra* n 9.

¹²⁹ See e.g. Russian Submission, *supra* n 9 (conditioning their INDC on the ‘maximum possible account of absorbing capacity of forests’).

¹³⁰ See Gupta, *supra* n 127.

¹³¹ Warsaw ADP Decision, *supra* n 2, para 2(c).

¹³² *Ibid*, para 14

¹³³ *Ibid*.

information accompanying national determined contributions. This in turn will affect the 'clarity, transparency and understanding'¹³⁴ of these contributions, and complicate any efforts to compare ambition across national contributions.

Given the strong likelihood of reaching Paris with an assortment of nationally determined contributions accompanied by disparate information types of varying importance, depth and relevance, their legal nature, in particular where they are housed and how they are anchored in the 2015 agreement becomes critically important.

Housing and anchoring of contributions: There are several possibilities for housing contributions. National contributions could be inscribed in the 2015 agreement, as for instance in one or more annexes, appendices, attachments or schedules. The EU,¹³⁵ the Least Developed Countries,¹³⁶ Australia,¹³⁷ China¹³⁸ and South Africa,¹³⁹ among others, subscribe to this view. National contributions could also be located elsewhere in documents such as COP decisions¹⁴⁰ (including of the governing body of the 2015 agreement) information,¹⁴¹ miscellaneous or other documents or be held by the FCCC Secretariat¹⁴² (including on their website), and/or recorded in one or more online registries.¹⁴³ The US, Canada¹⁴⁴ and New Zealand, Brazil among others, favour this approach. The US argues that schedules containing contributions should be 'housed separately (for example, by the Secretariat)',¹⁴⁵ and New Zealand suggests national schedules containing contributions be 'supplementary' to the legally binding instrument.¹⁴⁶ Brazil notes that an online tool based on communications from Parties is likely to be more practical than including contributions in an Annex to the agreement.¹⁴⁷ The legal nature of nationally determined contributions will depend, however, principally on how they are anchored in the 2015 agreement rather than where they are housed, although, as we shall see, their location is also significant.

¹³⁴ Warsaw ADP Decision, *supra* n 2, para 2(b), and Lima Call for Climate Action, *supra* n 6, para 13.

¹³⁵ Submission by Lithuania and the European Commission on behalf of the European Union and its member states, Further elaboration of elements of a step wise process for ambitious mitigation commitments in the 2015 agreement (16 September 2013), available at: file://localhost/<http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_eu_workstream_1_mitigation_20130916.pdf>, accessed 14 May 2015 (the EU notes that mitigation commitments should be a part of the 2015 agreement).

¹³⁶ Submission by the Nepal on behalf of the Least Developed Countries Group: Views and proposals on the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) (17 March 2014), available at: file://localhost/<http://unfccc.int/files/bodies/awg/application/pdf/submission_by_nepal_on_behalf_of_ldc_group_on_views_and_proposals_on_the_work_of_the_adp.pdf> accessed 14 May 2015.

¹³⁷ Submission by Australia, *supra* n 99, 4.

¹³⁸ Submission by China, *supra* n 123, 4-5.

¹³⁹ Submission by South Africa, South African Submission on Mitigation under the Ad hoc Working Group on the Durban Platform for Enhanced Action (30 September 2013), 4, available at: file://localhost/<http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_mitigation_20130930.pdf>, accessed 14 May 2015. It is worth noting that South Africa suggests the inscription of commitments in schedules to the 2015 agreement only by 2017.

¹⁴⁰ Submission by the United States, *supra* n 48, 4.

¹⁴¹ The Cancun pledges are contained in information documents. See Compilations of economy-wide emission reduction targets and Compilation of Information on Nationally Appropriate Mitigation Actions, *supra* n 95.

¹⁴² The FCCC Secretariat functions as a repository for information, as for instance, in relation to national communications from Parties.

¹⁴³ Views of Brazil on the Elements of the New Agreement under the Convention Applicable To All Parties (12 November 2014), available at: <file://localhost/<http://www4.unfccc.int/submissions/SitePages/sessions.aspx%3FshowOnlyCurrentCalls=1&populateData=1&expectedsubmissionfrom=Parties&focalBodies=ADP>>, accessed 14 May 2015.

¹⁴⁴ Canada ADP Submission (6 June 2014), available at: file://localhost/<http://unfccc.int/files/bodies/awg/application/pdf/canadian_adp_submission_-_june_2014.pdf>, accessed 14 May 2015.

¹⁴⁵ Submission by the United States, *supra* n 48, 4.

¹⁴⁶ Submission by New Zealand, Submission to the ADP (12 March 2014), 2, available at: file://localhost/<http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp24_submission_by_new_zealand_submission_2014_0312.pdf>, accessed 14 May 2015.

¹⁴⁷ Views of Brazil, *supra* n 143.

Options for anchoring: Switzerland proposes that Parties' commitments for the period from 2020 are to be 'anchored under the 2015 agreement'.¹⁴⁸ The content and language of the 'anchoring' provision in the 2015 agreement that links nationally determined contributions to the agreement will be determinative of the relationship of the 2015 agreement to national contributions, as well as the legal nature of the contributions.

The anchoring provision could merely take note of the contributions, as the Cancun Agreements did of the targets and actions of developed and developing countries respectively. This would have limited legal import. Moreover this would not be in keeping with the letter and the spirit of the Durban Platform decision, given the Durban decision was intended to represent an advance on the Cancun Agreements. The core 2015 agreement could create a range of internationally legally binding obligations in relation to national contributions.

Parties could choose to create purely procedural obligations for themselves in relation to the contributions. For instance, the anchoring provision could commit all Parties to preparing and communicating contributions and listing them either in or outside the agreement. The provision could also create a timeline for the final contributions to be communicated. This could be at Paris, at the time of joining the agreement or later. The anchoring provision could go further and commit Parties to maintaining and updating their contribution and/or schedule. Parties could be required to update their contribution as the result of an ex-ante process, or they could choose to do so unilaterally when domestic conditions change. If Parties are required to update their contribution and/or schedule, this could be done periodically in lock step with other Parties as and when necessary. All these constitute obligations of conduct, and lend themselves to determinations of compliance/non-compliance.

Parties could choose to create substantive obligations as well. For instance, the anchoring provision could commit Parties to implementing their nationally determined contributions. This may require translating their contributions into domestic legislation. The provision could be more specific and require Parties to impart domestic legal force to their contributions. At the ambitious end of the spectrum, the anchoring provision could commit Parties to achieving their nationally determined contributions. These constitute obligations of result, and also lend themselves to determinations of compliance/non-compliance.

The anchoring provision, whatever its content, could be framed by a general provision requiring Parties to progressively enhance the level of ambition reflected in their contributions. The Lima decision contains the kernel of this notion. The Lima decision requires each state's contribution to represent a 'progression beyond the current undertaking of that Party'.¹⁴⁹ This provision, if included in the 2015 agreement, in conjunction with an effective review and compliance process, will be of tremendous significance as it could ensure that the regime as a whole is moving towards ever more ambitious and rigorous contributions from Parties – that there is a 'direction of travel' for the regime, as it were. Such a provision will limit the discretion of Parties to revise their contributions in a downward direction.

In relation to their nationally determined contributions, the 2015 agreement could commit Parties to one or more of the following:

- Prepare and communicate,
- Maintain and update,
- Implement,

¹⁴⁸ Submission by Switzerland, *supra* n 119. See also, Submission by AILAC, *supra* n 100.

¹⁴⁹ Lima Call for Climate Action, *supra* n 6, para 10

- Achieve,
- Demonstrate legal force in domestic law.

Significance of housing: Although the precise contours of the anchoring provision – its content and language – will determine the legal nature of Parties’ contributions, the location or housing of nationally determined contributions may also have relevance.

Ease of updating? It has been argued that contributions can be more readily updated or changed if they are in supplementary instruments or otherwise ‘housed’ separately than if they were inscribed in a legally binding agreement.¹⁵⁰ However, if the contributions are inscribed in the agreement, Parties could adopt simplified and fast track amendment procedures in relation to them. For instance in the Chemical Weapons Convention, certain amendments are considered approved ninety days after the Executive Council recommends their adoption, unless a Party expressly objects to the amendment.¹⁵¹ The Doha amendment to the Kyoto Protocol is another example. It provides that any adjustments to increase the ambition of Parties’ quantified commitments shall be considered adopted unless more than three- fourths of the Parties present and voting object to its adoption.¹⁵² And, if contributions are housed separately, the 2015 agreement could introduce procedures for revision/updating of contributions that would lengthen and complicate the process of revision. Thus, it is not primarily their location, either in the 2015 agreement or outside, which determines how readily national contributions can be updated, but the process that is set for their revision and who ‘holds the pen’ in updating contributions.

Parties could update contributions unilaterally. For instance, they could communicate their revised contributions to the Secretariat who would then mechanically update the website or supplementary instrument in which the contribution features. Parties could even have access rights to the FCCC website which would permit them to submit and update their contributions at will, as is the case with the INDCs.¹⁵³ Parties could also update their contributions after they have been subject to a multilateral process. Such a process could be instituted whether the contributions are located in the agreement or outside. However, if contributions are an integral part of the agreement, since all Parties would have ‘approved’, even if only notionally, each individual national contribution, any revision of a national contribution will presumably need to involve a multilateral process, however simplified.¹⁵⁴ Arguably, the potential for downward revisions is limited where a multilateral process is in place to consider revisions. Thus, if contributions can be unilaterally updated/ revised, then the international process for revision will be seamless and speedy. If a multilateral process is engaged every time a country seeks to revise its contribution, the process for revision will be neither seamless nor speedy. The housing of the contributions is thus not dispositive in this regard, but indicative.

The location of contributions may, however, have temporal implications in relation to the submission of contributions. If contributions are annexed to the 2015 agreement, all Parties would need to submit these before Paris so that the COP can approve, even if only notionally as part of the Agreement, all the contributions before adopting the 2015 agreement. In this scenario, it is unclear what the legal implications would be for latecomers and for the agreement itself, given the

¹⁵⁰ Submission by the United States, *supra* n 48, 4.

¹⁵¹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1997, 1974 UNTS 45, Article XV(4) and (5). See also, CTBT, *supra* n 28, Article VII.

¹⁵² Decision 1/CMP.8, *supra* n 38, Annex I, E. Article 3, paragraph 1 quarter.

¹⁵³ See the INDC Submission Portal, available at: [file://localhost/<http://unfccc.int/focus/indc_portal/items/8766.php>](http://unfccc.int/focus/indc_portal/items/8766.php), accessed 14 May 2015.

¹⁵⁴ The US favor contributions housed elsewhere as in their view ‘national schedules are not ‘approved’ by other Parties in the same sense as either provisions of the agreement or decisions of the Parties’. Submission by the United States, *supra* n 48, 4.

contributions of latecomers would not have been ‘approved’ by the others, and given the agreement at the time of its adoption was not complete. If contributions are located outside the agreement, and no ‘approval’ is required, inscription could occur at any time – before, in or after 2015.

Legal relevance: The location of nationally determined contributions may also be legally relevant. If the content and the language of the anchoring provision in the 2015 agreement are clear and precise, they will determine the legal nature of the contributions. However, if the provision is constructively ambiguous – a strategy frequently resorted to by climate negotiators – and thus the legal nature of contributions is unclear, their location assumes legal significance. If they are inscribed in an annex, appendix or attachment to the 2015 agreement, there will be a presumption that it is an integral part of the 2015 agreement, as annexes are,¹⁵⁵ and if the 2015 agreement is legally binding, they will also be legally binding in form. However, in practice, if there is no clear obligation linked to the contributions inscribed in the annex, as for instance if all the agreement does is to ‘take note’ of contributions by Parties, then it may be difficult to demonstrate breach of any particular obligation in relation to these, except in egregious cases the general obligation derived from FCCC Article 4(1). If the contributions are located elsewhere, the characteristics of the documents they are located in will attach to the contributions. So for instance, if they are located in COP decisions, they will be formal FCCC documents, and can only be superseded by another COP decision.

Differentiation, housing and anchoring: Finally, it is worth noting that both housing and anchoring of contributions could be differentiated across commitment types and/or categories of countries. There could, for instance, be different annexes, attachments, schedules or online registries for different countries, different categories of Parties,¹⁵⁶ and/or different types of contributions.

There could also be different anchoring provisions – in terms of language and content – for different types of contributions and/or different categories of Parties. The legal nature of adaptation and mitigation contributions, for instance, could be differentiated. It is worth noting, however, that several developing countries are arguing that all contributions – whether on mitigation, adaptation or finance – must have the same legal nature.¹⁵⁷ Thus, if mitigation contributions of developing countries are to be legally binding so must financial contributions from developed countries. The legal nature of national contributions could also be differentiated across categories of countries. Thus catering to the long standing argument of some developing countries that the legal nature of contributions should be different for developed and developing countries – voluntary for developing countries and binding for developed countries.¹⁵⁸

CONCLUSION

This paper has sought to address two central questions in the on going climate negotiations: the legal form that the 2015 agreement might take, and the legal nature of the nationally determined contributions that are expected to form part of the 2015 package.

¹⁵⁵ See Aust, *supra* n 46, 383.

¹⁵⁶ Submission by Nicaragua on behalf of the Like-Minded Developing Countries (LMDC), Decision x/CP.20 Information on intended nationally determined contributions of Parties in the context of the 2015 agreed outcome (11 June 2014), available at: <http://unfccc.int/files/bodies/awg/application/pdf/adp2-5_submission_by_lmhc_crp_20140611.pdf>, accessed 14 May 2015. See also Submission by Sudan on behalf of the African Group, Elements of the Draft Negotiating Text under the ADP (31 May 2014), available at: <http://unfccc.int/files/bodies/application/pdf/adp_w1_elements_africangroup.pdf>, accessed 14 May 2015.

¹⁵⁷ Submission by China, *supra* n 123, 2. See also, Submission by LMDCs, *supra* n 70, 3 (noting that ‘[a]ll elements of the 2015 agreed outcome should have the same legal nature, consistent with any other related legal instruments that the COP has adopted, and may adopt under the Convention.’).

¹⁵⁸ See e.g. Submission by India, *supra* n 54, 36.

On the question of legal form, this paper identifies the instruments that will likely form part of the Paris package, and explores their characteristic features with a particular focus on their legal status and significance.

The Paris package is likely to consist of one or more of the following: a core 2015 agreement, COP decisions, supplementary instruments and political declarations. The core 2015 agreement could take the form of a protocol, amendments to the Convention, another legal instrument or agreed outcome with legal force. The Convention provides a procedure, including a six-month notice period, for adopting protocols and amendments, although it is unclear on who may propose a protocol, and how mature the text to be notified in accordance with the six-month rule has to be. Further, there are a range of options for entry into force of protocols and amendments in order to ensure environmental integrity and effectiveness. Parties could also experiment with provisional entry into force and provisional application pending entry into force.

The core 2015 agreement could also take the form of 'another legal instrument'. The COP is empowered to adopt instruments other than protocols and amendments, but it is unclear what form these instruments might take, and what procedures would need to be followed in relation to adopting such instruments. It is entirely conceivable, however, that the COP will adopt an instrument labelled something other than a Protocol, yet follow the procedures laid out in the Convention for protocols. The core 2015 agreement could take the form of an 'agreed outcome with legal force' which could be an international instrument such as a COP decision that has legal force domestically. However, most Parties believe a COP decision would be an inadequate response to the Durban mandate.

In addition to the core 2015 agreement, the Paris package will likely contain COP decisions – both those that complement the 2015 agreement and those that flesh it out and operationalize it. While COP decisions, are not, absent explicit authorization, legally binding, they have considerable operational significance, and they will play a key role in the final Paris package. The Paris package may also contain supplementary instruments such as national schedules and country contribution documents that could take the form of information documents, miscellaneous documents or a new category of documents. These are typically documents that readily lend themselves to revisions. Finally, the Paris package may contain political declarations on one or more aspects of the agenda. Although these are soft law instruments, if the Copenhagen Accord is any indication, they can have tremendous political significance and be influential in inducing the desired behavioural change. They require, however, subsequent processes if they are to be given legal effect.

This paper then proceeds to consider the legal nature of the nationally determined contributions that Parties have begun to submit. First, it considers the nature and scope of contributions, both of which remain open and have currently been left to national determination. This will likely lead to a diversity of contribution types. Some contributions will focus on mitigation alone while others will cover all areas; some contributions will be unconditional, while others will contain conditional and unconditional elements. In addition, given the extraordinary discretion provided to states in the Lima decision, there will be little uniformity in the information supplied by Parties in relation to these contributions.

Next, the paper considers options for housing and anchoring contributions. National contributions could be inscribed in the 2015 agreement, as for instance in an annex, appendix, attachment or schedule and be an integral part of the agreement or be housed outside the agreement as for instance in COP decisions, information, miscellaneous or other documents or be held by the FCCC Secretariat (including on their website). The legal nature of nationally determined contributions will depend principally on how they are anchored in the 2015 agreement – the content

and language of the ‘anchoring provision’ – rather than where they are housed. Wherever the contributions are located, Parties could choose to create a range of obligations – substantive or procedural, effort or result, voluntary or mandatory – in relation to contributions. They could also choose to make these internationally binding or request Parties to impart domestic legal force to them. If the anchoring language is ambiguous, however, the location of the contributions assumes greater legal relevance. In any case, there are practical ramifications to different housing options. It is also worth noting that both housing and anchoring of contributions could be differentiated across commitment types and/or categories of countries.

On both the issues of legal form and legal nature considered in this paper, there are numerous open questions that will need to be resolved by Parties in the near future if the Paris conference is to fulfill its mandate. This paper attempts to lay out the context, considerations and concepts that should guide the resolution of these open questions.