The Legal Form of the Paris Climate Agreement: a Comprehensive Assessment of Options

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For many years, the issue of the legal form of the new climate agreement has hovered over the international negotiations. Countries have insisted on first discussing substance. Indeed, it is here that the main divergences remain. However, one year out from the Paris climate conference, it is time to open the discussion on the legal form of the final agreement. The issue of legal form is often reduced to the negotiation of a ‘binding’ or ‘non-binding’ agreement. The bindingness of an international environmental agreement however depends on multiple parameters. We propose four parameters to be considered: the form of the core agreement; the ‘anchoring’ of commitments; mechanisms for transparency, accountability and facilitation; and mechanisms for compliance. Parties should assess pros and cons of these options, and the agreement should be optimised across all four, combining flexibility and credibility.

I. Introduction

In Durban, Parties to the United Nations Framework Convention on Climate Change¹ have agreed to negotiate a new climate agreement by the end of 2015.² The mandate for these negotiations sets out a certain number of parameters that the new agreement should reflect. Firstly, the agreement will be “under the Convention”, i.e. respecting the principles and objectives of the Convention. This includes in particular the ultimate goal of the Convention as described in Article 2 and subsequently elaborated in 2010 under Decision 1/CP.16, namely to hold warming to below 2 degrees. Achieving this level of mitigation will require widespread participation, a robust and credible regime, and a dynamic approach to increasing ambition over time. Secondly, the Paris agreement will be “applicable to all”, i.e. attracting the broadest possible participation consistent with the global nature of climate change, and reflecting the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC) “under the Convention”. Thirdly, the Paris agreement will be a multilateral, rules based regime, grounded in a “protocol, another legal instrument or an agreed outcome with legal force”.

Since Parties have agreed at COP 19 in Warsaw that their contributions to this instrument would be determined at the national level, it is crucial that the instrument is effective³. Effectiveness can be seen in terms of implementation to ensure that Parties deliver their contributions, and in terms of adequacy to ensure that aggregated individual contributions progressively achieve the long-term global goal. Consequently, the agreement should be both dynamic and durable. Many Parties have expressed the need to have an instrument that can be strengthened progressively over time, without burdensome renegotiation. The instrument to be adopted at COP21 in Paris should balance the need for flexibility, experimentation and innovation, with the need for credibility and

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³ See the Decision 1/CP.19 of the Conference of Parties, Further advancing the Durban Platform, UN Doc FCCC/CP/2013/10/Add.1, 31 January 2014.
ambition of the instrument and nationally determined contributions (NDCs). There are still some open questions regarding the legal nature of the 2015 agreement and of its constituent elements. Achieving at the same time the objectives of adequacy, universality and fairness, legal robustness, dynamism and durability will require a careful and comprehensive approach to legal form, maximizing synergies and balancing any potential trade-offs between objectives. The objective of this article is precisely to give an overview of key aspects of the new agreement’s legal form; the options available; and the potential interactions between them. After setting out the conceptual framework (II), it will address the form of the agreement (III), discuss the options for the legal form of the core agreement (IV) and for the anchoring of commitments (IV), the issue of transparency and facilitation of action (V) and compliance and enforcement (VI).

II. The Conceptual Framework

1. Clarification of the Terminology from a Legal Point of View

The Durban Platform has launched “a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties (...)”. Before discussing the options on legal form for the instrument to be adopted at COP21 in Paris, it is necessary to clarify some key concepts upfront.

In this way, “legal” is an adjective “qualifying substantives to indicate that they have a relation to the Law.” From that perspective, a legal norm or standard can be distinguished from a moral, social, ethical or religious norm or standard. However, a legal norm does not necessarily have a binding character or legal force.

A norm is “legally binding” only when it creates a legal obligation. In international public law, a legally binding norm provides for a legal link whereby a subject of international law can be bound vis-à-vis others to adopt a determined behaviour. This is the case when a norm finds its origin in a formal source of international law (treaty, customary rules, general international law principles, unilateral acts). Apart from the formal source of the legal norm, it is important to examine its content. Very often, legal obligations laid down by international treaties and agreements, although legally binding in form, are so softly worded, contingent or conditional, as to be devoid of real normative force.

“Legally enforceable” means that the legal norm is backed by procedural mechanisms that can mobilize various “disciplines” in order to ensure that States comply with their obligations. These mechanisms include transparency and facilitation, as well as compliance and enforcement. Conversely, a legal norm may be legally binding but not legally enforceable if there are no such mechanisms to support and eventually ensure its implementation. This is the most frequent situation found in international law. Such mechanisms may be established for the purposes of ensuring the implementation of provisions laid down by a legally binding instrument (international treaty or agreement) or by a non-legally binding instrument (for example a resolution adopted by an international organisation) even if the latter tend to be weaker. While such mechanisms can contribute to strengthening the normative force of a resolution that is not legally binding, they cannot on their own give a legally binding character to such resolutions.


In contrast to binary visions opposing law to non-law, or hard-law to soft-law, one has to acknowledge that the normative force of international environmental law operates along a spectrum. For example, even if soft law instruments are non-binding at first glance, in practice they can however have some legal effect. States often take great care when negoti-
ating such instruments, and occasionally include mechanisms to ensure the transparency and implementation of their actions under the soft law instrument in question. This provides convincing clues of the degree of normative force of such instruments. On the other hand, even in hard law numerous norms are non-binding because they have not been written as prescriptive norms, or have been written using such generic terms that they cannot be applied without additional precision. This is the case for almost all of the provisions of the Rio Convention on Biological Diversity, which begin with both: “Each contracting party shall, as far as possible, and where appropriate” or with “Each contracting party shall, in accordance with its particular conditions and capabilities” 10.

The degrees of normativity and effectiveness of soft law instruments are in fact variable. The absolute divide between hard and soft, between binding and non-binding does not stand up to an in-depth analysis. 11 Therefore, in order to assess the legal nature of an instrument, we propose to use the three following criteria:

- A formal criteria: is it embedded in a formal source of law or not, i.e. treaty, customary rules, general international law principles, unilateral acts. How was the norm adopted? By what organ, with what authority? According to what decision-making process? Did some States express reservations? If yes, which States?

- A substantive criteria: are the legal norms expressed in precise and prescriptive language? Or are they vague and hortatory?

- A procedural criteria: does the instrument include the capacity to mobilize relevant ‘disciplines’ in order to promote and ensure implementation of agreed norms? These include a robust transparency, accountability and facilitation mechanism, but they may also include a compliance and enforcement mechanism.

The inclusion of these criteria demonstrates that it is necessary to assess the instrument as a whole in determining its legal nature on the spectrum between hard and soft law, binding and non-binding. Likewise, it is necessary to assess the instrument as a whole when considering the above mentioned criteria of adequacy, universality and fairness, legality, and dynamism and durability.

III. The Legal Form of the Paris Agreement as the Result of Four Key Parameters

Since the Bali Conference, Parties have decided that the legal form should follow substance. However, it is difficult to make progress on substance as long as uncertainty remains on the legal form, in particular on the legally binding character of NDCs and the way the instrument may reflect differentiation (legal symmetry versus differentiated rights and obligations). To generate this comprehensive view, Parties should consider the legal form of the instrument to be adopted at COP21 in Paris in the light a number of parameters that emerge from the current negotiations:

- The form of the core agreement and its relationship to substantive contributions: although there is no consensus yet on the legal form, negotiations seem to be heading towards a hybrid instrument, with a number of Parties calling for a “core” agreement which may be supplemented by other instruments.

- The “anchoring” of NDCs: the legal effect of NDCs may depend on the way they are “anchored” in the Paris agreement.

- A mechanism for transparency, accountability and facilitation: the mechanisms to ensure transparency of actions undertaken by Parties can help to mobilize reputational incentives, and thus contribute to the normative force of the regime; in addition, this mechanism could undertake a facilitative role providing technical advice and mobilizing the resources of the regime to assist implementation.

- A mechanism for compliance and enforcement: parties may wish to create a mechanism for compliance and enforcement.

These four pillars and their relationship with the issue of legal form are summarized in figure 1 below.

For each of these four key parameters, Parties can choose between different options. Indeed there are
trade-offs among the parameters depending on the option chosen for each of them.

IV. The Legal Form of the Core Agreement

In Durban, Parties have decided "to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the United Nations Framework Convention on Climate Change applicable to all Parties". From a legal perspective, this mandate includes two main options among which Parties have to choose: a "protocol" or "another legal instrument or an agreed outcome with legal force".

1. The Protocol Option

The "core" of the Paris agreement can take the form of a protocol to the Convention, the adoption of which would then be governed Article 17 of the UNFCCC. Such a protocol would be legally binding for all ratifying Parties according to the customary rule Pacta sunt servanda, embodied in the 1969 Vienna Convention on the Law of Treaties in its Article 26. The treaty form offers some advantages regarding

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12 Decision 1/CP.17, supra, note 2.
durability and robustness. Commitments enshrined in a treaty are not easily reversible, even though Canada’s withdrawal from the Kyoto Protocol shows that it is always possible.14 In order to enter into force, a treaty is subject to ratification, acceptance or approval by States, according to national procedures, often requiring the approval of national parliaments. Once a treaty has been ratified, a state incurs immediate legal obligations in international law. It must conform to all the obligations set down in a treaty and cannot generally avoid them without a good excuse (like force majeure) or unless it has formally expressed a reservation. Most importantly, ratifying an international treaty gives domestic effect to the treaty’s provisions, promoting political ownership, stakeholder participation in implementation, and mobilizing the disciplines of domestic law. In the context of a collective action challenge, a robust treaty can help to overcome concerns about free-riding, thus potentially increasing ambition.

However, there are also risks and limitations with this form of legal instrument. Firstly, a protocol may not incentivize ambition or wide participation, if countries are concerned about the potential sovereignty costs of stringent, enforceable commitments. From that perspective, a protocol could be less ambitious, with a lower level of participation, than a non-binding instrument, for example a COP decision. Secondly, States have to express their consent to be bound by a protocol. A protocol could be ratified by a limited number of Parties only, leading to a two-track system with different regimes for Parties and non-Parties to the new protocol. However, such risk may be limited if not completely removed through the possibility offered to Parties to make reservations or provisions in the protocol to accommodate their national circumstances.

2. The Option of “Another Legal Instrument or an Agreed Outcome with Legal Force”

“Another legal instrument” does not mean much in as far as the terms “instrument” and “legal” are vague and generic. Furthermore, legally speaking, it is quite difficult to distinguish between a “legal instrument” and an “agreed outcome with legal force”, having in mind that a legal instrument is not always legally binding (but may be in certain circumstances).15

Ultimately, there are two options that can reasonably be considered: either a revision of the 1992 Convention and/or its annexes or a COP decision or a set of COP decisions. From a legal point of view, these two options are different when looking at conditions for adoption, entry into force and legal effect.

A substantive amendment to the Convention can be adopted by ¾ majority, if consensus cannot be found.16 An amendment to the Convention has legal effect once it has entered into force. To enter into force, an amendment to the Convention needs to be ratified by ⅔ of Parties, and then only enters into force for those Parties that have ratified the amendment. Ratification could be a lengthy process, with the risk that the amended Convention applies to a limited number of Parties only while others continue to apply the original UNFCCC. Once it enters into force, there is no doubt that an amendment to the UNFCCC would be legally binding, as is the UNFCCC itself. As noted above, however, formal bindingness is not sufficient; unless combined with substantive precision and the existence of robust procedures to promote and potentially enforce implementation.

A COP decision requires consensus to be adopted, and can be applied immediately once adopted. However, the legal effect of COP decisions is ambiguous in international public law. What COP decisions add in terms of flexibility and expedience, they thus lose in terms of legal security.17 Undoubtedly, they have a practical effect by operationalizing the provisions of the Convention. In that respect, the UNFCCC provides that “the COP shall take, within the limits of its mandate, the necessary decisions to ensure the effective application of the Convention”.18

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14 See UNFCCC, supra, note 1, Article 27.
16 It is worth noting that the UNFCCC provides for a simplified procedure to allow the entry into force of amended annexes (by opting in and not opting in). However, this provision cannot be used because the Convention states that annexes “shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character” (Article 16). A schedule of nationally determined contributions could form such an annex, but in any event it would require a modification of the Convention itself, at least to make a legal link between the new annex and Parties’ commitments to implement its content.
18 UNFCCC, supra, note 1, Article 7, our emphasis.
Thus, a COP decision can have political force. But, as a legal tool, it is not automatically legally binding. The extent to which COP decisions can create new legal obligations, become a source of law or allow a change in the interpretation of the Convention’s provisions remains unclear and widely debated among Parties. The International Court of Justice ruled on the legal effect of resolutions of the General Assembly of the United Nations, noting that “even if they are not binding, [they] may sometimes have normative value.” The normative force of a COP decision, including its degree of ‘bindingness’, may depend on three central factors:

The recognition of the capacity of the COP to take binding decisions: some constitutive treaties grant the COP the capacity to take binding decisions; or this capacity could arise as the result of concerted practice. In this case, a COP decision can give rise to legal obligations in itself as a “legal instrument”, i.e., a formally binding act from an (almost) international legislative body. Such cases are limited, and in any case the UNFCCC does not provide for this capacity to take binding decisions for its COP.

The content of the COP decision: this includes the precision and prescriptiveness of its provisions, as well as the existence of mechanisms or procedures to scrutinize implementation by Parties. Nothing prevents scrutiny of Parties’ implementation of non-legally binding instruments at the international level. The assessment of the decision’s legal effect must be done on the basis of a case-by-case analysis of the content of the COP decision with regard to its objectives as well as of the Convention’s objectives.

- Unilateral or coordinated acceptance to be bound: A COP decision can create a legal obligation if this is expressly accepted by States. Such acceptance can be made individually; a unilateral act by a State can be a source of international law. If States commit on a unilateral basis to apply a COP decision in a clear, precise and unconditional manner, they are “bound” to implement it at the international level. It is not necessary to provide evidence of the acceptance of the unilateral act by other subjects of law. States’ acceptance may also be done jointly, where a treaty provides for it (i.e. the convention).

Even if it is not binding, a COP decision creates a new legal situation. First, a State must examine it in good faith to the extent it reflects the opinion of a majority of States, which are Parties to a Treaty that the State in question has also acceded to. Second, such a decision may contribute to the recognition of customary rules, and/or may be integrated later in the content of a treaty (this may be the case in the Paris Agreement for some of the body of decisions adopted since Copenhagen). Thirdly, for the purpose of applying a decision, a State can decide to not apply a conflicting norm that was in force before the adoption of the decision if this does not affect the rights of other contracting Parties.

In any event, none of the three factors described above appears to be a sufficiently robust foundation to consider COP decisions as formally binding by themselves under the UNFCCC.

3. Advantages of a Combined Approach

At this point in the run up to Paris, a majority of Parties have stated their preference for the adoption of a legally binding instrument taking the form of a protocol to the UNFCCC which would be complemented by a series of COP decisions. This seems the best option to consider in so far as it gives the opportunity to optimize between the pros and cons of each option. The heart of the post 2020 regime would be laid down by a core agreement that would take the form of a protocol to the UNFCCC. This would be the most solemn and clear affirmation by States of their commitment to achieve the ultimate objective of the UNFCCC; as well as providing, within the protocol, further elaboration of the goals, procedures and institutions of the regime. This treaty would be complemented a series of COP decisions which would allow a flexible and swift implementation despite the lower level of legal security that they provide. With this

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19 In the case of Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), the ICJ stated recently, regarding recommendations of the International Whaling Commission that “These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule” (Judgment of 31 March 2014, Para. 46).

20 International Court of Justice (IC), Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Reports (1996), Para. 70, p. 254.


22 Dupuy and Kerbrat, Droit international public, supra, note 17, at 424.
multi-layer structure of the Paris agreement, the core provisions can be robust and durable, while the content of the treaty and its ambition can be progressively upgraded over time. A COP decision or a series of decisions would be adopted on the basis of the treaty reflecting key and overarching goals principles, following a well-known approach in international environmental law.23

V. Form and anchoring of National Determined Contributions

1. What is a Nationally Determined Contribution?

The concept of NDC represents a new aspect of the climate regime, whose implications should be taken into account when considering the issue of legal form.

While presenting common elements, the transition to a new, low-carbon development model will be different in different countries depending on their circumstances, resources, preferences, and levels of development. After the Lima Conference,24 it is likely that NDCs will remain diverse and complex, even if the Paris agreement could specify key accounting principles or options, and require Parties to specify how they apply accounting rules in their NDC.

The weakness of the Lima outcome from this point of view has implications for Parties’ accountability for their NDC. While countries should be accountable for their NDCs, it does not make sense to expect “to-the-ton” accountability. Indeed, the Chinese and US announcements already indicate this fact: they contain inevitable elements of ambiguity, a quantitative range in the case of the US (26-28% reduction by 2025); ambiguity in timeframe for China (peaking around 2030). Granted, the formal announcements should contain more precision. Nonetheless, we would argue that by the nature of the climate change problem, NDCs are likely to be diverse, multifaceted documents, framed by common but relatively loose rules on upfront information and accounting methods. In turn, accountability will inevitably take on a qualitative element: are countries making good faith efforts to implement their NDCs, with demonstrable progress towards its achievement?

Thirdly, it is likely that NDCs will be multiform, as indeed has been indicated already by the Chinese announcement (aspirational peaking range and non-fossil fuel share in energy supply, with potentially further elements in the final announcement). This underscores the importance of providing space to differentiate the normativity of different elements of the NDC. Some elements could form the core of the NDC; some could be for information purposes. Finally, it will be necessary to establish robust, independent procedural arrangements allowing for greater transparency of action toward the implementation of inherently diverse and complex NDCs.

There is also the question of timing, i.e. should NDCs be ready for anchoring in Paris or only afterwards? The Lima conference did not succeed in setting up a formal ex ante assessment of NDCs. But the Secretariat is asked to prepare by 1 November 2015 a synthesis report on the aggregate effect of the NDCs communicated by Parties by 1 October 2015.25 Under this time schedule, Parties may not have their NDCs in final or nearly final form ready in Paris, and could need more time to finalize them. If some adjustments need to be made subsequent to Paris, the Agreement should contain a provision that this should be done by 2016.

A final question relates to ambition in the dynamic context. Many have argued that the legal anchoring of NDCs needs to allow for easy updating. This is indeed valid. However, in a collective action problem like climate change, countries are very unlikely to do so unilaterally. Moreover, governments do not easily reverse decisions once taken. This highlights the importance of having a legally robust, collective commitment in the core agreement to regular rounds (every 5 years) of collective action. Parties should also commit individually to providing new or updated NDCs in line with this cycle. This should form a key part of their legal obligation under the core agreement.

23 Like the Bonn-Marrakech agreements, a set of COP decisions proposed for adoption to the first COP-MOP, which contributed to operationalize the Protocol.

24 See Decision 1/C22, Lima Call for Climate Action, UN Doc. FCCC/CP/2014/10/Add.1, 2 February 2015, Para. 14. Informations to be provided by Parties communicating their intended nationally determined contributions, are only indicative.

25 See 1/C20, supra, note 24, Para. 16.
2. Five Options for the Inscription of NDCs

If the Paris accord takes the form of a new protocol to the 1992 Convention, there are five legal options for the inscription of NDCs (see Figure 2 below). Those five options imply different consequences in terms of timing, legal force, transparency, accountability and non-compliance.

a. An Annex or Annexes to the Protocol

With this option, NDCs would be inscribed in one or several annexes of the Protocol. It could be a single annex bringing together all NDCs, on the model of the Kyoto Protocol. However, as noted above, NDCs will be diverse in terms of content. Therefore, the only possible option would seem to be an annex for each Party. From a practical point of view, a set of annexes has the disadvantage of resulting in an extensive text; however, nothing prevents it from a legal point of view.

With this option, the annex or annexes would form an integral part of the Protocol and would have the same legal force as a legally binding treaty. Whether or not the NDCs are indeed legally enforceable depends subsequently on the substantive and procedural provisions of the treaty. Are the NDCs relatively precise and couched in prescriptive terms? Are they backed by robust mechanisms to ensure transparency, accountability and facilitation, or indeed to eventually enforce compliance?

This option has several advantages. Forming part of a treaty, NDCs would be legally binding nationally for Parties to the agreement as well as internationally. The annex or annexes would be negotiated and adopted at the same time as the Protocol, following a minimum of coordination among Parties before or...
during the Paris conference. Indeed, the annex or annexes being part of the protocol, they would need to gain consensus within the COP to be adopted officially in a COP Decision.26 However, it is possible to introduce a simplified procedure to amend the annexes for the next round of contributions, in order to make the Paris accord a dynamic instrument. This option has the added advantage of providing a robust legal basis to ensure transparency and accountability, and to facilitate and eventually enforce compliance. Such provisions may be more difficult to introduce if NDCs are not binding internationally.

This option has also three disadvantages. First, it requires that all Parties’ contributions are ready before the Paris Conference, in order to inscribe them into the annex(es) to the protocol for their adoption.

Furthermore, once the treaty is adopted, the approach is by definition rather rigid and not very flexible over time, unless a simplified revision procedure is developed. The approach used by the Montreal Protocol to review the annex(es) through a simplified procedure is exemplary. Such a procedure was adopted to adjust Parties’ commitments under the second period of the Kyoto Protocol: the adjustment “shall be considered adopted by the Conference of the Parties serving as the meeting of the Parties to this Protocol unless more than three-fourths of the Parties present and voting object to its adoption”. Moreover, its entry into force is automatic. It does not need States’ ratification, a process inherently long and uncertain.27

Thirdly, coordinated, internationally binding obligations may be difficult for some Parties to accept, reducing participation and hence effectiveness. For some, domestic ratification of internationally binding obligations may be a challenge. Others may consider this option to contain either too little or too much legal differentiation or legal symmetry. Continued disagreement on this question of legal differentiation/legal symmetry may result in a lowest common denominator, unless a more intermediate solution than this option is found.

b. A National Schedule Integrated in the Protocol

NDCs could be determined at the national level and inscribed into National Schedules, which the Protocol could integrate after adoption by a specific provision to the effect that they form an integral part of the Protocol. National contributions could be designed and notified to the secretariat according to a common format and a uniform terminology, and based on common metrics, while allowing Parties to self-differentiate their commitments by type (quantitative targets, expressed in absolute or relative terms, etc.) and scope of commitments (economy-wide, sectoral, policies and measures, project activities, covering all or part of GHG emissions). National schedules could also indicate restrictions, exemptions or even conditions for the implementation of the NDC.

Drawing on the model of national schedules in the General Agreement on Trade in Services (GATS), this option is different from the previous one in that national contributions are not part of the Protocol at the time of its adoption.28 NDCs could be notified after the Paris Conference in order to reflect the principles and rules of the Paris Accord and be automatically integrated into the protocol, without being subject to other Parties’ acceptance.

Less constraining in terms of timing, this option offers more flexibility while providing for the same binding legal force to NDCs than if they were introduced in an annex at the time of adoption. Once notified and forming part of the treaty, contributions would be implemented according to the treaty, in particular to its provisions on transparency, accountability and compliance. National Schedules could be valid for one cycle of collective action, as provided for in the Protocol. In this case, Parties would have to decide if and under what conditions States could modify their contributions. A complete freedom, even to review downward the ambition of their NDCs, is theoretically possible. But this could be prevented by introducing the “no backsliding” principle.

c. NDCs Outside the Protocol but Binding due to a Provision in the Protocol

NDCs could also exist outside the Protocol, for example in a registry kept by the secretariat on the model of the INF document in which the UNFCCC secretariat compiles Parties’ “pledges” communicated af-

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26 UNFCC, supra, note 1, Art. 17 Para. 1.

27 See Art. 3 Para. 1 quater of the Kyoto Protocol as amended in Doha in 2012, t/CMP/11 Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 the Doha Amendment, UN Doc. FCCC/KP/CMP/2012/1/Add.1, 28 February 2013.

ter Copenhagen. But the protocol would contain the legal obligation for all Parties to submit a national contribution and to implement it. States could have an obligation of result (to achieve the pre-determined result) or, more reasonably, an obligation of means (to use their best endeavours to achieve the result). This, in a nutshell, is the spirit of recent AILAC submission, a proposal that merits serious consideration by Parties. As Parties would be internationally bound by an obligation to implement their national contribution, it would help balance legal security at the international level and national sovereignty to determine NDCs. It could also create the legal basis for a more robust regime for transparency, accountability and facilitation, based on this international legal obligation for each Party to implement its NDC.

As with the option of National Schedules, this option would allow flexible timing for some adjustments post-Paris. It would also allow the simple updating of NDCs during each subsequent round of collective action (or unilaterally if Parties so wish).

d. Inscription in a COP Decision

The Protocol can provide that initial NDCs, as well as any revised or new NDCs, are to be adopted by COP/MOP decisions. In comparison to option iii) above, the Protocol would not contain a provision requiring Parties to implement their NDC (obligation of means). In order to operationalize this approach and make it effective by 2020, the COP to the UNFCCC could prepare this decision to be endorsed at COP/MOP1 (on the model of the Bonn and Marrakesh Accords adopted in 2001 to provide for modalities to implement the Kyoto Protocol, which were formally adopted in Montreal in 2005 through a series of COP/MOP decisions applying mutatis mutandis).

As discussed above in this paper, COP and COP/MOP decisions are legal instruments, but not necessarily legally binding by themselves. They can have some legal effects: even though they do not have the same legal force as a treaty. For instance, they would be based on the framework of the UNFCCC and the “Paris protocol” forming the “core” agreement of the Paris Accord. Parties should apply COP and COP/MOP decisions in good faith as implementing measures of the international treaty they have agreed to approve. A judge or an arbitrator could refer to such decisions in order to interpret the provisions of the protocol itself. In addition, NDCs inscribed in COP/MOP decisions could be subject to both an ex-ante assessment on the basis of upfront information and an ex-post assessment of progress made by Parties in their implementation, if the protocol provides for this.

However, with this option, a State cannot be held liable for non-compliance if it does not meet its contribution; it could however benefit from incentives or facilitative measures provided by the protocol to do so. Less robust from a legal point of view, this option has the main disadvantage to not be very dynamic: because a COP or COP/MOP decision can only be amended by another COP or COP/MOP decision, a consensus would be required for the adoption of reviewed or new contributions. In addition, Parties would not be allowed to review unilaterally their national contributions to increase their level of ambition and obtain recognition without a COP/MOP decision to endorse it (although unilateral revision seems unlikely anyway in the context of a collective action challenge).

e. Inscription in an INF document

With this last option, contributions would be compiled in an “INF” document and/or in a registry maintained by the Secretariat, on the model of the compilation of pledges made by Parties after Copenhagen-Cancun. In comparison to option iii) above, the Protocol would not contain a provision requiring Parties to implement their NDC (obligation of means). The Protocol could refer to NDCs while encouraging all Parties to take measures to implement them and contribute to the achievement of a long term collective goal. In that case, such contributions would have no

29 Independent Association of Latin America and the Caribbean

30 One could think for example to the Register/compendium of voluntary commitments in the follow-up of Rio + 20, see on the Internet: <www.uncsd2012.org/commit> (last accessed on 26 December 2014); Option supported by the United States in U.S Submission—September 2014, available on the Internet at: <http://unfccc.int/files/bodies/cop/application/pdf/us_submission_fall_2014_final.pdf>, at 10 (last accessed on 26 December 2014).
legal force at international level. In the absence of an international obligation to implement the NDC, it becomes difficult to envisage strong mechanisms for transparency and accountability, and for facilitating or indeed enforcing compliance. Implicit naming and shaming would therefore be the only international discipline to support Parties’ implementation of the protocol.

VI. Transparency, Accountability and Facilitation

1. The Role of Transparency in Legal Form

With contributions determined at national level, transparency, accountability and facilitation become a cornerstone of the post 2020 regime. Transparency and accountability are key to reciprocity and trust, and therefore to making the Paris agreement an adequate, durable and dynamic instrument to tackle climate change.

As noted above, transparency and accountability are an important aspect of legal form, relating to the substantive and procedural criteria that can be used to judge the legal force of an instrument. The precision of NDCs, achieved through agreed ex ante information standards and accounting principles and rules, will be a key aspect of their substantive force. In this regard, Lima adopted relatively loose rules to ensure the precision of NDCs. Thus, as NDCs will remain diverse and complex, processes to track and facilitate implementation become all the more important. The presence of mechanisms to promote and ensure their implementation relates to the procedural force of the new agreement.

Transparency and accountability are not a substitute for the formal legal bindingness of the core agreement or NDCs. Indeed a central argument of this paper is that the absence of formal legal bindingness would make developing a strong regime for transparency and accountability more difficult (if states do not consent to be bound to implement their NDCs, why develop a robust regime for promoting and ensuring that they do?). However, transparency and accountability are crucial pillars of the overall legal form and legal effect of the Paris agreement, and to this extent warrant greater attention in the negotiations than has hitherto been the case.

Here we set out some key concepts and theoretical frameworks that inform the subsequent discussion of transparency and accountability in the Paris agreement.

– **Transparency of emissions:** this relates to the measurement, reporting and verification (MRV) of accurate and timely emissions inventories.

– **Transparency of NDCs:** this relates to the provision of sufficient upfront information with the submission of NDCs, in order to ensure that these are as transparent as possible in terms of expected emissions outcomes. It includes the development and application of agreed accounting principles and rules, in particular on land use and markets. We can include under this point both substantive rules (on upfront information, for example) as well as procedures intended to increase the transparency of targets (through transparency procedures with a mandate to clarify NDCs, and track their achievement, for example). Transparency of targets can also facilitate the assessment of the adequacy of aggregated mitigation efforts towards achieving the 2 degrees target, as well as the equity of individual NDCs.

– **Transparency of implementation:** this relates to the provision of information on and assessment of demonstrable progress towards the achievement of NDCs, and the multilateral determination of achievement subsequent to the end of the period.

– **Accountability:** we group what is often termed ‘compliance’ under the broader term ‘accountability’. A regime has multiple ‘disciplines’ that can be mobilized, implicitly or explicitly, to help promote and ensure implementation of NDCs. These include reputational and material incentives, to enforcement mechanisms such as sanctions. In order for such disciplines to be explicitly mobilized, Parties need to be explicitly accountable for the implementation of the NDCs (formal and substantive bindingness), and the regime needs to have the capacity for the explicit determination of demonstrable progress or successful implementation.

Despite the fact that the transparency framework has been significantly improved since the adoption of the Cancun Agreements, there is still room for strengthening this framework in several important respects, as a key aspect of the overall legal force of the Paris agreement. This section discusses why and how this could be done. It takes into account the con-
text of the overall regime, given how negotiations are shaping up so far and the four key parameters that the Paris Accord should reflect. It also takes into account the existing framework, i.e. how the transparency framework in the Paris agreement could build upon the Cancun Agreements. Because it looks forward to the post 2020 regime, this paper does not address the question of whether and how NDCs may be assessed in the light of upfront information provided by Parties in the run up to Paris.

2. Objectives of the Transparency Framework

The primary objective of the transparency framework is to build trust, reciprocity, and reputational incentives to implement Parties’ commitments. These reputational incentives can be implicit or explicit, depending on the extent to which the transparency framework allows for a technical determination on implementation.

The second objective is to put in place positive incentives and to facilitate implementation. The transparency framework should help mobilize positive incentives, which may be reputational (i.e. the creation of a ‘race to the top’ to showcase action, etc.), or material, for example the mobilization of resources or expertise for countries having good faith difficulties with implementation.

The third objective is to develop policy learning and alignment of expectations: the transparency regime can reveal and share best practice and help to align expectations about policies, enabling the more effective and rapid diffusion of policy expertise and confidence, including to the private sector. From that perspective, the transparency framework can also help operationalize the “no backsliding” principle according to which there must be a progression on ambition and scope over time in both individual contributions and aggregated collective action from one commitment cycle to the next one.

The fourth objective is to provide an input to collective action into any subsequent cycle of commitments. By revealing information on implementation and facilitating policy learning, the transparency regime can support subsequent rounds of collective action, as well as potentially identify and help solve problems with implementation or the development of subsequent contributions.

Finally, a fifth objective could be, after a commitment cycle, to provide factual inputs to a compliance regime if Parties chose to introduce one in the Paris Accord.

These objectives could be translated into general principles of transparency into the Paris agreement itself, to pave the way for the adoption of modalities and procedures, including institutional arrangements to be adopted before the latter becomes effective by 2020.


The transparency framework should be technical in nature, by monitoring progress towards achievement of Parties’ contributions. It should be informed by science and available data, be non-confrontational, non-punitive, non-intrusive and respectful of Parties’ national sovereignty. Transparency of implementation should be based on information provided by Parties, while taking into account upfront information the latter have provided to define and support their NDC, include the description of relevant national circumstances.

To this end, existing reporting requirements should be improved and streamlined, in particular to include long term projections of emissions pathways, more detailed information on policy design, priorities and national circumstances, as well as further indicators of progress of implementation. It is important to underscore the reporting implications for a complex, long-term problem like climate change. Understanding progress on implementation, as well as taking into account the evolution of national circumstances relevant for implementation, requires reporting and assessment that goes beyond looking merely at GHG outcomes. The reporting regime should be extended to include further data on policy inputs and intermediate outcomes such as investments, R&D and progress on sectoral indicators of decarbonisation.

The Paris agreement would reflect the core principles, institutions and modalities of the transparency framework. Detailed improvement of existing transparency arrangements can start at COP22, reflecting the core principles defined in the Paris agreement. They should be finalized by 2018 in order to apply to the last biannual reports due before 2020.
When looking at existing requirements for the elaboration and submission of biennial reports (BR) by developed country Parties and biennial updated reports (BUR) by developing country Parties, there is some room for improvement to increase transparency of Parties’ mitigation actions and their effects.

The transparency framework should apply to all the same way in terms of frequency and intensity, while taking into account the self-differentiation made by Parties when determining their NDCs, notably by type of commitment and the description of relevant national circumstances. Some flexibility should be given to developing country Parties in terms of accuracy of emissions measurement (tiers 1 to 3, use of default emission factors) if they do not have the capacity or the data to apply the more stringent requirements. Additional flexibility may be given to developing country Parties in terms of consequences further to the determination of problems of implementation.

In order to deliver the various objectives proposed above, the transparency framework should be conducted on a regular timeline, to feed the development of NDCs for the next cycle and the assessment of collective action. The frequency of existing reporting requirements through biannual reports\(^{31}\) fits with a length of 10 year cycle with mid-period review, or with a 5 year cycle.

4. Possible Institutional Arrangements

Several institutional arrangements can be envisaged to establish such a transparency framework. The process to ensure transparency of implementation should be separate from the process whereby collective action can be assessed for the next commitment cycle. In addition, it should be separate from the process related to ex post determination of compliance after the given commitment period: the objective of the transparency mechanism is to be forward looking and to independently assess progress towards the achievement of NDCs.

Finance and adaptation have their own dedicated institutional arrangements: the Standing Committee on Finance and the Adaptation Committee. Dedicated new institutional arrangements are required to ensure transparency on the implementation of mitigation NDCs. It must have a high technical capacity, independence from day-to-day negotiations, and the institutional capacity to undertake detailed interactions with Parties in order to understand their progress towards their NDC. There is a need for a permanent institution to become a core aspect of the post 2020 regime. Its functions would be as follows:

- provide technical support and guidance to parties on mitigation (the institutional arrangements for finance, adaptation and technology can have a similar function in their respective domains);
- share relevant information, knowledge, experience and good practices on transparency;
- determine on progress towards the implementation of NDCs and signal potential problems of implementation.

Therefore, the Paris agreement should establish a new body: a Committee for the Transparency and Recognition of Mitigation Action. This should work on the basis of special arrangements regarding its relationships with the COP (or the COP/MOP if the Paris Accord is a protocol) and other institutions under the Convention, like the Green Climate Fund.

The Transparency Committee could have two separate branches (or panels), each being governed by its own mandate and processes:

- A branch/panel working on transparency of individual implementation. Its composition and expertise should build upon the existing arrangements (roster of experts, Expert Review Teams, Technical Team of Experts, Consultative Group of Experts). Its mandate should allow technical experts to assess the performance of implementing measures in the light of their effects on the basis of improved reporting requirements and processes as discussed above. A key weakness of the current system is that there is no independent, explicit determination of problems of implementation. In this regard, there are different options to consider as how to follow up the technical assessment made by this transparency panel:
  - The panel submits the report on individual implementation to all Parties via the Secretariat, or
  - The panel submits a synthesis report via the Secretariat covering all Parties but highlighting questions of implementation encountered by individual Parties.

\(^{31}\) Parties shall submit BRs and BURs every two years, with the first BR due on 1 January 2014, and the first BUR by December 2014.
A branch/panel working on adequacy of collective action with a long term goal: the panel would prepare every four years a report based on the compilation of proposed future contributions that would be submitted to all Parties via the Secretariat, which would organize a consultative process to discuss the level of collective ambition. The 2013 - 2015 review process could inspire Parties to establish such a consultative procedure in a more institutionalized way.

VII. Consequences of non-compliance

1. Non-Compliance in the Existing Regime

Before addressing the potential consequences of a non-compliance with the Paris agreement, it is important to recall the current consequences in cases of non-compliance with the UNFCCC, the Kyoto Protocol, and the Cancun agreements.

a. Consequences of Non-Compliance with the UNFCCC

“In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention” the Convention contains a dispute settlement clause in its Article 14. According to this provision, “the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice”. There is an optional clause for compulsory jurisdiction of the International Court of Justice or arbitration (under conditions of reciprocity) and, by default, a conciliation commission which “shall render a recommendatory award, which the parties shall consider in good faith”.

However such a provision has never been used. For several reasons, the Parties are very reluctant to accept a compulsory jurisdiction: only the Netherlands has done so for both the ICJ and arbitration, and the Solomon Islands for arbitration. Because of the requirement of reciprocity, only a dispute between the Netherlands and the Solomon Islands could lead to a settlement under Article 14, taking the form of arbitration. Of course the Parties to a dispute can still agree to bring the matter before the ICJ or an arbitration tribunal after the dispute has arisen and only for this dispute. But this remains exceptional, in particular for a multilateral dispute, even if international law permits it.32

In addition to Article 14, the Convention provides for a Multilateral Consultative Process (MCP) under Article 13. The MCP has been established by the COP in the form of a set of procedures.33 Its objective was to resolve questions regarding the implementation of the Convention, by providing advice and assistance to Parties to overcome difficulties encountered in their implementation of the Convention, promoting understanding of the Convention and preventing disputes. The process was designed to be conducted in a facilitative, cooperative, non-confrontational, transparent and timely manner, and be non-judicial, separate from, and without prejudice to, the provisions of Article 14 of the Convention (Settlement of Disputes). In the Annex to the above mentioned Decision 10/CP.4, the terms of reference given for such process provide that questions regarding the implementation may be raised, with supporting information, by either a Party with respect to its own implementation, or a group of Parties with respect to their own implementation, or a Party or a group of Parties with respect to the implementation by another Party or group of Parties. However, because Parties could not reach consensus on the composition of the designated Committee in charge of conducting the procedures, the MCP has never been operational.

b. Consequences of Non-Compliance with the Kyoto Protocol

The Kyoto Protocol gave birth to a very elaborate compliance mechanism aiming “to facilitate, promote and enforce compliance with the commitments under the Protocol”. It is a non-contentious procedure of control of compliance and reaction to non-compliance.34

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32 See the ILC Articles on State Responsibility, 2001 (art. 48), and the commentaries of the ILC (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, at 126). See also the 2011 advisory opinion of the Seabed Disputes Chamber of the ITLOS which elaborates on the work of the ILC stating that “Each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area” (about the Montego Bay Convention). ITLOS, Advisory Opinion of February 1 2011, Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Para. 180, available on the Internet at: <http://www.itlos.org/index.php?id=1098&L=1%252525> (last accessed on 14 November 2014).


This procedure operates without prejudice to the more classical dispute resolution clause of the above mentioned Article 14 of the Convention which applies mutatis mutandis to the Protocol.35

The first non-compliance procedure of an environmental treaty was drawn up in 1990 in the framework of the Montreal Protocol on substances that deplete the ozone layer.36 This pioneering procedure has already been taken up and adapted by a dozen other environmental conventions, becoming little by little a standard practice. Although inspired by the same model, all these procedures have peculiarities of their own. Among them, the Kyoto Protocol has given rise to the most comprehensive non-compliance procedure to date. The importance of the environmental issues at stake and the specificity of the Protocol, which uses market mechanisms, explain the rigour of the compliance mechanism under the Kyoto Protocol. The monitoring and control procedure is very robust and precise. Divided into two branches, a facilitative branch and an enforcement branch, the Compliance Committee is quasi-judicial. Potential sanctions are essentially intended to be dissuasive. But the “consequences” are not punitive; they aim at “the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply”. Appeal to the COP-MOP is provided against a decision of the enforcement branch.

Although very sophisticated, the system is not fool-proof and Canada’s withdrawal has recently shown how the Committee is powerless to cope with non-compliance.37 This highlights the inherent weakness of international environmental law to provide for the enforcement of state obligations against their will. Perhaps more importantly, the inability of the compliance mechanism to alert to the evident problems of implementation being experienced by Canada before its withdrawal highlights another weakness; this nullified eventual reputational incentives. This weakness should be fixed in future arrangements.

c. Consequences of Non-Compliance with the Cancún Agreements

The Cancun agreements consist of a set of COP decisions adopted in Cancun (2010), and completed in Durban (2011), Doha (2012), and Warsaw (2013), in the wake of the Copenhagen accord. Their scope is extended, covering adaptation, mitigation, finance and technology. By themselves, the Cancun agreements do not create new international obligations (at most they specify obligations under the Convention). Thus, regarding mitigation, pledges made by the Parties are not internationally mandatory; they are compiled in a simple INF document.

However, their implementation is subject to a transparency regime. But in case of non-compliance, there are no consequences, except a shaming if the assessment process implicitly reveals problems of implementation. Furthermore, there is no compliance committee. A sanction would not be consistent with the non-binding character of Cancun pledges. The system puts the stress rather on implicit reputational incentives, and to a lesser degree on technical and financial assistance, to promote implementation.

2. Consequences of non-compliance with the Paris agreement: options and issues

These three examples show how the legal form which will be chosen for the Paris agreement and for NDCs will shape the compliance procedures that can be used. If the core agreement is a Protocol, two main options are opened regarding compliance.

a. Mandatory Substantive Obligations: if NDCs are Inscribed in a Protocol or Recognized as Mandatory by the Protocol

This option allows the design of a non-compliance mechanism, potentially largely based on the multilateral determination of compliance and facilitative and reputational incentives.38 A more flexible procedure, mainly based on facilitation and incentives, such as that of the Montreal Protocol, would proba-

35 See Art. 19 of the Protocol.
37 See Compliance Committee, CC/MOP/2/2014/2, 20 August 2014, Canada’s withdrawal from the Kyoto Protocol and its effects on Canada’s reporting obligations under the Protocol, Note by the Secretariat.
b. Non-Mandatory Substantive Obligations: if NDCs are compiled in a COP-MOP decision or an INF document

In the event of a short Protocol, laying down the basic principles, and referring to a COP-MOP decisions or an INF document for the rest (and in particular for NDCs), it appears quite difficult if not useless to design a robust compliance mechanism. Why elaborate a hard mechanism to control the implementation of a soft law instrument? One option is that such a mechanism be designed to control compliance with other provisions of the Protocol (procedural MRV provisions...), in order to solidify a somewhat very fragile system.

In any event, regarding contributions to mitigation, the COP-MOP could monitor and review their implementation and decide to deal with potential difficulties. It could elaborate on the works of a committee or, a minima, on a report prepared by the secretariat based on verification. Still this poses the question of the differentiation, and the question of the articulation with a transparency mechanism. But no solution is possible, not even explicit shaming by the COP-MOP. Assistance to States in difficulty remains possible. It would require a procedure and an institution like a compliance committee, which could be named differently (for example an implementation committee).

It is the same for an INF document, but the COP-MOP has even less legitimacy in intervening in the implementation, and in attempting to shame. This risks withdrawal or a downward revision of NDCs. This is exactly the configuration of the Cancun agreements.

c. Compliance with Procedural Obligations

It should be noted that the question of compliance goes beyond NDCs. The protocol may contain largely procedural obligations to implement an NDC. At a lower level of legal force, it may merely contain a procedural obligation to have an NDC and to respect the relevant reporting and transparency rules. It may also contain an obligation to update the NDC every negotiation cycle (every 5 years). The more the obligations of the protocol are reduced to procedural ones, the more compliance with these procedural obligations becomes important. This would particularly be the case to operationalize the idea of a five year negotiation cycle and the no backsliding principle. There should be a stringent compliance mechanism with enforceable consequences (suspension of participation in the regime) for non-compliance with key procedural requirements.

VIII. Conclusions

Several key messages can be distilled from the discussion on the issues and options for the legal form of the new climate agreement to be adopted in Paris 2015. There is a need for early clarity on the issue of legal form and a comprehensive approach to the issue of legal form, based around the four pillars assessed here: the form of the core agreement and the legal link with NDCs; the inscription of NDCs; the mechanism for transparency, accountability and facilitation and the mechanism for compliance. Consensus appears to be emerging around the use of a hybrid structure, with some elements in the core agreement and some in associated implementing de-

39 See for example Independent Association of Latin America and the Caribbean AILAC Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), Submission on the legal architecture and structure of the elements of the 2015 Agreement, available on the Internet at: <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload106_99_130574191142313924-140918%20AILAC%20su bmission%20ADP%202-6%20legal%20Architecture,%20pdf%20178.pdf>，“Committed contributions on adaptation would not be subject to the Compliance Mechanism”, at 78 (last accessed on 26 December 2014).
cisions. This can be a useful structure to balance credibility and durability with flexibility and dynamism. As a minimum the core agreement should contain a legal obligation to implement an NDC, and to update it every five years in line with the agreed cycle of negotiations. NDCs are obviously a new element of the climate regime, the consequences of which need to be taken into account. Their inherent diversity entails a consequence even greater need for a robust mechanism for transparency, accountability and facilitation. This mechanism needs to be the core of the Paris agreement. It should have independent institutional capacity and a technical mandate to track progress, identify problems, and provide support and guidance both to the implementation of NDCs and the preparation of NDCs for subsequent rounds. It should be able to signal individual problems of implementation ahead of time (early warning system). It should have a separate branch for the assessment of collective adequacy prior to the commencement of each commitment period.

Parties may wish to include a compliance mechanism in the new agreement. This should be separate from the mechanism on transparency, accountabili-

ty and facilitation, both in terms of institutional structure and mandate. Given the current stage of global cooperation, it seems unlikely (and potentially undesirable) that countries will agree to a punitive compliance mechanism. However, a political mechanism could be put in place to discuss egregious cases of non-compliance after the end of the commitment period. There should be, however, a robust enforcement mechanism for core procedural obligations relating to the submission, updating and reporting regarding NDCs. This is a crucial element to operationalize the concept of a dynamic and durable agreement operating on regular predictable cycles of strengthened action. This in turn is key to the political and legal signal of credibility that Paris must send. From these perspectives, one relevant option to consider would be the reactivation and improvement of the Multilateral Consultative Process as a way of activating a separate facilitative compliance mechanism under the UNFCCC.\textsuperscript{40} The Paris core agreement could include a mandate to work this out before 2020 and provide guidance, in particular to arrange a link between the Transparency Mechanism and the facilitative compliance approach allowing the branch on implementation of the Transparency Committee, as much as Parties, to trigger the procedure on the basis of technical assessments of implementation problems and discuss about possible remediation measures.

\textsuperscript{40} Sebastian Oberthur, "Options for a Compliance Mechanism in a 2015 Climate Agreement", 4 Climate Law (2014), at 30-49.