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Understanding the 2015 Paris Agreement

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The international climate change regime has been in evolution for nearly three decades. Over the course of these three decades, notwithstanding seemingly irresolvable differences, parties have negotiated three legally binding instruments—the 1992 United Nations Framework Convention on Climate Change (UNFCCC 1992), the 1997 Kyoto Protocol (KP 1997), and the 2015 Paris Agreement (UNFCCC 2016b)—and numerous decisions under these instruments. These instruments, in particular the KP and the Paris Agreement, represent fundamentally different approaches to the three central issues the international climate change regime has been struggling with since the inception of multilateral negotiations. These issues are: the architecture of climate instruments; the legal form of climate instruments and the legal character of provisions in them; and differentiation among countries, in particular, between developed and developing countries. This chapter explores each of these central issues in turn, with a focus on how the Paris Agreement resolves these issues and represents a step change in the international community's efforts to address climate change.

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Central Issues in the Multilateral Climate Change Negotiations

The three central issues in the international climate change regime, namely, architecture, legal form and character, and differentiation, are intricately intertwined. The stronger the legal character of the obligation, the less autonomy states have, and thus greater the differentiation sought by developing countries.

Architecture[1]

The multilateral climate change negotiations have, from their inception, experimented with different design and architecture options for the legal instruments that comprise the climate change regime. The KP, with legally binding targets and timetables for developed countries (categorized as Annex I countries in the UNFCCC and Annex B countries in the KP), based on commonly agreed rules, with a strong measurement, reporting, and verification (MRV) system and stringent compliance mechanism, represents the archetypal 'top-down architecture'. Since it reflects developed country leadership, the KP has enduring significance for developing countries. However, it proved less popular with developed countries, in particular the US, which is not a party to it. The KP's second commitment period running from 2013 to 2020 proved even less popular with some developed countries, such as Japan and Russia, which withdrew. Although the parties with emission targets were all assessed in compliance at the end of the first commitment period in 2012, they accounted for only 24 per cent of 2010 global emissions (Shishlov, Morel, and Bellassen 2016: 768), and the KP will cover an even smaller fraction of global emissions in its second commitment period, assuming the relevant amendment enters into force.[2]

[1] This section builds on previous work, notably Bodansky and Rajamani (2018).

[2] Australia, Belarus, the European Union (EU), Iceland, Kazakhstan, Norway, Switzerland, and Ukraine together accounted for 13.96 per cent of global greenhouse gas (GHG) emissions in 2010, excluding emissions from the land sector. Even if contributions to the global carbon stock or historical

The 2009 Copenhagen Accord, a non-binding instrument, 'take[n] note of' by parties (UNFCCC 2010), reflected the first signs of departure from the Kyoto-like 'top-down' model. The Copenhagen Accord recognized 'the scientific view that the increase in global temperature should be below 2 degree Celsius', but did not prescribe aggregate or individual emission reduction targets, either mid-term or long term, for states. Rather, it required Annex I parties to commit to targets and developing countries to undertake mitigation actions, which were to be inscribed in its Appendices I and II, respectively. A total of 141 parties agreed to be listed in the Copenhagen Accord, and several of them inscribed targets and actions in their appendices. The 2010 Cancun Agreements merely captured these targets and actions in information documents, thus deferring to national autonomy in arriving at commitments/actions in the face of diverse national circumstances and constraints (Bodansky 2011). It rapidly became evident, however, that such a pure bottom-up approach had its limitations. It led to qualified and conditional pre-2020 greenhouse gas (GHG) mitigation pledges of considerable diversity, dubious rigour, and uncertain climate impact, which did not place the world on a trajectory to achieving the 2°C global temperature goal (United Nations Environment Programme [UNEP] 2015).

The negotiations for the Paris Agreement, informed by this experience, sought to design a 'hybrid' instrument. In the build-up to Paris, the 2013 Warsaw decision (UNFCCC 2014) inviting parties to initiate/intensify domestic preparations for Nationally Determined Contributions (NDCs) firmly positioned the bottom-up approach as the starting point for the Paris Agreement (Rajamani 2014). The 2014 Lima Call to Climate Action (UNFCCC 2015) laid out indicative information that the parties were required to provide along

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responsibility are factored in, these countries will account only for 24 per cent of global carbon dioxide (CO_2) emissions. Cumulative CO_2 emissions excluding LULUCF (land use, land use change, and forestry) during 1850–2012 (in percentage of world total) were: the EU (24 per cent); Australia (0.01 per cent); Norway (0.001 per cent); and Switzerland (0.002 per cent). See World Resources Institute (n.d.).

with their contributions, in order to promote clarity, transparency, and understanding, thus beginning to circumscribe the discretion available to parties. Ultimately, the Paris Agreement crystallized this emerging hybrid architecture in which bottom-up substance to promote participation (contained in parties' contributions) is combined with a top-down process to promote ambition and accountability.

Legal Form and Character[3]

In the decade of multilateral negotiations leading up to the Paris Agreement, states had been grappling with the legal form the instrument they were negotiating should take. The options ranged from a soft law instrument, such as a decision taken by the Conference of the Parties (COP), to a legally binding instrument. It is worth noting that there is a distinction between the legal form of an agreement and the legal character of provisions within it. The legal character of a provision refers to the extent to which the provision creates rights and obligations for parties, sets standards for state behaviour, and lends itself to assessments of compliance/non-compliance and the resulting visitation of consequences. Treaties—albeit legally binding instruments requiring state consent (Vienna Convention 1969: Article 11)[4]—typically contain a range of provisions varying in legal character, some with greater legal force and authority than others, and thus some that lend themselves to compliance and others that do not (Abbott et al. 2003: 401; Bodansky 2016: 142; Rajamani 2016b: 342; Werksman 2010: 672, 2016).[5]

[3] This section draws on previous work, including Rajamani (2016a, 2016b, 2017).

[4] Legally binding instruments apply only to those states that have expressed their consent to be bound by means of ratification, acceptance, approval, or accession.

[5] The legal character of a provision depends on a range of factors, including location (where the provision occurs), subjects (whom the provision addresses), normative content (what requirements, obligations, or standards the provision contains), language (whether the provision uses mandatory or recommendatory language), precision (whether the provision uses contextual, qualifying, or discretionary clauses), and oversight (what institutional mechanisms exist for transparency, accountability, and compliance).

Vulnerable countries on the front lines of climate impact had long argued that anything short of a legally binding instrument would be an affront to the grave crisis threatening their nations. To those likely to lose their nations to rapidly increasing sea-levels, soft law, with all the conceptual fuzziness and state autonomy in implementation that accompanies it, was an unsettling international response. Many developed countries too had favoured a global and comprehensive legally binding instrument under the UNFCCC. The BASIC (Brazil, South Africa, India, and China) countries, concerned about constraints on their development prospects, had initially opposed a legally binding instrument, but in the lead up to the 2011 Durban conference that launched the process to negotiate the Paris Agreement, all but India had placed their weight behind a legally binding instrument. In deference to India's concerns, the Durban Platform launched a new phase of negotiations towards a 'protocol, another legal instrument or agreed outcome with legal force' (UNFCCC 2012)—a formulation that admitted of a range of possibilities for legal form, some of which would be binding but not others (Rajamani 2012).

India's antipathy to a legally binding instrument at this stage was likely due to many overlapping factors, but its position signalled a lack of confidence—whether due to an institutionalized wariness of the international legal system or legal capacity constraints—that India could play a determinative role in shaping the legally binding instrument that would emerge. India could have negotiated an agreement that contained an equitable burden-sharing arrangement, enhanced scrutiny over provision of support by developed countries, as well as soft obligations for developing countries. A sophisticated understanding of the relationship between legal form and character, as introduced earlier, could have enabled India to support a legally binding treaty, while still calibrating the legal bindingness of particular provisions within the treaty to address their concerns and deliver the substantive provisions that were in their interest.

In any case, by the end of the four-year negotiating process that culminated in the Paris conference, India too had softened its stance on the legal form of the instrument that the states were negotiating. A powerful political momentum had built up, due to the efforts of the EU and many vulnerable countries, towards adoption of a legally binding instrument. Also, the reluctance of many countries across

the developed–developing country divide to take on internationally negotiated commitments had led to the emergence and gathering traction of the notion of NDCs—an approach that, by privileging sovereign autonomy, respecting national circumstances, and permitting self-differentiation, significantly reduced the sovereignty costs of a legally binding instrument. Further, due to the efforts of the US and others, there was increasing recognition and acceptance by states of the distinction between the legal form of the instrument and the legal character of NDCs, as discussed earlier. The Paris Agreement thus is a treaty, albeit one with a range of provisions of differing legal character, explored later.

Differentiation

The issue of differentiation between and among developed and developing countries is another site of long-standing conflict in the climate negotiations. At the normative level, this conflict is reflected in varying interpretations of the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC) (Bodansky and Rajamani 2018; UNFCCC 1992: Article 3). At the operational level, this conflict is reflected in the support (or lack thereof) for particular forms of differentiation that the climate instruments have experimented with over the years.

The Durban Platform of 2011 that launched the negotiating process towards the 2015 agreement contained no reference to CBDR&RC, unusually so. Developed countries had sought to downgrade the salience of CBDR&RC by arguing that this principle must be interpreted in the light of contemporary economic realities, but many developing countries were against this proposal. The text of the decision was therefore drafted such that the 2015 agreement was 'under the Convention' (UNFCCC 2012: Para 3), thereby implicitly engaging its principles, including CBDR&RC. The Doha and Warsaw decisions in 2012 and 2013, continuing this impasse, contained a general reference to 'principles' of the Convention (UNFCCC 2013b: Preambular Recital 7; UNFCCC 2014: Preambular Recital 9), but no specific reference to the CBDR&RC principle. It was only in the Lima Call for Climate Action of 2014, which arrived hot on the heels of a US–China bilateral statement

(Obama 2014: Para 2), that an explicit reference to the CBDR&RC principle, albeit 'in light of different national circumstances', was reintroduced in the climate process (UNFCCC 2015: Para 3). This qualification, a compromise arrived at between the US and China, arguably introduces a dynamic element to the interpretation of the CBDR&RC principle. As national circumstances evolve, so too will the common but differentiated responsibilities (CBDR) of states. However, it is also arguable that since 'respective capabilities' are based on national circumstances, this qualification merely reiterates an element of the principle.

At an operational level, the CBDR&RC principle permits differential treatment between countries in the fashioning of treaty obligations. Accordingly, the UNFCCC and its KP required developed countries to take the lead in assuming and meeting ambitious GHG mitigation targets. The KP put in place an elaborate institutional architecture to oversee this division of responsibilities, including a compliance system which references the CBDR&RC principle and applies differently to developing and developed countries. This proved problematic for many developed countries. The US' rejection of the KP in 2001 (Bush 2001), and the eventual withdrawal of many major developed countries from the KP's second commitment period, can be traced, in part, to concerns about such differentiation in the KP (World Resources Institute n.d.).[6] In the negotiations since the KP, and in particular since its rejection by the US, there was a gradual erosion of annex-based differentiation and a move towards self-differentiation in the climate regime (Rajamani 2012). This shift occurred in response to consistent demands from developed countries that specific mitigation commitments be extended to developing countries. Many developing countries, for their part, vigorously resisted such efforts; some, including India, came together in a negotiating coalition—the Like-Minded Developing Countries (LMDCs)—primarily to preserve annex-based differentiation (UNFCCC 2013a). In Paris, a compromise was struck on differentiation that bypassed

[6] The second commitment period of the KP only covers countries representing 11.8 per cent of the 2012 global GHG emissions. This includes the emissions share of Australia, Belarus, EU-28, Iceland, Kazakhstan, Norway, Switzerland, and Ukraine in 2010, excluding LULUCF.

the UNFCCC annexes, built on self-differentiation, and took distinct approaches to differentiation in different issue areas. In contrast to the explicit categorization of countries seen in the UNFCCC and KP annexes, the self-differentiation approach allows parties to define their own commitments, tailor these to their national circumstances, capacities, and constraints, and thus differentiate themselves from each other. The 2009 Copenhagen Accord was built around this type of self-differentiation, and the 2013 Warsaw decision inviting parties to 'initiate or intensify domestic preparations for their intended nationally determined contributions' (UNFCCC 2014: Para 2[b]) presaged such a self-differentiated approach in the 2015 Paris Agreement. The development of this approach represented a step change in the climate regime and set the stage for a more nuanced approach to differentiation in the Paris Agreement.

The 2015 Paris Agreement

The 2015 Paris Agreement was adopted after years of deeply contentious multilateral negotiations. As mentioned earlier, it represents a step change in the climate change regime, reflecting a hybrid approach to: architecture, combining 'bottom-up' NDCs with a 'top-down' oversight system; legal form and character, containing a spread of provisions of differing legal character; and differentiation, containing a nuanced application of the CBDR&RC principle.

Architecture and Core Obligations

The Paris Agreement resolves to confine the increase in global average temperature to 'well below 2°C' above pre-industrial levels and to pursue efforts towards a 1.5°C temperature limit (UNFCCC 2016b: Article 2[1]). The world is not currently on a pathway to 1.5°C; indeed, it is far from it. Such a pathway would dramatically shrink the remaining carbon space, with troubling implications for countries like India that have yet to lift the vast majority of their citizens from the scourge of poverty (Jayaraman and Kanitkar 2016). Nevertheless, the 'well below 2°C' target and the aspirational 1.5°C goal sets an ambitious direction of travel for the climate regime to be achieved, inter alia, through global peaking of GHG emissions as

soon as possible, and rapid reductions thereafter (UNFCCC 2016b: Article 4[1]).

In order to meet the temperature goal, parties are subject to binding obligations of conduct in relation to preparing, communicating, and maintaining NDCs, as well as in taking domestic measures (Falk 2016). Parties are also required to communicate their contributions every five years (UNFCCC 2016b: Article 4[9]); and while doing so, they have to provide the information necessary for clarity, transparency, and understanding (UNFCCC 2016b: Article 4[8]). These provisions are phrased in mandatory terms ('shall'), and thus constitute binding obligations for parties. In addition to these obligations, the Paris Agreement sets normative expectations that for every five-year cycle, parties must put forward contributions that represent a progression on the last and reflect their highest ambition possible. There is also an expectation that developed countries will lead (UNFCCC 2016b: Article 4[4]).

In addition to mitigation, parties are obliged to engage in adaptation planning and implementation of adaption actions, and are encouraged to submit and update periodic adaptation communications (UNFCCC 2016b: Article 7). The Paris Agreement also includes a provision on 'loss and damage' (UNFCCC 2016b: Article 8), signalling both that the issue is within the scope of the Paris Agreement and that it is to be addressed independently of adaptation.

The Paris Agreement's hybrid approach preserves state autonomy in the determination of their NDCs, but strengthens oversight of these contributions through a robust transparency system, a global stocktake process, and a compliance mechanism. In so doing, it limits the self-serving nature of self-determination and generates normative expectations. The 'transparency framework for action and support' places extensive informational demands on all parties (UNFCCC 2016b: Article 13), and subjects information on mitigation and finance to close scrutiny (UNFCCC 2016b: Article 13[11]).

A complementary 'global stocktake' every five years is intended to assist parties in determining if national efforts add up to what is necessary to limit temperature increase to well below 2°C (UNFCCC 2016b: Article 2[1]). The global stocktake is required to assess collective progress 'in the light of equity and the best available science' (UNFCCC 2016b: Article 14[1]). The inclusion of 'equity' was a

negotiating coup for several developing countries, in particular the Africa Group, that had long championed the need to consider parties' historical responsibilities, current capabilities, and development needs in setting expectations for NDCs (UNFCCC 2013c). It is unclear at this point how equity, yet to be defined in the climate regime, will be understood and incorporated in the global stocktake process, but its inclusion leaves the door open for a dialogue on equitable burden sharing. The Paris Agreement also establishes a mechanism to facilitate implementation of, and promote compliance with, its provisions (UNFCCC 2016b: Article 15).

Legal Character

The Paris Agreement, albeit a legally binding instrument, contains provisions that are spread across the spectrum of legal character (Rajamani 2016b). At one end of the spectrum are 'hard law' (Kiss and Shelton 2007: 10–13) provisions that create rights and obligations for parties, set standards, and lend themselves to assessments of compliance and non-compliance. This is, for instance, the case with individual ('each Party') obligations, framed in mandatory terms ('shall'), with clear and precise normative content and no qualifying or discretionary elements. Article 4(2), stating that 'Each Party shall prepare, communicate and maintain' successive NDCs, is an example of such an obligation. This obligation is one of conduct rather than of result. Thus, the central obligation in relation to mitigation is to submit NDCs, not to achieve them.

In the middle of the spectrum are 'soft law'[7] (Handl 1988: 371) provisions that identify actors ('each Party' or 'all Parties'), set standards, albeit frequently with qualifying and discretionary elements and in recommendatory terms ('should' or 'encourage'). Article 7(10), stating that 'Each Party should, as appropriate, submit and update periodically an adaptation communication....', is an example.

[7] The term 'soft law' is used to refer to 'international prescriptions that are deemed to lack requisite characteristics of international normativity', but which, nevertheless, 'are capable of producing certain legal effects'.

At the other end of the spectrum are provisions lacking in normative content that capture understandings between parties, provide context or offer a narrative, best characterized as non-law, even though they exist in the operational part of a legally binding instrument. Article 6(8), stating that 'parties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties', is an example. These categories—hard, soft, and non-law—are imprecise and fluid, and there is no bright line between them. The Paris Agreement contains a mix of hard, soft, and non-law elements between which there is dynamic interplay. Each provision contains a unique blend of elements of legal character, and thus occupies its own place in the spectrum from hard law to non-law. The combination of elements in each provision is a reflection of the demands of the relevant issue area as well as the particular politics that drove its negotiation.

Differentiation[8]

The Paris Agreement neither creates explicit categories of parties nor tailors commitments to categories of parties as the UNFCCC and the KP do. Rather, it tailors differentiation to the specificities of each issue area it addresses: mitigation, adaptation, finance, technology, capacity building, and transparency (Rajamani 2016a). In effect, this approach has resulted in different forms of differentiation in different issue areas.

In the area of mitigation, for instance, the Paris Agreement combines self-differentiation with normative expectations of 'progression' and 'highest possible ambition' for all countries, and of leadership for developed countries. In contrast, in the area of transparency, differentiation is tailored to capacities, by providing flexibility to those developing countries 'that need it in the light of their capacities' (Bodansky, Brunnée, and Rajamani 2017: 231–8).

The finance provisions of the Paris Agreement are perhaps the most UNFCCC-like in the form of differentiation they embody. Developed countries are required in mandatory terms ('shall') to

[8] This section draws on Rajamani (2016a).

provide financial resources to developing country parties 'in continuation of their existing obligations under the Convention' (UNFCCC 2016b: Article 9[1]). Developed countries are also required to continue to take the lead in mobilizing climate finance (UNFCCC 2016b: Article 9[3]). This obligation is given concrete content in the decision accompanying the Paris Agreement that captures an agreement to continue the collective developed countries' mobilization goal through 2025, and to set before 2025, a 'new collective quantified goal from a floor of USD 100 billion per year' (UNFCCC 2016c: Para 53).

This fine-grained operationalization of CBDR&RC in the light of different national circumstances (CBDR&RC-NC) in the Paris Agreement proved sufficient to secure agreement, but it nevertheless left several lingering equity concerns unaddressed (Jayaraman and Kanitkar 2016). For instance, the Paris Agreement uses the terms 'developed' and 'developing' countries without either defining them or using lists, as the UNFCCC and KP do. Further, in relation to transparency, parties will need to consider which developing countries need flexibility, what kind of flexibility will be provided (UNFCCC 2016c: Para 89),[9] and for how long. In these and other areas, the devil of differentiation will lie in the details of the post-Paris negotiations.

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The Paris Agreement reflects an innovative approach to global climate change regulation, one that reflects a step change from previous approaches that, albeit seemingly rigorous, had deterred widespread participation. In seeking to balance breadth of coverage with depth of commitments, the Paris Agreement chose to combine ambitious long-term goals with national determination of contributions, binding obligations of conduct, and a rigorous oversight system. The NDCs submitted by parties to the Paris Agreement, 170 as of May 2018 (UNFCCC n.d.), cover a wide range, signalling broad participation across countries.

[9] This specifies flexibility in 'scope, frequency, and level of detail of reporting, and in the scope of review'.

The Paris Agreement's aspiration to universal participation, however, was dealt a body blow by the US announcement of its withdrawal from the Agreement (Liptak and Acosta 2017). The US will remain a party to the Paris Agreement until November 2020, according to the rules which prescribe a three-year waiting period and an additional year for actual withdrawal (UNFCCC 2016b: Article 28). If and when the US withdrawal takes effect, as it is the world's second-largest GHG emitter and largest economy, the challenges of meeting the Paris Agreement's goals are likely to substantially increase. Moreover, in its statement of intent, the US indicated an interest in identifying more favourable terms, implying a possible downgrade of its NDCs (US Department of State 2017). Although such backsliding on NDCs is not consonant with parties' commitments and attendant normative expectations (including 'progression') under the Paris Agreement (Rajamani and Brunnée 2017), it does indicate the potential risk of the careful Paris consensus unravelling. A risk, however, that appears to be receding as no other country has followed the US lead thus far.

The countries that remain committed to the Paris Agreement concluded the bulk of the Paris Rulebook in December 2018. The Rulebook, balancing prescriptiveness with flexibility, fleshes out the skeletal Paris Agreement, and operationalizes processes established in the Paris Agreement, such as in relation to transparency, stocktake, implementation, and compliance. In doing so the Rulebook strengthened the Paris Agreement's oversight system, of critical importance given the 'bottom-up' nature of Parties' NDCs do not add up to what is required to meet the long-term temperature goal identified in the Paris Agreement.

There are variations among NDCs, inter alia, in relation to the nature of mitigation targets (ranging from absolute, deviations from business-as-usual to intensity targets, and policies and actions); scope/coverage of gases and sectors; reference points; whether they are conditional or unconditional, or contain elements of both; and justifications for how their NDC is 'fair and ambitious'. Although such variations reflect the diversity of national circumstances and must be accommodated in the Agreement, at least initially, these self-selected contributions accompanied by selectively chosen information and self-serving narratives foster uncertainty and militate against comparability and assessment. In any case,

current NDCs, even assuming they are unconditionally implemented, place us on a trajectory to 2.6–3.2°C temperature increase (UNFCCC 2016a).

The Paris Agreement, designed, unlike the KP, to foster widespread participation even at the cost of less stringent commitments, depends for its effectiveness on the ability of the regime to deliver ambition over time. It remains to be seen if the Agreement, as operationalized through the Rulebook, and the widespread actions it has catalysed among state, non-state, and sub-state actors, will deliver such ambition in time to bend the curve of emissions towards the Agreement's temperature goals.

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