The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations

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The ongoing UN negotiations for a 2015 climate agreement have yet to resolve two fundamental legal issues on which its effectiveness will hinge. The first is the precise legal form this agreement will take. Parties had agreed to work towards a 'protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'. This leaves scope for a range of possible legal forms, only some of which are legally binding. Second, they have yet to determine the legal nature of the 'nationally determined contributions' submitted by Parties. This article addresses these two critical issues: on 'legal form', it identifies the instruments that could form part of the Paris package, focussing on their legal status, significance and influence; and on the 'legal nature' of nationally determined contributions, it considers their nature and scope, the range of options for 'housing' these contributions as well as their relationship to the core 2015 agreement.

INTRODUCTION

The international climate regime is comprised principally of the 1992 United Nations Framework Convention on Climate Change1 (the Convention), the 1997 Kyoto Protocol2 and the decisions of Parties under these instruments. It is widely known that the goal of this regime is to reduce greenhouse gas emissions and thereby limit increases in global temperature. Although these instruments are important first steps towards addressing climate change and its impacts, they are widely regarded as inadequate and inadequately implemented. At the Durban Conference in 2011, Parties launched a process to negotiate a climate agreement that will come into effect and be implemented from 2020.3 This process,

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christened the Ad-Hoc Working Group on the Durban Platform for Enhanced Action (ADP), is intended to craft the agreement that will govern, regulate and incentivise the next generation of climate actions. For the reader’s convenience a chronological table of processes and instruments is provided at the end of this article. The ADP process is expected to conclude its work at a conference of Parties scheduled for Paris at the end of 2015, which should result in a new agreement.\(^4\)

The Durban decision that launched these negotiations 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’.\(^5\) Parties chose not to address the legal form of the 2015 agreement at subsequent conferences. In 2013, the Warsaw conference invited Parties to submit ‘intended nationally determined contributions’ in the context of the 2015 agreement, but left the legal form of the 2015 agreement and, explicitly, the legal nature of nationally determined contributions unresolved.\(^6\) The Lima conference in 2014, that arrived at an ‘Elements text’\(^7\) for the 2015 agreement, and the ‘Geneva Negotiating Text’\(^8\) that emerged a few months later, also contained footnoted disclaimers as to legal form and nature. Parties must of necessity resolve these key legal issues before an agreement can be reached in Paris. Parties must 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 article 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 the ‘legal form’ of the core 2015 agreement. The Paris package is likely to consist of one or more of the following: a core 2015 agreement, Conference of Parties (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 six-month notice period for adopting protocols and amendments, although it is unclear how mature the text to be notified in accordance with the six-month rule has to be. Further, there is a range of options for entry into force of protocols and amendments in order to ensure environmental integrity and effectiveness.

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\(^4\) Durban Platform, ibid, para 4.
\(^5\) ibid, para 2.
\(^6\) Decision 1/CP.19, ‘Further Advancing the Durban Platform’ FCCC/CP/2013/10/Add.1 (31 January 2014) (Warsaw ADP Decision) para 2(b) and (c).
\(^7\) Decision 1/CP.20, ‘Lima Call for Climate Action’ FCCC/CP/2014/10/Add.1 (2 February 2015) (Lima Call for Climate Action) Annex: ‘Elements for a draft negotiating text’.
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. 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 operationalise it. While COP decisions are not, absent explicit authorisation, 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 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, they can have considerable political significance and be influential in inducing the desired behavioural change.

The article then proceeds to explore the legal nature of the national contributions that will eventually form part of the Paris package. In essence, countries have agreed to publicly outline what climate actions they intend to adopt from 2020 under a new international agreement. Parties have begun to submit these intended nationally determined contributions in response to the invitation issued by the COP in Warsaw to do so. These will presumably transform from ‘intended’ to eventual or final contributions in the context of the Paris agreement, and may even assume a different form and be given a different name. For ease of reference, these will be referred to in this article as ‘national contributions’. First, the article considers the nature and scope of national contributions, both of which remain open and have currently been left to national determination. This will likely lead to a diversity of contribution types. In addition, given the extraordinary discretion provided to states, there will be little uniformity in the information supplied by Parties in relation to these contributions. Next, the article considers options for housing and anchoring contributions. National contributions could be inscribed inside the 2015 agreement or outside, as for instance in COP decisions, information, miscellaneous or other documents. The legal nature of nationally determined contributions will depend principally on how they are anchored in the 2015 agreement – the content, language and commitments prescribed in the

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9 See, eg, 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) at http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx (all URLs were last accessed 14 June 2015).
‘anchoring provision’ – rather than where they are housed. The article 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.

The discussion of these key legal issues in the negotiations for a 2015 agreement is by its very nature devilishly detailed. This discussion is nevertheless significant for at least two reasons. First, it provides a broader context as well as specific criteria for assessing the Paris outcome. An understanding of the overwhelming political, technical and legal challenges at the heart of the climate negotiations will enable a better understanding (and perhaps a more charitable view) of the outcome Parties arrive at. Second, this discussion provides practical and grounded insights into the complexities and legal difficulties that arise in deeply contentious multilateral negotiations. As one would expect in such negotiating processes, States have varying appetites for undertaking legally binding commitments. This has created room for an outcome comprising an innovative package of instruments, and commitments within them, of varying levels of normativity and legal gravitas. While the climate negotiations may be particularly contentious, such a differentiated approach has useful lessons to offer other comparable international regimes.

**LEGAL FORM OF THE 2015 AGREEMENT**

**The Paris package**

The Paris conference is likely to yield a package of instruments with varying degrees of normativity. There are several reasons to expect a ‘package’ outcome. First, the current negotiations cover such a breadth of issues and in such detail that only a sub-set of them will be suitable for inclusion in a legally binding instrument. Any such legally binding instrument will therefore likely be accompanied by decisions taken by the conference that elaborate and operationalise elements of the agreement. Second, some issues under consideration may require immediate implementation. Decisions taken by the conference, unlike any legally binding instrument agreed to in Paris, will be immediately effective. A legally binding instrument will only take effect once it enters into force, which, if the Kyoto Protocol experience is any indication, could take several years. Third, some issues are so highly disputed that Parties may not agree to address them in a legally binding instrument, preferring to address them in accompanying instruments of less formal significance. Compromises on such contested issues could find a home in decisions taken by the conference, in instruments such as information or miscellaneous documents or in political declarations. The Paris package is likely therefore to comprise a combination of the following: (i) a core 2015 agreement, (ii) COP decisions, (iii) supplementary instruments (such as information and/or miscellaneous documents, schedules etc), and (iv) one or more political declarations. Each of these is discussed in turn, emphasising their legal and operational significance and thereby shedding light on the likely rigor and effectiveness of the Paris package.
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’. This instrument will form the core 2015 agreement. All the options proposed – save for one interpretation of an agreed outcome with legal force – would constitute a legally binding instrument.

The vast majority of Parties expect the core 2015 agreement, many years in the making, to take the form of a legally binding instrument. To most, a legally binding instrument signals the highest expression of political will, and thus may be the only appropriate response to what UN Secretary General, Ban Ki-moon, has characterised as the ‘defining challenge of our age’. Legally binding instruments have several attractive attributes. They crystallise international commitments into domestic legislative action, thereby co-opting domestic enforcement mechanisms and generating predictability as well as certainty in both implementation and accountability at domestic and international levels. Such commitments also typically survive domestic political changes. Treaties such as the FCCC and the Kyoto Protocol are binding in this sense, and most Parties believe they are negotiating another such instrument to bolster the climate regime.

However, compliance, implementation and effectiveness of legally binding instruments rest on a range of factors. One such factor is the normative content as well as precision of the provisions within these treaties. The FCCC and Kyoto Protocol contain provisions couched in discretionary and contextual language that render the setting of a standard, a finding of compliance or non-compliance, and the resulting visiting of consequences, problematic tasks. This in turn affects assessing compliance for such provisions. Thus although a legally binding instrument may 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. Given the wide

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10 Durban Platform, n 3 above, para 2.
11 The term ‘legally binding’ is typically applied to negotiated legal instruments that render particular state conduct mandatory as well as, at least in principle, judicially enforceable. J. Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15 Leiden Journal of International Law 1, 32, noting however that most norms that are enforceable in principle are often not enforced in practice. Legally binding instruments apply only to those states that have expressed their consent to be bound by means of ratification, acceptance, approval or accession. See Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (Vienna Convention) Art 11.
12 Secretary General Ban Ki-moon, Opening Remarks at 2014 Climate Summit, General Assembly 23 September 2014.
15 For instance, the commitments of industrialised countries relating to technology transfer are peppered with phrases such as ‘as appropriate’ and ‘all practicable steps’. FCCC, Art 4(5).
16 For instance, the Kyoto Protocol requires developed country Parties to make ‘demonstrable progress’ by 2005 in achieving their identified mitigation commitments. Kyoto Protocol, Arts 3(1) and (2).
divergences between Parties, states will likely protect themselves either by placing contested issues in non-legally binding instruments, or by negotiating language providing interpretive flexibility in the legally binding instrument. Thus the core 2015 agreement, assuming it is a legally binding instrument, is likely to contain a range of provisions of differing levels of normativity and precision.

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 recognised in FCCC Article 17 as a method of expanding the climate regime. Article 17 does not provide any guidance on the content of protocols. 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). A similar rule applies to proposed amendments to the FCCC and the Kyoto Protocol. 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 the end of May 2015. The Geneva negotiating text was communicated in all six official UN languages in March 2015 thus ‘fulfilling all relevant legal and procedural requirements for COP 21 to adopt a protocol, another legal instrument or agreed outcome with legal force’.

Article 17 does not provide guidance on the nature of the text that is 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 labelled a negotiating text (as the Geneva text is)? If Parties are free to submit 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-optioned text may not serve the purpose (as is arguably the case with the Geneva text). 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. 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

17 FCCC, Art 15(2).
18 Kyoto Protocol, Art 21(3).
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’.\footnote{ibid, FCCC/AGBM/1997/3, para 18.} Notwithstanding this request, the Brazilian proposal for the Clean Development Fund that transformed into the Clean Development Mechanism was submitted after the negotiating text was circulated, and the prescribed six-month deadline had passed.\footnote{J. Depledge, ‘Tracing the Origins of the Kyoto Protocol: An Article by Article Textual History’ FCCC/TP/2000/2, 75.} It appears possible then for Parties to provide an implied waiver to this procedural requirement.

In any case, the ADP co-chairs made no such request to the Parties in relation to the Geneva Negotiating Text.\footnote{Geneva Negotiating Text, n 8 above.} The much-bracketed and many-optioned ninety-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 organisation of the agreement or the legal nature of its provisions.\footnote{ibid, footnote 1.} 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.\footnote{ibid.} Parties have, however, accepted this text as the basis for substantive negotiations going forward.\footnote{Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (13 February 2015) Closing Plenary webcast at http://webtv.un.org/watch/closing-plenary-geneva-climate-change-conference-2015-unfccc/4051829279001.} In this context, it appears the six-month requirement will provide Parties with notice that a treaty will be proposed for adoption rather than notice of the substantive ideas in it.

\textit{Entry into force:} Article 17 provides that any proposed Protocol shall itself establish the requirements for its entry into force.\footnote{FCCC, Art 17(3).} The Kyoto Protocol chose a double-trigger entry into force requirement covering both a certain number of Parties as well as a certain percentage of global CO\(_2\) emissions from Annex I Parties.\footnote{Kyoto Protocol, Art 25(1).} 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’),\footnote{Durban Platform, n 3 above, para 2.} any new Protocol will need to have an entry into force requirement designed to reflect this. Entry into force requirements could include a quantitative threshold such as ratification by a certain number of Parties and/or a green house gas (GHG) emissions threshold (ie, a percentage share of global emissions or a certain Gt of CO\(_2\) eq). These requirements could also specifically identify countries (either by name or by description, as for instance percentage share of global emissions) that would need to be part of the agreement for it to enter into force.\footnote{See, eg, Comprehensive Nuclear-Test-Ban Treaty 1996, 35 ILM 1439 (CTBT), Art XIV.}
Entry into force requirements could also set a target date for the instrument to enter into force.\textsuperscript{31} The Durban platform decision requires the 2015 agreement to ‘come into effect and be implemented from 2020’. While this provision reflects an understanding among Parties in relation to when the agreement will take effect, the agreement will only have legal effect when entry into force requirements are fulfilled, which could be before or after 2020. If the agreement enters into force before 2020, it will nevertheless become operational only from 2020. The agreement could, however, prescribe a date, for instance 1 January 2020, on which the agreement will enter into force provided other requirements such as a certain number of countries and/or percentage share of global emissions are fulfilled. Entry into force requirements could also create presumptions in favour 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.\textsuperscript{32}

Viewed pragmatically, entry into force requirements could be framed to ensure that all or most of those essential to the success of the Protocol are represented and will likely take several years to be fulfilled. Given the imperatives of science and the urgency of mitigation action (ie, efforts to reduce emissions such as adopting new technologies or renewable energy sources) 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 the provisional application of any new treaty that is to emerge.

**Provisional application pending entry into force:** Article 25 of the Vienna Convention on the Law of Treaties provides for provisional application of a treaty pending its 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 its entry into force. The General Agreement on Tariffs and Trade 1947 (GATT) is an oft-quoted example of provisional application. A Protocol of Provisional Application applied the GATT provisionally for nearly four decades.\textsuperscript{33} Typically, provisional application is rendered subject to national legal systems.\textsuperscript{34} In addition, in some cases a certain degree of flexibility is also explicitly counted. The Antarctic Treaty Environmental Protocol 1991, provides for provisional application such that pending entry into force the treaty is applied ‘in

\textsuperscript{31} See, eg, Montreal Protocol on Substances that Deplete the Ozone Layer 1987, 1522 UNTS 3 (Montreal Protocol) Art 16(1).
\textsuperscript{32} 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, Arts VI(4) and (5); the International Convention for the Prevention of Pollution from Ships 1973, 1340 UNTS 184, Arts 16(2)(f)(ii) and (iii), and the International Convention for the Safety of Life at Sea (SOLAS) 1974, 1184 UNTS 278, Art VIII(v)(ii).\textsuperscript{2}.
\textsuperscript{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 (Art 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.
\textsuperscript{34} For instance, the Energy Charter, Art 45 contains the caveat ‘to the extent that such provisional application is not inconsistent with its constitution, laws or regulations’, *ibid.*
accordance with their [states’] legal systems and to the extent practicable. 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 recognised during the negotiations leading to the FCCC, hence the discourse at the time on a ‘prompt start’ of the FCCC. 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. The decision adopting the Doha amendment to the Kyoto Protocol that laid out targets for the second commitment period of the Protocol, 2013 to 2020, also recognises that, pending its entry into force, Parties may provisionally apply the Kyoto Protocol’s second commitment period obligations. For those who choose not to apply these provisionally, they are still required to ‘implement their commitments and other responsibilities in relation to the second commitment period, in a manner consistent with their national legislation or domestic processes’.

Another Legal Instrument
The core 2015 agreement could also take the form of another ‘legal instrument’. In the context of the Berlin Mandate, 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. 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, amendments to the annexes, and protocols. 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) authorises 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

37 Depledge, n 22 above, 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) (Berlin Mandate) preambular recital 3.
41 FCCC, Art 15.
42 FCCC, Art 16.
43 FCCC, Art 17.
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 treaties\(^44\) even if they are not called protocols (such as for instance the ‘Paris 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.\(^46\)

Although Article 17 applies specifically only to ‘protocols’, arguably Parties could apply Article 17 procedures to such other legal instruments. The United States, a non-Party to the Kyoto Protocol is keen to avoid the use of the term ‘protocol’ and thus would prefer to adopt the 2015 agreement without explicit reference to Article 17. 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, following suit, adopt a legally binding instrument designated something other than a protocol without explicit reference to Article 17, while still following the procedure laid out in Article 17.

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,\(^47\) 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 characterise 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’,\(^48\) thus signalling that it will indeed be a treaty within the meaning of the Vienna Convention. The substance of these final clauses suggests that this instrument will be one that requires a state’s consent to be ‘bound’.\(^49\) 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 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

\(^{44}\) Vienna Convention, Art 1(a): ‘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’.

\(^{45}\) The Vienna Convention does not distinguish between different types of treaties. See \textit{ibid}.


\(^{48}\) \textit{ibid}, 10–11.

phrased in hortatory terms and others in mandatory terms, and for some of these to lend themselves to enforcement while others do not.

**Agreed Outcome with Legal Force**

The core 2015 agreement could also take the form of an ‘agreed outcome with legal force’. The term ‘agreed outcome with legal force’ in the Durban Platform decision is the result of a ‘huddle’ with the EU and India at its centre. 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. The term ‘agreed outcome with legal force’ fits the bill. The ambiguity in the term ‘agreed outcome with legal force’ creates room for the possibility that it could be interpreted as an outcome that derives legal force from domestic rather than international law. This 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.

Such an interpretation would arguably fulfil the Durban mandate 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.

**A Core 2015 Agreement ‘under the Convention’**

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 the latter, 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, the powers of the COP to review the

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50 See J. Vidal and F. Harvey, ‘Durban climate deal struck after tense all-night session’ The Guardian 11 December 2011.


52 FCCC, Art 2.
implementation of the Convention and any related legal instruments,53 and its provision on settlement of disputes.54 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.

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 responsibilities, and those that insisted that any reference to common but differentiated responsibilities must be qualified with a statement that this principle is to 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 political conditions.55 The text was accordingly drafted 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 Doha56 and Warsaw57 decisions 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’.58 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 responsibilities.

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 on what principled basis. Some Parties have argued that the 2015 agreement must be in accordance

53 FCCC, Art 7(2).
54 FCCC, Art 14(2).
55 See, eg, 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. 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) and G. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 EJIL 509.
56 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.
57 Warsaw ADP Decision, n 6 above, recital para 9.
58 Lima Call for Climate Action, n 7 above, para 3.
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’.\textsuperscript{59} This suggests a clear hierarchy between the Convention and the 2015 agreement and in doing so expands the scope for interpretive 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 is a problematic task, given the definitional and interpretational differences over the Convention’s provisions as well as lack of clear benchmarks. 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 authorises the adoption of ‘another legal instrument’ that has in the past been used to signal 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 categorisation of Parties reflected in the Convention’s annexes.\textsuperscript{60} 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.\textsuperscript{61} Some variation therefore appears possible, but it is unclear where and on what basis the line might be drawn.

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.\textsuperscript{62} 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.\textsuperscript{63} 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


\textsuperscript{60} Submission by LMDCs, \textit{ibid}, 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 . . .’).

\textsuperscript{61} FCCC Annex I contains countries such as Belarus, Cyprus, Malta and Turkey that are not part of Kyoto Annex B.


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 categorisation 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?

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 it. 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 authorise the Conference of Parties to engage in the progressive normative and institutional development of the regime. COP decisions have enriched and expanded the normative core of the regime by fleshing out treaty obligations, reviewing the adequacy of existing obligations, and launching negotiations to adopt further obligations. COP decisions have also created an elaborate institutional architecture to supervise compliance with obligations.

Although COP decisions have considerable operational significance and reach in the climate regime, their legal status in international law is less certain. COP decisions are relevant factors in interpreting the treaty. However their precise legal status depends on the enabling clause, 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

65 FCCC, Art 7.
66 See, eg, Kyoto Protocol, Arts 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).
67 Pursuant to FCCC, Art 4(2) (d).
68 See, eg, Berlin Mandate, n 39 above.
69 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).
70 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, Art 31(3)(a). See Whaling in the Antarctic (Australia v Japan, New Zealand intervening), where the International Court of Justice 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) at [46].
71 The enabling clause in the relevant treaty may authorise a COP decision to be binding, or explicitly require further consent for it to be binding, as for example in the case of Kyoto Protocol, Art 18 (mandating that compliance procedures and mechanisms entailing binding consequences shall be adopted by means of an amendment to the Protocol), see Brunnée, n 11 above.
are not, absent explicit authorisation,\textsuperscript{72} legally binding on Parties.\textsuperscript{73} 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 authorise binding law-making by the COP. The Kyoto Protocol does, but only with respect to a circumscribed set of reporting and accounting obligations.\textsuperscript{74} 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 authorised in the climate regime are not legally binding.

Intriguingly, COP decisions in the climate regime, even in the absence of explicit authorisation 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 authorised to do,\textsuperscript{75} but also, more controversially, in relation to Parties.\textsuperscript{76}

Further, COP decisions have also put in place rules, and rendered access to certain benefits contingent on compliance with these rules.\textsuperscript{77} 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.\textsuperscript{78} This is a view that that at least some Parties share.\textsuperscript{79}

The Geneva text currently contains 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 its 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 marginalised, it is unlikely such a technically sound approach will prevail.

**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 miscellaneous

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\textsuperscript{72} Explicit authorisation for binding law-making is unusual. Montreal Protocol, Art 2(9) is an oft-quoted example.

\textsuperscript{73} See Brunnée, n 11 above, 32.

\textsuperscript{74} Kyoto Protocol, Art 7(1) read with Art 7(4), 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).

\textsuperscript{75} FCCC, Art 7.

\textsuperscript{76} See, eg, Decision 7/CP.7, ‘Funding under the Convention’ FCCC/CP/2001/13/Add.1 (21 January 2002) para 1(b) and (e).

\textsuperscript{77} See, eg, COP decisions under Kyoto Protocol, Art 17 (emissions trading), and, Brunnée, n 11 above, 32–33.

\textsuperscript{78} See Brunnée, \textit{ibid}, 33.

\textsuperscript{79} Submission by India, n 51 above.
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. Neither information nor miscellaneous documents are translated into the six UN languages. Information documents offer information and miscellaneous documents contain Parties’ views and proposals in relation to agenda items before the COP. Information documents are prepared merely as informational tools. They do not by themselves require Parties to engage in particular actions. They can be revised and reissued. An example of an information document often seen at the climate negotiations is the list of participants. The most high-profile examples of information documents are the documents containing the Cancun pledges and the Kyoto second commitment period targets. 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. This, given past precedent, will likely be an information document. Miscellaneous documents usually contain Parties’ proposals and views, which can change and be captured in later submissions and miscellaneous documents.

National schedules or country contribution documents 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

82 See, eg, List of Participants, FCCC/CP/2014/INF.2 (12 December 2014).
83 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).
84 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).
85 Lima Call for Climate Action, n 7 above, para 16.
86 Typically, synthesis of national communications from Parties are captured in information documents. See, eg, 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).
87 See, eg, Views on options and ways for further increasing the level of ambition, Submissions from Parties. FCCC/ADP/2012/MISC.1 (28 March 2012).
89 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) at http://unfccc.int/files/bodies/awg/application/pdf/140918_ailac_submission_adp_2-6_legal_architecture_vf.pdf.
ADP co-chairs. These only have a 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, they can sidestep this debate.

**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.

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. 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 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, it is not inconceivable that even a COP decision may prove difficult to reach, as it did in Copenhagen. In such a case, a subset 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 formalise 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. It instructs its own representatives to engage in particular conduct, rather than Parties more generally.

The Copenhagen Accord, the most significant political declaration to emerge from the climate regime, offers valuable lessons on the value of political

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90 Lima Call for Climate Action, n 7 above, para 16. See also, INDCs as communicated by Parties at http://www4.unfccc.int/submissions/indc/ Submission%20Pages/submissions.aspx.
91 Decision 1/CP.8, ‘Delhi Ministerial Declaration on Climate Change and Sustainable Development’ FCCC/CP/2002/7/Add.1 (28 March 2003).
92 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 adopted, 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.
94 See, eg, ibid, para 8.
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 authorised 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’ of the Copenhagen Accord. The FCCC Secretariat made it clear that the Accord has ‘no formal legal standing’ in the climate change process. 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 states of the world’s largest economies. It thus provides unparalleled political guidance in an area rife with discord. Second, 141 states representing 87.24 per cent of global emissions have since associated with the Accord. Although the Kyoto Protocol has 192 Parties, its emissions reductions commitments only cover a fraction of global emissions. Third, the political compromises in the Accord were fleshed out and adopted into the climate process a year later through the Cancun Agreements. 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

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96 ibid, preambular recital.
98 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, ibid, 72 (noting that ‘it is a clear letter of political intent and unprecedented in its conception.’).
101 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 at http://www.mofa.go.jp/policy/environment/warm/cop/kp_pos_1012.html.
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.\textsuperscript{103} It is worth contrasting the Accord with the Kyoto Protocol. Despite its many innovations or perhaps because of these,\textsuperscript{104} little of the Kyoto Protocol’s architecture is likely to survive in the 2015 agreement.

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).\textsuperscript{105}

**LEGAL NATURE OF CONTRIBUTIONS**

Parties have been invited to submit ‘intended nationally determined contributions’ in 2015.\textsuperscript{106} 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, there is less clarity on next steps. First, it is unclear whether ‘intended’ nationally determined contributions would turn into nationally determined contributions in the 2015 agreement or whether they would take some other as yet undetermined form and be named something else. Second, it is unclear whether national contributions, whatever form they eventually take and whatever they may be named, should be a part of 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 national contributions in relation to the 2015 agreement rather than the ‘intended nationally determined contributions’ Parties are submitting in response to the Warsaw call to do so.\textsuperscript{107} National contributions, whatever form they eventually take and whatever they may be named, will be anchored in the 2015 agreement, and thus have a different legal basis than the intended nationally determined contributions sought by the Warsaw decision. The discussion below does, however, take its cues from the views and decisions of Parties in relation to intended nationally determined contributions as these provide a strong signal of political sweet spots in relation to national contributions in the 2015 agreement.

\textsuperscript{103} 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, n 98 above, 79 (noting that ‘[t]he Accord text also usefully bows in the direction of national sovereignty’).

\textsuperscript{104} For instance, differentiation in central obligations, and the enforcement branch of the compliance system.


\textsuperscript{106} Warsaw ADP Decision, n 6 above, para 2(b).

\textsuperscript{107} See Lima Call for Climate Action, n 7 above, para 8 (noting that the arrangements specified in relation to intended nationally determined contributions are without prejudice to the content of the 2015 agreement).
Nature and scope of contributions: As a preliminary matter, it is important to consider the nature and scope of intended nationally determined 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 intended 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 crystallise into commitments for all Parties, as some countries argue they should, or into commitments for some and actions for others, as other countries argue they should. It is also unclear whether national 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. Nationally determined, in Switzerland’s words, suggests ‘nationally owned’. 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. If national contributions can be interpreted to be conditional in this way, aggregation of national efforts will prove difficult. Aggregation of national efforts is critical to determining the likelihood of achieving the chosen temperature goal.

The scope of national contributions is also unclear. Since the term ‘contributions’ is not qualified by ‘mitigation’, contributions could take the form of adaptation, finance, technology transfer or capacity-building contributions. At the Lima conference in 2014, there was a range of views, 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 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 reiterates the invitation to Parties to communicate their intended nationally determined
contributions.\footnote{Lima Call for Climate Action, n 7 above, para 9.} 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,\footnote{ibid, para 12.} 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 alone\footnote{See, eg, Switzerland’s INDC, Submission by Latvia and the European Commission; Submission by Norway; US Cover Note, INDC and Accompanying Information; and Russian Submission, n 9 above.} while others may cover all areas;\footnote{See, eg, Gabon INDC, n 9 above. See also, J. Gupta, ‘India offers two options for UN climate deal’ (3 February 2015) at http://indiaclimatedialogue.net/2015/02/03/india-offers-two-options-un-climate-deal/.} some will likely be unconditional,\footnote{See, eg, Submission by Latvia and the EC, n 9 above; and Enhanced Actions on Climate Change: China’s Intended Nationally Determined Contributions (30 June 2015) at http://www4.unfccc.int/submissions/INDC/Published%20Documents/China/1/China’s%20INDC%20-%20on%2030%20June%202015.pdf (last accessed 9 July 2015).} while others may contain conditional\footnote{See, eg, Russian Submission, n 9 above (conditioning their INDC on the ‘maximum possible account of absorbing capacity of forests’).} and unconditional elements.\footnote{See Gupta, n 116 above.} 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.\footnote{Warsaw ADP Decision, n 6 above, para 2(c).} 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.\footnote{ibid.} The language used in relation to the provision of such information – ‘may include, as appropriate, inter alia’\footnote{ibid.} – 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 information accompanying national determined contributions. This in turn will affect the ‘clarity, transparency and understanding’\footnote{Warsaw ADP Decision, n 6 above, para 2(b), and Lima Call for Climate Action, n 7 above, para 13.} of these contributions, and complicate any efforts to compare ambition across national contributions.

\footnotetext[113]{Lima Call for Climate Action, n 7 above, para 9.}
\footnotetext[114]{ibid, para 12.}
\footnotetext[115]{See, eg, Switzerland’s INDC, Submission by Latvia and the European Commission; Submission by Norway; US Cover Note, INDC and Accompanying Information; and Russian Submission, n 9 above.}
\footnotetext[116]{See, eg, Gabon INDC, n 9 above. See also, J. Gupta, ‘India offers two options for UN climate deal’ (3 February 2015) at http://indiaclimatedialogue.net/2015/02/03/india-offers-two-options-un-climate-deal/.}
\footnotetext[117]{See, eg, Submission by Latvia and the EC, n 9 above; and Enhanced Actions on Climate Change: China’s Intended Nationally Determined Contributions (30 June 2015) at http://www4.unfccc.int/submissions/INDC/Published%20Documents/China/1/China’s%20INDC%20-%20on%2030%20June%202015.pdf (last accessed 9 July 2015).}
\footnotetext[118]{See, eg, Russian Submission, n 9 above (conditioning their INDC on the ‘maximum possible account of absorbing capacity of forests’).}
\footnotetext[119]{See Gupta, n 116 above.}
\footnotetext[120]{Warsaw ADP Decision, n 6 above, para 2(c).}
\footnotetext[121]{ibid, para 14.}
\footnotetext[122]{ibid.}
\footnotetext[123]{Warsaw ADP Decision, n 6 above, para 2(b), and Lima Call for Climate Action, n 7 above, para 13.
There is a strong likelihood of reaching Paris with a motley assortment of intended nationally determined contributions accompanied by disparate information types of varying importance, depth and relevance. The Paris conference may decide on a process for converting intended nationally determined contributions into national contributions in the 2015 agreement. It may offer further direction on the nature and scope of national contributions. It may also clarify the information that must accompany contributions as well as render provision of such information mandatory. This will enhance the ‘clarity, transparency and understanding’ of national contributions. If the Paris conference is unable to reach agreement on these issues, and the variation across contributions continues, the legal nature of contributions – especially where they are housed and how they are anchored in the 2015 agreement – becomes critically important.

*Housing 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, the Least Developed Countries, Australia, China and South Africa, among others, subscribe to this view. National contributions could also be housed elsewhere in documents such as COP decisions (including of the governing body of the 2015 agreement) information, miscellaneous or other documents or be held by the FCCC Secretariat (including on their website), and/or recorded in one or more online registries. The US, Canada, New Zealand and Brazil, among others, favour this approach. The US argues that schedules containing contributions should be ‘housed separately (for example, by

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124 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) at http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_eu_workstream_1__mitigation_20130916.pdf (the EU notes that mitigation commitments should be a part of the 2015 agreement).


126 Submission by Australia, n 88 above, 4.

127 Submission by China, n 112 above, 4–5.


129 Submission by the United States, n 47 above, 4.

130 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, n 83 above.

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

132 Views of Brazil on the Elements of the New Agreement under the Convention Applicable To All Parties (12 November 2014) at http://www4.unfccc.int/submissions/SitePages/sessions.aspx?showOnlyCurrentCalls=1&populateData=1&expectedsubmissionfrom=Parties&focalBodies=ADP.

the Secretariat), and New Zealand suggests that national schedules containing contributions should be ‘supplementary’ to the legally binding instrument. 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.

Wherever national contributions are housed – inside or outside the agreement – their legal nature will depend principally on the commitments that are prescribed in the provision that anchors the national contributions to the 2015 agreement.

Anchoring of Contributions: The anchoring provision could prescribe a range of commitments of varying degrees of normativity in relation to the national contributions. It could prescribe procedural commitments such as a commitment to submit national contributions and/or substantive commitments. An example would be a commitment to achieve certain mitigation or financial targets. The content and language of the anchoring provision will determine the rigour of these commitments. Some commitments may constitute obligations of effort while others may be obligations of result. Some commitments may be voluntary while others may be mandatory. Some commitments may lend themselves to enforcement while others may not. Some commitments may be conditional while others may be unconditional.

Parties could choose to create purely procedural commitments 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 contributions. 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 contributions, 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 commitments 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

134 Submission by the United States, n 47 above, 4.
136 Views of Brazil, n 132 above.
137 Submission by Switzerland, n 108 above (using the term ‘anchoring’). See also, Submission by AILAC, n 89 above.
nationally determined contributions. These constitute obligations of result, and also lend themselves to determinations of compliance/non-compliance.

The anchoring provision could also commit Parties to progressively enhancing 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’ 138 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 would limit the discretion of Parties to revise their contributions in a downward direction.

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

It has been argued that contributions may be more readily updated or revised if they are housed separately rather than inscribed in a legally binding agreement.139 While this may be true, the process set for updating or revision of national contributions will also be significant. Parties could adopt simplified and fast track amendment procedures in relation to contributions inscribed in the agreement.140 Conversely, they could introduce lengthy complex procedures for revision/updating of contributions housed outside the agreement. Thus, the process that is set for updating and revision of national contributions and who ‘holds the pen’ in doing so is also relevant to how dynamic the contributions can be.

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 intended nationally determined contributions.141 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 housed in the agreement or outside. However, if contributions are an

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138 Lima Call for Climate Action, n 7 above, para 10.
139 Submission by the United States, n 47 above, 4.
140 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. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1997, 1974 UNTS 45, Arts XV(4) and (5). See also, CTBT, n 30 above, Art VII. 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. Decision 1/CMP.8, n 38 above, Annex I, E. Art 3, para 1 quarter.
141 See the INDC Submission Portal, at http://unfccc.int/focus/indc_portal/items/8766.php.
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.¹⁴² 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 housing of contributions may 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 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 housed outside the agreement, and no ‘approval’ is required, inscription could occur at any time – before, in or after 2015.

The housing of nationally determined contributions may also be legally relevant. If the content and 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, the housing of contributions 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,¹⁴³ and if the 2015 agreement is legally binding, they will be binding as well. 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 housed elsewhere, the characteristics of the documents they are housed in will attach to the contributions. So for instance, if they are housed in COP decisions, they will be formal FCCC documents, and can only be superseded by another COP decision.

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

¹⁴² The US favours 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, n 47 above, 4.
¹⁴³ See Aust, n 46 above, 383.
countries, different categories of Parties, 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. Several developing countries are arguing that all contributions – whether on mitigation, adaptation or finance – must have the same legal nature. 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. This would cater 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.

A final issue in relation to national contributions is whether the 2015 agreement should render the submission of a national contribution a condition precedent to joining the agreement. Such a requirement would appear logical in light of the fact that the 2015 agreement is intended to be ‘applicable to all’. However, there are difficulties with this approach. The scope of national contributions is currently left to national determination – some countries will have only mitigation contributions, while others will have contributions covering other areas as well. Parties will need to decide whether all or only some contributions count for the purposes of joining the agreement. If Parties provide additional guidance in Paris in relation to the nature and scope of national contributions, they will also need to clarify who will assess whether this guidance has been met. The UN depository chosen to accept instruments of ratification cannot perform any evaluative functions in this context. Parties will have to decide on a process and/or institution to perform this function.

**CONCLUSION**

The climate regime is in evolution, and has been over the last two decades. Over the last decade in particular, three critical shifts have occurred which will fundamentally shape the 2015 agreement. First, there is increasing acceptance of the notion that a ‘bottom-up’ (facilitative) architecture that provides considerable autonomy to sovereign states in the actions they take to combat climate change is the starting point for the 2015 agreement. The Warsaw decision inviting Parties to prepare and submit intended ‘nationally determined’ contributions

145 Submission by China, n 112 above, 2. See also, Submission by LMDCs, n 59 above, 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.’).
146 See, eg, Submission by India, n 51 above, 36.
substantiates this point. There will likely be ‘top-down’ (prescriptive) elements, such as a review, assessment or stock-taking of national contributions, as well as transparency provisions, but these are yet to be finalised. Second, there is a growing recognition that the extent of differential treatment in the climate regime, in particular the Kyoto model of differentiation with targets for some and none for others, may not be in keeping either with evolving economic realities or with the objectives of the climate regime. The Durban decision requiring the 2015 agreement to be ‘applicable to all’, and the increasing certainty that the Kyoto Protocol will not be renewed for a third commitment period, are evidence of this trend. Third, there is diminishing appetite among key countries, given divergent interests and domestic compulsions, to accept legally binding commitments. As the devil is in the detail, this article explored options and suggestions for the legal form of the 2015 agreement as well as the legal nature of national contributions from Parties. There are numerous open questions on both legal form and legal nature that will need to be resolved by Parties in the near future if the Paris conference is to fulfil its mandate. This article attempts to set out the context, considerations and concepts that should guide the resolution of these open questions. Together, these three issues – architecture, differentiation and legal form – lie at the heart of the 2015 negotiations and will shape the agreement that emerges from this process.

That Parties will reach agreement, whether in Paris or shortly thereafter, is in little doubt. On architecture, the Warsaw decision set the tone with its call for ‘nationally determined’ contributions. On differentiation, the US-China joint statement, since reflected in the Lima decision, captures a viable compromise that seeks to operationalise the principle of common but differentiated responsibilities, ‘in light of different national circumstances.’ This is likely to result in a more nuanced and updated form of differentiation, and in combination with a bottom-up architecture in self-differentiation. Finally, on legal form, Parties are engaged in clever manoeuvrings that may result in a legally binding instrument but without legally binding GHG mitigation (and other) targets. This article seeks to unpack the issues surrounding the clever compromises being struck in order to balance competing interests and demands.
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1988</td>
<td>UN General Assembly characterises climate change a 'common concern of mankind'</td>
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<td>1990</td>
<td>Intergovernmental Panel on Climate Change issues first assessment report, estimating that global mean temperature likely to increase by about 0.3°C per decade, under business-as-usual emissions scenario</td>
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<td>1990</td>
<td>UN General Assembly establishes Intergovernmental Negotiating Committee to negotiate a climate change convention</td>
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<td>1992</td>
<td>Framework Convention on Climate Change (FCCC) opened for signature at Rio Summit</td>
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<td>1994</td>
<td>FCCC enters into force</td>
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<td>1995</td>
<td>First Conference of Parties to the FCCC adopts Berlin Mandate authorising negotiations to strengthen FCCC commitments</td>
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<td>1997</td>
<td>Third Conference of Parties to the FCCC adopts the Kyoto Protocol introducing GHG targets for developed country Parties for the first commitment period from 2008 to 2012</td>
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<td>2001</td>
<td>Seventh Conference of Parties to the FCCC adopts Marrakesh Accords, spelling out the detailed rules, in particular, for the operationalisation of the Kyoto mechanisms (Joint Implementation, Clean Development Mechanism, and Emissions Trading) as well as for a Compliance mechanism for the Kyoto Protocol</td>
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<td>2005</td>
<td>Kyoto Protocol enters into force</td>
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<td>2005</td>
<td>First Meeting of Parties to the Kyoto Protocol launches negotiations towards a second commitment period for Kyoto</td>
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<td>2007</td>
<td>Thirteenth Conference of Parties to the FCCC adopts the Bali Action Plan, initiating a new round of negotiations towards an 'agreed outcome'</td>
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<td>2009</td>
<td>Fifteenth Conference of Parties takes note of the Copenhagen Accord, reached between 28 Heads of States, containing voluntary mitigation pledges</td>
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<td>2010</td>
<td>Sixteenth Conference of Parties adopts the Cancun Agreements, incorporating elements of the Copenhagen Accord into the FCCC process, including by taking note of the mitigation pledges under the Copenhagen Accord, housed in information documents</td>
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<td>2011</td>
<td>Seventeenth Conference of Parties adopts the Durban Platform, launching negotiations with a scheduled end in 2015 towards an agreement to take effect from 2020</td>
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<td>2012</td>
<td>Eighth meeting of Parties to the Kyoto Protocol extends the Kyoto Protocol for a second commitment period from 2012 to 2020</td>
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<td>2013</td>
<td>Nineteenth Conference of Parties in Warsaw invites Parties to prepare and submit 'intended nationally determined contributions' in the context of a 2015 agreement</td>
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<td>2014</td>
<td>Twentieth Conference of Parties arrives at the Lima Call to Climate Action, setting the stage for the 2015 agreement, and providing cautious guidance on the 'intended nationally determined contributions'</td>
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<tr>
<td>2015</td>
<td>Parties begin to submit their 'intended nationally determined contributions' in the context of the 2015 agreement</td>
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*Full texts of all key instruments and decisions in the climate regime are available at http://unfccc.int/2860.php.*