

## Ahead of Paris: a look at the legal form options for the climate agreement

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In an attempt to reach a new agreement to curb GHG emissions and to deal with the impacts of climate change, countries are negotiating a new deal on climate for the period post 2020. This new international agreement is scheduled for adoption at the next Conference of Parties to be held in Paris in December this year (COP 21).

So far, the negotiations have centered their attention on the content of the agreement, deferring the decision on its legal form remains to be resolved. Apart from setting out that the agreement could be 'a protocol, another legal instrument or an agreed outcome with legal force under the Convention' (Durban mandate) no further specification as to what is intended or covered by each of these options has been agreed. As Paris approaches, the legal form question needs to be addressed with urgency. Clarity about the contours and instruments compounding these three options is paramount; more so, as the outcome in Paris is likely to be a 'package', comprising not one, but a combination of instruments of different legal character.

The 2015 agreement could take the form of a 'protocol' under Article 17 of the UNFCCC. A protocol would be a new international treaty, formally binding on all ratifying Parties according to the general rules of international law. The requirements for its entry into force will be established in the language of the protocol itself. For instance, Parties could agree that a number of ratifications representing a certain percentage of global GHG emissions would be a requirement for the protocol to enter into force.

Although the UNFCCC (Art. 17) envisages the adoption of protocols for the further implementation of the Convention, Parties are free to call a new international treaty on climate by another name (e.g. Covenant, Implementation Agreement, or just Agreement). A protocol (or which ever name it takes) could also have annexes, attachments or appendices, which would form an integral part of it.

While the 'protocol' option is clear, the term 'another legal instrument' is open to at least two different interpretations. For Bavishi, R. the fact that 'another legal instrument' is written alongside 'protocol' could suggest that this option refers to another international treaty of equivalent character (e.g. a convention, charter)<sup>1</sup>. A second interpretation is that 'another legal instrument' refers to amendments to the Convention or its annexes in accordance with articles 15 and 16 of the UNFCCC. Such amendments would be legally binding in nature, and could modify any aspect of the UNFCCC, including provisions defining its scope, objective and principles. According to article 15.2, however, the text of any proposed amendment needs to be communicated to the Parties at least 6 months before the meeting of the Parties at which it is intended for adoption, in this case, COP 21 in December. No proposed amendment has been put forward within this six-month notice, meaning that such option has not been pursued.

The most contentious part of the Durban mandate concerns the final option: 'agreed outcome with legal force under the Convention'. For Werksman, J. this alternative seems to be designed to allow room for an outcome that does not take the form of the legal instruments expressly contemplated in the Convention; namely – as refer above, a Protocol (art. 17) and amendments to the convention or its annexes (arts. 15 and 16) but is still 'under the Convention'.<sup>2</sup> Furthermore, the description 'with legal force' signals something less stringent than 'legally binding', intending to offer an option clearly softer.

In a submission in 2012, India expressed the view that whereas a 'protocol' or 'another legal instrument' are legally binding outcomes, an 'agreed outcome with legal force' could be an outcome whose legal force derives from a country's domestic law.<sup>3</sup> As noted by Bodansky, D. under this interpretation, one may argue that voluntary commitments on mitigation for example could meet this requirement if they

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<sup>1</sup> Bavishi, R. (2012) *Unwrapping the Durban Package*. Briefing Paper, March 2012, Legal Response Initiative (LRI) London, United Kingdom

<sup>2</sup> Werksman, J. (2011) *Q & A: The legal aspects of the Durban Platform text*. December 2011

<sup>3</sup> See submission of India at p. 33 para 7. *Views on a work plan for the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Submissions from Parties*, UN Doc. FCCC/ADP/2012/MISC.3 30 April 2012, available at <http://unfccc.int/resource/docs/2012/adp1/eng/misc03.pdf>.

were captured in binding national legislation.<sup>4</sup>

Commentators have also pointed out that this outcome could refer to COP decisions.<sup>5</sup> Under this interpretation, the Paris agreement could take the form of a COP decision, or set of decisions. Nonetheless, if the Paris agreement consisted of COP decisions alone, it would probably not satisfy the criterion of 'legal force' in the Durban mandate. This is because, strictly speaking, COP decisions are not legally binding. The COP can take decisions to promote the effective implementation of the Convention and although they are often framed in mandatory language their decisions are not considered legally binding on the Parties to the UNFCCC.

Despite the above, the political force of COP decisions should not be underestimated. When the COP adopts a decision, there is a legitimate expectation that States would act in accordance with that decision. Moreover, COP decisions can gradually create and fill a normative and institutional framework that compels Parties into certain activities. The Clean Development Mechanism for example was operationalised through COP decisions. As not everything can be contained in the core agreement it is almost certain that COP decisions will form part of the Paris outcome. These might address issues in more detail and/or focus on implementation aspects and institutional arrangements not contemplated in the agreement.

### **A Paris 'package'**

At present, many Parties seem to be in favour of a 'mix bag' outcome, comprising instruments of different legal form – in other words, a 'package'. This would be formed by a core agreement (possibly, a legally binding 'protocol') accompanied by COP decisions. Annexes to the core agreement (which would form an integral part of it) and, eventually, political declarations on some aspects, might also form part of this so-called 'package'.

For many countries, a 'protocol' under art. 17, is indeed the preferred outcome. As States would be required to manifest their consent to be bound (normally through ratification), this instrument signals the highest form of political will in which governments express their consent to act. Countries would buy into the agreement as States, meaning that commitments will survive eventual changes in administration. Under a legally binding treaty, State's conduct is not optional, which provides trust and credibility not only among the Parties to the agreement, but also among other stakeholders – it would be easier for civil society to hold governments accountable. But despite the legal certainty provided by this legal form, this outcome might also pose risks and limitations: if countries are concerned about the costs of stringent and enforceable commitments, a protocol may fail to secure wide participation or incentivise the ambition required. As a result, as noted by Maljean-Dubois, S; *et al*, there could be a de facto two-track system with different regimes for Parties to the Paris protocol and Parties to the UNFCCC only.<sup>6</sup>

But even a legally binding protocol adopted under article 17 of the UNFCCC could contain only general provisions that do not create legal rights and obligations. Provisions can be softly worded or formulated in ambiguous terms. These can refer to general aspirations, commending Parties to 'increase efforts' without creating legal obligations as such. For the Paris agreement it is important to consider that legal form alone will not determine its strength or legal force. Its content, with precise, prescriptive language, specifying expected activities and outcomes from States, is crucial. Additionally, even if the content is prescriptive – the strength of compliance procedures, mechanisms, or even sanctions for addressing non-compliance, might influence the degree of enforceability by States.

The Paris package might also contain one or more political declarations. As COP decisions require consensus for adoption, a sub-set of Parties could arrive at political declarations on outstanding issues. These might be considered an appropriate vehicle to address issues not covered in the core agreement. But owing to the fact that political declarations are soft law instruments, with no formal legal standing to the Parties or the Secretariat, considerable uncertainty remains about their strength and actual effect.

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<sup>4</sup> Bodansky, D. (2012) *The Durban Platform: issues and options for a 2015 agreement*, Center for Climate and Energy solutions (C2ES), December 2012.

<sup>5</sup> *Unpublished*. Options of the Legal Form of the 2015 Climate Agreement: Considerations for Africa.

<sup>6</sup> Maljean-Dubois, S., Wemaëre, M., Spencer, T. (2014). *A comprehensive assessment of options for the legal form of the Paris Climate Agreement*, Working Papers N°15/14, IDDRI, Paris, France.

Political declarations, however, can still be influential and have considerable degree of political force. The Copenhagen Accord for example was negotiated by heads of State of the world's largest economies, capturing self-selected targets and actions.

The legal form could be left for political discussion as long as the content of the 2015 agreement enhances the implementation of the Convention. Parties need to examine the content of the 'Paris Package', as obligations from the agreement can be categorised in several ways. The agreement could for instance include obligations of efforts from Parties (designing policies and measures), obligation of result from Parties (targets on GHGs) or include procedural obligations (compliance and reporting).

The threat posed by climate change to human societies and the planet requires the 'widest possible cooperation by all countries and their participation in an effective and appropriate international response' (Decision 1/CP.17 preamble). The 2015 agreement should strive to maximise ambition while at the same time retaining flexibility to achieve the broadest possible participation. The challenge ahead lies in finding a legal design that balances out these inter-linked factors. Of key importance would be to set aside issues that, given its significance, should be placed in the core agreement with stringency and more detail, and other matters that can be placed in supplemental documents. Choosing the right combination of instruments might be in fact be the key to accomplish an effective and enduring climate change regime. Let's hope that countries raise to the challenge.