

# STRUCTURE OF A 2015 CLIMATE CHANGE AGREEMENT



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Governments are aiming to produce a new global climate change agreement in 2015 in Paris. Past outcomes of the UN climate negotiations—like many other multilateral environmental regimes—consist of packages containing different types of instruments. It is likely that the outcome of the ongoing Durban Platform negotiations will, likewise, be comprised of multiple instruments. This brief provides an overview of: 1) the structure of earlier climate packages; 2) key considerations bearing on the choice of instruments in a Paris outcome; and 3) the range of instruments available to parties.

## THE UNFCCC REGIME THUS FAR

The UN Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, and Copenhagen/Cancun outcome illustrate some of the different ways of structuring an international regime.

The UNFCCC regime consists of (1) a core agreement, which took the form of a convention; (2) annexes listing the countries subject to certain specific commitments relating to mitigation, finance, technology, and reporting; and (3) subsequent decisions by the Intergovernmental Negotiating Committee and the COP, establishing the rules for particular elements of the agreement, such as the communication of information.

Similarly, the Kyoto Protocol regime consists of (1) a core agreement, which took the form of a protocol to the UNFCCC; (2) two annexes, defining the gases and sectors covered, and listing the quantified emission limitation and reduction objectives (QELROs) for Annex I parties; (3) a concurrent COP decision addressing methodological issues, including the global warming potentials to be used by parties; and (4) the Marrakesh Accords, establishing the rules for particular Protocol provisions, including emissions trading, the Clean Development Mechanism, reporting and review, accounting of the land sector, and compliance.

In contrast, the Copenhagen/Cancun outcome consists of (1) a political declaration adopted by twenty-eight states in Copenhagen; (2) a set of COP decisions adopted the following year in Cancun, formalizing the provisions of the Copenhagen Declaration; (3) information (INF) documents, listing states' mitigation pledges; (4) subsequent COP decisions, specifying the rules for particular elements of the Cancun Agreements, such as international assessment and review (IAR) and international consultation and analysis (ICA); (5) the governing instrument for the Green Climate Fund; and (6) a registry of developing country NAMAs seeking international funding.

## KEY CONSIDERATIONS

Structuring the Durban Platform outcome to be achieved at COP 21 in Paris involves two overarching and inter-related dimensions:

- (1) which instruments to include and how to allocate particular elements of the outcome across these instruments; and
- (2) when to adopt an instrument, in Paris or subsequently.

A number of legal, political and policy considerations are relevant to decisions about which instruments to include, where to address a given issue, and when. These include:

- **Legal character**—Some parts of the outcome can be made legally binding and others not. The legal character of a particular provision depends both on the type of instrument in which it is included, and whether it is formulated in legally-binding terms.
- **Fixed vs. changeable**—Different instruments can have different amendment rules, with greater or lesser degrees of flexibility. For example, rules set forth in a COP decision can be revised through a subsequent COP decision, rather than requiring a treaty amendment. Similarly, many multilateral environmental agreements establish more flexible rules for amendments to annexes than for amendments to the core agreement.
- **Top-down vs. bottom-up**—Some elements of the outcome can be internationally negotiated, while others can be nationally determined, or a blend of the two.
- **Optionality**—While some elements may be mandatory, others can be optional (through either opt-out or opt-in procedures).
- **Readiness**—Issues that are not ripe for decision in Paris, or require further technical work, can be addressed subsequently, through additional agreements or COP decisions.
- **Credibility**—Certain elements may be essential to complete in Paris in order for the outcome to be broadly accepted as “climate-credible.”
- **Parity**—The distribution of elements across the different instruments, and their timing, could affect perceptions of the balance or parity among core elements of the outcome.
- **Ratifiability**—The structure of the outcome, and whether and how particular issues are addressed, could make it easier or harder for individual states to join, thereby facilitating or deterring participation and entry into force.

## RANGE OF AVAILABLE INSTRUMENTS

Like the UNFCCC, Kyoto Protocol, and Copenhagen/Cancun regimes, the Durban Platform outcome could

include a variety of different instruments—for example:

- A core legal instrument.
- Annex(es).
- Ancillary instruments whose content is nationally-determined, such as schedules, registries, or INF documents.
- COP decisions addressing particular issues in greater detail, such as accounting, accountability, and so forth, adopted either at COP-21 or thereafter.
- A political declaration.

A given issue or element could be addressed in multiple instruments (in the immediate Paris outcome and/or over time). For example, the core agreement might contain a general provision, with the detailed rules set forth in an annex or in a subsequent COP decision.

## CORE AGREEMENT

The core agreement of the 2015 Durban Platform outcome could take the form of a protocol, UNFCCC amendment, or other ancillary agreement to the UNFCCC with legal force. Article 15 of the UNFCCC sets forth the rules for the adoption, acceptance, and entry into force of amendments. It provides that amendments to the Convention shall be adopted by consensus if possible, and otherwise by a three-quarters majority vote; must be ratified or otherwise accepted by three quarters of the parties in order to enter into force; and apply only to those parties that express their consent to be bound. In contrast, the UNFCCC does not establish any rules for the entry into force of protocols, so a Paris protocol would need to specify its own entry-into-force requirements.

The content of the core agreement could include, *inter alia*, objectives, principles, commitments, institutional arrangements, accountability mechanisms, amendment procedures, provisions addressing subsequent contribution periods, and provisions anchoring any ancillary instruments.

As a legal agreement, the core agreement would apply only to those states that have expressed their consent to be bound by means of ratification, acceptance, approval or accession.

Although the core agreement would be a legal instrument, it could include provisions that are not legally

binding. For example, the emissions reduction target for Annex I parties set forth in Article 4.2 of the UNFCCC is formulated as an “aim” rather than a legal commitment. Similarly, a number of provisions in the Minamata Mercury Convention address what parties “may” do rather than what they “shall” do (for example, articles 7.4, 8.6). An important question relating to the core agreement will be which provisions to formulate as commitments and which to formulate in other terms.

## ANNEXES

Multilateral environmental agreements often include annexes or appendices, which are considered an integral part of the core agreement.

Annexes can serve several functions. Often, annexes address matters that may require more frequent revision than the core agreement, for which more flexible amendment procedures are appropriate. Many multilateral environmental agreements make it easier to amend annexes than to amend the agreement itself—for example, by allowing annex amendments to be made by a two-third or three-quarters majority vote and by providing that annex amendments apply to all parties unless a party opts out within a specified period of time.

Annexes can also be used to address technical issues or specialized sub-issues of the core agreement. For example, an agreement may set forth the rules for arbitration in an annex rather than in the core agreement.

Annexes can consist of lists or they may contain detailed provisions. Annexes A and B of the Kyoto Protocol list the sectors and gases covered by the agreement and the QELROs of Annex I parties, respectively. In contrast, the three annexes to the Desertification Convention specify regional implementation measures for Africa, Asia, and Latin America. Similarly, the annexes to the International Convention for the Prevention of Pollution from Ships (MARPOL) represent mini-conventions, setting forth detailed rules regarding the various types of vessel-source pollution (oil pollution, sewage, garbage, etc.).

Annexes may be mandatory or optional for parties to the core agreement. For example, MARPOL originally had five annexes, two of which were mandatory (addressing oil pollution and hazardous substances carried in

bulk) and three of which were optional (addressing hazardous substances carried in packaged form, sewage, and garbage).

## SCHEDULES/REGISTRIES/INF DOCUMENTS

A core agreement can provide for ancillary instruments, variously termed schedules, lists, registries or INF documents. Depending on the terms of the core agreement, the content of these ancillary instruments may be nationally determined, or may be subject to international disciplines or to international negotiation. For example:

- Under the General Agreement on Tariffs and Trade (GATT), each party has a schedule listing the tariff concessions and other commitments it has made. The GATT gives parties some leeway in changing their schedules, subject to certain disciplines.
- The Ramsar Convention establishes a List of Wetlands of International Importance, and allows parties to unilaterally designate wetlands for inclusion on the list.
- The Cancun Agreements provide for two INF documents, listing the commitments and actions by parties relating to mitigation, along with a NAMA registry listing developing country NAMAs (nationally appropriate mitigation actions) seeking international support.

The rules governing modifications/revisions of an ancillary instrument are typically specified in the core agreement. For example, the GATT sets forth the rules for modifications of national schedules; similarly, the Ramsar Convention specifies the rules for modifying a wetlands listing.

## COP DECISIONS

Like annexes, COP decisions can be used to address particular issues in greater detail. For example, the COP has adopted decisions addressing the methodologies to be used for greenhouse gas inventories, and spelling out the procedures for International Assessment and Review (IAR) and International Consultation and Analysis (ICA).

Although, generally, COP decisions are not legally binding, the core agreement can authorize the COP to make decisions that are binding on the parties. For example, the methodologies for greenhouse gas

inventories adopted by the COP pursuant to Article 12.1(a) of the UNFCCC, or the rules for emissions trading adopted by the CMP pursuant to Article 17 of the Kyoto Protocol, are binding on parties.

In contrast to annexes, COP decisions do not have any special requirements relating to adoption and amendment, and do not require ratification, acceptance, approval or accession by states. In theory, this makes COP decisions easier to revise, and hence more flexible, than the core agreement or its annexes—although in the absence of formal rules of procedure, the default consensus rule within the COP can make decision-making difficult.

COP decisions can be adopted concurrently with the core agreement, or the agreement can authorize or direct the COP to elaborate rules on an issue in the future, for issues not yet ripe for decision or for which there was insufficient time to negotiate. For example, the UNFCCC directed the COP to consider establishing a multilateral consultative process to address questions of implementation (Article 13). Similarly, the

Kyoto Protocol directed the CMP to adopt guidelines for reviews of Annex I parties by expert review teams (Article 8.1), to “elaborate modalities and procedures” for the CDM (Article 12.7), to “define the relevant principles, modalities, rules, and guidelines” for emissions trading (Article 17), and to “approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance” (Article 18).

## POLITICAL DECLARATIONS

A political declaration can be part of a broader multilateral outcome, serving either as a substitute for or as a complement to a core legal agreement or a COP decision. The Copenhagen Accord was a political declaration adopted at COP-15, in lieu of a legal agreement. In contrast, the 2015 outcome could include a core legal agreement accompanied by a political declaration containing additional political commitments by some or all parties or addressing issues that some or all parties do not wish to address in a legal instrument.

### Other C2ES Resources:

*Toward 2015: An International Climate Dialogue*

*Parties' Submissions to the UNFCCC Ad Hoc Working Group on the Durban Platform*

*Building Flexibility and Ambition into a 2015 Climate Agreement*, June 2014

*Issues for a 2015 Climate Agreement*, May 2014

*Evolution of the International Climate Effort*, May 2014

*The Durban Platform: Issues and Options for a 2015 Agreement*, December 2012

Available at [www.c2es.org/international/2015-agreement](http://www.c2es.org/international/2015-agreement)



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