

KEY LEGAL ISSUES IN THE 2015 CLIMATE NEGOTIATIONS



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In fashioning the new international climate change agreement to be adopted later this year in Paris, parties to the United Nations Framework Convention on Climate Change (UNFCCC)¹ must address a range of legal issues. This brief outlines some of the key issues and concludes that: The Paris outcome arguably must include a core legal agreement constituting a treaty under international law; the exact title of the core agreement is legally irrelevant; the agreement can contain both binding and non-binding elements; the legal nature of parties' nationally determined contributions (NDCs) is independent of where they are housed; and consistency with the UNFCCC does not require that the agreement adopt the same structure.

LEGAL FORM OF THE CORE 2015 AGREEMENT

At the 17th Conference of the Parties (COP 17) in 2011, UNFCCC parties adopted the Durban Platform for Enhanced Action, calling for a “protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties,” to be adopted at COP 21 in Paris.² This deliberately open formulation raises the question: What legal forms would satisfy the Durban Platform mandate that the Paris outcome have “legal force”?³

The Paris outcome is likely to include a number of instruments, including a core agreement, COP decisions, and possibly a political declaration. Thus far, negotiations have focused largely on the core agreement, but the legal form of that agreement remains to be determined. Interim decisions at COP 19 in Warsaw⁴ and COP 20 in Lima,⁵ and the negotiating text⁶ that emerged earlier this year in Geneva, are all explicitly without prejudice to the agreement's legal form.

Arguably, the Durban Platform requirement that the Paris outcome include an instrument having “legal force” implies that this instrument must take the form of a treaty within the meaning of the Vienna Convention on the Law of Treaties. The Vienna Convention defines a “treaty” as “an international agreement concluded

between States in written form and governed by international law, ... whatever its particular designation” (VCLT art. 2.1(a)).⁷ Treaties bind only those states that express their consent to be bound—for example, through ratification or accession—so one indicator of whether an agreement is intended to be a treaty is whether it includes final clauses addressing issues such as ratification and entry into force.

As an alternative to a treaty, could the Paris outcome take the form of a COP decision, provided it were translated into and given legal force in domestic law?⁸ Two considerations weigh against this conclusion and suggest that a COP decision alone would be insufficient to discharge the Durban Platform mandate. First, the circumstances of the Durban Platform's adoption indicate that the phrase, “outcome with legal force,” was chosen in order to suggest something more than a COP decision, which ordinarily would not be legally binding on the parties⁹ and thus not have “legal force.”¹⁰ Second, the five-year gap in the Durban Platform timetable between 2015, when the Paris outcome is scheduled for adoption, and 2020, when the outcome would become effective, suggests that parties intended to allow time for entry into force, which would not be necessary if the Paris outcome were simply a COP decision.

COP 21 could adopt a treaty instrument pursuant to several articles of the UNFCCC:

Protocol: Article 17 of the UNFCCC authorizes the COP to adopt protocols. It imposes no constraints on the content or process for the conclusion of protocols, except that a proposed protocol must be circulated at least six months in advance of the meeting at which it is to be adopted, a condition that has been met through the Geneva Negotiating Text. The term “protocol” does not have a precise meaning in international law, but generally refers to a legal agreement that is, in some manner, supplemental to an existing legal agreement—for example, by setting forth additional obligations or procedures or extending an existing treaty to new domains.¹¹

Amendments: An amendment to the UNFCCC would clearly constitute “another legal instrument” within the meaning of the Durban Platform. Although there have been few proposals thus far to amend the Convention, Article 15 of the UNFCCC authorizes the COP to adopt amendments by a three-quarters majority vote. Amendments are subject to the six-month rule, and require the deposit of instruments of acceptance by three-quarters of the parties to enter into force.

Annexes: Article 16 of the UNFCCC authorizes the COP to adopt annexes, which “form an integral part” of the Convention and therefore also constitute “legal instruments.” But Article 16 restricts the contents of annexes to “lists, forms, and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.” This limitation would seem to make many if not most of the elements contained in the Geneva Negotiating Text inappropriate for inclusion in an annex.

Other legal instruments: Finally, the COP arguably may adopt legal instruments pursuant to its residual authority under Article 7.2 to make “the decisions necessary to promote the effective implementation of the Convention” and to “exercise such other functions as are required for the achievement of the objective of the Convention.”

Although the Vienna Convention provides that treaties are binding on the parties, treaties may include different types of provisions, with different legal force, some creating legally binding commitments and others not. For example, Article 4.1(a) of the UNFCCC establishes a legally binding commitment to develop, periodically

update, publish, and make available to the COP national greenhouse gas (GHG) inventories, whereas Article 4.2(b) of the UNFCCC expresses a non-binding “aim” to return developed country emissions to 1990 levels, rather than a legal commitment. Moreover, some provisions of a treaty could create conditional obligations, such as mitigation obligations conditional on the provision of support or on action by others, and other provisions could create unconditional obligations.

Since the adoption of the Durban Platform, there has been considerable debate on what the core 2015 agreement should be called—a protocol, agreement, accord, or some other term. Although this question may be important politically—for example, the term “protocol” may have positive or negative associations in some countries—it is without significance as a matter of international law. Whether an international agreement is a treaty within the meaning of the Vienna Convention depends on whether it was intended to create legal obligations, which is determined by the contents of the agreement and the circumstances of its adoption, rather than by its title.¹² Thus, whether the Paris agreement is called a protocol, an implementing agreement, or some other term would be irrelevant to the legal character of parties’ obligations.

It is worth noting that in adopting a new legal instrument, the COP need not specify the article of the Convention pursuant to which it is acting, and can christen the Paris agreement whatever it chooses—“protocol,” “implementing agreement,” or some other term. For example, COP 3 adopted the Kyoto Protocol without specifying whether it was doing so under Article 7 or 17 of the Convention.¹³

ENTRY INTO FORCE

If the core 2015 agreement is a protocol or other legal instrument, rather than an amendment, it would need to specify the conditions for its entry into force. The Paris agreement could condition entry into force on a variety of factors, either singly or in combination.¹⁴ For example, it could require acceptance or ratification by:

- A defined number of states;
- States representing a defined percentage or level of emissions; or
- Specific states.

The Kyoto Protocol’s entry into force, for instance, required that the agreement be formally accepted by at

least 55 countries accounting for at least 55 percent of developed country emissions in 1990.

The treaty could also provide for entry into force on a specific date, so long as the other entry into force provisions have been satisfied. If entry into force is conditioned on an emissions threshold, the threshold must be defined in such a way that it is clearly ascertainable by the depositary whether the conditions for entry into force have been satisfied.

ANCHORING NATIONALLY DETERMINED CONTRIBUTIONS

COP 19 in Warsaw invited “all Parties to initiate or intensify domestic preparations for their intended nationally determined 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.”¹⁵ That these intended nationally determined contributions (NDCs) are meant to be part of the Paris outcome is evident in that they were solicited “in the context” of adopting an instrument in Paris. However, the Warsaw decision does not specify whether or not national contributions should be contained in the core 2015 agreement and is explicitly “without prejudice to the legal nature of the contributions.”

LEGAL CHARACTER

The legal character of NDCs will depend on the provisions of the core agreement relating to NDCs. If the core agreement requires parties to achieve their NDCs, or to adopt measures to implement their NDCs, then parties’ NDCs would be legally binding, in the sense that failure by a party to achieve or implement its NDC would put the party in breach of its treaty obligations. But the core agreement could include a variety of procedural obligations relating to NDCs that would not make the substance of a state’s NDC legally binding. For example, the core agreement could require parties to put forward an NDC, maintain an NDC throughout the lifetime of the agreement, provide upfront information, report on implementation, and/or accept international review. Thus, it is important to distinguish the question of whether the core agreement creates legal obligations with respect to NDCs from the narrower question of whether the agreement makes the content of parties’ NDCs legally binding.

HOUSING

Nationally determined contributions (NDCs), once finalized, could be housed “inside” or “outside” the core agreement. For example, NDCs could be housed in one or more annexes or schedules that are designated an “integral part” of the core agreement. Alternatively, NDCs could be housed outside the core agreement—for example, in an information (INF) or miscellaneous (MISC) document, or a list or website maintained by the secretariat or depositary. Or a hybrid approach could be used, housing the central elements of NDCs in an annex that is part of the core agreement, and the more detailed substance of NDCs outside the core agreement in national schedules.

Where NDCs are housed has no direct bearing on their legal character, as noted above; that is determined by the provisions of the core agreement addressing NDCs. Nevertheless, the question of where NDCs are housed has considerable practical implications.

First, if NDCs are to be an integral part of the core agreement, they would arguably be part of the package that states would need to ratify or otherwise accept in order to become a party. This raises the question of what a state could do if it does not wish to endorse another state’s NDC, short of not joining the agreement. The need to formally accept other states’ NDCs could thus create a chilling effect on the ratification of the instrument.

Second, since annexes are ordinarily adopted concurrently with their underlying agreement, housing NDCs in an annex would either require parties to finalize their NDCs in Paris (which some parties may not be in a position to do), or require the establishment of a procedure to modify the annex after the core agreement is adopted.

Third, where NDCs are housed could affect the ease with which parties will be able to update them over time. Locating NDCs in a website and permitting parties to update them unilaterally, for instance, would allow for seamless and instant updating of NDCs, while locating NDCs in an annex accompanied by formal amendment requirements could render updating a lengthy process. It is worth noting, however, that it is possible to include simplified fast-track amendment procedures for annexes. So it is not principally the location of the NDCs but the process that is set for their revision—in particular, whether updating is done unilaterally or through a multilateral process—that will determine how easily parties can update NDCs.

Finally, the placement of NDCs inside or outside the core agreement could be relevant if the text of the agreement is ambiguous concerning the legal status of NDCs. In that event, if NDCs are inscribed in the document, there would be a presumption that they form an integral part of the agreement. If NDCs are located elsewhere, the characteristics of the documents in which they are housed would ordinarily attach to the contributions.

DIFFERENTIATION

It is worth noting that both housing and anchoring of contributions could be differentiated across commitment types and/or countries or categories of countries. For instance, different instruments or types of instruments could house the NDCs of different countries, categories of parties, and/or types of contributions. Similarly, anchoring provisions could vary for different types of contributions and/or categories of parties.

TIMING

Parties must also consider the timing and process of translating the *intended* NDCs parties are currently submitting¹⁶ into *final* NDCs. Given uncertainties about what rules, if any, will be adopted in Paris relating to NDCs and what rules may be adopted later, it could be difficult for states to turn intended NDCs into final NDCs in Paris. The agreement could allow parties to make technical adjustments to their intended NDCs to reflect any rules adopted and require them to submit their final NDCs upon formally accepting or ratifying the agreement. If NDCs are not finalized in Paris, a significant issue will be how to reflect parties' intended NDCs in the Paris outcome. They could, for example, be listed in an INF document that the COP takes note of or they could continue to be housed solely on the UNFCCC website. Given the provisional nature of intended NDCs, and the lapse of time between submission of intended and final NDCs, a "no backsliding" provision may be helpful in providing assurance that parties will not regress from the level of effort in their INDCs when they join the Paris agreement and finalize their NDCs.

RELATIONSHIP OF THE PARIS OUTCOME TO THE UNFCCC AND KYOTO PROTOCOL

In fashioning the Paris agreement, parties must consider its relationship to its parent agreement, the UNFCCC,

and to the Kyoto Protocol, a legal agreement under the UNFCCC that technically will remain in force even after the entry into force of the Paris agreement.

IMPLICATIONS OF "UNDER THE CONVENTION"

The Durban Platform launched negotiations toward a 2015 climate agreement "under the Convention."¹⁷ This proviso could have several possible implications.

One clear implication is that the Paris outcome will be developed under the authority of the UNFCCC and will be part of the Convention's architecture. Since any instrument adopted by the COP pursuant to Article 7, 15, or 17 would, *ipso facto*, be under the Convention, this condition would be satisfied.

Another implication is that the provisions of the Convention that explicitly apply to "related legal instruments" would apply to the 2015 agreement. Three provisions of the Convention do so: the ultimate objective specified in Article 2, the implementation review authority of the COP under Article 7.2, and the dispute settlement procedure provided for in Article 14.

In addition, the negotiating context for the term "under the Convention" in the Durban Platform decision suggests that parties intended the principles of the Convention to continue to be relevant to the 2015 agreement. Article 3 of the UNFCCC provides that its principles are to guide the parties "in their actions to achieve the objective of the Convention and to implement its provisions."¹⁸ The 2015 agreement is intended to "fulfill the ultimate objective of the Convention,"¹⁹ which suggests that the principles of the Convention will be engaged.

Other possible implications, with differing levels of support among parties, are that the 2015 agreement: be subservient to the UNFCCC; build on the existing work done under the Convention, for example, relating to MRV, adaptation, and finance; make use of the same institutions as the UNFCCC; and/or be modeled on the UNFCCC, and include the annex structure reflected in Article 4. The last has proven particularly controversial, with some parties arguing that consistency with the UNFCCC requires that the 2015 agreement conform to the "principles, provisions and structure of the Convention" and not "rewrite, restructure, replace, or reinterpret the Convention or its principles or adopt something outside of it."²⁰ Other parties contend that there is a difference between being consistent with the UNFCCC and being modeled on the UNFCCC, and that the Paris

agreement need not incorporate the Convention's annex structure. As these parties argue, since the UNFCCC does not mandate that the annex structure apply to related legal instruments, there would be no inconsistency in adopting a different approach.

INSTITUTIONAL RELATIONSHIPS

Parties need to consider the institutional relationships that should exist between the UNFCCC, Kyoto Protocol and the 2015 agreement. International treaty regimes involving multiple legal instruments reflect a variety of institutional arrangements between their component parts.

One approach is to have different institutions for each separate legal agreement. For example, the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer create separate meetings of the parties, each with its own rules of procedure and agenda.²¹ Similarly, the Kyoto Protocol established a meeting of the parties that meets concurrently with but is distinct from the UNFCCC's conference of the parties.

Alternatively, related legal agreements can use the same institutions, with a voting rule to ensure that only parties to a given instrument may vote on issues relating to that instrument. For example, the Protocols to the Long-Range Transboundary Air Pollution Convention (LRTAP) all make use of the LRTAP Executive Body, even though the Executive Body includes representatives of all Convention parties, not just Protocol parties. The mandate of the Executive Body with respect to protocols is specified in the protocols themselves, rather than in LRTAP, which does not expressly provide that the Executive Body may act as the governing body of protocols. Similarly, the Marine Environment Protection Committee of the International Maritime Organizations serves, in effect, as the meeting of the parties to the International Convention on the Prevention of Pollution from Ships (MARPOL) as well as its various annexes.

When an agreement uses the institutional arrangements of another agreement, rather than establishing its own, this raises the question of whether and how decision-making will be limited to the parties. Generally this has not proved to be a problem in practice, since in most multilateral environmental regimes, decisions are taken by consensus and the need to distinguish between parties and non-parties has not arisen. However, in order

to ensure that parties retain decision-making authority, the 2015 agreement might provide that only parties be allowed to vote on issues relating to that agreement.

CONCLUSION

The Durban Platform's requirement that the Paris outcome have "legal force" suggests that the core agreement adopted in Paris must constitute a treaty within the meaning of the Vienna Convention on the Law of Treaties. But two important points should be noted. First, treaties can contain a mix of binding and non-binding provisions; thus, not all the provisions of the Paris agreement need to create legal obligations. Second, treaties can go under many names, and the exact title of the Paris agreement is legally irrelevant to the legal character of its provisions.

The legal character of NDCs under the Paris agreement will be determined by the provisions of the agreement, rather than by where NDCs are housed. NDCs could be made an integral part of the agreement, and yet not represent legal obligations, if the agreement establishes only procedural rather than substantive obligations. Conversely, NDCs could be housed outside the agreement on the UNFCCC website, and yet still be legally binding if the agreement requires parties to achieve them. Thus, although the location of NDCs has various practical implications, it does not determine their legal character.

Finally, the requirement that the Paris outcome be "under the Convention" rules out results that would be inconsistent with the Convention, but does not necessarily require that the Paris agreement be modeled on the UNFCCC or have the same structure. Parties have a great deal of flexibility in designing the Paris agreement, including the agreement's commitments and institutional arrangements.

ENDNOTES

1 United Nations Framework Convention on Climate Change 1992, 1771 UNTS 107 [hereinafter "UNFCCC"].

2 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 (March 15, 2012) [hereinafter "Durban Platform"], para 2.

3 See generally for detailed commentary and references on these issues, Lavanya Rajamani, *Negotiating the 2015 Climate Agreement: Issues relating to Legal Form and Nature, Mitigation Action Plans and Scenarios (MAPS) Programme*, South Africa (May 2015).

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

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

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

7 Vienna Convention on Law of Treaties, 1969, 1155 UNTS 331, Art. 2.1(a). It is worth noting that the term “treaty” in the Vienna Convention sense is not the same as the term “treaty” within the meaning of Article II of the US Constitution. The vast majority of international agreements to which the US is a party were not approved as “treaties” pursuant to Article II; instead, they were adopted as so-called executive agreements, in most cases with the authorization of Congress.

8 See e.g. 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 (April 30, 2012), 33-34 (noting 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 Cancún Agreements with differing degrees of bindingness under the provisions of domestic and international law under the FCCC.”)

9 See Jutta Brunnée, *COPing with Consent: Law-making under Multilateral Environmental Agreements*, 15 Leiden Journal of International Law 1, 33 (2002).

10 A COP decision is binding only if the Convention provides a hook, requiring parties to follow the decision. For example, Article 4.1(a) requires parties to use comparable methodologies to be agreed by the COP in preparing their national GHG inventories.

11 United Nations Office of Legal Affairs Treaty Section, “Definition of Key Terms in the UN Treaty Collection,” https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.

12 Anthony Aust, *Modern Treaty Law and Practice* 20, 23 (2d ed. 2007).

13 See ‘Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change,’ FCCC/CP/1997/7/Add.1 (March 25, 1998).

14 For a general overview of entry-into-force provisions, see United Nations, *Handbook of Final Clauses of Multilateral Treaties* (2003).

15 Warsaw ADP Decision, para 2(b).

16 See INDC Portal, available at: http://unfccc.int/focus/indc_portal/items/8766.php

17 Durban Platform, para 2.

18 FCCC Art. 3, chapeaux.

19 Durban Platform, preambular recital para 3.

20 See e.g. LMDC views on identification of elements in ADP Workstream 1 (November 18, 2013), para 3, available at: http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp2-3_lmdc_workstream_1_20131118.pdf, and Submission by LMDCs, Submission on Elements of the 2015 Agreed Outcome (March 9, 2014), available at: http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_lmdc_wsl_20140309.pdf.

21 Vienna Convention art. 6 (creating conference of the parties to the Convention); Montreal Protocol art. 11 (creating meeting of the Protocol parties, to be held in conjunction with the Convention COP, but with its own rules of procedure).



The Center for Climate and Energy Solutions (C2ES) is an independent nonprofit organization working to promote practical, effective policies and actions to address the twin challenges of energy and climate change.