

THE PARIS CLIMATE CHANGE AGREEMENT: A NEW HOPE?

*By Daniel Bodansky**

Draft: May 17, 2016

Forthcoming in the *American Journal of International Law* (2016)

I. INTRODUCTION¹

Know your limits. This familiar adage is not an inspirational rallying cry or a recipe for bold action. It serves better as the motto for the tortoise than the hare. But, after many false starts over the past twenty years, states were well advised to heed it when negotiating the Paris Agreement.² While it is still far too early to say whether the Agreement will be a success, its comparatively modest approach provides a firmer foundation on which to build than its more ambitious predecessor, the Kyoto Protocol.³

* Sandra Day O'Connor College of Law, Arizona State University. Many thanks to Susan Biniarz, Franz Perez, Nigel Purvis, Lavanya Rajamani, and Bryce Rudyk for their very helpful comments.

¹ This article draws on the author's previous writings about the UN climate change regime, including: *A Tale of Two Architectures: The Once and Future UN Climate Change Regime*, 43 ARIZ. ST. L.J. 697 (2011); *The Durban Platform Negotiations: Goals and Options* (Harvard Project on Climate Agreements, July 2012) [hereinafter Bodansky, *Durban Platform Negotiations*]; *The Durban Platform: Issues and Options for a 2015 Agreement* (Center for Climate and Energy Solutions, Dec. 2012); and *Legally-Binding vs. Non-Legally Binding Instruments*, in TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME (Scott Barrett, Carlo Carraro & Jaime de Melo, eds., 2015).

² Paris Agreement (Dec. 13, 2015), in UNFCCC, Report of the Conference of the Parties on its Twenty-First Session [hereinafter COP Report and session number], Addendum, at 21, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement]. The Agreement is annexed to Decision 1/CP.21 of the Conference of the Parties, *infra* note 13. UNFCCC documents cited herein are available at the Convention's website, <http://unfccc.int/>.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 UNTS 162 [hereinafter Kyoto Protocol].

In the case of climate change, the limits on action are daunting. In the United States, a majority of one of the two main political parties openly questions the science of climate change, making legislative action all but impossible and limiting the kind of international agreement the United States can join.⁴ In India, climate change is dwarfed on the political agenda by the need to provide electricity to 300 million people.⁵ Not without reason, climate change has been called a “super wicked problem.”⁶ It requires societies and individuals to undertake potentially costly measures now to address a long-term and still somewhat uncertain threat. It implicates virtually every aspect of a states’ domestic policy, including energy, agriculture, and transportation. And it requires massive collective action by states with very different interests, priorities, and circumstances.

The Paris Agreement seeks a Goldilocks solution that is neither too strong (and hence unacceptable to key states) nor too weak (and hence ineffective). To safeguard national decision-making, it adopts a bottom-up approach, in which the Agreement “reflects rather than drives national policy.”⁷ But to promote stronger action, states’ “nationally-determined contributions” (or NDCs, for short) are complemented by international norms to ensure transparency and accountability and to prod states to progressively ratchet up their efforts.

The Paris Agreement has been hailed as “historic,”⁸ a “landmark,”⁹ the “world’s greatest diplomatic success,”¹⁰ a “big, big deal.”¹¹ But, if so, it is

⁴ Tiffany Germain, Kristine Ellingboe & Kiley Kroh, *The Anti-Science Climate Denier Caucus: 114 Congress Edition*, CLIMATE PROGRESS (Jan. 8, 2015), at <http://thinkprogress.org/climate/2015/01/08/3608427/climate-denier-caucus-114th-congress/>.

⁵ Richard Martin, *India’s Energy Crisis*, MIT TECHNOLOGY REVIEW (Oct. 7, 2015), at <https://www.technologyreview.com/s/542091/indias-energy-crisis/>.

⁶ Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009).

⁷ David Roberts, *The Conceptual Breakthrough Behind the Paris Climate Treaty*, VOX (Dec. 15, 2015), at <http://www.vox.com/2015/12/15/10172238/paris-climate-treaty-conceptual-breakthrough>.

⁸ Joby Warrick & Chris Mooney, *196 Countries Approve Historic Climate Agreement*, WASH. POST (Dec. 12, 2015), at <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/12/proposed-historic-climate-pact-nears-final-vote/>.

⁹ Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES, Dec. 13, 2015, at A1.

not because of the novelty of the agreement's contents. The real paradigm shift occurred at the 2009 Copenhagen Conference, when states abandoned the Kyoto Protocol's architecture in favor of a more flexible approach.¹² Nor is it because states' initial emission reduction pledges under the Agreement are sufficient. Even the biggest fans of the Paris outcome do not claim that it puts the world on a pathway to limiting climate change to well below 2 degrees Celsius, the goal agreed in Paris, much less the even more ambitious aim of 1.5 degrees, which many argue is necessary to avert catastrophic damage.¹³ At best, the NDCs put forward by countries in connection with the Paris Conference will limit temperature increase to 2.7 degrees Celsius.¹⁴

If Paris indeed proves historic it will be because it institutionalizes a new paradigm that, over time, catalyzes ever stronger global action to combat climate change. Eight features of the Paris Agreement stand out:

- First, it is a legally binding instrument (albeit with many non-binding elements), in contrast to the Copenhagen Accord,¹⁵ which was a political deal.
- Second, it is global. It applies not only to developed countries, like the Kyoto Protocol, but also to developing countries, which account for a growing share of global emissions. As of March 15,

¹⁰ Fiona Harvey, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, GUARDIAN (Dec. 14, 2015), at <http://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations>.

¹¹ Thomas L. Friedman, *Paris Climate Accord Is a Big, Big Deal*, N.Y. TIMES, Dec. 16, 2015, at A35.

¹² Daniel Bodansky, *The Copenhagen Climate Change Conference—A Postmortem*, 104 AJIL 230 (2010).

¹³ In the conference decision adopting the Paris Agreement, the parties themselves acknowledged that the intended nationally determined contributions (INDCs) submitted prior to the Paris Conference are insufficient. Adoption of the Paris Agreement, COP Report No. 21, Addendum, at 2, Dec. 1/CP.21, para. 17, UN Doc. FCCC/CP/2015/10/Add.1, at 4 (Jan. 29, 2016) [hereinafter Paris Decision].

¹⁴ According to Climate Action Tracker, full implementation of the INDCs submitted as of December 15, 2015, would put the world on a pathway to 2.4–2.7 degrees Celsius. *Effect of Current Pledges and Policies on Global Temperature*, CLIMATE ACTION TRACKER, at <http://climateactiontracker.org/global.html> (last visited Mar. 15, 2016).

¹⁵ Copenhagen Accord (Dec 18, 2009), in COP Report No. 15, Decision 2/CP.15, UN Doc. FCCC/CP/2009/11/Add.1, at 4 (March 30, 2010) [hereinafter Copenhagen Accord].

2016, 188 countries had put forward intended nationally determined contributions, representing roughly 95 percent of global emissions.¹⁶ This, in itself, is extraordinary.

- Third, it specifies the same core obligations for all countries. In doing so, it abandons the static, annex-based approach to differentiation in the United Nations Framework Convention on Climate Change (UNFCCC)¹⁷ and the Kyoto Protocol, in favor a more flexible, calibrated approach, which takes into account changes in a country's circumstances and capacities and is operationalized differently for different elements of the regime.
- Fourth, it establishes a long-term, durable architecture, in contrast to the Copenhagen Accord, which involved one-shot pledges addressing only the period up to 2020.
- Fifth, the long-term architecture institutionalizes an iterative process, in which, every five years, parties will come back to the table to take stock of their collective progress and put forward emission reduction plans for the next five-year period.
- Sixth, it sets an expectation of progressively stronger action over time.
- Seventh, it establishes a common transparency and accountability framework that reflects Justice Brandeis's admonition, sunlight is the "best of disinfectants."¹⁸ States will have an incentive to carry out their NDCs because, if they don't, everyone will know, subjecting them to peer and public pressure.
- Eighth, it appears to command universal, or near universal, acceptance.¹⁹

¹⁶ Climate Action Tracker, *supra* note 14. For a listing of the INDCs submitted, see *INDCs as Communicated By Parties*, UNFCCC at <http://www.unfccc.int/submissions/INDC/Submission%20Pages/submissions.aspx> (last visited Mar. 15, 2016).

¹⁷ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102–38 (1992), 1771 UNTS 107 [hereinafter UNFCCC].

¹⁸ LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

¹⁹ At the UN signing ceremony on April 22, 2016, 175 countries signed the Paris Agreement, apparently the most ever on a single day. For a listing of signatories, see <http://www.un.org/sustainabledevelopment/blog/2016/04/parisagreementsignatures/>. Only Nicaragua has voiced objections to the Agreement, both at the closing plenary at COP-21 and at the signing ceremony. See Statement by Paul Oquist Kelley at the High-

The Paris Agreement is a relatively brief document and will need to be elaborated through decisions of the parties. That process began in Paris, in the conference decision adopting the agreement.²⁰ But many elements of the Paris Agreement still need to be fleshed out, including rules, modalities, and guidelines for the new market mechanisms, the enhanced transparency framework, and the five-year global stock-take and updating process. Whether the Paris Agreement reflects true political convergence or a papering over of differences should become apparent in the course of these negotiations. As always, the devil is in the details. But what kind of devil will it prove to be? Will the next phase of the negotiations be a comparatively technical process, elaborating the political deal in Paris, or will it be as political and contentious as ever?

Finally, the Paris Agreement was undoubtedly the most visible and important outcome of the Paris Conference, but it was only one component. The Paris Conference involved more than 19,000 government participants (including 150 heads of state), more than 6000 representatives of NGOs and business, including many CEOs, and roughly 2800 members of the press. It provided the occasion, and in some cases the catalyst, for a wide variety of pledges by public and private actors at all levels—countries, regions, cities, international organizations, businesses, and NGOs.²¹ The success of the Paris Agreement will depend, in no small measure, on the degree to which that momentum can be harnessed and carried forward.

II. BACKGROUND

The Paris Agreement represents the culmination of the third phase of the United Nations climate change regime. The first phase ran from 1990–1995 and involved the negotiation, adoption, and entry into force of the UNFCCC. The second occupied the decade from 1995–2004, from the initiation of the Kyoto Protocol negotiations to its entry into force. The current phase has focused on developing a more global approach, which limits the greenhouse gas (GHG) emissions of all countries.

level Signature Ceremony, <http://webtv.un.org/search/paul-oquist-kelley-nicaragua-high-level-signature-ceremony-for-the-paris-agreement-national-statements/4858083079001?term=Nicaragua>.

²⁰ Paris Decision, *supra* note 13.

²¹ See *infra* Part V for a discussion of these parallel initiatives.

The negotiations that ultimately led to Paris effectively began in 2005, when attention turned to the question of what to do post-2012, after the Kyoto Protocol's first commitment period ended. Developing countries pushed for a continuation of the Kyoto system, but parties with Kyoto emission targets were reluctant to do so, because they did not want to be bound by targets while the United States, China, and other major economies were not. Instead, they advocated a more global approach.²²

The eventual compromise was to pursue negotiations along two parallel tracks, one to consider an amendment to the Kyoto Protocol establishing a second commitment period, the other to promote "long-term cooperative action" under the UNFCCC. The Kyoto Protocol parties launched the first track at their first meeting in 2005;²³ the UNFCCC parties launched the second track two years later in the Bali Action Plan.²⁴ Both tracks were to conclude at the 2009 Copenhagen Conference.

The Copenhagen Conference was freighted with huge expectations—expectations further heightened by the Danish decision to invite heads of state. But two years proved too little time to fully resolve the enormous issues at stake about the future architecture of the regime, and the Copenhagen Conference ended in acrimony and disappointment.²⁵ Although leaders of a broadly representative group of states, including all of the world's major economies, agreed to the Copenhagen Accord on the final night of the conference, the Accord was political rather than legal in character and, in any event, did not win acceptance from the conference as a whole.

Despite these disappointments, the Copenhagen Accord, in embryonic form, pointed the way forward. In contrast to the Kyoto Protocol, which had set emission reduction targets through a collective process of international negotiations, the Copenhagen Accord established a bottom-up

²² See, e.g., European Commission, *Winning the Battle Against Climate Change*, COM(2005) 35 final (Feb. 9, 2005).

²³ Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Article 3, Paragraph 9, of the Kyoto Protocol, Decision 1/CMP.1 (Dec. 9–10, 2005), *in* Kyoto Protocol Meeting of the Parties Report No. 1, UN Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006).

²⁴ Bali Action Plan, Decision 1/CP.13 (Dec. 14–15, 2007), *in* COP Report No. 13, Addendum, at 3, UN Doc. FCCC/CP/2007/6/Add.1, at 3 (reissued March 14, 2008).

²⁵ See Bodansky, *supra* note 12.

architecture, in which countries defined their own targets and actions and then recorded them internationally. Also in contrast to Kyoto, it began to erode the sharp differentiation between developed and developing country parties. For the first time, China, India, Brazil, and other emerging economies put forward national emission limitation pledges. The result was a fundamental reorientation of the climate change regime, away from the rigidly differentiated approach of the Kyoto Protocol, toward a more bottom-up, global approach.²⁶

The 2010 Cancún Agreements formally incorporated the main elements of the Copenhagen Accord into the UNFCCC regime, including the pledges made by countries to reduce their emissions.²⁷ But the Copenhagen/Cancún pledges addressed only the period through 2020, leaving open what to do next. Moreover, Cancún did not resolve whether to extend the Kyoto Protocol beyond 2012. These two issues became the focus of the 2011 Durban Conference.

The Durban Platform for Enhanced Action,²⁸ which launched the negotiations leading to the Paris Agreement, resolved these issues through a finely balanced compromise among the principal negotiating blocs in the UNFCCC process.²⁹ On one side, the European Union and other states with Kyoto targets such as Switzerland, Norway, and New Zealand agreed to a second Kyoto commitment period, which they formally adopted the following year in Doha.³⁰ In exchange, China, India, Brazil, and South Africa accepted a mandate to negotiate a new instrument with “legal force” to apply from 2020. This mandate was acceptable to the United States because it did not differentiate between developed and developing countries, but instead called for the negotiation of an instrument

²⁶ *Id.* at 239–40.

²⁷ Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Dec. 1/CP.16 (Dec. 10–11, 2010), *in* COP Report No. 16, Addendum, UN Doc. FCCC/CP/2010/7/Add.1 (March 15, 2011).

²⁸ Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Dec. 1/CP.17 (Dec. 11, 2011), *in* COP Report No. 17, Addendum, at 2, UN Doc. FCCC/CP/2011/9/Add.1 (March 15, 2012) [hereinafter Durban Platform].

²⁹ Bodansky, *Durban Platform Negotiations*, *supra* note 1.

³⁰ Doha Amendment to the Kyoto Protocol, Dec. 8, 2012, *in* Kyoto Protocol Meeting of the Parties Report No. 8, UN Doc. FCCC/KP/CMP/2012/13/Add.1 (Feb. 23, 2013).

“applicable to all [UNFCCC] parties.”³¹ Finally, small island and other vulnerable states succeeded in establishing a separate workstream focusing on increasing pre-2020 mitigation ambition.

The Durban Platform established the Ad Hoc Working Group on the Durban Platform (ADP), which met fifteen times over the next four years. Milestones of the ADP process included the 2013 Warsaw decision on “Further Advancing the Durban Platform,”³² which first articulated the hybrid structure of the new agreement and called on states to submit their intended nationally determined contributions (INDCs) well in advance of the Paris conference, and the 2014 Lima Call for Action,³³ which elaborated informational norms for parties’ INDCs. In November 2014, the United States and China made a joint announcement on climate change,³⁴ signaling greater cooperation between the world’s two biggest emitters and bolstering a more positive dynamic in the negotiations³⁵ (a positive spirit reinforced by a U.S.-China Joint Presidential Statement in September 2015, shortly before COP-21³⁶). The ADP produced a draft negotiating text in February 2015.³⁷ Throughout the year, countries began submitting their INDCs and, by the time the Paris conference began, more than 180 states had done so.

³¹ Durban Platform, *supra* note 28, para. 2.

³² Further Advancing the Durban Platform, Dec. 1/CP.19 (Nov. 23, 2013), *in* COP Report No. 19, Addendum, at 3, UN Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) [hereinafter Warsaw Decision].

³³ Lima Call for Climate Action, Dec. 1/CP.20 (Dec. 14, 2014), *in* COP Report No. 20, Addendum, at 2, UN Doc. FCCC/CP/2014/10/Add.1 (Feb. 2, 2015) [hereinafter Lima Call for Climate Action].

³⁴ White House Press Release, U.S.–China Joint Announcement on Climate Change (Nov. 12, 2014), *at* <https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

³⁵ See Kristina Daugirdas and Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL ___, notes 11–13 and accompanying text.

³⁶ White House Press Release, U.S.–China Joint Presidential Statement on Climate Change (Sept. 25, 2015), *at* <https://www.whitehouse.gov/the-press-office/2015/09/25/us-china-joint-presidential-statement-climate-change>.

³⁷ Negotiating Text, *in* UNFCCC, Ad Hoc Working Group on the Durban Platform for Enhanced Action, UN Doc. FCCC/ADP/2015/1 (Feb. 25, 2015).

The ADP concluded its work at the end of the first week in Paris, forwarding its draft negotiating text to ministers.³⁸

In the UN climate change regime, the end game of conferences of the parties (COPs) is typically a process of trench warfare, in which virtually every word is fought over, and gains and losses are measured in brackets and commas. One has to be a COP-ologist, familiar with the subtle history and nuance of every provision, to follow the to and fro. The Paris Conference was no exception. What was exceptional was the masterful performance of the French Foreign Minister, Laurent Fabius, in managing the negotiations. First, he organized issue-specific groups facilitated by designated ministers. Then he used the “Indaba” format introduced at the Durban Conference.³⁹ Finally, states met during the final day and night in bilateral and other small groups to hammer out compromises on the crunch issues. Throughout the process, the French team kept an open door, to hear the concerns of particular delegations, all the while keeping firm control of the text, releasing a series of drafts that progressively narrowed the issues under negotiation.⁴⁰ The result was a remarkably positive spirit in the final week, with little of the sniping typical of COPs.

There was one surprise at the end, however. On the final Saturday afternoon, shortly before the closing plenary was scheduled to begin, the United States discovered that the text distributed by Fabius earlier in the day on a take-it-or-leave-it basis differed from the previous version. “Should” had been replaced by “shall” in a key provision, converting a recommendation about the form of future NDCs into a legal requirement. The mistake could not have been more consequential, since it affected the ability of the United States to join the agreement. Arguably, if the provision said “shall” and hence created a legal obligation, Senate or congressional

³⁸ Draft Paris Outcome: Revised Draft Conclusions Proposed by the Co-Chairs, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Addendum, UN Doc. FCCC/ADP/2015/L.6/Rev.1 (Dec. 5, 2015).

³⁹ At COP-17 in Durban, the South African presidency introduced the concept of an Indaba—a closed, open-ended meeting of parties, with limited seating, at which important decisions would be made. Proceedings, *in* COP Report No. 17, at 11, para. 35, UN Doc. FCCC/CP/2011/9 (Mar. 15, 2012).

⁴⁰ For example, the text distributed in the middle of the final week had only about fifty square brackets, as compared to the nine hundred brackets in the text forwarded by the ADP to ministers at the beginning of the week. For a tracking of brackets in the successive negotiating drafts, see <https://parisagreement.org> (last visited May 15, 2016).

approval might have been required for U.S. participation, whereas if “should” were used, the Paris Agreement could be accepted by the president as a presidential-executive agreement. Reportedly, “should” had been used consistently in earlier drafts of the provision.⁴¹ How the word “shall” appeared in the final text presented on Saturday afternoon may never be known. In any event, after a long delay, the issue was finally resolved through a Secretariat statement that use of the word, “shall,” was a “technical” error that would be corrected in the final text. A collective gasp went through the room when the Secretariat read the change, but no one raised an objection, and Fabius gaveled the agreement through by acclamation.

III. OVERARCHING ISSUES

The Paris Agreement can best be understood by how it addresses three perennial issues in the climate change negotiations: (1) legal form, (2) differentiation, and (3) top-down versus bottom-up architecture.

A. Legal Form

1. Background

The issue of legal form has been a preoccupation—some might say obsession—of the climate change regime from the outset.⁴² The original General Assembly mandate for the UNFCCC negotiations specified that the outcome would be a “framework convention . . . containing appropriate commitments”⁴³—that is, a treaty under international law. But one of the agreement’s key provisions—the emissions target for Annex I countries specified in Article 4.2—was formulated as an “aim” rather than as a legal obligation.⁴⁴ The mandate for the Kyoto Protocol negotiations again

⁴¹ See Daugirdas and Mortenson, *supra* note 35, ___, notes 75–79 and accompanying text.

⁴² See Daniel Bodansky, *The Legal Character of the Paris Agreement*, REV. EUR., COMP. & INT’L ENVTL. L. (forthcoming 2016).

⁴³ G.A. Res. 45/212, Protection of Global Climate for Present and Future Generations of Mankind, GAOR Supp. No. 49A, UN Doc. A/45/49, at 147 (Dec. 21, 1990).

⁴⁴ UNFCCC, *supra* note 17 [convert footnote number into cross-reference?], Art. 4.2(b) (requiring parties to communicate policies and measures “with the aim of returning individually or jointly to their 1990 levels”).

specified that the legal form of the outcome would be a treaty.⁴⁵ But it left open whether the centerpiece of the new agreement—emissions reduction targets for Annex I parties—would be legally binding,⁴⁶ an issue not resolved until the following year at COP-2 in Geneva.⁴⁷

The issue of legal form continued to overshadow the negotiations about the post-2012 period. Many hoped and assumed that the Copenhagen outcome would be a treaty. But disagreements over the issue of legal form made adoption of a treaty impossible. The United States was willing to accept a legal instrument only if it applied symmetrically to all parties, while China, India, and other large developing states were willing to accept a legal agreement only if it established emission reduction obligations exclusively for developed states. The solution was to make the Copenhagen Accord a non-binding instrument, whose provisions represented political rather than legal commitments. The Cancún Agreements, as COP decisions, also lacked legal force.

Not all regarded the Copenhagen Accord and Cancún Agreements as the final outcome of the Bali Action Plan process, however, and negotiations continued, with many states continuing to press for adoption of a new legal agreement. It was against this backdrop that COP-17 met in 2011 and adopted the Durban Platform.

2. Legal Form of the Paris Agreement and Its Relationship to the UNFCCC

The Durban Platform called for the negotiation of a “protocol, another legal instrument, or an agreed outcome with legal force”⁴⁸—a deliberately vague formulation designed to bridge the gap between the European Union

⁴⁵ The Berlin Mandate, Dec. 1/CP.1, pmbl. (Apr. 7, 1995), *in* COP Report No. 1, Addendum, UN Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995) (calling for negotiation of “a protocol or another legal instrument”) [hereinafter Berlin Mandate].

⁴⁶ *Id.* para. 2(a).

⁴⁷ Geneva Ministerial Declaration (July 18, 1996), *in* COP Report No. 2, Addendum, Annex, at 71, 73, para. 8, UN Doc. FCCC/CP/1995/15/Add.1 (Oct. 29, 1996) (calling for negotiation of commitments for Annex I parties regarding “quantified legally-binding objectives for emissions limitations and significant overall reductions within specified time frames”). As with the Copenhagen Accord, the COP “took note” of the Geneva Declaration, rather than formally adopting it. *Id.* at 70.

⁴⁸ Durban Platform, *supra* note 28, para. 2.

and other high ambition countries, which wanted a mandate to negotiate a new treaty, and India, which wanted to leave the issue of legal form open. Of the triad—protocol, another legal instrument, or an agreed outcome with legal force—the first two options are clearly treaties, but the meaning of the third option was initially unclear because the phrase, “agreed outcome with legal force,” was novel and had no accepted definition in international law. This ambiguity allowed India to argue that an outcome with legal force under a state’s domestic law would satisfy the Durban Platform mandate.⁴⁹

Although no explicit decision was ever made by the ADP about the issue of legal form, it became increasingly apparent as the negotiations wore on that the Paris outcome would take the form of a treaty. This growing convergence was reflected in the first iteration of the draft negotiating text circulated in February 2015, which included final clauses addressing signature, ratification, and entry into force.⁵⁰ Presumably, states’ increasing acceptance of the treaty form reflected their growing comfort with the contents of the agreement. In the final phases of the negotiations, states that had concerns over the issue of legal form concentrated on ensuring that particular provisions did not create legal obligations, rather than on depriving the agreement as a whole of its legal character.

Ultimately, the issue of legal form was addressed in the Paris Agreement as it had been in the UNFCCC, by distinguishing between the legal form of the agreement and the legal character of particular provisions. Notwithstanding suggestions by a few commentators to the contrary,⁵¹ there appears to be no disagreement among states that the Paris Agreement is a treaty within the meaning of international law.⁵² The parties’ intent to create a legal agreement is clearly implied by their inclusion of final clauses

⁴⁹Indian Submission to the ADP Work Plan, para. 7, UN Doc. FCCC/ADP/2012/Misc.3, at 33 (April 30, 2012); see Lavanya Rajamani, *The Durban Platform for Enhanced Action and the Future of the Climate Regime*, 61 INT’L & COMP. L.Q. 501, 506–07 (2012).

⁵⁰ Negotiating Text, *supra* note 37, para. 215–24.

⁵¹ E.g., Anne-Marie Slaughter, *The Paris Approach to Global Governance*, PROJECT SYNDICATE (Dec. 28, 2015), at <https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>.

⁵² The term “treaty” has a narrower meaning in U.S. constitutional law than in international law, referring to international agreements that are submitted to the Senate for advice and consent to ratification, pursuant to Article II of the Constitution. U.S. CONST. Art. II, § 2.

addressing issues such as signature, ratification, entry into force, and depositary functions.⁵³ But the prescriptive force of the Paris Agreement's provisions varies, and many are not formulated as legal obligations.

The choice of the title "Paris Agreement," rather than "Paris Protocol" or "Paris Implementing Agreement," as some states had proposed, does not affect the agreement's status as a treaty, which depends on the parties' intent, not what the instrument is called.⁵⁴ But the choice of "agreement" rather than "protocol" or "implementing agreement" may reflect a desire by some states to avoid an implication that the Agreement is subordinate to the UNFCCC.⁵⁵ Notwithstanding the neutral title, however, the Paris Agreement and the UNFCCC clearly have a close relationship: Article 2.1 emphasizes the Paris Agreement's role "in enhancing the implementation of the Convention," the agreement employs the UNFCCC's institutions (including the financial mechanism, COP, secretariat, and subsidiary bodies),⁵⁶ and Article 20.1 allows only UNFCCC parties to join.

3. Legal Character of Particular Provisions

The Paris Agreement reflects a careful calibration of the prescriptive force of its various provisions. Some provisions are expressed as "shalls," thereby creating legal obligations. Others use the verb, "should" or "encourage," creating different levels of recommendation. Others are expressed as expectations, using the verb "will." Still others are permissive, using the verb "may." And still others use the verb, "are to," which could be interpreted as stating either a commitment or an expectation.

The legal character of the Agreement's provisions was important to many delegations, but none more so than the United States, due to the peculiarities of its domestic treaty-approval process. Although the U.S.

⁵³ Paris Agreement, *supra* note 2, Arts. 20–29.

⁵⁴ Vienna Convention on the Law of Treaties, Art. 2(1)(a), May 23, 1969, 1155 UNTS 331 (defining treaty as "an international agreement concluded between states in written form and governed by international law, . . . whatever its particular designation").

⁵⁵ The fact that the title "Paris Implementing Agreement" was proposed in the ADP and apparently rejected undercuts Annalisa Savaresi's argument that the Paris Agreement can be regarded as an implementing agreement. Annalisa Savaresi, *The Paris Agreement – A Rejoinder*, EJIL:TALK! (Feb. 16, 2016), at <http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>.

⁵⁶ Paris Agreement, *supra* note 2, arts. 9.8, 16–19.

Constitution provides that “treaties” require the advice and consent of two-thirds of the Senate, most international agreements are adopted by the United States not under this procedure, but rather as “executive agreements”—in most cases with the approval of Congress, but in some cases by the President acting alone.⁵⁷ Since Senate or congressional approval of the Paris Agreement appears impossible, an imperative for the U.S. delegation in Paris was to ensure that the agreement did not contain the types of legally binding provisions that might trigger a need for legislative approval—in particular, new financial commitments or a legally-binding emissions target.⁵⁸

Probably the single issue of legal form that proved most difficult to resolve concerned the legal character of parties’ NDCs—almost precisely the same issue as in the UNFCCC negotiations. The European Union and many small island states argued that giving the NDCs legal effect—for example, by creating an obligation to implement or achieve—would express a higher level of commitment, give the NDCs greater credibility, and provide a stronger assurance of implementation and compliance. Pushing in the other direction, the United States argued that a strong transparency system could accomplish the same ends and that creating an obligation to implement or achieve NDCs could discourage participation and/or ambition.

The Warsaw Decision left open the legal status of NDCs by characterizing them as nationally determined “contributions” rather than “commitments.” To avoid any ambiguity on this score, the Decision said—not just once, but twice—that it was “without prejudice to the legal nature of the contributions.”⁵⁹ As a result, the legal character of NDCs continued to be debated until the very end. The Paris Agreement finally resolved this issue in Article 4.2, which establishes a number of procedural obligations

⁵⁷ Daniel Bodansky, *Legal Options for U.S. Acceptance of a New Climate Agreement* 14 (Center for Climate and Energy Solutions, May 2015), available at <http://www.c2es.org/docUploads/legal-options-us-acceptance-new-climate-change-agreement.pdf>.

⁵⁸ See Daugirdas and Mortenson, *supra* note 35, __notes 69–81 and accompanying text.

⁵⁹ Warsaw Decision, *supra* note 32, para. 2(b).

relating NDCs, and requires parties to “pursue domestic mitigation measures, with the aim of achieving the objective of [their] contributions.”⁶⁰

B. Differentiation

Like legal form, differentiation has been a recurrent issue in the UN climate change regime since its inception. In Paris, it proved one of the most difficult issues to resolve, and played out across all of the elements of the Paris Agreement: mitigation, adaptation, finance, and transparency.

The principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) was first articulated in the UNFCCC and has two bases: first, the different historical responsibilities of parties for causing the climate change problem, and, second, their differing capabilities to address it.⁶¹ The UNFCCC reflected the principle of CBDR-RC by establishing both common obligations for all parties, as well as differentiated obligations for parties listed in Annexes I and II of the Convention.⁶² Although these annexes reflect a categorical approach to differentiation, the UNFCCC also recognized that its categorization of countries might need to evolve over time, as their responsibilities and capabilities change. Accordingly, the UNFCCC called for a review of the annexes, with a view to their possible amendment.⁶³ This allowed for the possibility that, as countries’ responsibilities and capabilities changed, they might “graduate” from one category of party into another—they might move, for example, from non-Annex I to Annex I status.

The adoption of the Berlin Mandate in 1995, which initiated the negotiations leading to the Kyoto Protocol, represented a hardening of the climate regime’s approach to differentiation by explicitly excluding any new commitments for non-Annex I countries.⁶⁴ The sharp differentiation

⁶⁰ Paris Agreement, *supra* note 2, Art. 4.2.

⁶¹ On differentiation, see generally LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (2006).

⁶² Compare UNFCCC, Article 4.1 (establishing common obligations) with Articles 4.2–4.4 (establishing differentiated obligations for Annex I and Annex II parties). In addition to Annex I and II, the UNFCCC also differentiates other categories of countries, including economies in transition (Article 4.6), small island states (Article 4.8(a)), and least developed countries (Article 4.9).

⁶³ *Id.* Art. 4.2(f).

⁶⁴ Berlin Mandate, *supra* note 45, para. 2(b).

between Annex I and non-Annex I countries was further exacerbated by the rejection in Kyoto of proposals to allow developing countries to assume voluntary commitments to reduce their emissions.⁶⁵ Indeed, some began to suggest that the principle of CBDR-RC had established a “firewall” between Annex I and non-Annex I parties.

From the outset, the UNFCCC’s annex structure never perfectly reflected the principle of CBDR-RC. And as the global economy transformed, it became increasingly disconnected from reality. Countries that had rapidly developed and become among the richest in the world, such as Singapore and Qatar, were still classified as “developing.” South Korea and Mexico remained non-Annex I parties, even after they had joined the Organization for Economic Cooperation and Development (OECD). Developing country emissions collectively surged ahead of developed country emissions. And China became the biggest emitter in the world, accounting for one-quarter of global emissions in 2012, roughly as much as the United States and European Union combined.⁶⁶

Many developing countries still argued that the UNFCCC’s division of the world into Annex I and non-Annex I parties was equitable, since they bear less responsibility and have other development priorities. But, for Annex I countries, moving away from the UNFCCC’s annex structure towards a more global approach became perhaps the top priority in developing a post-Kyoto regime.

The Copenhagen/Cancún framework began to break down the firewall between developed and developing countries. It retained important elements of differentiation. The type of emissions pledge differed for developed and developing countries: quantified emission reduction targets for developed countries and nationally appropriate mitigation actions for developing countries. The transparency system was bifurcated: a system of “international assessment and review” for developed countries, and a process of “international consultation and analysis” for developing

⁶⁵ Joanna Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History*, UNFCCC Technical Paper, UN Doc. FCCC/TP/2000/2, at 102–05 (Nov. 25, 2000).

⁶⁶ Zhu Liu, *China’s Carbon Emissions Report 2015*, at 2 (Harvard Kennedy School, May 2015) available at <http://belfercenter.ksg.harvard.edu/files/carbon-emissions-report-2015-final.pdf>.

countries.⁶⁷ And the pledge to mobilize financial resources applied only to developed countries. But, compared to Kyoto, the Copenhagen/Cancún framework represented a significant shift. It called on all countries to put forward emission reduction pledges, for listing internationally. It called on developing countries to report on their GHG inventories and mitigation actions in biennial reports. And, for the first time, it subjected those reports to international scrutiny.

The Durban Platform dramatically accelerated the move away from the Kyoto Protocol's categorical approach to differentiation. It explicitly provided that the new agreement would be "applicable to all" and made no reference to the principle of CBDR-RC, or to developed, developing, Annex I, or non-Annex I parties—the categories that had dominated the climate change regime until then. It thus provided a fundamentally different frame for the Paris negotiations than previous mandates.⁶⁸

Of course, the fact that the Durban Platform did not explicitly mention CBDR-RC did not mean the principle was no longer relevant. The Durban Platform implicitly incorporated the principle by stating that the new agreement would be "under the Convention." The question was how CBDR-RC should be reflected in the new agreement. Did the concept of nationally determined contributions sufficiently reflect the principle, through its implicit self-differentiation, or should the agreement include explicit differentiation and, if so, by categorically differentiating between developed and developing country commitments? Should the provisions on finance apply only to developed countries, as in earlier instruments, or should the Paris Agreement expand the donor pool? And should the provisions on transparency retain the bifurcated approach of the Copenhagen Accord, or adopt a common system with built-in flexibility for developing countries?

The 2014 U.S.–China joint announcement in November 2014 helped break the impasse by articulating a modified, more flexible version of the principle of CBDR-RC, which added the phrase "in the light of different national circumstances."⁶⁹ The following month, the Lima Call for Action⁷⁰

⁶⁷ Copenhagen Accord, *supra* note 15, para. 5. *See generally* Bodansky, *supra* note 12, at 240.

⁶⁸ Rajamani, *supra* note 49, at 502.

⁶⁹ US–China Joint Announcement, *supra* note 34.

⁷⁰ Lima Call for Action, *supra* note 33.

picked up this new formulation as a basis for compromise, and the new formulation is repeated in several provisions of the Paris Agreement, including the preamble,⁷¹ Article 2.2 (establishing the Agreement's aim), Article 4.3 (on progression), and Article 4.19 (on long-term low greenhouse gas emission development strategies).

The Paris Agreement largely completes the move away from the Kyoto Protocol's categorical approach to differentiation. Perhaps most significantly, it does not include any reference to the annex structure of the UNFCCC, marking an end to the divide between Annex I and non-Annex I countries. Instead, it takes a more particularized approach, reflecting the principle of CBDR-RC differently in its different elements:

- The procedural commitments relating to NDCs are, in general, common (with some flexibility given to least developed and small island states), and all countries over time are to move towards economy-wide absolute emission reduction targets.⁷²
- The NDCs themselves involve self-differentiation.
- The transparency framework takes account of parties' different capacities by providing "built-in flexibility" to "those developing country Parties that need it," rather than to developing countries as a class.⁷³
- Finally, the provisions on finance, technology, and capacity-building,⁷⁴ as well as some hortatory provisions relating to NDCs,⁷⁵ continue to be differentiated on a more categorical basis, between developed and developing countries—although, since the categories

⁷¹ Paris Agreement, *supra* note 2, pmbl., para. 3.

⁷² *Id.* Arts. 4.2, 4.6, 4.8, 4.9, 4.13.

⁷³ *Id.* Arts. 13.1, 13.2.

⁷⁴ *Id.* Arts. 4.5 (support for developing countries to implement mitigation article), 6.6 (share of proceeds from new sustainable development mechanism for developing countries), 7.6 (recognizing the importance of support for adaptation), 7.13 (support for adaptation for developing countries), 9 (finance), 10 (technology), 11 (capacity building), 13.14 (support for developing countries for implementation), 13.15 (support to build transparency-related capacity of developing countries).

⁷⁵ *Id.* Arts. 4.1 (peaking will take longer for developing countries), 4.4 (recommending that developed countries "continue taking the lead by undertaking economy-wide absolute emission reduction targets," while only encouraging developing countries "to move over time towards economy-wide emission reduction or limitation targets in light of different national circumstances.").

“developed” and “developing” countries are left undefined, they are less rigid than the UNFCCC’s and Kyoto Protocol’s annexes.

In this more carefully calibrated approach, differentiation remains, but in the context of what can fairly be described as a common global framework that fully incorporates emerging economies such as China, India, and Brazil. That is one of the Paris Agreement’s signal achievements.

C. Bottom-up vs. Top-Down Architecture

A third perennial issue in the UN climate change regime has been how much latitude to give states in developing their climate change policies. On the one hand, since climate change is a classic collective action problem, many argue that a top-down approach is required, consisting of collectively negotiated emissions targets to ensure reciprocity of effort. On the other hand, because climate change implicates virtually every aspect of domestic policy and raises huge domestic sensitivities, and because each country knows best its domestic circumstances, this suggests the need for a bottom-up approach, in which international pledges grow out of, and reflect, domestic policies, rather than being superimposed on them. The Kyoto Protocol takes the first approach; the Copenhagen Accord the second.

The Copenhagen Accord attracted much wider participation than Kyoto. The countries willing to accept Kyoto emission targets represented only about a quarter of global emissions in the first commitment period, and this number has dropped to less than 15 percent in Kyoto’s second commitment period. By contrast, 141 countries put forward emission pledges under the Copenhagen Accord, representing more than 85 percent of global emissions.⁷⁶

The problem was that the Copenhagen pledges often lacked transparency and were difficult to understand, undermining any prospect of holding states accountable. To address this problem, many states urged that the Paris negotiations develop a hybrid architecture that combines a bottom-up approach to promote flexibility and participation with a top-down system of international rules to promote ambition and accountability. The Durban Platform pointed in this direction by recognizing, in its

⁷⁶ U.S. Climate Action Network, *Who’s On Board with the Copenhagen Accord?*, at <http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments> (last visited Mar. 15, 2016).

preamble, that fulfilling the Convention's objective "will require strengthening of the multilateral, rules-based regime."⁷⁷

The 2013 Warsaw Decision on "Further Advancing the Durban Platform"⁷⁸—adopted at the midpoint of the Paris negotiations—reflected in embryonic form, the Paris Agreement's emerging hybrid architecture. By characterizing parties' contributions as "nationally determined," the Warsaw Decision suggested a bottom-up process, in which each state would be able to define the stringency, scope, and form of its contribution. But the Decision also introduced some international discipline by calling on parties to communicate their intended nationally determined contributions (INDCs) "in a manner that facilitates . . . clarity, transparency, and understanding," and by suggesting they do so in the first quarter of 2015, to leave time before Paris for a process of informal, *ex ante* review.⁷⁹ The Lima Call for Climate Action, adopted the following year at COP-20, contributed additional details, identifying (but not prescribing) information that states might provide in connection with their NDCs, including assumptions and methodological approaches, time frames, and scope and coverage.⁸⁰

In a very real sense, the bottom-up component of the Paris Agreement's hybrid architecture was largely complete by the time the conference began. Over the course of 2015, virtually every state submitted an INDC. The Paris Conference focused on the other half of the hybrid equation: the development of strong international rules to promote ambition. Ultimately, the so-called "friends of rules" in Paris proved successful in including comparatively strong rules on transparency, accounting, and updating.⁸¹ Granted, the agreement fails to include a number of important proposals, such as that NDCs be quantified or quantifiable and include an unconditional element, and that proposed

⁷⁷ Durban Platform *supra* note 28, pmb., para. 3.

⁷⁸ Warsaw Decision, *supra* note 32.

⁷⁹ *Id.* para. 2(b).

⁸⁰ Lima Call for Action, *supra* note 33, para. 14.

⁸¹ Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics*, INT'L & COMP. L.Q. (forthcoming 2016) (the "friends of rules" group included South Africa, the European Union, the United States, Switzerland, New Zealand, Australia, and others, as well as the Singaporean facilitator).

NDCs be subject to a process of ex ante review, to consider their ambition, comparability, and fairness. Nevertheless, the rules that were successfully incorporated into the agreement are at the outer edge of what seemed achievable based on the previous four years of negotiations. Elements designed to promote ambition include the long-term goal (Article 2), the medium and long-term emission goals (Article 4.1), the enhanced transparency framework (Article 13), the five-year cycle of global stock-takes and successive NDCs (Articles 14 and 4.9), and the expectation of progression that applies to all elements of the agreement, including not only mitigation, but also adaptation and finance (Article 3).⁸²

IV. ANALYSIS OF SPECIFIC ISSUES

The Paris outcome took the form of a COP decision, which includes the Paris Agreement as an annex.⁸³ The Agreement itself is comparatively brief, consisting of twenty-nine articles, addressing the various elements of the Durban Platform: mitigation, adaptation, finance, technology transfer, capacity-building, and transparency of action and support. The accompanying COP decision is somewhat longer, and is largely devoted to elaborating the Paris Agreement.⁸⁴ In addition, the COP decision includes sections addressing:

- Interim arrangements pending the Agreement's entry into force.⁸⁵
- Parties' intended nationally determined contributions (INDCs).⁸⁶
- The separate workstream of the ADP concerning pre-2020 mitigation ambition.⁸⁷
- The efforts of non-party stakeholders, including cities and other subnational authorities, the private sector, NGOs, and financial institution.⁸⁸

⁸² Paris Agreement, *supra* note 2.

⁸³ Paris Decision, *supra* note 13.

⁸⁴ *Id.* paras. 22–104.

⁸⁵ *Id.* paras. 5–11.

⁸⁶ *Id.* paras. 12–21.

⁸⁷ *Id.* paras. 105–32.

⁸⁸ *Id.* paras. 133–36.

A. *Aims (Articles 2 and 4.1)*

Long-term mitigation objectives can be defined in a number of ways, in terms of atmospheric concentrations of GHGs, temperature change, or emissions. The UNFCCC opted for the first of these alternatives, establishing as its “ultimate objective” stabilization of atmospheric concentrations at levels that would prevent dangerous anthropogenic climate change.⁸⁹ In contrast, the Copenhagen Accord defined a temperature change objective, namely, to limit temperature increase above pre-industrial levels to less than 2 degrees Celsius.⁹⁰ The following year, the Cancún Agreements reiterated the below-2 degree temperature goal, but also called for consideration of strengthening the goal to 1.5 degrees.⁹¹

In Paris, adoption of the below-1.5 degree goal was the top priority of some small island states, for whom climate change is an existential threat. Most analysts agree that there is virtually no realistic prospect of achieving the below-2 degree goal⁹² (temperature has already increased by 1 degree from pre-industrial levels),⁹³ at least without some form of climate engineering,⁹⁴ and states themselves acknowledged in the Paris COP decision that the NDCs they have submitted fall well short of the below-2 degree goal.⁹⁵ So moving to a more stringent, and hence even more

⁸⁹ UNFCCC, *supra* note 17, art. 2.

⁹⁰ Copenhagen Accord, *supra* note 15, paras. 1–2.

⁹¹ Cancún Agreements, *supra* note 27, para. 4.

⁹² David G. Victor & Charles F. Kennel, *Ditch the 2° Warming Goal*, 514 NATURE 30, 30–31 (2014); *see also* David G. Victor, *Why Paris Worked: A Different Approach to Climate Diplomacy*, ENVIRONMENT360 (Dec. 15, 2015), at http://e360.yale.edu/feature/why_paris_worked_a_different_approach_to_climate_diplomacy/2940/ (characterizing 1.5 degree goal as “ridiculous”); Michael Le Page, *Paris Deal Is Agreed—But Is It Really Good Enough*, NEW SCIENTIST (Dec. 12, 2015) at <https://www.newscientist.com/article/dn28663-paris-climate-deal-is-agreed-but-is-it-really-good-enough/> (quoting Michael Grubb that “actually delivering 1.5 degrees C is simply incompatible with democracy”).

⁹³ *Global Temperatures Set to Reach 1° C Marker for First Time*, UNITED KINGDOM MET OFFICE (Nov. 9, 2015) at <http://www.metoffice.gov.uk/news/release/archive/2015/one-degree>.

⁹⁴ Scenarios for achieving the below-2 degree Celsius temperature goal all rely on using carbon dioxide removal techniques in the second half of the century, such as bioenergy and carbon capture and storage (BECCS). *See* Jeff Tollefson, *The 2° C Dream*, 527 NATURE 436, 437 (2015).

⁹⁵ Paris Decision, *supra* note 13, para. 17.

unrealistic, temperature goal would appear utopian.⁹⁶ The importance that many countries nevertheless placed on the issue highlights that the Paris Agreement serves not only a regulatory function, but also expressive and advocacy functions.⁹⁷ Whether or not the regime ever achieves the 1.5 degree goal, it provides a potent rallying cry for activists and a basis to push states and other actors to take stronger action.

The vulnerable states advocating a below-1.5 degree goal were partially successful. The agreement defines its aim as holding the increase in global average temperature to “well below” 2 degrees—a strengthening of the below-2 degree goal in Copenhagen and Cancún. Moreover, it recognizes that the 1.5 degree goal would “significantly reduce the risks and impacts of climate change” and pledges to “pursue efforts” to achieve that goal.⁹⁸ In that connection, the accompanying COP decision asks the Intergovernmental Panel on Climate Change (IPCC) to undertake an assessment of 1.5 degree pathways.⁹⁹

In addition to the 2/1.5 degree temperature goal, the Paris Agreement also articulates a global emissions peaking goal, which parties are to achieve as soon as possible (but with a recognition that this will take longer for developing countries), with rapid reductions thereafter. During the ADP negotiations, there was also significant support for inclusion of a long-term de-carbonization goal, in line with the IPCC’s conclusion that temperature stabilization will require zero net-carbon emissions. G-7 leaders had included such a goal in their 2015 summit declaration.¹⁰⁰ But fossil fuel-producing states did not want to single out carbon dioxide or focus only on emissions from sources to the exclusion of removal by sinks. So, instead, the agreement’s long-term emissions goal addresses greenhouse gases more

⁹⁶ As one observer in Paris reportedly said, “They may as well agree that all fairies shall ride unicorns too.” Jeff Goodell, *Will the Paris Climate Deal Save the World?*, ROLLING STONE (Jan. 13, 2016), at <http://www.rollingstone.com/politics/news/will-the-paris-climate-deal-save-the-world-20160113?page=2>.

⁹⁷ See generally Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996).

⁹⁸ Paris Agreement, *supra* note 2, Art. 2.

⁹⁹ Paris Decision, *supra* note 13, para. 21.

¹⁰⁰ White House Press Release, G-7 Leaders’ Declaration, Schloss Elmau, Germany (June 8, 2015), at <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>.

generally and is defined as achieving “a balance between anthropogenic emissions by sources and removals by sinks,”¹⁰¹ Although the time frames for both the peaking and long-term balance goals are described rather vaguely, and the Agreement does not include a quantified mid-term emissions goal, such as a 50 percent reduction goal by mid-century, as some parties had proposed, the long-term net emissions neutrality goal nevertheless sends a strong signal to business and lends added importance to sinks policies, and both goals should be read in light of the Agreement’s 2/1.5 degree temperature goal.

In order to address all of the elements of the Durban Platform in a balanced manner, the Paris Agreement also defines aims for adaptation and finance, albeit in general, qualitative terms (rather than in quantitative terms, as proposed by the African Group). For adaptation, Article 2 expresses the aim of increasing adaptive capacity, fostering climate resilience, and reducing vulnerability—aims reiterated in Article 7, which deals specifically with adaptation. The finance aim—namely, to make “finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”—addresses private as well as public flows and provides support for efforts to phase out climate unfriendly investments.

B. Mitigation and Global Stocktake (Articles 4 and 14)

The Paris Agreement addresses mitigation through NDCs, which differ from the Kyoto Protocol’s emission targets in four respects. First, they are nationally determined rather than internationally negotiated. Second, they are not legally binding: there is no obligation under the Paris Agreement to achieve them. Third, they are to be recorded in a public registry to be established by the secretariat later this year, rather than in an annex to the agreement, as some countries proposed. Fourth, they are required of all parties, rather than only Annex I parties.

A central issue in the Paris negotiations was what commitments to include with respect to parties’ NDCs. There was broad agreement among states to include procedural commitments—for example, to prepare, communicate, maintain, and periodically update an NDC—which are

¹⁰¹ Paris Agreement, *supra* note 2, art. 4.1.

reflected in the first sentence of Article 4.2. Conversely, there was a general recognition that the agreement would not commit countries to achieve their NDCs, given the opposition to Kyoto-style targets by the United States, China, India, and many other countries.¹⁰² The contentious issue was whether to include an obligation requiring parties to implement their NDCs, which the European Union and some developing countries pushed to include.

A duty to implement, as compared to a duty to achieve, is an obligation of conduct rather than an obligation of result. But, in the context of the Paris Agreement, the difference between the two appears small, since the test of whether a state has implemented its NDC might be seen as whether it has achieved its NDC. This led to a search for a softer formulation, which would allow EU countries to claim that NDCs are not merely voluntary and the United States to say that they are not legally binding. The result was the second sentence of Article 4.2, which requires parties to “pursue domestic mitigation measures, with the aim of achieving the objective of [their] contributions.” The first part of the sentence reiterates the obligation in Article 4.2 of the UNFCCC to “adopt national policies and take corresponding measures” to mitigate climate change; the second part of the sentence, after the comma, links these measures to parties’ NDCs, establishing what some describe as an obligation to pursue measures in good faith, in contrast to an obligation to implement.

The basic commitments with respect to NDCs are not differentiated. Instead, each party, in formulating its NDC, is to reflect the principle of CBDR-RC in light of different national circumstances¹⁰³—in essence, self-differentiating the NDCs. The article on mitigation also incorporates some differentiation in the expectations it sets. For example, it provides that developed country parties “should” continue to take the lead by undertaking economy-wide, absolute emissions reduction targets, while only “encouraging” developing countries to move towards economy-wide

¹⁰² Given the strong opposition by many states to inclusion of an obligation to achieve, NDCs cannot be considered unilaterally binding acts, contrary to a suggestion by Jorge Vinuales, *The Paris Climate Agreement: An Initial Examination, Part II*, EJIL:TALK! (Feb. 8, 2016) at <http://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-ii-of-iii/>.

¹⁰³ Paris Agreement, *supra* note 2, art. 4.2.

targets over time.¹⁰⁴ It also provides that developing countries shall receive support for implementing their mitigation commitments,¹⁰⁵ and gives flexibility to least-developed countries and small-island developing states.¹⁰⁶

A major criticism of the Copenhagen/Cancún pledges was that they were not presented in a transparent, understandable manner, nor were there common accounting rules to measure progress in implementation. In response, the Warsaw Decision called on states to present their INDCs in a manner that “facilitates . . . clarity, transparency and understanding.”¹⁰⁷ The following year, the Lima Call for Climate Action identified up-front information that states might provide when submitting their INDCs, in order to achieve these ends.¹⁰⁸

The Paris Agreement incorporates these norms from the Warsaw and Lima decisions. It requires that parties provide, when communicating their NDCs, “the information necessary for clarity, transparency and understanding”¹⁰⁹ in accordance with the Paris COP decision, which reiterates the list of up-front information identified in the Lima Call for Action.¹¹⁰ The Paris Agreement also provides for a common accounting system, requiring parties to account for their NDCs so as to promote transparency, accuracy, completeness, comparability, and consistency, and to avoid double counting.¹¹¹

¹⁰⁴ *Id.* Art. 4.4. This was the provision at issue on the final day, concerning “shall” versus “should.” See *supra* Part II, n.41 and accompanying text. It reflects a Brazilian “concentric circles” proposal during the negotiations. See Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties, ADP Submission (Nov. 6, 2014) available at http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf.

¹⁰⁵ Paris Agreement, *supra* note 2, Art. 4.5.

¹⁰⁶ *Id.* Art. 4.6.

¹⁰⁷ Warsaw Decision, *supra* note 32, para. 2(b). See *infra* note 79 and accompanying text.

¹⁰⁸ Lima Call for Climate Action, *supra* note 33, para. 14.

¹⁰⁹ Paris Agreement, *supra* note 2, Art. 4.8.

¹¹⁰ Paris Decision, *supra* note 13, para. 27.

¹¹¹ Paris Agreement, *supra* note 2, Art. 4.13.

In addition to the rules set forth in the Paris Agreement itself and the Paris COP decision, Article 4 authorizes the meeting of the Paris Agreement parties (known as the CMA) to:

- Specify additional information that parties are to provide when submitting their NDCs.¹¹²
- Consider common time frames for future NDCs.¹¹³
- Adopt accounting guidance.¹¹⁴

The Paris Agreement also establishes a comparatively strong ratchet-up mechanism, to promote progressively stronger NDCs over time. This was viewed as crucial by many states, since the NDCs submitted in the run-up to Paris were acknowledged to be insufficient. The ratchet-up mechanism operates on a five-year cycle and includes three elements:

- “Global stocktakes” by the meeting of the parties to assess collective progress in achieving the agreement’s long-term goals, which will be conducted every five years, unless the CMA decides otherwise.¹¹⁵ The stocktakes will be facilitative and comprehensive, addressing not only mitigation, but also adaptation, finance, technology transfer, and capacity-building, and will be undertaken “in light of equity and the best available science.”¹¹⁶
- An obligation that each state communicate an NDC every five years, informed by the outcomes of the global stocktake.¹¹⁷
- An expectation (reflected by the use of the verb “will” rather than “shall”) that each party’s successive NDC represent a progression beyond its previous NDC and reflect its highest possible ambition.¹¹⁸

¹¹² *Id.* Art. 4.8.

¹¹³ *Id.* Art. 4.10.

¹¹⁴ *Id.* Art. 4.13.

¹¹⁵ *Id.* Art. 14.2.

¹¹⁶ *Id.* Art. 14.1.

¹¹⁷ *Id.* Art. 4.9.

¹¹⁸ *Id.* Art. 4.3. The expectation of “progression” appears stronger than the “no-backsliding” principle that some proposed during the negotiation, because it implies that parties will advance rather than merely not retreat. It could be satisfied through changes to a contribution’s stringency, scope, or type.

- Complementing this ratchet mechanism, the Paris Agreement also recommends that parties formulate and communicate long-term low emission development strategies.¹¹⁹

The Paris Agreement and Decision establish the following timeline for the ratchet mechanism:

- In 2018, parties will convene a “facilitative dialogue” focusing on mitigation, to take stock of their collective progress in achieving the emission goals set forth in Article 4.1.¹²⁰
- By 2020, parties with NDCs running to 2025 are requested to communicate a new NDC, informed by the facilitative dialogue. Parties with NDCs running to 2030 may continue their existing NDC or update it.¹²¹
- By 2020, parties are invited to communicate their mid-century, long-term low greenhouse gas emission development strategies.¹²²
- In 2023, the CMA will conduct its first global stocktake, addressing adaptation and finance as well as mitigation.¹²³
- By 2025, all parties must communicate their successive NDC, informed by the global stocktake, nine to twelve before the next CMA.¹²⁴
- In 2028, the CMA is expected to conduct its second global stocktake, which will inform the successive NDC that each party is required to communicate by 2030.¹²⁵

The ratchet mechanism will then continue on a five-year cycle indefinitely.

C. Market Based Approaches (Article 6)

Market-based approaches such as emissions trading and the Clean Development Mechanism (CDM) were central features of the Kyoto

¹¹⁹ Paris Agreement, *supra* note 2, Art. 4.19.

¹²⁰ Paris Decision, *supra* note 13, para. 20.

¹²¹ *Id.* paras. 23, 24.

¹²² *Id.* para. 35.

¹²³ Paris Agreement, *supra* note 2, Art. 14.2

¹²⁴ Paris Decision, *supra* note 13, para. 25.

¹²⁵ Paris Agreement, *supra* note 2, Art. 4.9.

Protocol architecture, but for most of the ADP negotiations, it was unclear whether states would agree to include market-oriented language in the Paris Agreement. The fact that more than half the INDCs submitted by parties contemplated the use of international carbon markets¹²⁶ suggested broad support for inclusion of a market-based provision. But a small number of states, led by Bolivia, strongly opposed such a provision.

It came as something of a surprise, therefore, that the Paris Agreement includes not just a few paragraphs on markets, but a separate article. As a concession to market opponents, Article 6 never refers directly to “markets,” and expressly recognizes the importance of non-market approaches,¹²⁷ but not market approaches. Nevertheless, in effect, it provides for two market-based mechanisms.

First, Article 6.2 recognizes that parties may engage in “cooperative approaches” to achieve their NDCs, involving the use of “internationally transferred mitigation outcomes” (ITMOs)—the new jargon for emissions trading and other mechanisms to link national climate policies. To ensure environmental integrity, parties must apply “robust accounting rules”—including to ensure that emission reductions are not double counted—consistent with guidance to be adopted by the CMA. Because parties’ NDCs are highly heterogeneous, developing this common accounting system will pose difficult but not insurmountable challenges.¹²⁸

Second, Article 6.4 establishes a new mechanism to “promote the mitigation of greenhouse gas (GHG) emissions while fostering sustainable development” (dubbed by many the “sustainable development mechanism” or SDM). Like the CDM, the new mechanism will generate emission reduction offsets that another country can use to fulfill its NDC. But, in contrast to the CDM, the SDM will not be limited to project-based reductions, and might involve emission reduction policies or programs. In addition, it will be able to generate offsets for emission reductions in developed as well as developing countries, thus merging the roles of the

¹²⁶ INTERNATIONAL CARBON ACTION PARTNERSHIP (ICAP), EMISSIONS TRADING WORLDWIDE: STATUS REPORT 2016, at 25 (2016) (sixty-four INDCs said they planned to use markets, and twenty-five said they were considering using markets).

¹²⁷ Paris Agreement, *supra* note 2, Art. 6.8.

¹²⁸ See Daniel Bodansky, Seth A. Hoedl, Gilbert E. Metcalf & Robert N. Stavins, *Facilitating Linkage of Climate Policies through the Paris Outcome*, CLIMATE POLICY (2015).

CDM and joint implementation under the Kyoto Protocol. The Paris Agreement and Decision task the CMA to designate a supervisory body for the new mechanism, as well as to develop rules, modalities and procedures, drawing on the experience gained from the existing UNFCCC and Kyoto Protocol mechanisms.¹²⁹

D. Adaptation (Article 7)

Many developing countries have long felt that adaptation has been a poor relation of mitigation in the climate change regime and sought to include stronger provisions in the Paris Agreement. Mitigation is a collective action problem, so the rationale for international cooperation is clear: emission reductions provide a public good. But adaptation provides primarily local benefits, so countries have an incentive to adapt, regardless of what other countries are doing, making collective action unnecessary. The primary rationales for international cooperation are the potential spillover effects of climate change impacts (for example, in the form of refugees), the sharing of information and expertise, and the moral responsibility of emitting states to compensate victim states for transboundary harms. But, to date, none of these rationales has been sufficient to motivate a strong international response, although the 2010 Cancún Adaptation Framework¹³⁰ represents an effort to redress this shortcoming.

Since adaptation is in states' self-interest, there is relatively little rationale for imposing obligations on them to adapt. The only adaptation commitment in the Paris Agreement is to engage in adaptation planning processes and implementation—and even this is qualified by the modifier, “as appropriate.”¹³¹ Instead of requiring adaptation, the Paris Agreement seeks to encourage greater adaptation efforts through softer means:

- It acknowledges that adaptation is a global challenge.¹³²
- It tasks the CMA with developing modalities to recognize the adaptation efforts of developing countries.¹³³

¹²⁹ Paris Agreement, *supra* note 2, Art. 6.7; Paris Decision, *supra* note 13, para. 37(f).

¹³⁰ Cancún Agreements, *supra* note 27, paras. 13–14.

¹³¹ Paris Agreement, *supra* note 2, Art. 7.9.

¹³² *Id.* para. 7.2.

- It recognizes the importance of support and of taking into account the needs of developing countries.¹³⁴
- It recommends that parties strengthen their cooperation on adaptation.¹³⁵
- It recommends that parties submit adaptation communications (possibly as part of their NDCs), identifying priorities and needs, for listing on a public registry.¹³⁶

Admittedly, all of these provisions are quite general, and it is unclear how effective they will be. In the ADP, African states had proposed a more specific provision: a quantitative finance goal, based on an assessment of impacts and adaptation costs.¹³⁷ But developed (and some developing) states were unwilling to accept a quantitative goal, so the “global goal on adaptation” in the Paris Agreement is formulated in general, qualitative terms, namely, to enhance adaptive capacity, strengthen resilience, and reduce vulnerability to climate change.¹³⁸

Perhaps the two most consequential provisions on adaptation are not found in Article 7 on adaptation, but in other parts of the Paris Agreement. First, Article 14 includes adaptation within the scope of the 5-year global stocktakes, which will help ensure regular attention to the issue.¹³⁹ Second, Article 9.4 provides that scaled-up financial resources “should aim to achieve a balance between adaptation and mitigation” and specifically recognizes the need for “public and grant-based resources” for adaptation.

¹³³ *Id.* para. 7.3.

¹³⁴ *Id.* para. 7.6.

¹³⁵ *Id.* para. 7.7

¹³⁶ *Id.* para. 7.10.

¹³⁷ See Submission by Swaziland on behalf of the African Group on Adaptation in the 2015 Agreement, ADP Submission (Oct. 8, 2013), *available at* http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_adaptation_20131008.pdf.

¹³⁸ Paris Agreement, *supra* note 2, art. 7.1.

¹³⁹ *Id.* Art. 14.1.

E. Loss and Damage (Article 8)

For many years, small island and other vulnerable states have sought to raise the issue of loss and damage, which they argue is distinct from adaptation, since adaptation focuses prospectively on limiting the impacts of climate change, whereas loss and damage is retrospective and concerns harms that have already occurred or are unavoidable. Developed states have generally resisted these efforts to address loss and damage, fearing the issue could eventually lead to claims for liability and compensation.

In 2013, the Warsaw Conference established the Warsaw International Mechanism for Loss and Damage, but, at the insistence of the United States, placed it under the Cancún Adaptation Framework. The Warsaw Decision called for a review of the new mechanism in 2016 at COP-22,¹⁴⁰ leading developed countries to believe the issue had been taken off the table for the Paris negotiations. But the issue of loss and damage is of tremendous importance to small-island and low-lying coastal states, as well as African states in drought-prone areas, and they successfully pushed to include a provision on loss and damage in the Paris Agreement.

Although Article 8 does not contain very much new of substance, it is significant for two reasons. First it expressly brings the issue of loss and damage within the scope of the Paris Agreement. Second, it is a freestanding article, thus, arguably, separating loss and damage from adaptation, as developing countries have long sought. As the price for agreeing to include Article 8, however, the United States insisted on adding a paragraph to the Paris COP decision stating that “Article 8 of the Agreement does not involve or provide a basis for any liability or compensation,”¹⁴¹ thereby stripping loss and damage of its most distinctive elements. Some of the areas of cooperation and facilitation identified in Article 8 are, in fact, forms of adaptation, aimed at preventing damage, including early warning systems, emergency preparedness, and comprehensive risk assessment and management. Nevertheless, Article 8 gives loss and damage a toehold in the regime, which developing countries are likely to use to push the issue going forward.

¹⁴⁰ Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, Dec. 2/CP.19 (Nov. 23, 2013), *in* COP Report No. 19, *supra* note 32, at 6.

¹⁴¹ Paris Decision, *supra* note 13, para. 51.

F. Finance and Other Means of Implementation

Pre-Paris, many anticipated that finance would be one of the most difficult “crunch” issues to resolve, given the seemingly unbridgeable gap between developing countries, who sought new financial commitments in the Paris Agreement, and developed countries, who generally said they could not accept any new commitments and sought to broaden the donor pool.¹⁴² In the end, developing countries were willing to settle for relatively little new in the Paris Agreement, making resolution of the finance issue possible.

The UNFCCC requires Annex II parties (a subset of Annex I, limited to OECD countries) to provide financial assistance to developing countries for mitigation and adaptation.¹⁴³ In the Copenhagen Accord, developed countries committed to a goal of mobilizing \$100 billion per year in climate finance by 2100, in order to assist developing countries in mitigating and adapting to climate change. The Copenhagen pledge encompassed money from both public and private sources, and was made “in the context of meaningful mitigation actions” by developing countries, as well as transparency on implementation.¹⁴⁴ A recent OECD report found that \$62 billion in climate finance was mobilized in 2014, up from \$52 billion in 2013,¹⁴⁵ although these figures are disputed because of methodological questions about what counts as climate finance.¹⁴⁶

Against this backdrop, the Paris Agreement’s provisions on finance are rather modest and include the following:

Financial commitments – Article 9 reiterates the existing obligations of developed countries under the UNFCCC. It creates a number of new reporting requirements (including biennial reports that include projected

¹⁴² See Daugirdas and Mortenson, *supra* note 35, at ____, notes 30–32 and accompanying text.

¹⁴³ UNFCCC, *supra* note 17, Arts. 4.3, 4.4.

¹⁴⁴ Copenhagen Accord, *supra* note 15, para. 8.

¹⁴⁵ OECD, CLIMATE FINANCE IN 2013–2014 AND THE USD 100 BILLION GOAL (2015) available at <http://www.oecd.org/environment/cc/OECD-CPI-Climate-Finance-Report.pdf>.

¹⁴⁶ MINISTRY OF FINANCE, GOVERNMENT OF INDIA, CLIMATE CHANGE FINANCE, ANALYSIS OF A RECENT OECD REPORT (Nov. 27, 2015).

levels of public finance), but not any new substantive obligations. Instead, the only new substantive norm in the Paris Agreement is soft, recommending that the mobilization of climate finance “should represent a progression beyond previous efforts.”¹⁴⁷

Enlarging the donor pool – In a departure from the sharp differentiation in the UNFCCC, the Paris Agreement “encourages” other parties to “provide or continue to provide support voluntarily.”¹⁴⁸ This provision is considerably weaker than developed countries wished. It encourages rather than requires the provision of support, and is silent as to who should do so (as compared to earlier formulations that specified countries “with capacity” or “in a position” to do so). Nevertheless, Article 9.2 could prove significant, by beginning to break down the wall between donor and recipient countries. Along similar lines, Article 9.3 calls for developed countries to take the lead in mobilizing climate change, but as “part of a global effort.”

Mobilization goal – The United States and other developed countries succeeded in excluding a reference to the Copenhagen one-hundred billion dollar per year mobilization goal in the Paris Agreement itself. Instead, the only quantitative finance goal appears in paragraph fifty-four of the Paris COP decision, which extends developed countries’ existing one-hundred billion dollar mobilization goal through 2025 and provides that the parties shall set a new collective quantified goal prior to 2025 (not necessarily limited to developed countries), using the one-hundred billion per year figure as a floor.¹⁴⁹

Finance will be part of the 2023 global stocktake. Like the Copenhagen Accord, the Paris Agreement recommends that the provision of scaled-up support should aim to achieve a balance between mitigation and adaptation.¹⁵⁰

¹⁴⁷ Paris Agreement, *supra* note 2, Art. 9.3.

¹⁴⁸ *Id.* Art. 9.2

¹⁴⁹ Paris Decision, *supra* note 13, para. 53.

¹⁵⁰ Paris Agreement, *supra* note 2, Art. 9.4.

G. Transparency (Article 13)

Since parties' NDCs are not legally binding, the Paris Agreement's transparency framework is the main mechanism to hold states accountable for doing what they say.¹⁵¹ The premise is that peer and public pressure can be as effective as legal obligation in influencing behavior, an issue that has long been debated in the literature on soft law.¹⁵²

Developing countries have traditionally resisted strong reporting and review requirements. Until now, the climate regime has addressed their concerns by differentiating between their commitments and those of developed countries. The 2010 Cancún Agreements, for example, established two systems: International Assessment and Review (IAR) for developed countries, and International Consultations and Analysis (ICA) for developing countries.¹⁵³ A crunch issue in Paris was whether to move away from the bifurcated approach of the Cancún Agreements to a common system for both developed and developing countries.

Although the “enhanced transparency framework for action and support” established by the Paris Agreement is not explicitly characterized as “common” or “unified,” it largely reflects the desire of developed countries for a single system applicable to all countries. In general, it addresses differentiation not through bifurcation between developed and developing countries, but through: (1) “built in flexibility, which takes into account Parties’ different capacities”¹⁵⁴ and provides flexibility to “those developing countries that need it in the light of their capacities;”¹⁵⁵ and (2) a new Capacity-Building Initiative for Transparency to assist developing countries.¹⁵⁶

¹⁵¹ See generally HARRO VAN ASSELT, HÅKON SÆLEN & PIETER PAUW, ASSESSMENT AND REVIEW UNDER A 2015 CLIMATE CHANGE AGREEMENT (2015).

¹⁵² See COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed., 2003); THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David Victor, Kal Raustiala & Eugene B. Skolnikoff, eds., 1998).

¹⁵³ Cancún Agreements, *supra* note 27, paras. 44, 46(d), 63, 66.

¹⁵⁴ Paris Agreement, *supra* note 2, Art. 13.1.

¹⁵⁵ *Id.* Art. 13.2.

¹⁵⁶ Paris Decision, *supra* note 13, para. 84.

The transparency framework distinguishes between mitigation, adaptation, and finance in terms of both its approach to differentiation and the legal character of its provisions:

Mitigation – For mitigation, the transparency framework establishes a common, mandatory system. Each party is required to submit GHG inventories at least biennially (and, in the case of developed countries, annually),¹⁵⁷ and to regularly provide “information necessary to track progress in implementing and achieving its NDC.”¹⁵⁸ This information then undergoes a technical expert review, which focuses on a party’s implementation and achievement of its NDC, identifies areas of improvement, and evaluates consistency with the modalities, procedures and guidelines for reporting adopted by the CMA.¹⁵⁹ Article 13 also requires each party to participate in “a facilitative, multilateral consideration of [its] progress” in implementing and achieving its NDC.¹⁶⁰

Adaptation – In contrast, the transparency framework is much more modest with respect to adaptation, and does not mention loss and damage at all. It recommends rather than requires that parties provide information,¹⁶¹ and does not subject that information to any international review.

Finance – Finally, for finance, the transparency framework is mandatory and differentiated, reflecting the differentiated character of the Paris Agreement’s substantive provisions on finance. Developed countries are required to provide information on the support they have provided to developing countries.¹⁶² In contrast, reporting is merely recommended for developing countries that choose to provide support, as well as for

¹⁵⁷ See *id.* paras. 90 (requiring reporting “no less frequently than on a biennial basis”), 92(e) (noting need to ensure that parties maintain at least their current frequency of reporting, which for developed country GHG inventories is annually).

¹⁵⁸ Paris Agreement, *supra* note 2, Art. 13.7. The accompanying COP decision gives greater specificity to the term, “regularly,” by providing that all parties, except for least developed and small island states, shall report on at least a biennial basis. Paris Decision, *supra* note 13, para. 90.

¹⁵⁹ Paris Agreement, *supra* note 2, Arts. 13.11, 13.12.

¹⁶⁰ *Id.* Art. 13.11.

¹⁶¹ *Id.* Art. 13.8.

¹⁶² *Id.* Art. 13.9.

developing countries that receive support.¹⁶³ Like information about mitigation, information about the support a party provides will undergo a technical expert review, as well as a facilitative, multilateral consideration of progress.¹⁶⁴

Despite the absence of explicit bifurcation in the new transparency framework, the Paris Agreement provides a number of hooks that developing countries might try to use to reintroduce bifurcation in the future. For example, the agreement provides that the enhanced framework shall “build on” the transparency arrangements under the Convention,¹⁶⁵ and that these arrangements, including the bifurcated system of IAR and ICA, “shall form part of the experience drawn upon” in developing the framework’s rules.¹⁶⁶ Moreover, paragraph 89 of the Paris Decision “decides” that those developing countries that need flexibility in light of their national capacities “shall” be provided flexibility in implementing the transparency framework, “including in the scope, frequency, and level of detail of reporting, and in the scope of review.”¹⁶⁷ But the Paris Agreement also provides developed countries with a strong argument against bifurcation, by characterizing the modalities, procedures, and guidelines to be developed by the CMA as “common.”¹⁶⁸

H. Implementation and Compliance Mechanism (Article 15)

In addition to the enhanced transparency framework, the Paris Agreement establishes a new implementation and compliance mechanism. The agreement provides only a few details about the new mechanism. It will be composed of experts; be facilitative, transparent, non-adversarial, and non-punitive;¹⁶⁹ and report to the CMA.¹⁷⁰ The agreement does not describe the relationship between the new mechanism and the enhanced

¹⁶³ *Id.* Art. 13.10.

¹⁶⁴ *Id.* Art. 13.11.

¹⁶⁵ *Id.* Art. 13.3.

¹⁶⁶ *Id.* Art. 13.4.

¹⁶⁷ Paris Decision, *supra* note 13, para. 89.

¹⁶⁸ Paris Agreement, *supra* note 2, Art. 13.13.

¹⁶⁹ *Id.* Art. 15.2.

¹⁷⁰ *Id.* Art. 15.3.

transparency framework, which is also described as facilitative and non-punitive,¹⁷¹ and leaves it up to the CMA to develop the mechanism's modalities and procedures.¹⁷²

I. Human Rights

Climate change threatens a variety of human rights, including the rights to life, health, food, and housing, and the measures taken to mitigate and adapt to climate change can raise human rights concerns as well.¹⁷³ In 2010, the Cancún Agreements focused on the latter issue, “emphasiz[ing] that Parties should, in all climate change related actions, fully respect human rights.”¹⁷⁴ In Paris, NGOs hoped to build on this statement by including a human rights provision in the operative part of the Paris Agreement.

NGO lobbying succeeded in including a reference to human rights in the Paris Agreement, albeit in the preamble rather than in an operative article, and focusing only on the human rights aspects of response measures, not of climate change itself. The provision provides:

Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.¹⁷⁵

The provision does not expand countries' human rights obligations; rather, it refers to parties “respective” obligations. Whether this passing reference to human rights provides a foundation on which to build remains to be seen.

¹⁷¹ *Id.* Art. 13.3.

¹⁷² *Id.* Art. 15.3.

¹⁷³ Office of the High Commissioner for Human Rights, Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (Nov. 26, 2015). [No all CAPs or italics for this citation? Compare footnote 179, in which the report title is italicized.]

¹⁷⁴ Cancún Agreements, *supra* note 27, para. 8.

¹⁷⁵ Paris Agreement, *supra* note 2, pmb. para. 7.

J. Final Clauses

The Paris Agreement includes a standard set of final clauses. Parties must express their consent to be bound by means of ratification, accession, acceptance, or approval.¹⁷⁶ Entry into force involves a “double trigger,” requiring acceptance by at least 55 states that account for at least 55% of global greenhouse gas emissions.¹⁷⁷ The agreement incorporates by reference the UNFCCC’s provisions on amendments,¹⁷⁸ adoption and amendment of annexes,¹⁷⁹ and dispute settlement.¹⁸⁰ Reservations are expressly disallowed,¹⁸¹ but parties may withdraw beginning three years after the agreement’s entry into force by giving one year’s notice.¹⁸²

K. Interim Arrangements and Next Steps

Now that Paris is concluded, what next? For states that have submitted INDCs, their INDCs must be converted into NDCs. Unless a state decides otherwise, this will happen automatically when a state submits its instrument of ratification, acceptance, approval or accession—in essence, removing the “I” from INDC, leaving the substance of the contribution unchanged.¹⁸³ But the Paris COP decision does not prohibit a state from making substantive changes to its contribution before finalizing it, as many had hoped.

The Paris COP decision establishes an Ad Hoc Working Group on the Paris Agreement (APA), and tasks it with preparing for the Agreement’s

¹⁷⁶ *Id.* Art. 20.

¹⁷⁷ *Id.* Art. 21. The penultimate version of the negotiating text had also included bracketed language providing that the agreement would not enter into force prior to 2020, but this language somewhat mysteriously dropped out of the final text, raising the possibility of early entry into force, before many countries have ratified. See UNFCCC Legal Affairs Programme, *Information Note: Entry into Force of the Paris Agreement: Legal Requirements and Implications* (April 6, 2016).

¹⁷⁸ Paris Agreement, *supra* note 2, art. 22.

¹⁷⁹ *Id.* Art. 23.

¹⁸⁰ *Id.* Art. 24.

¹⁸¹ *Id.* Art. 27.

¹⁸² *Id.* Art. 28.

¹⁸³ Paris Decision, *supra* note 13, para. 22.

entry into force and the first meeting of the CMA.¹⁸⁴ The APA's main job will be to develop guidance on up-front information and accounting, and to elaborate rules, modalities, and guidelines relating to the transparency framework, the global stocktake, and the implementation and compliance mechanism, for adoption by the CMA.¹⁸⁵ These negotiations in the APA will provide an earlier indicator of the stability of the political equilibrium reflected in the Paris Agreement. In the UN climate change regime, issues are rarely settled fully and parties often push to regain ground they had previously ceded. In Paris, many developing countries accepted the move away from binary differentiation only reluctantly, so it will be interesting to see whether they push to reintroduce it when elaborating the Paris Agreement's rules.

V. PARALLEL INITIATIVES IN PARIS

Mega-conferences such as Paris can be important not only for their direct outcomes, but also in catalyzing action by a wide variety of actors. In addition to the Paris Agreement itself, the Paris process included a number of national, sub-national, and non-state initiatives. Highlights included:

- Pledges by various developed countries to provide \$19 billion per year in public finance by 2020, including a pledge of more than \$5 billion by France and a doubling by the United States of its support for adaptation, to \$800 million.
- Mission Innovation, a joint initiative of the United States, France, and leaders from eighteen other countries, who pledged to double their support for clean energy research and development over the next five years.¹⁸⁶
- The Breakthrough Energy Coalition, a related private initiative spearheaded by Bill Gates to invest in clean energy technologies, financed by twenty-six investors from ten countries, including Jeff Bezos and Mark Zuckerberg.¹⁸⁷

¹⁸⁴ *Id.* para. 7.

¹⁸⁵ *Id.* paras. 7, 8, 10, 11, 26, 28, 31, 91–96, 99–01, 103.

¹⁸⁶ *Announcing: "Mission Innovation"*, THE WHITE HOUSE (Nov. 29, 2015), <https://www.whitehouse.gov/blog/2015/11/29/announcing-mission-innovation>.

¹⁸⁷ BREAKTHROUGH ENERGY COALITION, *at* <http://www.breakthroughenergycoalition.com/en/index.html> (last visited Mar. 15, 2016).

- The International Solar Alliance, an initiative involving 120 countries, led by India and France, aimed at promoting solar energy deployment in developing countries.
- The Paris Pledge for Action, which promises the support of non-state stakeholders in implementing the Paris Agreement and meeting or exceeding its 2 degree temperature goal. By mid-January, more than 1200 non-party stakeholders had signed the pledge, including more than 600 companies, 180 investors, and 110 cities and regions.¹⁸⁸
- The Lima to Paris Action Agenda (LPAA) and its associated NAZCA portal,¹⁸⁹ which records actions by sub- and non-state actors. Currently, the NAZCA portal lists approximately 11,000 commitments, more than 2000 from cities, a roughly equal number from private companies, and more than 230 from civil society organizations.
- The Compact of Mayors, which now involves more than 450 cities.¹⁹⁰

Early in the process, some harbored the hope that the Paris Agreement would explicitly recognize the role of sub- and non-state actors in combatting climate change, or might even allow non-state actors to sign.¹⁹¹ But the UNFCCC process is conservative by nature, and making such a radical departure from the norms of multilateral environmental agreements gained little traction in the negotiations. Instead, the only mention in the Paris Agreement of non-state actors appears in the preamble, which recognizes “the importance of the engagements of . . . various actors . . . in addressing climate change.”¹⁹² The Paris COP decision includes a more fulsome section on “non-party stakeholders”—a category that includes civil society organizations, the private sector, financial institutions, cities, and

¹⁸⁸ PARIS PLEDGE FOR ACTION, at <http://www.parispledgeforaction.org/about/> (last visited Mar. 15, 2016).

¹⁸⁹ NAZCA stands for Non-State Actor Zone for Climate Action. NAZCA: ACCELERATING CLIMATE ACTION, <http://climateaction.unfccc.int> (last visited Mar. 15, 2016).

¹⁹⁰ COMPACT OF MAYORS, at <http://www.compactofmayors.org/> (last visited May 9, 2016).

¹⁹¹ Daniel C. Esty, *Bottom-Up Climate Fix*, N.Y. TIMES, Sept. 22, 2014, at A25.

¹⁹² Paris Agreement, *supra* note 2, pmbl. para. 15.

other sub-national authorities. The decision welcomes their efforts, invites them to scale these efforts up, and invites them to demonstrate their efforts via the NAZCA portal.¹⁹³

VI. ASSESSING PARIS

Is the Paris Agreement an historic turning point or, as one critic put it, a “triumph of wishes over facts”?¹⁹⁴ As usual, the truth lies somewhere in-between. Whether we see the glass as half full or half empty depends on our perspective.

In terms of solving the climate change problem, the Paris Agreement clearly falls short. But compared to business as usual, the Paris Agreement represents a real advance. It is projected to reduce emissions by about 3.5 gigatonnes in 2030¹⁹⁵ and to reduce expected warming in 2100 by about 1 degree.¹⁹⁶ The process of preparing INDCs “kick-started, consolidated and enhanced” the national planning process in many countries, according to one study.¹⁹⁷ And the rules in the Paris Agreement go as far—or further—than most people thought possible in promoting transparency and progression.

The success of the Paris Conference is often contrasted with the breakdown in Copenhagen, and invidious comparisons between the two conferences have been a staple of commentary.¹⁹⁸ But in many respects, the

¹⁹³ Paris Decision, *supra* note 13, paras. 133–4.

¹⁹⁴ Tom Switzer, *Paris Agreement Is a Triumph of Hope over Facts*, SYDNEY MORNING HERALD (Dec. 30, 2015), at <http://www.smh.com.au/comment/paris-climate-agreement-is-a-triumph-of-hope-over-facts-20151227-glvd0.html>.

¹⁹⁵ Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions, in COP Report No. 21, *supra* note 2, at 10.

¹⁹⁶ *Paris Agreement: Near Term Actions Do Not Match Long-Term Purpose—But Stage Is Set to Ramp Up Climate Action*, Climate Action Tracker Statement (Dec. 12, 2015) at http://climateactiontracker.org/assets/publications/briefing_papers/CAT_COP21_Paris_Agreement_statement.pdf.

¹⁹⁷ Thomas Day et al., *Preparation of Intended Nationally Determined Contributions (INDCs) as a Catalyst for National Climate Action*, at 2 (NewClimate Institute, Nov. 2015) at http://mitigationpartnership.net/sites/default/files/indc_as_catalyst.pdf.

¹⁹⁸ E.g., *The Paris Agreement Marks an Unprecedented Political Recognition of the Risks of Climate Change*, ECONOMIST (Dec. 12, 2015), at <http://www.economist.com/news/international/21683990-paris-agreement-climate-change-talks> (Paris a “far cry from the botched mess of the Copenhagen climate summit”);

Paris Agreement merely formalizes and extends the bottom-up paradigm to which the 2009 Copenhagen Conference gave birth. Elements of the Paris Agreement that originated in the Copenhagen Accord include:

- The goal of holding global warming below 2 degrees Celsius.
- The system of national pledges to reduce emissions.
- The non-binding character of these contributions, and the reliance on transparency rather than legal enforcement to promote accountability and effectiveness.
- The shift away from the binary approach to differentiation towards a more flexible approach that encompasses all countries.
- The pledge to mobilize climate finance from public and private sources.
- Perhaps most importantly, the expansion of the regime to address the vast majority of global emissions, rather than focusing only on the emissions of developed countries.¹⁹⁹

Nevertheless, the Paris Agreement does not simply recapitulate the Copenhagen Accord. It builds on Copenhagen in three important respects:

Differentiation – First, the Paris Agreement creates a more common system for all countries than the Copenhagen Accord. Copenhagen still retained elements of the binary approach to differentiation of the Kyoto Protocol, with distinctions drawn in various provisions between Annex I and non-Annex I parties. In contrast, the Paris Agreement completely abandons the Annex I/non-Annex I bifurcation. Most of the commitments in the Paris Agreement apply to all parties. And while the financial commitments of developed countries are reaffirmed, the Paris Agreement enlarges the donor pool by encouraging other countries to provide financial support.

Durability – Second, the Paris Agreement gives the Copenhagen architecture a more durable character. The Copenhagen Accord addressed only the period up until 2020, through a one-off pledging process. The

Harvey, *supra* note 10 (contrast of Paris and Copenhagen “could not have been greater”); Annalisa Savaresi, *The Paris Agreement—A New Beginning?*, 34 J. ENERGY NAT. RES. L. 16, 18 (2016) (describing Copenhagen as “the low-point in the history of the climate regime”).

¹⁹⁹ See Bodansky, *supra* note 12, at 239-40.

Paris Agreement, in contrast, establishes a treaty regime of indefinite duration.

A rules-based structure – Finally, the Paris Agreement supplements the bottom-up system of NDCs with internationally negotiated rules to promote greater ambition and transparency.

In each of these respects, the Paris Agreement moves away from the positions of those that opposed the Copenhagen Accord (or failed to support it when the conference unraveled the final night) and towards those that supported it. The Paris Agreement is less differentiated, provides for stronger transparency, and has a stronger legal form than Copenhagen. So why was Copenhagen rejected and Paris accepted?

Some point to the deft diplomacy of the French, and this certainly played a role. In Copenhagen, the Danes created openings for those who wished to raise procedural objections—most importantly, by not using the text from the official UN negotiations as the basis for their compromise proposal. The French learned from this mistake. From the beginning, they insisted that they did not have a separate text in their back pocket and would work with the negotiating text emerging from the ADP. That helped defuse suspicions and allowed countries to feel that they had ownership of the Paris outcome.

But the importance of French diplomacy should not be overstated. The fundamental problem in Copenhagen was not ham-handed Danish diplomacy, but rather the lack of substantive consensus about the future direction of the regime. If countries had had similar substantive reservations about the Paris deal, they could have found plenty of procedural grounds on which to object, as they had in Copenhagen. Although many have hailed the Paris Conference's transparency,²⁰⁰ in some ways the Paris endgame was less transparent than Copenhagen's. Throughout the final week, the French kept tight control of the text, listening patiently to all sides, but deciding what would be included in the next iteration. Then, in the final day and night, rather than convene a broadly representative "friends of the chair" group, as the Danes had tried

²⁰⁰ E.g., Henrik Selin and Adil Najam, *Paris Agreement on Climate Change: The Good, the Bad, and the Ugly*, THE CONVERSATION (Dec. 14, 2015), at <http://theconversation.com/paris-agreement-on-climate-change-the-good-the-bad-and-the-ugly-52242> (describing Paris as "refreshingly transparent").

to do, the French presidency held a series of consultations with individual countries and negotiating groups, and delegations and groups of delegations met informally with one another. Virtually no one knew who was meeting with whom, and where the text stood. The result of this fluid, ad hoc process was a text containing new provisions of unknown provenance, which most delegations saw for the first time when it was presented to them in final form on Saturday afternoon, hours before the concluding plenary.

Why did countries accept this final text, rather than raise procedural objections? The trust and good will that the French engendered certainly helped. But it was not the main reason why Paris succeeded. The explanation instead lies in four factors:

First, while the Copenhagen architecture had been new in 2009, countries had become familiar with it by the time of the Paris conference. It formed the basis of the Cancún Agreements, and was reflected in the Warsaw and Lima decisions. So the foundation of the Paris Agreement had already been laid. Countries understood, and accepted, at least the broad outlines of the deal.

Second, the positions of several key developing countries, including China and Brazil, evolved considerably between Copenhagen and Paris, pushed in part by progressive developing countries in the so-called Cartagena Group.²⁰¹ In Copenhagen, they still hoped for an indefinite continuation of the Kyoto Protocol; indeed, two years later, in Durban, adoption of a second commitment period under Kyoto was a precondition for their agreement to begin the Paris negotiations. Although no decision was ever formally made not to continue the Kyoto Protocol, by the time of the Paris Conference, everyone seem to have accepted that the next phase of the climate change regime would be a single agreement applicable to all parties. In Paris, the Kyoto Protocol was the dog that didn't bark, and it now looks as if it will go gently into the night.

Third, in Paris, unlike Copenhagen, the United States and China worked constructively together. The joint announcement by the United

²⁰¹ The Cartagena Dialogue for Progressive Action was founded in 2010 and has involved at one time or another roughly thirty developing and developed parties, including Australia, Bangladesh, Colombia, Costa Rica, France, Germany, Indonesia, Maldives, Marshall Islands, and Mexico, Norway, the United Kingdom, and the European Commission.

States and China in fall 2014 heralded this shift, and gave many observers confidence that Paris would succeed. In September 2015, in the run-up to the Paris Conference, the United States and China issued a joint presidential statement, which reaffirmed the 2014 announcement and laid out a joint “vision” for the conference.²⁰² While China resists the notion of a “G-2,” it was much in evidence in the Paris process.

Finally, expectations for Paris were much more realistic than Copenhagen. Leading up to Copenhagen, it was obvious to close observers that countries would not be able to reach a legal agreement. But most people still took adoption of a Copenhagen Protocol as the benchmark of success, and were bitterly disappointed when it did not happen.

The Paris conference gives new hope to the UN climate change regime. But much remains to be done, and much could still go wrong. Countries were able to agree only to the basic structure of the new climate change regime—the cycle of NDCs, reporting, review, stocktaking, and updating. Now, they must elaborate more detailed rules for how the Paris Agreement will work in practice. This process of elaboration will reveal the degree to which the Paris Agreement reflects a new political equilibrium or merely papered over long-standing differences.

Moreover, the Paris Agreement could still be undermined by a host of exogenous factors: elections in the United States, turmoil in the European Union, an economic downturn in China. The Agreement, while important, is only one of many determinants of climate policy. Success or failure in combatting climate change will depend as much or more on other factors, such as domestic politics and technological change.

Nevertheless, the Paris Agreement justifies cautious optimism about the future of international climate policy. Given current political realities, the Agreement produced as much as could reasonably have been expected, and perhaps more. That may or may not make Paris historic, but it is certainly cause for celebration.

²⁰² White House Press Release, U.S.–China Joint Presidential Statement on Climate Change (Sept. 25, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/25/us-china-joint-presidential-statement-climate-change>.