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Event Paper

# Options for the Legal Form of the Paris Outcome

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## 1. Introduction

The Durban Decision (1/CP.17), which launched the Durban Platform for Enhanced Action, calls for Parties to adopt “a protocol, another legal instrument or an agreed outcome with legal force” at the COP 21 to be held in Paris later this year. Various technical and legal questions have been raised about the meaning of these terms. Whereas the United Nations Framework Convention on Climate Change (UNFCCC) has direct provisions for the adoption of future protocols under its framework, there is no clarity about “another legal instrument” and an “agreed outcome with legal force”.

There are various legal options for the form of the final outcome in Paris that comes under the three broad options listed in the Durban Decision. While any outcome in Paris can be potentially called ‘Paris Agreement’, it must be noted that in international law, an agreement may or may not refer to a legally binding arrangement<sup>1</sup>; the legally binding nature will depend upon its terms for commitments, compliance and enforcement.

This paper discusses various legal form options for the Paris Agreement, in light of the UNFCCC regime and the international law.

## 2. A Protocol

In simple terms, a protocol is an agreement between two or more states, usually expressed in written form and governed by international law. General guidance on the making and interpretation of international agreements is provided in the 1969 Vienna Convention on the Law of the Treaties (VCLT).<sup>2</sup> International agreements set forth mutual principles, objectives, rules and commitments that are binding between the concerned parties. The binding force of agreements is represented by the principle of *pacta sunt servanda*, meaning that “agreements must be kept”. It must be noted that other international documents such as treaty, convention, accord, agreement, covenant, charter, statute, pact, declaration, are also used to refer to agreements between two or more states adopted under international the VCLT.

Protocols within environmental framework conventions usually assume the form of a new “treaty within the treaty”. These are autonomous legal instruments, though aimed at furthering into detail the implementation of the framework Convention.<sup>3</sup> Protocols often contain their own provisions on ratification and entry into force, reservations and withdrawal, and so on. The parties to the framework Conventions are not obligated to accept and ratify any protocol that may be proposed

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<sup>1</sup> “If there is no obligation that is created in the agreement, then there can be no question of being bound to it”. “Gentlemen’s agreements” and “declarations”, for instance, are non-binding agreements. See *Legal Response Initiative Training Manual*, page 31, available at: <http://legalresponseinitiative.org/training/>

<sup>2</sup> The VCLT is the result of codified customary law related to treaty making and interpretation. Because it is based on custom, it has been widely accepted by non-parties. So far 113 countries have ratified the VCLT (among the non-parties group are the United States, France and Turkey). The VCLT, however, refers only to agreements between states, although recognizing the legal force in agreements between states and other subjects of international law. The VCLT only applies to treaties in written form, albeit without prejudice of accepting the legal force of agreements expressed in other forms (article 3). Therefore, any bilateral or multilateral agreement based on domestic laws is excluded. On the other hand, treaty provisions might bind non-parties if by their conduct they accept it as representing customary international law. (BIRNIE, BOYLE and REDGWELL, *International Law and the Environment*, CUP, 2011; CRAWFORD, James, *Brownlie’s Principles of Public International Law*, OUP, 2012)

<sup>3</sup> Framework conventions are sometimes referred to as the ‘Mother Convention’

under it.

## 2.2. Key provisions of a Protocol

Protocols usually have the same structure and elements as any other multilateral environmental agreement (MEA).

The following is a list of key elements of a MEA/ a Protocol:

**Preamble:** A preamble sets the background and the context of the agreement. It may be a set of paragraphs, drafted in a “considering this/considering that...” style. Such paragraphs have no binding legal value on their own, but may be relevant to guide the interpretation of the overall agreement.

**Objective and principles:** As in any treaty, a protocol may contain an explicit objective. However, protocols under framework Conventions are aimed at supporting the achievement of its objective, thus any objective to be stated in the protocol would be the same as in the main treaty. For example, the Kyoto Protocol did not include a specific objective, but referred to the Convention in the preamble. Also generally found in the MEAs are principles that the Parties agree will guide their actions under the agreement. These provisions can have an important interpretive value as an agreement is implemented.

**Core commitments:** The core commitments of a Protocol may be more specific than compared to the language and the openness of Framework Convention’s-like commitments. For example, the Kyoto Protocol included specific GHG mitigation commitments to developed country parties. The UNFCCC only included general commitments.

**Provisions for implementation:** These includes provisions for the establishment of a compliance system, institutional arrangements, a governance structure with decision-making bodies and processes.

**Final provisions:** Final provisions of an international agreement includes provisions on procedure, such as signature, ratification, depositary, entry into force , voting, amendment, withdrawal , reservations , voting rules etc. While these provisions often appear to be *pro forma*, voting and entry into force can be critically important.

**Annexes:** Usually MEAs have annexes with lists or categories of specific items or kinds of items covered by substantive or other provisions (e.g. substances, countries, activities, even Party specific commitments). Some agreements include separate provisions for adopting or amending Annexes.

## 2.3. Protocols in the UNFCCC regime

The UNFCCC envisions the possibility of future protocols to be adopted by the Parties, under Article 17:

Accordingly,

1. *The Conference of the Parties may, at any ordinary session, adopt protocols to the Convention.*
2. *The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a session.*

3. *The requirements for the entry into force of any protocol shall be established by that instrument.*

4. *Only Parties to the Convention may be Parties to a protocol.*

5. *Decisions under any protocol shall be taken only by the Parties to the protocol concerned.*

The Convention also expressly provides that “*any related legal instruments that the Conference of the Parties may adopt*” remain at the service of the achievement of its ultimate objective.

*ARTICLE 2: The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*

As a consequence, the preamble in the Kyoto Protocol states that:

*“In pursuit of the ultimate objective of the Convention as stated in its Article 2...”*

The Geneva Text adopted by the Parties in February 2015, and further made available in all the UN languages, fulfils legal requirement and structure of a Protocol, thus allowing for a possible *Paris Protocol* at COP 21.

Should the Paris Agreement be a protocol under the UNFCCC, it will be a legally binding instrument, adopted by the Conference of the Parties and applicable to all parties that ratify it. Such outcome would secure the continuing implementation of the Convention under a rules-based regime. In the domestic level, following the ratification process, parties will be bound to undertake policies and enact legislation in order to comply with their commitments under the *Paris Protocol*.

### 3. “Another Legal Instrument”

The exact definition of ‘another legal instrument’ is not clear. It could be assumed that ‘another legal instrument’ means a legally binding document that is not a Protocol. The UNFCCC provides provisions for two options of such legally binding documents:

- An amendment
- An annex under the Convention.

#### 3.1 An Annex

Annexes usually form an integral part of the treaties they relate to, so that any reference to the treaty itself amounts to a reference to the whole instrument - which concerns the principal treaty instrument and its annexes -, unless it is otherwise provided. Accordingly, an annex to a treaty is legally binding as well.

In the UNFCCC, the rules for adoption and amendment of annexes are contained in article 16, which states as well that “*Annexes to the Convention shall form an integral part thereof*”. Peculiarly though, annexes to the UFGCC are limited to “*lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character*”. The existing annexes to the Convention (Annex I and Annex II) provide lists of countries.

In the context of a Paris agreement, it can be argued that an annex alone will not suffice to bring about the enhanced action envisioned in the Durban Platform as annexes can have a limited scope in terms of what it can cover.

In Paris, an Annex would be an option to place each party's Nationally Determined Contribution (NDC). Since annexes are integral parts of the treaty they refer to, should any such annex be devised in Paris, NDCs would be legally binding over each party. In this context, NDCs would be a clear mandate for the undertaking of specific actions in the domestic level, and non-compliance with any such specific domestic actions would amount to a breach of obligations under international law. Alternatively, NDCs could be placed outside the protocol/agreement, assuming the form of national schedules, which are non-internationally binding.

### 3.2 An Amendment

Such as with Annexes, Parties can adopt Amendments to the Convention. Article 15 of the Convention describes the process for amendments to the Convention. Any Party may propose amendments to the Convention but they need to be adopted by three-fourths majority if consensus cannot be reached. By amending the Convention, new obligations, principles and even objectives may be introduced. Such legal form option is one that could most certainly present meaningful changes in the climate regime and in a legally binding manner. Nonetheless, such a hard-law outcome is equally the hardest to achieve, requiring substantial agreement by the parties on all such modifications in the regime.

## 4. “An agreed outcome with legal force”

There is no legal precedence under international law for ‘an agreed outcome with legal force’. This language was agreed as the result of a last minute compromise during the negotiations in Durban, clearly in order to accommodate a legal form option that is not necessarily legally binding<sup>4</sup>. Following this, parties have expressed their views on what such an “agreed outcome with legal force” entails. A particular view has arisen on the possibility that this outcome is only legally binding in the domestic level.<sup>5</sup>

It is clear that this category may include options for a legally flexible outcome, as opposed to a strong legally binding instrument under international law.

<sup>4</sup> WERKSMAN, Jacob. *Q&A: The Legal Aspects of the Durban Platform Text*. World Resources Institute Blog. December, 2011. Available at: <http://www.wri.org/blog/2011/12/q-legal-aspects-durban-platform-text>

<sup>5</sup> “A protocol’ and ‘another legal instrument’ concern legally binding instruments under the Convention. A protocol or legal instrument refers to an instrument or agreement that has to be ratified by the Parties. On the other hand, ‘an agreed outcome with legal force’ need not have the legal form of a protocol or a legal instrument; it could be an outcome that derives legal force from national or international law. In view of this, an agreed outcome of ADP may include aspirational CoP decisions, binding CoP decisions, setting up of institutions and bodies covering various aspects of Bali Action Plan and Cancun Agreements with differing degrees of binding-ness under the provisions of domestic and international law under the UNFCCC. The legal shape of post 2020 arrangements cannot be pre-judged. India is open to exploring any and all options, including a combination of these options, at the appropriate juncture in the negotiations, when the substantive content of the arrangements have been agreed”. Submission by India on the Work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action. Date: 09/03/2013. [http://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_india\\_workstr\\_eam\\_2\\_20130309.pdf](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_india_workstr_eam_2_20130309.pdf)

## 4. 1 COP Decisions

A possible legally flexible outcome in Paris is a set of COP decisions of the Conference of the Parties.

The legal effect of such decisions is ambiguous. On the one hand, COP decisions may entail the normative force of a legally binding decision when they are accepted as legally binding by the parties<sup>6</sup>. On the other hand, the COP decisions can be only recommendations to Parties.<sup>7</sup>

According to the Article 7 of the Convention, Parties can adopt decisions aimed at implementing the Convention. As stated by Article 7:

*2. The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. (...)*

By this decision, the COP is overall empowered to take on decisions to enhance implementation of obligations already stated by the Convention. These are often measures of administrative character, such as setting up bodies and institutional arrangements, but may also be aspirational and encouragement decisions, with a view to accelerating implementation and promoting ambition.

COP decisions require consensus to be adopted and can be applied immediately. Such decisions may have a good deal of political force that renders them effective. Nonetheless, it may as well lead to the *lowest common denominator* on the substance, i.e. the least that parties can comfortably agree in consensus.

Should the Paris agreement take the form of a set of COP decisions alone, it may be limited in the extent to which it can impose new robust obligations, and thus create concerns on the legal certainty of the regime. For instance, one possibility is that a COP decision *invites* parties to impart legal force domestically to their nationally determined contributions<sup>8</sup>. This would not be enough binding in international law, but in the event it is successfully implemented by parties in the domestic level, the decision could be indeed effective, ultimately enabling achievement of the objective of the Convention.

<sup>6</sup> See 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, 20 p.

<sup>7</sup> “Ordinarily, COP decisions have the legal status of recommendations. However, the COP’s decisions can have legal force if the UNFCCC expressly authorizes it to adopt rules on a particular subject. For example, articles 4.1(a), 4.2(c), and 7.2(d) authorize the COP to adopt methodologies for the preparation of national inventories. Similarly, several UNFCCC provisions give the COP authority to establish rules for UNFCCC institutions—for example, Article 9.3 authorizes the COP to elaborate the functions and terms of reference of the Subsidiary Body for Scientific and Technological Advice (SBSTA)”. (BODANSKY, Daniel. “Issues for 2015 Climate Agreement”, Center for Climate and Energy Solutions, May, 2014. Available at: <http://www.c2es.org/docUploads/issues-for-a-2015-climate-agreement.pdf>)

<sup>8</sup> “(...) if the Paris conference resulted in a COP decision that requested, invited or encouraged Parties to impart domestic legal force to their nationally determined contributions. Most Parties, however, view a COP decision alone, however forceful it may be, as an inadequate response to the Durban mandate.”. (RAJAMANI, Lavanya. “Negotiating the 2015 Climate Agreement: Issues relating to Legal Form and Nature”, Research Paper, May 2015. Available at: [https://seors.unfccc.int/seors/attachments/get\\_attachment?code=823DV9EFOXNZ8EWPR70J3HPWBPLWN71X](https://seors.unfccc.int/seors/attachments/get_attachment?code=823DV9EFOXNZ8EWPR70J3HPWBPLWN71X))

## 4.2 A Political Agreement

A political agreement is also a flexible outcome with no legal rigour. An agreement can be political either because it may expressly reinforce that, or because its provisions are drafted in a non-prescriptive soft-worded manner.

The Copenhagen Accord is an example of a political agreement based upon voluntary measures by the signatory parties. This kind of instrument allows for bolder and more ambitious initiatives. Parties may feel more inclined to take chances when there is no pressure to commit irretrievably to something that they are not completely sure they will be able to deliver in the long term.

Though such agreements may encourage more pledges for domestic action by developed and developing countries, they will not be legally binding under international law hence will not be enforceable.

## 5. Other options

### 5.1 An Implementing Agreement

As already mentioned in this paper, an agreement may be a treaty if it fulfils the conditions prescribed in the VCLT, no matter how it is named. Accordingly, some parties have been calling for an *Implementing Agreement* in Paris, instead of a protocol<sup>9</sup>.

Despite the fact that both are legally binding instruments, the protocol is the one option explicitly referred to in the Convention, with particular rules and conditions for adoption. Taking into account its ordinary meaning, an “implementing agreement” may be interpreted as an instrument devised exclusively for the service of better implementing what is already provided in the Convention; whereas a protocol is largely known for being more autonomous and able to establish other streamlined rules for achieving the Convention’s objective.

### 5.2 A mix of options

A Paris agreement does not need to be reached entirely in one form. It also does not have to be an entirely legally binding agreement, but could consist of a combination of legally binding and non-legally binding instruments.

For example, there is a possibility of an outcome that consists on: a protocol to address mitigation and adaptation elements; and a set of COP decisions to cover the means of implementation. Additionally, an annex to the protocol could incorporate parties’ NDCs.

Such mixed outcome have the possibility of combining the legal certainty of the continuation of a rules-based regime - more robust and durable; together with the flexibility and the prospects of a swift implementation of a less binding instrument - which could also enable progressive ambition.

At this stage, it seems unlikely that a single legally binding instrument will rise in Paris, since there

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<sup>9</sup>“(…) the COP could adopt legal instruments that conform to the definition of treaties even if they are not called protocols (such as for instance the ‘Paris Agreement’ or ‘Implementing Agreement’). Indeed, the definition of treaties explicitly provides that ‘whatever its particular designation’ if it satisfies other requirements it would be treaty. As Anthony Aust notes, it is not the name that determines the status of the instrument, rather whether the negotiating states intended the instrument to be binding (or not) in international law”. (RAJAMANI, idem)

are still many fundamental divergences among parties. Therefore, a mixed outcome is not a sign of failure of the rules-based regime, but can be seen as a balanced approach to an extremely disputed issue in the most universal of the multilateral environmental treaties.<sup>10</sup>

## 6. Summary of legal form options, their conditions and effects

Legal Form	Conditions for Adoption	Entry into force	Legal Effect <sup>11</sup>
Protocol	By consensus. Adoption by the Conference of the Parties.	<ul style="list-style-type: none"> <li>• Upon ratification by a certain number of countries/or GHG emissions cover.</li> <li>• Entry into force conditions and possible provisional applications may be provided in the instrument itself.</li> <li>• Enters into force only for those who have ratified it (possible two-track system).</li> </ul>	Legally binding
Annex	¾ Majority if no consensus	<ul style="list-style-type: none"> <li>• Upon ratification by ¾ of parties.</li> <li>• Enters into force only for</li> </ul>	Legally binding

<sup>10</sup> “There is a correlation between the stringency and specificity of obligations and the legal form of the document in which they are contained on the one hand and the extent of participation in such an agreement on the other. An effective agreement requires a balance between both of these elements. Stringent and specific obligations contained in a legally binding 2015 Agreement may limit the participation of parties therein. An insistence that the entirety of the 2015 Agreement must be legally binding may equally lead to a watering down of its obligations in order to achieve a broad participation of parties. In both cases, the effectiveness of the 2015 Agreement will be reduced”. (BAVISHI, Raj, Legal Response Initiative, “*The Lima Call for Climate Action – Reflections and Prospects*”, Briefing Paper. Available at: <http://legalresponseinitiative.org/wp-content/uploads/2015/02/BP01.15-long-Lima-ADP-Outcomes1.pdf>)

<sup>11</sup> It must be noted that legally bindingness depends not only on the form of the Agreement but also on obligations or provisions of enforcement.

		those who have ratified it (possible two-track system).	
Amendment	$\frac{3}{4}$ Majority if no consensus	<ul style="list-style-type: none"> <li>• Upon ratification by <math>\frac{3}{4}</math> of parties.</li> <li>• Enters into force only for those who have ratified it (possible two-track system).</li> </ul>	Legally binding
COP decisions	Consensus	<ul style="list-style-type: none"> <li>• Immediately applicable</li> </ul>	Ambiguous
Political Agreement	Voluntary	<ul style="list-style-type: none"> <li>• Depends upon the agreement itself. Could be immediate, if parties have the mandate to agree without domestic approval.</li> </ul>	Political
Implementing Agreement	Adoption by the Conference of the Parties.	<ul style="list-style-type: none"> <li>• Upon ratification by a certain number of countries/or GHG emissions cover.</li> <li>• Entry into force conditions and possible provisional applications may be provided in the instrument itself.</li> </ul>	Legally binding, but its relationship with the UNFCCC is less clear since there's no particular rules for such an instrument in the UNFCCC.

Countries such as the U.S. claims that they have constraints against a protocol option domestically, and developed countries are in general hesitant to take on legally binding financial commitments under a Protocol. A legally binding instrument that commits developing countries is also a delicate outcome, since for the first time in the regime such parties could be held accountable in international law. It is therefore important that any legally binding commitment for developing

countries are facilitated with predictable and sustainable means of implementation.

Some of the options listed above can be adopted without full consensus by Parties. It must be noted that the agreement may reach the minimum threshold of  $\frac{3}{4}$  majority for adoption, but for the change to be effective, it is important that parties agree in consensus to implement it, to prevent a situation in which only a group of countries is bound by the new agreement, whilst the others continue applying the previous arrangements.

## 7. Conclusions

The possible Paris outcome in general usage is recognised as the “Paris Agreement”. The word *agreement* in this context is considered in its broad meaning of an agreed outcome that is reached under a collective appreciation. The Durban decision contemplates that in Paris there should ultimately be an *agreed* outcome in generic terms and lists three possible legal form options. However, the meaning and technical details of some of the options are currently not very clear.

In the run up to the COP 21, options on the legal form that the Paris agreement may assume will become clearer. Some alternatives are by definition legally binding in the international level; others do not provide such legal certainty. While some options will give high legal rigour and enforceability, others may gather more participation, ambition and accelerate implementation. Parties’ interests in the current state of play of the negotiations differ widely, which makes the event of a single strong legally binding protocol far at distance.

There are various legal options for the form of the final outcome from the COP 21 to be held in Paris that comes under the three broad options listed in the Durban Decision. While any outcome in Paris can be potentially called 'Paris Agreement', it must be noted that in international law, an agreement may or may not refer to a legally binding arrangement ; the legally binding nature will depend upon its terms for commitments, compliance and enforcement. This paper discusses various legal form options for the Paris Agreement, in light of the UNFCCC regime and the international law.



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## Climate Change

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