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A comprehensive assessment of options for the legal form of the Paris Climate Agreement

Sandrine Maljean-Dubois (CERIC CNRS-Aix-Marseille Université), Matthieu Wemaëre (Paris and Brussels Bar Associations, Associate Researcher CERIC)
Thomas Spencer (IDDRI)

OPTIMIZING THE WIDE SPECTRUM OF LEGAL OPTIONS

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

COMBINING FLEXIBILITY AND CREDIBILITY

Negotiations appear to be heading towards a hybrid agreement. Some provisions would be contained in a core agreement, and some in implementing documents such as decisions or schedules. This structure can help to balance legal certainty with flexibility. The core agreement should contain a binding provision to implement and regularly update a 'nationally determined contribution' (NDC). If these NDCs were to be housed outside the agreement, this could give more flexibility on their content, submission and updating. The core agreement should contain strong provisions on transparency, accountability and facilitation, including independent institutional arrangements (a Transparency Committee). At this stage in global cooperation and given inherent weaknesses in international environmental law, a punitive compliance mechanism seems unfeasible. However, the agreement should contain a compliance mechanism regarding procedural obligations, such as submission and updating of NDCs.

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Institut du développement durable
et des relations internationales
27, rue Saint-Guillaume
75337 Paris cedex 07 France

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For more information about this document, please contact:
Thomas Spencer – thomas.spencer@iddri.org

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1. INTRODUCTION

Parties to the United Nations Framework Convention on Climate Change (UNFCCC) have agreed to negotiate a new climate agreement by the end of 2015. The mandate for these negotiations sets out a certain number of parameters that the new agreement should reflect.

The agreement should be:

1. *Adequate*: the Paris agreement will be "under the Convention", i.e. respecting the principles and objectives of the Convention. This includes in particular the ultimate goal of the Convention as described in Article 2 and subsequently elaborated in 2010 under Decision 1/CP.16, namely to hold warming to below 2 degrees Celsius. Achieving this level of mitigation will require widespread participation, a robust and credible regime, and a dynamic approach to increasing ambition over time.

2. *Universal and fair*: the Paris agreement will be "applicable to all", i.e. attracting the broadest possible participation consistent with the global nature of climate change, and reflecting the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC) "under the Convention".

3. *Legally robust*: the Paris agreement will be "a multilateral, rules based regime", in particular a regime grounded in a "protocol, another legal instrument or an agreed outcome with legal force". Since Parties have agreed at COP 19 in Warsaw that their contributions to this instrument would be determined at the national level, it is crucial that the instrument is effective.

4. *Dynamic and durable*: many Parties have expressed the need to have an instrument that can be strengthened progressively over time, without burdensome renegotiation. The instrument to be adopted at COP 21 in Paris should balance the need for flexibility, experimentation and innovation, with the need for credibility and ambition of the instrument and nationally determined contributions (NDCs).[1]

As implied by the options listed in point three above, there are still some open questions regarding the legal nature of the 2015 agreement and of its constituent elements. Achieving the four broad objectives listed above will require a careful and comprehensive approach to legal form, maximizing synergies, and balancing any potential trade-offs between objectives.

The objective of this paper is to provide an overview of key aspects of the new agreement's legal form, the options available, and the potential interactions between them. It is structured as follows: Section 2 sets out the conceptual framework, Section 3 addresses the form of the agreement itself, and Section 4 discusses the options for anchoring NDCs in the new agreement. Section 5 then discusses the issue of transparency and facilitation of action, and Section 6 discusses compliance and enforcement. The conclusion summarizes the main lines of argument.

2. THE CONCEPTUAL FRAMEWORK

2.1. Clarification of the terminology from a legal point of view

This paper discusses the options for the legal form of the instrument to be adopted at COP 21 in Paris. However, before entering into this discussion, it is necessary to clarify some key concepts upfront.

- *Legal norm*: "*legal*" is an adjective "*qualifying substantives to indicate that they have a relation*

1. As is noted throughout this paper, there is still disagreement about the exact legal nature of the mitigation 'contributions', and other contributions, in the 2015 agreement. Following current negotiation practice, we therefore use the term 'nationally determined contributions' without prejudice to their eventual legal form.

to the Law".[2] From that perspective, a legal norm or standard can be distinguished from a moral, social, ethical or religious norm or standard. However, a legal norm does not necessarily have a binding character or legal force.

- "*Legally binding*": a norm is legally binding only when it creates a legal obligation. In international public law, a legally binding norm provides for a legal link whereby a subject of international law can be bound vis-à-vis others to adopt a determined behaviour.[3] This is the case when a norm finds its origin in a formal source of international law (i.e.: treaty, customary rules, general international law principles, unilateral acts). Apart from the formal source of the legal norm, it is important to examine its content. Legal obligations in international treaties and agreements, although legally binding in form, are often so softly worded, contingent or conditional, as to be devoid of real normative force. This issue of the content of legally binding norms is taken up further in Section 2.2.
- *"Legally enforceable"*: means that the legal norm is backed by procedural mechanisms that can mobilize various 'disciplines'[4] in order to ensure that States comply with their obligations (see Section 2.2 below). These mechanisms include transparency and facilitation, as well as compliance and enforcement. Conversely, a legal norm may be legally binding but not legally enforceable if there are no such mechanisms to support and eventually ensure its implementation. This is the most frequent situation found in international law. The aforementioned procedural mechanisms may be established for the purposes of promoting the implementation of provisions laid down both by a legally binding instrument or by a non-legally binding instrument (for example a resolution adopted by an international organisation). However, procedural mechanisms in non-legally binding instruments tend to be weaker[5]. While such mechanisms can contribute to strengthening the normative force of a resolution that is not legally binding, they cannot on their own give a legally binding character to such resolutions.

2. Dictionnaire de droit international, J. Salmon, p. 629 (our translation).
3. Dictionnaire de droit international, J. Salmon, p. 765.
4. We use the word 'discipline' in the sense of an incentive to act in a certain way. These incentives can be positive or negative, reputational or material, and created implicitly or explicitly by the regime.
5. See for example the role of the Commission on Sustainable Development in the follow up of Agenda 21.

2.2. *Hard* and *soft law*: three criteria of normativity

While law and non-law, or 'hard law' and 'soft law' are often presented as existing in binary opposition to one another, in reality the normative force of international environmental law operates along a spectrum. For example, although soft law instruments may seem non-binding at first glance, in practice they can have some legal effect. States often take great care when negotiating such instruments, and occasionally include mechanisms to promote the transparency and implementation of their actions under the soft law instrument in question. Such inclusions provide telling clues of the degree of normative force these instruments in reality possess.

As regards to hard law, numerous norms are non-binding because they have not been written as prescriptive norms, or have been written using such generic terms that they cannot be applied without additional precision. This is the case for the vast majority of the provisions of the Rio Convention on Biological Diversity, which begin either with: "Each contracting party shall, as far as possible, and where appropriate (…)", or with "Each contracting party shall, in accordance with its particular conditions and capabilities (…)".

The degrees of normativity and effectiveness of soft and hard law instruments are in fact variable. The absolute divide between *hard* and *soft*, between binding and non-binding does not stand up to an in-depth analysis.[6] Therefore, in order to assess the legal nature of an instrument, we use the following set of criteria:

- A formal criteria: is the instrument embedded in a formal source of law or not (i.e. treaty, customary rules, general international law principles, unilateral acts)? How was the instrument adopted? By what organ, with what authority? According to what decision-making process? Did some States express reservations? If yes, which States?
- A substantive criteria: are the legal norms expressed in precise and prescriptive language? Or are they vague and hortatory?
- A procedural criteria: does the instrument include the capacity to mobilize relevant 'disciplines' in order to promote and ensure implementation of agreed norms? Such disciplines include a robust transparency, accountability and facilitation mechanism, as well as possibly a compliance and enforcement mechanism.

6. See. D. Shelton (ed.), *Commitment and Compliance. The Role of Non-binding Norms in the International Legal System*, (Oxford, OUP, 2000) 560 p.

These criteria demonstrate the necessity of assessing the instrument as a whole when determining its legal nature, on the spectrum between hard and soft law, binding and non-binding.

2.3. The legal form of the Paris Agreement as the result of four key parameters

Since the Bali Conference (COP 13, 2007), Parties have been of the view that legal form should follow substance. However, it is difficult to make progress on substance while uncertainty remains on the legal form, in particular on the legally binding character of NDCs.

To generate a comprehensive view, Parties should consider the legal form of the instrument to be adopted at COP21 in Paris in the light of four parameters that emerge from the current negotiations:

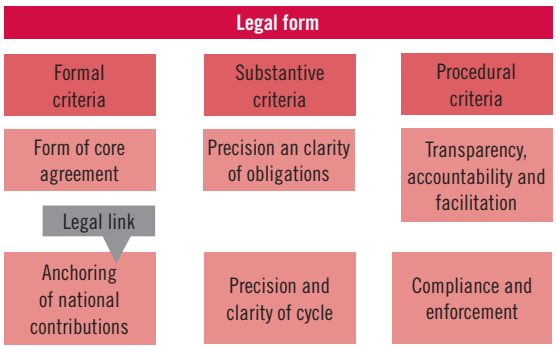
- *Form of the core agreement and its relationship to substantive contributions*: although there is no consensus yet on the legal form, negotiations seem to be heading towards a hybrid instrument, with a number of Parties calling for a "core" agreement which may be supplemented by other instruments.
- *'Anchoring' of NDCs*: the legal effect of NDCs may depend on the way they are 'anchored' in the Paris agreement.
- *A mechanism for transparency, accountability and facilitation*: a mechanism to ensure transparency of actions undertaken by Parties can help to mobilize reputational incentives, and thus contribute to the normative force of the regime; in addition, this mechanism could undertake a facilitative role providing technical advice and mobilizing the resources of the regime to assist implementation.
- *A mechanism for compliance and enforcement*: parties may wish to create a mechanism for compliance and enforcement.

These parameters and their relationship with the issue of legal form are summarized in figure 1

For each of these four key parameters, Parties can choose between different options, which entail a series of trade-offs.

This paper aims to shed some light on the pros and cons of the various options that Parties may consider regarding these four key parameters. It also aims to as well to highlight the inter-linkages between these options. We consider it important to optimize all four parameters in a way that can make the Paris agreement adequate, universal and fair, legally robust, and dynamic and durable.

Figure 1. The pillars of the legal form discussion



Source: Authors.

3. THE LEGAL FORM OF THE CORE AGREEMENT

In Durban, Parties decided "*to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the United Nations Framework Convention on Climate Change applicable to all Parties*".[7] From a legal perspective, this mandate includes two main options between which Parties have to choose: a "*protocol*" or "*another legal instrument or an agreed outcome with legal force*".

3.1. The protocol option

The "core" of the Paris agreement can take the form of a protocol to the Convention, the adoption of which would then be governed Article 17 of the UNFCCC. Such a protocol would be legally binding for all ratifying Parties according to the customary rule *Pacta sunt servanda*, embodied in the 1969 Vienna Convention on the Law of Treaties according to its Article 26: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*".

The treaty form offers some advantages regarding durability and robustness. Commitments enshrined in a treaty are not easily reversible, even though Canada's withdrawal from the Kyoto Protocol shows that it is always possible to withdraw from legally binding instruments.[8] In order to enter into force, a treaty is subject to ratification, acceptance or approval by States, and often requires the approbation of national parliaments. Once a treaty has been ratified, a state incurs immediate legal obligations in international law. It must conform to all the obligations set down in a treaty

7. Decision 1/CP.17.
8. See UNFCCC article 27.

and cannot generally avoid them without a good excuse (such as *force majeure*) or unless it has formally expressed a reservation. Most importantly, ratifying an international treaty gives domestic effect to the treaty's provisions, thus promoting political ownership, stakeholder participation in implementation, and mobilizing the disciplines of domestic law. In the context of a collective action challenge, a robust treaty can help to overcome concerns about free-riding and thus potentially increase ambition.

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

3.2. The option of "another legal instrument or an agreed outcome with legal force"

In the final analysis, two options can be reasonably considered here: (1) a revision of the 1992 Convention and/or its annexes, or (2) a COP decision or a set of COP decisions. From a legal point of view, these two options differ with regards to conditions for adoption, entry into force, and legal effect.

An amendment to the Convention can be adopted by ¾ majority, if consensus cannot be found, and has legal effect once it has entered into force. To enter into force, a substantive[9] amendment to the Convention needs to be ratified by ¾ of Parties, and then only enters into force for those Parties that have ratified the amendment. Ratification could be a lengthy process, with the risk that the amended Convention applies only to a limited number of Parties, while other Parties continue to apply the original UNFCCC. Once it enters into force, there is no doubt that an amendment to the UNFCCC would be legally binding, as is the UNFCCC itself. As noted earlier, however, formal bindingness is not sufficient by itself to ensure normative force and effectiveness.

A COP decision requires consensus to be adopted, and can be applied immediately once adopted. However, the legal effect of COP decisions is ambiguous in international public law. What COP decisions add in terms of flexibility and expedience, they thus lose in terms of legal security.[10] Undoubtedly, they can have a practical effect. In that respect, the UNFCCC provides that "*the COP shall take, within the limits of its mandate, the necessary* ***decisions*** *to ensure the effective application of the Convention*".[11]

Thus, while a COP decision can have political force its status as a legal tool is less certain, as it is not automatically legally binding. Indeed, the extent to which COP decisions can create new legal obligations, become a source of law, or allow a change in the interpretation of the Convention's provisions remains unclear and widely debated among Parties.[12]

In a ruling on the legal effect of resolutions of the General Assembly of the United Nations, the International Court of Justice noted that "*even if they are not binding, [they] may sometimes have normative value*".[13] The normative force of a COP decision, including its degree of 'bindingness', depends on three central factors:

1) *The recognition of the capacity of the COP to take binding decisions:* some constitutive treaties grant the COP the capacity to take binding decisions; this capacity could also arise as the result of concerted practice. In this case, a COP decision

9. It is worth noting that the UNFCCC provides for a simplified procedure to allow the entry into force of amended annexes (by opting out and not opting in). However, this provision cannot be used because the Convention states that annexes "*shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character*" (Article 16). A schedule of nationally determined contributions could form such an annex, but in any event it would require a modification of the Convention itself, at least to make a legal link between the new annex and Parties' commitments to implement its content.

10. Pierre-Marie Dupuy and Yann Kerbrat, Droit international public (Paris: Précis Dalloz, 2011), at 425.

11. UNFCCC, Article 7, our emphasis.

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

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

could give rise to legal obligations, i.e. a formally binding act from an (almost) international legislative body.[14] Such cases are limited. Furthermore, the UNFCCC does not provide for this capacity to take binding decisions for its COP.

2) The content of the COP decision: this includes the precision and prescriptiveness of the decision's provisions, as well as the existence of mechanisms or procedures to scrutinize implementation by Parties. There is no legal impediment to scrutiny of Parties' implementation of non-legally binding instruments at the international level. The assessment of the decision's legal effect must be done on the basis of a case-by-case analysis of the content of the COP decision with regard to its objectives, as well as of the Convention's objectives.

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

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

In any event, none of the three factors described above appears to form a sufficiently robust foundation to consider COP decisions as formally binding by themselves under the UNFCCC. In the context of enhancing a multilateral, rules-based, durable climate regime, COP decisions may therefore be an inadequate legal basis.

3.3. Advantages of a combined approach

At this point in the run up to Paris, a majority of Parties have stated their preference for the adoption of a legally binding instrument taking the form of a protocol to the UNFCCC, complemented by a series of COP decisions.

This seems to be the best option to consider in so far as it gives the opportunity to optimize between the pros and cons of each. A protocol would be the most solemn and clear affirmation by States of their commitment to achieve the ultimate objective of the UNFCCC; as well as providing further legal elaboration of the procedures and institutions of the regime. Such a treaty would be complemented a series of COP decisions, which would allow a flexible and swift implementation of the protocol, despite the lower level of legal security that they provide.[15] Within this multi-layer structure of the Paris agreement, the core provisions should be robust and durable, while the content of the treaty and its ambition could be progressively upgraded over time.[16]

4. FORM AND ANCHORING OF NATIONALLY DETERMINED CONTRIBUTIONS (NDCs)

4.1. What is an NDC?

The concept of NDC represents a new aspect of the climate regime, whose implications should be taken into account when considering the issue of legal form. We highlight several characteristics that are relevant for the discussion on legal form.

Countries are currently negotiating the information that should be provided together with NDCs in order to ensure that they are transparent and credible. The Paris agreement could likewise specify key accounting principles or options, and require Parties to specify how they apply accounting rules in their NDC. Nonetheless, it is likely that NDCs will remain diverse and complex. Such diversity reflects the problem of mitigating climate change, which necessitates a structural transition to a new, low-carbon development model. This transition is not just a question of 'reducing emissions', as if it were as simple as dimming a light switch. It

14. Cf. Brunee, J. (2002), " COPing with Consent: Law-Making Under Multilateral Environmental Agreements", 15 Leiden Journal of International Law 1–52.

15. P.-M. Dupuy et Yann Kebrat, *Droit international public*, Précis Dalloz, 12ème édition, 2014, p. 424.

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

requires concerted policy action across all sectors, innovation and investment in new infrastructure, and profound changes in the organization of production and consumption. The transition interacts with 'exogenous' factors like economic growth, trade and capital flows, demography, and evolutions in social norms. While it will be long-term and uncertain, it must happen extremely rapidly in comparison with other socio-economic evolutions of comparable magnitude (the industrial revolution, for example). Finally, while presenting common elements, the transition will differ across countries depending on their circumstances, resources, preferences, and levels of development.

Several conclusions can be drawn from this discussion. Firstly, NDCs will reflect the diversity of countries and the complexity of the transition. Secondly, this observation has implications for countries' accountability toward their NDC. While countries should be accountable for their NDCs, it is not reasonable to expect 'to-the-ton' accountability. Indeed, the Chinese and US announcements already indicate this reality: they contain inevitable elements of ambiguity, a quantitative range in the case of the US (26-28% reduction by 2025), and an ambiguity in timeframe in the case of China (peaking around 2030). It is likely that NDCs will be multiform, as indeed has been already indicated by the Chinese announcement (aspirational peaking range and non-fossil fuel share in energy supply, with potentially further elements in the final announcement). This underscores the importance of providing space to differentiate the normativity of different elements of the NDC. Some elements could form the core of the NDC; some could be for information purposes.

Granted, the formal announcements, to be made in the spring of 2015, will likely be more precise. Nonetheless, we would argue that NDCs are likely to be diverse, multifaceted documents, framed by common but relatively loose rules on upfront information and accounting methods.

Thus, accountability will inevitably take on a qualitative element: are countries making good faith efforts to implement their NDCs, with demonstrable progress towards achievement? To summarize the argument: complex problems require complex solutions; NDCs will reflect this. As a consequence, it will be necessary to establish robust, independent procedural arrangements allowing for greater transparency of action toward the implementation of inherently diverse and complex NDCs (see section 5 on transparency, accountability and facilitation).

There is also the question of timing, i.e. should NDCs be ready for anchoring in Paris or only afterwards (even though the INDC phase should be completed between Lima and Paris)? There are two reasons for considering a later date. Firstly, there is the hope that more time for a robust assessment process will stimulate upward revision. Secondly, some countries have expressed the need for more time for the definition of accounting rules. Regarding the first, few countries have indicated a willingness to have a robust *ex-ante* assessment (see also below). Regarding the second, countries should indeed indicate the accounting rules that they plan to use, potentially based on agreed principles and existing rule sets. However, in order to ensure the political signal of the Paris agreement, it seems necessary to have NDCs in final or nearly final form in Paris. If some adjustments need to be made subsequent to Paris, the Agreement should contain a provision that this be done by 2016.

In addition to NDCs, the Paris agreement should contain a requirement that Parties develop and submit indicative long-term deep decarbonisation pathways. These would be legally non-binding, and kept separate from NDCs and other reporting requirements. Their purpose would be threefold. Firstly, they would support the iterative learning process that the regime should establish, by providing a long-term thinking alongside each round of short-term NDCs. Secondly, they would increase the scope for transparency, trust and differentiation, by allowing each Party to describe in their own terms the opportunities, challenges and needs for international cooperation that deep decarbonisation implies for them. Thirdly, they would help to align expectations around the long-term. The Paris agreement could contain a requirement to develop and submit such indicative pathways by 2018, to update them in line with each cycle; it would also specify that such pathways are non-binding (they could be housed in an INF document, for example).

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

of predictable cycles should form the basis of the so-called ratchet mechanism.

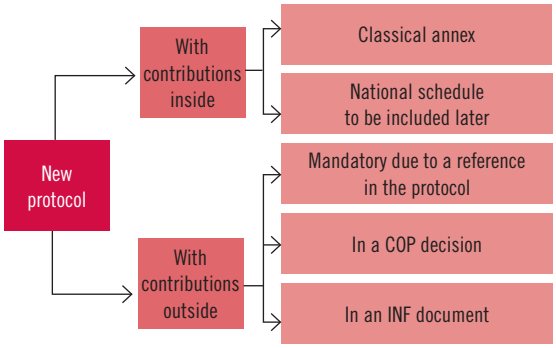
Clarifying these points upfront provides a better basis for judging between different options for anchoring NDCs in the agreement. It is to this that we now turn.

4.2. Five options for the anchoring of NDCs

If the Paris agreement takes the form of a new protocol to the 1992 Convention, there are five legal options for the anchoring of NDCs. Those five options imply different consequences in terms of timing, legal force, transparency, accountability and non-compliance.

Figure 2 sets out the five options for the anchoring of NDCs. These are then discussed in the following sub-sections.

Figure 2. Five options for the anchoring of NDCs



Source: Authors.

4.2.1. An annex or annexes to the protocol

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

With this option, the annex or annexes would form an integral part of the protocol, and would have the same legal force as a legally binding treaty. Whether or not the NDCs are indeed legally enforceable depends subsequently on the substantive and procedural provisions of the treaty.

This option has several advantages. Forming part of a treaty, NDCs would be legally binding nationally for Parties to the agreement, as well as internationally. The annex or annexes would be negotiated and adopted at the same time as the protocol, following a minimum of coordination among Parties before or during the Paris conference. Indeed, the annex or annexes being part of the protocol, they would need to gain the consensus of the COP to be adopted officially in a COP Decision.[17] However, it is possible to introduce a simplified procedure to amend the annexes for the next round of contributions, in order to render the Paris agreement a dynamic instrument. This option has the added advantage of providing a robust legal basis to ensure transparency, accountability and facilitation, and to eventually enforce compliance. Such provisions may be more difficult to introduce if NDCs are not binding internationally (see below).

This option has also three disadvantages. First, it requires that all Parties' contributions be ready before the Paris Conference, in order to inscribe them into the annex(es) to the protocol for their adoption. Secondly, once the treaty is adopted, the approach is by definition rather rigid and not very flexible over time, unless a simplified revision procedure is developed.[18] Thirdly, coordinated, internationally binding obligations may be difficult for some Parties to accept, reducing participation and hence effectiveness. For some, domestic ratification of internationally binding substantive obligations may be a challenge. Others may consider this option to contain either too little or too much legal differentiation or legal symmetry. Remaining disagreement on this question of legal differentiation/legal symmetry may result in a lowest common denominator, unless a more intermediate solution than this option is found.

4.2.2. A national schedule integrated in the protocol

NDCs could be determined at the national level and inscribed into *National Schedules*, which the protocol could integrate after adoption by a specific provision to the effect that they form an integral part of the protocol. National contributions could be designed and notified to the secretariat according to a loose common format and a

17. UNFCC Article 17§1 ; see on this model the decision 1/CP.3.

18. The approach used by the Montreal Protocol to review the annex(es) through a simplified procedure is exemplary. Such a procedure was adopted to adjust Parties' commitments under the second period of the Kyoto Protocol: the adjustment "*shall be considered adopted by the Conference of the Parties serving as the meeting of the Parties to this Protocol unless more than three-fourths of the Parties present and voting object to its adoption*". Moreover, its entry into force is automatic. It does not need States' ratification, a process inherently long and uncertain. See Article 3 §1 quater of the Kyoto Protocol as amended in Doha in 2012.

uniform terminology, while allowing Parties to self-differentiate their commitments by type and scope. National schedules could also indicate restrictions, exemptions or even conditions for the implementation of the NDC.

Drawing on the model of national schedules in the General Agreement on Trade in Services (GATS), this option differs from the previous option in that national contributions are not part of the protocol at the time of its adoption.[19] NDCs could be notified after the Paris Conference in order to reflect the principles and rules of the Paris agreement and be automatically integrated into the protocol, without being subject to other Parties' acceptance.

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

4.2.3. NDCs outside the protocol but binding due to a provision in the protocol

NDCs could also exist outside the protocol, for example in a registry kept by the secretariat on the model of the INF document in which the secretariat compiled Parties' "pledges" communicated after Copenhagen. But the protocol would contain the legal obligation for all Parties to submit a national contribution and to implement it. States could have an obligation of result (to achieve the pre-determined result) or, more reasonably, an obligation of means (to use their best endeavours to achieve the result). This, in a nutshell, is the spirit of a recent AILAC submission[20], a proposal which merits serious consideration by Parties. As Parties would be internationally bound by an obligation to implement their national contribution, this option would help balance legal security at international level and national sovereignty to determine NDCs. It could also create the legal basis for a more robust regime for transparency, accountability and facilitation, based on this international legal obligation for each Party to implement its NDC.

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

4.2.4. Anchoring in a COP decision

The protocol can provide that initial NDCs, as well as any revised or new NDCs, be adopted by COP/MOP decisions. In comparison to option iii) above, the protocol would not contain a provision requiring Parties to implement their NDC (obligation of means). In order to operationalize this approach and make it effective by 2020, the COP to the UNFCCC could prepare this decision to be endorsed at COP/MOP1 of the new protocol (if the new agreement is a protocol).[21]

As discussed above in this paper, COP and COP/MOP decisions are legal instruments, but not necessarily legally binding by themselves. They can have some legal effects even without having the same legal force as a treaty. Parties should apply COP and COP/MOP decisions in good faith as implementing measures of the international treaty they have agreed to approve. In addition, if the protocol provides for it, NDCs inscribed in COP/MOP decisions could be subject to both an ex-ante assessment on the basis of upfront information, and an assessment of progress made by Parties in their implementation. In the absence of an international commitment to implement the NDC, this assessment of implementation would likely be weaker. With this option a State cannot be held liable for non-compliance if it does not make efforts to implement its NDC.

4.2.5. Anchoring in an INF document

With this last option, NDCs would be compiled in an "INF" document and/or in a registry maintained by the Secretariat, on the model of the

19. See also Article 10§1 of the Vienna Convention on the ozone layer (1985).

20. Independent Association of Latin America and the Caribbean AILAC Ad-Hoc Working Group on the Durban Platform for Enhanced Action (ADP), Submission on the legal architecture and structure of the elements of the 2015 Agreement, http://tinyurl.com/qfz2wfq, consulté le 28 octobre 2014.

21. The approach used by the Montreal Protocol to review the annex(es) through a simplified procedure is exemplary. Such a procedure was adopted by the Kyoto Protol to adjust Parties' commitments under the second commitment period: the adjustment "*shall be considered adopted by the Conference of the Parties serving as the meeting of the Parties to this Protocol unless more than three-fourths of the Parties present and voting object to its adoption*".

compilation of pledges made by Parties after Copenhagen-Cancun.[22] In comparison to option iii) above, the protocol would not contain a provision requiring Parties to implement their NDC (obligation of means). The protocol could refer to NDCs while encouraging all Parties to take measures to implement them and contribute to the achievement of a long-term collective goal. In that case, such contributions would have no legal force at the international level. In the absence of an international obligation to implement the NDC, it becomes difficult to envisage strong mechanisms for transparency, accountability and facilitation, let alone for enforcing compliance. Implicit naming and shaming would therefore be the only international discipline available for supporting Parties' implementation of the protocol.

5. TRANSPARENCY, ACCOUNTABILITY AND FACILITATION

5.1. Key concepts and the role of transparency in legal form

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

As noted in section 2 above, transparency and accountability are an important aspect of legal form, relating to the substantive and procedural criteria that can be used to judge the legal force of an instrument. The precision of NDCs, achieved through agreed *ex ante* information standards and accounting principles and rules, will be a key aspect of their substantive force. However, as discussed above, NDCs will likely remain diverse and complex. Therefore, processes to track and promote implementation become all the more important.

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

Here we set out some key concepts and theoretical frameworks that inform the discussion of transparency and accountability in the Paris agreement taken up in subsequent sections of the paper:

- *Transparency of emissions*: this relates to the measurement, reporting and verification (MRV) of accurate and timely emissions inventories.
- *Transparency of NDCs*: this relates to the provision of sufficient upfront information with the submission of NDCs, in order to ensure that these are as transparent as possible in terms of expected emissions outcomes. It includes the development and application of agreed accounting principles and rules, in particular on land use and markets. We can include under this point both substantive rules (on upfront information, for example) as well as procedures intended to increase the transparency of targets (through *ex ante* consultation, for example). Transparency of targets can also facilitate the assessment of the adequacy of aggregated mitigation efforts towards achieving the 2 degrees target, as well as the equity of individual NDCs.
- *Transparency of implementation*: this relates to the provision of information on and assessment of demonstrable progress towards the achievement of NDCs, and the multilateral determination of achievement subsequent to the end of the period.
- *Accountability*: we group what is often termed 'compliance' under the broader term 'accountability'. A regime has multiple 'disciplines' that can be mobilized, implicitly or explicitly, to help promote and ensure implementation of legal obligations. These range from reputational incentives and assistance, material incentives, to enforcement mechanisms such as sanctions. In order for such disciplines to be explicitly mobilized, Parties need to be explicitly accountable for the implementation of their legal obligations, and the regime needs to have the capacity to explicitly determine demonstrable progress or successful implementation.

Despite significant improvements in the transparency framework since the adoption of the Cancun Agreements, there is still room for strengthening this framework in several important respects.

22. One could think for example to the Register/ compendium of voluntary commitments « volontaires » in the follow-up of Rio + 20 (see www.uncsd2012.org/ commit). Option supported by the United States in their September submission, p. 10.

5.2. Potential objectives of the transparency framework

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

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

The third objective should be to develop policy learning and alignment of expectations: the transparency regime can reveal and share best practice and help to align expectations about policies, enabling the more effective and rapid diffusion of policy expertise and confidence, including to the private sector. From that perspective, the transparency framework can also help to operationalize the "no backsliding" principle,

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

Finally, a fifth objective could be, after a commitment cycle, to provide factual inputs to a compliance regime if Parties chose to introduce one in the Paris agreement (see section 6).

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

5.3. Nature, scope and timing of the transparency framework

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

When looking at existing requirements for the elaboration and submission of biennial reports (BR) by developed country Parties and biennial updated reports (BUR) by developing country Parties, there is some room for improvement to increase transparency of Parties' mitigation actions and their effects. To this end, existing reporting requirements should be improved and streamlined, in particular to include more robust projections of emissions pathways, more detailed information on policy design, priorities and national circumstances, as well as further indicators of progress on implementation. It is important to underscore the reporting implications of addressing a complex, long-term problem like climate change. Understanding progress on implementation, as well as taking into account the evolution of national circumstances relevant for implementation, requires reporting and assessment that goes beyond looking merely at GHG outcomes. The reporting regime should be extended to include further data on policy inputs and intermediate outcomes such as investments, R&D and progress on sectoral indicators of decarbonisation.

The Paris agreement should reflect the core principles, institutions and modalities of the transparency framework. Detailed improvement of existing transparency arrangements can start at COP 22, in line with the core principles defined in the Paris agreement. They should be finalized by 2018 in order to apply to the last biannual reports due before 2020.

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

In order to deliver the various objectives proposed above, the transparency framework should be conducted on a regular timeline, so as to feed into the development of the next cycle of NDCs, and to assess collective action. The frequency of existing reporting requirements through

biannual reports[23] fits with a length of a 5-year cycle of contributions.

5.4. Possible institutional arrangements

The process to ensure transparency of implementation should be separate from the assessment of adequacy prior to each commitment cycle. In addition, it should be separate from the process related to *ex post* determination of compliance after the given commitment period. The objective of the transparency mechanism is to be forward looking and to provide independent, technical assessment of progress towards the achievement of NDCs.

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

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

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

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

- A branch/panel working on transparency of individual implementation. Its composition and expertise should build upon the existing arrangements (e.g. roster of experts, Expert Review Teams, Technical Team of Experts, Consultative Group of Experts). Its mandate should allow technical experts to assess the performance of implementing measures in the light of their effects on the basis of improved reporting requirements and processes as discussed above. A key weakness of the current system is that there is no independent, explicit determination of problems of implementation. In this regard, different options can be considered on how to follow up the technical assessment made by this transparency panel:
  - The panel submits the report on individual implementation to all Parties via the Secretariat, or
  - The panel submits a synthesis report via the Secretariat covering all Parties but highlighting questions of implementation encountered by individual Parties
- A branch/panel working on the adequacy of collective action in line with the long term goal. The panel would prepare every four years a report based on the compilation of proposed future contributions that would be submitted to all Parties via the Secretariat, which would organize a consultative process to discuss about the level of collective ambition. The 2013-2015 review process could inspire Parties to establish such a consultative procedure in a more institutionalized way.

6. CONSEQUENCES OF NON-COMPLIANCE

6.1. Non-compliance in the existing regime

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

6.1.1. Consequences of non-compliance with the UNFCCC

"In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention" the Convention contains a dispute settlement clause in its Article 14:

- "*the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice*";
- an optional clause for compulsory jurisdiction of the International Court of Justice or arbitration (under conditions of reciprocity) ;

23. Parties shall submit BRs and BURs every two years, with the first BR due on January 1, 2014, and the first BUR by December 2014.

- by default, a conciliation commission which "*shall render a recommendatory award, which the parties shall consider in good faith*".

Such a provision has, however, never been used. For several reasons, the Parties are very reluctant to accept a compulsory jurisdiction—only the Netherlands has done so for both the ICJ and arbitration, and the Solomon Islands for arbitration. Because of the requirement of reciprocity, only a dispute between the Netherlands and the Solomon Islands could lead to a settlement under Article 14, taking the form of arbitration. Of course the Parties to a dispute can still agree to bring the matter before the ICJ or an arbitration tribunal after the dispute has arisen and only for this dispute. But this remains exceptional, in particular for a multilateral dispute, even if international law permits it.[24]

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

6.1.2. Consequences of non-compliance with the Kyoto Protocol

The Kyoto Protocol gave birth to a very elaborate compliance mechanism aiming "*to facilitate, promote and enforce compliance with the commitments under the Protocol*". It is a non-contentious procedure of control of compliance and reaction to non-compliance.[25] This procedure operates without prejudice to the more classical dispute resolution clause of the Article 14 of the Convention (see above) which applies *mutatis mutandis* to the Protocol.[26]

The first non-compliance procedure of an environmental treaty was drawn up in 1990 in the framework of the Montreal Protocol on substances that deplete the ozone layer (1987). This pioneering procedure has already been taken up and adapted by a dozen other environmental conventions, becoming little by little a standard practice. Although inspired by the same model, all these procedures have peculiarities of their own.

Among them, the Kyoto Protocol has given rise to the most comprehensive non-compliance procedure to date. The importance of the environmental issues at stake and the specificity of the Kyoto Protocol, which uses market mechanisms, explain the rigour of its compliance mechanism. The monitoring and control procedure is very robust and precise. Divided into two branches, a facilitative branch and an enforcement branch, the Compliance Committee is quasi-judicial. Potential sanctions are essentially intended to be dissuasive. But the "*consequences*" are not punitive; they aim at "*the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply*". Appeal to the COP-MOP is provided against a decision of the enforcement branch.

But despite being very sophisticated, the system is not fool-proof. Notably, Canada's withdrawal from the Kyoto Protocol has recently shown how the Committee is powerless to cope with non-compliance.[27] This highlights the inherent weakness of international environmental law to provide for the enforcement of state obligations against their will. Perhaps more importantly, the inability of the compliance mechanism to alert to the evident

24. See the ILC Articles on State Responsibility, 2001 (art. 48), and the commentaries of the ILC (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, p. 126). See also the 2011 advisory opinion of the Seabed Disputes Chamber of the ITLOS which elaborates on the work of the ILC stating that « Each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area » (about the Montego Bay Convention). ITLOS, Advisory Opinion of February 1 2011, Case N°17, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, § 180.

25. See Decision 27/CMP.1 Procedures and mechanisms relating to compliance under the Kyoto Protocol.

26. See son article 19.

27. See Compliance Committee, CC/EB/25/2014/2 20 August 2014 *Canada's withdrawal from the Kyoto Protocol and its effects on Canada's reporting obligations under the Protocol*, Note by the secretariat.

problems of implementation Canada was experiencing before withdrawing highlights another weakness. This weakness should be fixed in future arrangements.

6.1.3. Consequences of non-compliance with the Cancun Agreements

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

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

6.2. Consequences of non-compliance with the Paris Agreement: options and issues

6.2.1. Mandatory substantive obligations: if NDCs are inscribed in a protocol or recognized as mandatory by the protocol

This option allows the design of a non-compliance mechanism, potentially largely based on the multilateral determination of compliance and facilitative and reputational incentives.[28] A more flexible procedure, one that is mainly based on facilitation and incentives such as that of the Montreal Protocol, would probably be more adapted to the current views of Parties. Sanctions could however be envisaged as a last resort, or be developed in a subsequent iteration of the regime.

The scope of the procedure would have to be determined: would it go beyond mitigation, including for example finance and adaptation? Many Parties take the view that compliance should apply only to specific mitigation commitments.[29] Furthermore, would developed and developing Parties be subject to the same legal obligation from this point of view? In addition, Parties would have to think about the practical and institutional articulation between the work of the Compliance Committee and the Transparency Mechanism (Section 5). Finally, they would have to determine the decision-making procedures. Who is going to decide? The COP-MOP? The Committee? An ad hoc panel as in the WTO model?

6.2.2. Non-mandatory substantive obligations: if NDCs are compiled in a COP-MOP decision or an INF document

In the event of a short protocol that lays down the basic principles, and refers to a COP-MOP decisions or an INF document containing NDCs, it appears quite difficult if not useless to design a robust compliance mechanism. Why elaborate a hard mechanism to control the implementation of a soft law instrument? One option is that such a mechanism be designed to control compliance with other provisions of the protocol (for example, procedural or MRV provisions—see section 6.2.3), in order to solidify a fragile system.

In any event, the COP-MOP could monitor and review the implementation of NDCs. It could elaborate on the work of a transparency committee or, as a minimum, on a report prepared by the secretariat based on the transparency procedures (see section 5). But in this case, no sanctions are possible, not even explicit shaming by the transparency mechanism. Assisting States in difficulty remains a possibility. This would require a procedure and an institution akin to a compliance committee, albeit with a different name, for example, an implementation committee. If NDCs are housed in an INF document, the transparency mechanism would have even less capacity to explicitly determine non-implementation of an NDC. Such was the configuration of the Cancun agreements.

6.2.3. Compliance with procedural obligations

It should be noted that the question of compliance goes beyond NDCs. The protocol may contain largely procedural obligations to implement an

28. Few Parties to defend the maintenance of the Kyoto compliance committee in its two branches. See however *Submission by Nepal on behalf of the Least Developed Countries Group on the ADP Co-Chairs' Non Paper of 7 July 2014 on Parties Views and Proposal on the Elements for a Draft Negotiating Text*, p. 8 ss.

29. See for example Independent Association of Latin America and the Caribbean AILAC Ad-Hoc Working Group on the Durban Platform for Enhanced Action (ADP), Submission on the legal architecture and structure of the elements of the 2015 Agreement, http://tinyurl.com/qfz2wfq, précité, consulté le 28 octobre 2014. « *Committed contributions on adaptation would not be subject to the Compliance Mechanism* » (§78).

NDC (option three described in section 4). At a lower level of legal force, it may merely contain a procedural obligation to have an NDC and to respect the relevant reporting and transparency rules. It may also contain an obligation to update the NDC every negotiation cycle (every 5 years). The more the obligations of the protocol are reduced to procedural ones, the more compliance with such procedural obligations becomes important. This would particularly be the case regarding the operationalization of the idea of a five year negotiation cycle, and the no backsliding principle. There should be a stringent compliance mechanism with enforceable consequences (suspension of participation in the regime) for non-compliance with key procedural requirements, like the requirement to update one's NDC in line with the agreed cycle.

7. CONCLUSION

This paper has discussed the issues and options for the legal form of the new climate agreement to be adopted in Paris 2015. Several key messages can be distilled from the discussion:

- There is a need for early clarity and a comprehensive approach to the issue of legal form, based around the four parameters assessed here, namely (1) the form of the core agreement and the legal link with NDCs; (2) the anchoring of NDCs; (3) the mechanism for transparency, accountability and facilitation; and (4) the mechanism for compliance.
- Consensus appears to be emerging around the use of a hybrid legal structure, with some elements in the core agreement and some in associated implementing documents. This can be a useful structure for balancing credibility and durability with flexibility and dynamism. At a minimum, the core agreement should contain a legal obligation to implement an NDC, and to update it every five years in line with the agreed cycle of negotiations.
- NDCs are a new element of the climate regime, the consequences of which need to be taken into account. In keeping with the complex nature of the climate change problem, NDCs are likely to be diverse, multifaceted documents, framed by common but relatively loose rules on upfront information and accounting methods. This underscores the need for a robust mechanism for transparency, accountability and facilitation.
- The transparency, accountability, and facilitation mechanism must form the core of the Paris agreement. It should have independent institutional capacity and a technical mandate to track progress, identify problems, and provide support and guidance both to the implementation of NDCs and the preparation of NDCs for subsequent rounds. The mechanism should be able to signal individual problems of implementation ahead of time (i.e. an early warning system). This mechanism should have a separate branch for the assessment of collective adequacy prior to the commencement of each cycle.
- Parties may wish to include a compliance mechanism in the new agreement. Such a mechanism should be separate from the mechanism on transparency, accountability and facilitation, both as regards to its institutional structure and its mandate. Given the current stage of global cooperation, it seems unlikely (and potentially undesirable) that countries will agree to a punitive compliance mechanism. However, a political mechanism could be put in place to discuss egregious cases of non-compliance after the end of each cycle. There should be, however, a robust enforcement mechanism for core procedural obligations relating to the submission, updating and reporting of NDCs. Such a mechanism is a crucial element to operationalize the concept of a dynamic and durable agreement operating on regular predictable cycles of strengthened action. This in turn is key to the political and legal signal of credibility that Paris must send.
- From this perspective, one relevant option to consider would be the reactivation and improvement of the Multilateral Consultative Process as a way of activating a separate facilitative compliance mechanism under the UNFCCC.[30] The Paris core Agreement could include a mandate to work this out before 2020 and provide guidance. In particular, there should be a link between the Transparency Mechanism and the facilitative compliance approach by allowing the implementation branch of the Transparency Committee, as much as Parties, to trigger the procedure on the basis of technical assessments of implementation problems. ▮

30. Sebastian Oberthur, "Options for a Compliance Mechanism in a 2015 Climate Agreement", *Climate Law*, 4 (2014) 30-49.

A comprehensive assessment of options for the legal form of the Paris Climate Agreement

Sandrine Maljean-Dubois (CERIC CNRS-Aix-Marseille Université), Matthieu Wemaëre (Paris and Brussels Bar Associations, Associate Researcher CERIC)
Thomas Spencer (IDDRI)

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