

From Legal form to legal practicalities

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Plan

- The challenge ahead is to achieve balance between the different objectives of the Paris Agreement: how much and where to put the normative focus on?
- The choice of the legal form depends on how best to maximize synergies between the various objectives, while ensuring effective implementation of nationally determined contributions (NDC)
 - ✓ Options for the legal form in the Durban mandate
 - ✓ What legal force for NDC?
 - ✓ How to combine top-down and bottom up obligations?

The Challenge ahead...

- To adopt a multilateral “rules based” post 2020 climate regime to transform our economies and societies towards low carbon development and resilience to climate change
- The objectives of the “Paris Agreement” should be:
 - ✓ Universal and fair: “applicable to all” => participation, equity
 - ✓ Adequate and ambitious: to meet the “below 2°C” objective => strengthened cooperation, increase of ambition over time
 - ✓ Durable and dynamic: long term stable framework with clear pathways to drive climate action => engagement, flexibility
 - ✓ Legally robust: transparency and accountability => trust, effectiveness
- A multilateral Agreement to be combined with nationally determined contributions (INDC/NDMC)

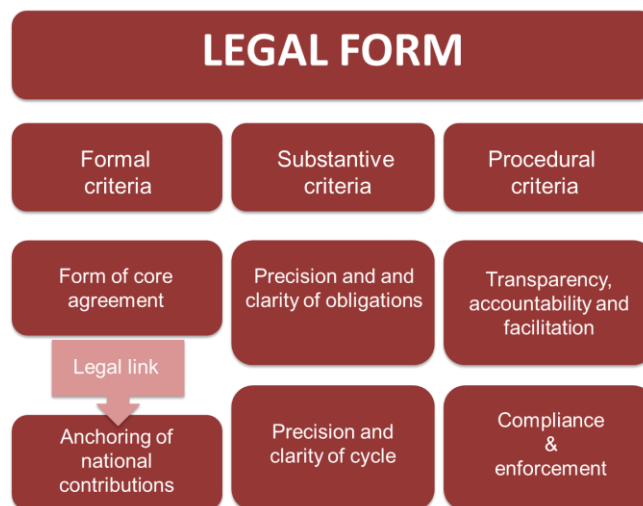
Achieving balance

- The balance between ambition and participation, robustness and flexibility, effectiveness and fairness depends on the level of priority of various options...which may greatly vary from one Party to another
- Need to assess possible trade-offs between objectives, also in the light of the balance to be found between international legal security and national sovereignty
- The normative force operates along a spectrum of legal parameters (formal, substantial, procedural) which strongly interact
 - ✓ The key question is where is the heart of the regime so that the normative focus can be put on and/or around it

Hard and Soft Law...

- Degrees of normativity and effectiveness of soft and hard law instruments are variable...
- Use of different 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)?
 - ✓ *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?

Strong interactions between legal parameters of the Paris Agreement



Clarification...what is legally binding?

- “Legal”: adjective qualifying substantives to indicate they have a relation to the Law
 - ✓ Not necessarily legally binding, nor having legal force
- “Legally binding”: a norm which creates a legal obligation
 - ✓ In international 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
- “Legally enforceable”: legal norm backed by procedural mechanisms that can mobilize different disciplines in order to ensure that States comply with their obligations
 - ✓ This includes transparency and facilitation, as well as compliance and enforcement

On the legal form of the Agreement

- The choice of the legal form depends on how best it can maximize synergies between the various objectives, while ensuring effective implementation of national contributions
- In the UNFCCC context Parties have been of the view that “*the legal form should follow the substance*”
- Since Bali, the legal form has haunted the negotiations: Parties could hardly agree on substance as long as uncertainty remained on the legal form
- In Durban, Parties decided to launch a process to develop “*a protocol, another legal instrument or an agreed outcome with legal force*” to be adopted at COP21 and effective in 2020

Option 1: a Protocol

- The “core” of the Paris Agreement can take the form of a protocol to the UNFCCC (art. 17 UNFCCC: 6 months rule)
 - ✓ “Lex speciali” of the UNFCCC, to be adopted by consensus at COP21 and subject to ratification/approval
- Hard law: a protocol is a legally binding instrument (Pacta sunt servanda, art. 26 Vienna Convention on Treaties)
 - ✓ It must be performed in good faith by Parties
- Primacy of international law over domestic law once ratified
 - ✓ Legal framework to be established at national level
- Most solemn engagement at international level
 - ✓ Strong commitment vis-à-vis other Parties
 - ✓ Political ownership through ratification/approval process

Options 2 and 3: another legal instrument or an agreed outcome with legal force

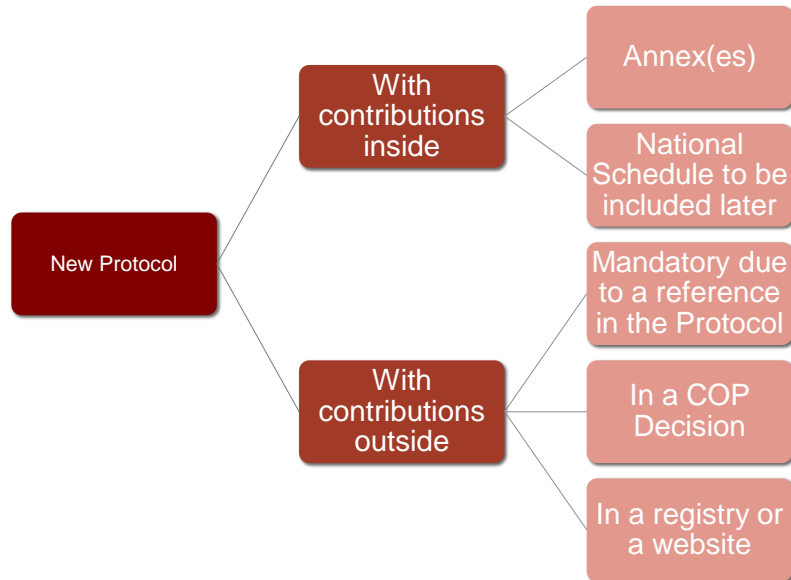
- Options not clear: a new treaty, an amendment to the UNFCCC, a series of COP Decisions, a combination?
- Today, consensus that the Paris Agreement should be under the auspices of the UNFCCC, as it stands
 - ✓ Option 2 and 3 may be operationalized through a series of COP Decisions
- COP Decisions cannot create new legal obligations
 - ✓ Not automatically legally binding, but it can create a new legal situation: political force but legal uncertainty
- Adoption by consensus: no ratification/approval
 - ✓ Immediate effect and flexibility versus legal security and sustainability

Protocol	COP Decisions
+ New Treaty, legally binding, which can create new legal obligations to supplement the UNFCCC in an updated and dynamic manner: legal security at international level - May be soft on substance	- Not legally binding + Can create new legal situation depending on the content and the way obligations are formulated + Continuity with the UNFCCC "Acquis"
+ Durability and robustness (rules based), which can overcome free-riding and provide for mechanisms to make it legally enforceable - Flexibility: unless simplified procedures are provided for by the agreement	+ Flexibility: adjustments to make the agreement more dynamic - Durability and robustness: what a COP Decision provides for, another one can decide otherwise
+ Implementation: to be performed in good faith, providing for a legal framework for strengthened cooperation and possibility to introduce new decision making provisions (voting rules)	+/- Implementation: no legal security at international level; but each country may unilaterally declare it is bound to implement COP Decisions - no compliance/enforcement under the UNFCCC
+ Participation: can provide conditions for its entrance into force and consequences in case of withdrawal - Participation: if too stringent in terms of sovereignty costs, non compliance risks and/or conditions for entrance into force (number of countries/level of emissions)	+ Participation: adoption by consensus, immediately applicable by Parties, no risk of "2 tracks" system

INDC: to be housed "in" or kept "outside"?

- Key (political) question in current negotiations: what legal force for INDCs and at what level (international/national)?
 - ✓ International legal security v. national sovereignty
 - ✓ Legal symmetry v. differentiated obligations/commitments
- Answers vary depending on how to envision the INDC concept and on the legal form of the Paris Agreement :
 - ✓ Does the INDC concept stand for self/nuanced differentiation?
 - ✓ More options with a Protocol, possible combination of "core" provisions and "housing" of INDC
- From theory to reality: need to take into consideration what is acceptable to Parties and what is achievable in Paris, taking account of interactions between all legal aspects

NDCs in/under a new Protocol



“In” the Paris Agreement (1): Annex(es)

• Annex(es): different options

- ✓ One single annex
- ✓ One annex per country (alphabetical order ?)
- ✓ Two annexes distinguishing NDCs from Annex I and non Annex I
- ✓ Several annexes per type of contributions/commitments

• Consequences:

- NDCs legally binding at international and national levels, legally enforceable if provided so by the treaty provisions
- First NDCs subject to approval/ratification together with the treaty (but each Party would ratify its NDC only, contrast with KP)
- If subsequent NDCs: may be subject to amendments using a simplified procedure such as the Doha Amendment to the KP
- In Paris, the COP would have to adopt by consensus the Protocol and the annex(es) containing the headlines numbers (+ provisional application rules)

“In” the Paris Agreement (2): attached Schedules

- **The GATS model**

- National Schedules which form an integral part of the Agreement, to be notified after the adoption of the Agreement

- **Consequences:**

- National Schedules would be legally binding at international level
- NDCs would better reflect the principles and rules of the Paris Agreement and be automatically integrated into the Agreement, without being subject to other Parties’ acceptance, including for their review during subsequent cycle/periods
- National Schedules would be finalized after Paris, leaving space for some assessment and review before 2020

“Under” the Paris Agreement: National Schedule

- **Several options envisaged by Parties:**

- ✓ In a separate COP decision, and/or
- ✓ Into a “registry” maintained by the UNFCCC Secretariat, or
- ✓ In a website maintained by the UNFCCC Secretariat

- **Consequences:**

- NDCs are not legally binding at international level (but may have some legal effect if adopted through a COP decision by consensus)
- NDCs do not need to be ratified/approved at national level
- If the Paris Agreement is an international treaty, its approval/ratification would give some legal effect to NDCs at national level
- Possibility to require Parties to assess and review NDCs in the Paris Agreement (transparency and ambition) but less legal basis for substantive requirements

NDCs “outside” but binding due to a provision of the Protocol

- **Hybrid option: obligation of conduct (top-down) to implement a given result, e.g. NDCs (bottom up) that would be “anchored” outside**
 - Combination of two obligations in order to provide international legal security while respecting national sovereignty
 - Obligation to prepare, submit and to implement domestic “legislation” to make it legally binding nationally and accountable internationally and fit with cycles of contributions.
- **Better to have NDCs housed “in” the Paris Agreement for more political visibility and legal basis to require more transparency at international level:**
 - Need to raise ambition of NDCs over time! Link to global goals!
 - ✓ Ex-post: review of a state's performance in implementing its NDC = ☺

Pros and cons of the various options

Options	Pros	Cons
Annex(es) to the Paris Agreement (Protocol)	Bindingness Certainty Level Playing Field	Not flexible except if NDCs are reviewed through simplified procedures (3/4 majority for blocking)
National Schedule which forms part of the Paris Agreement (Protocol)	Bindingness Certainty Level Playing Field Flexibility for adoption	GATS model works well for trade cooperation, but what about climate cooperation?
(outside) NDCs to be implemented according to a provision of the Paris Agreement (Protocol)	-Some legal security at international level - Legally binding nationally if conduct targets legislation - Flexibility to adjust NDCs after Paris and onwards	NDCs are not legally binding at international Need for robust transparency, ambition and compliance rules in the international regime
Registry/Repository (website) maintained by the UNFCCC Secretariat (NAMA model)	Flexibility Minimum of international coordination (notification/format)	NDC not legally binding Need for a robust international transparency, ambition and compliance framework (Treaty)

Latest developments on INDC...

- **Around 160 INDC submitted covering over 90% of global GHG emissions but not ambitious enough to stay below 2°C**
- **Last ADP Session (19-23 October, Bonn) produced a more balanced 55 pages draft Agreement** (without prejudice to the legal form) reflecting all options:
 - Art. 2 (General) refers to the obligation for all to regularly prepare, communicate and implement an INDC, and to the progression principle (conditional to the provision of financial support as far as developing countries are concerned)
 - Article 3.2 (Mitigation/individual efforts) refers to a mitigation component of the INDC (namely NDMC for Nationally Determined Mitigation Contribution) => question marked concerning the housing of INDC including the NMDC or just the NMDC?

Options in the draft Agreement (v. 23/10)

- **Art. 3.9 of Draft Agreement (« Housing » provisions): 2 options**
- **Option1: “in” or “out” without differentiation**
 [The NDMC/NDMCC communicated by Parties shall be [listed][published] in a [online registry maintained by the secretariat][Annex [X] to this agreement][on the UNFCCC website].]
- **Option 2: “In” but with binary differentiation**
 - The NDMC/NDMCC communicated by developed country Parties shall be inscribed **in** Annex A to this agreement.
 - The NDMC/NDMCC communicated by developing country Parties shall be inscribed **in** Annex B to this agreement.]

Conclusions

- **No “miracle” or “one size fits all” solution:** need to find the right balance and focus a attention on the core of the debate
 - ✓ How to frame legal obligations of Parties, especially as regards mitigation
 - ✓ How to ensure accountability and effective implementation which can build trust and enhance ambition
 - Best option is a protocol, providing for the procedural obligation to implement the national contribution(s) housed in the Agreement through a rules based regime including a transparency mechanism and a facilitative compliance regime
 - ✓ If Parties cannot agree to house the INDC/NDMC in the Agreement, second best would be that they commit to take implementing measures towards their mitigation commitment that is to be binding under domestic law, with a transparency and global stocktake provisions
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Thank you !