

Remarks on the International Legal Character of the Paris Agreement

Jacob Werksman

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mjil>

Recommended Citation

Jacob Werksman, *Remarks on the International Legal Character of the Paris Agreement*, 34 Md. J. Int'l L. 343 (2020).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol34/iss1/12>

This Symposium: Articles and Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Remarks on the International Legal Character of the Paris Agreement*

JACOB WERKSMAN†

I. INTRODUCTION

These informal remarks on the legal character of the Paris Agreement were made in February 2016, only a few months after the Agreement was adopted by acclamation by the representatives of more than 190 countries.¹ Governments sped to ratify the Agreement, triggering its entry into international legal force on November 4, 2016, less than a year after its adoption.² The wide support of the international community for the Paris Agreement was forged through many compromises, including on the Agreement's legal character.³ As will be described, a number of the compromises that weakened the Agreement's legal character were made, in part, to

© 2019 Jacob Werksman

* This Article is based on the third 2016 'Environmental Law Brodies Lecture' delivered by the author on February 9th, 2016, shortly after the Paris Agreement was adopted. It has been brought up to date in light of more recent developments. The Brodies lecture is held every year at the University of Edinburgh in association with Brodies LLP.

† Jacob Werksman is Principal Advisor, Directorate General for Climate Action, European Commission and was a Lead Negotiator for the European Union during the Paris Agreement negotiations. The lecture was delivered in his personal capacity and reflects his own views. These views are informed by his professional involvement in the climate change negotiations, on and off, since 1991, representing a range of governments and NGOs, beginning as a legal advisor to the Alliance of Small Island States, working with various European governments.

1. *Status of Treaties: 7.d Paris Agreement*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7d&chapter=27&clang=_en (last visited Mar. 22, 2019).

2. *Id.*

3. Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMMUNITY & INT'L ENVTL. L. 142 (2016).

accommodate U.S. domestic politics.⁴ Knowing that the consent of a Republican-controlled Senate for a new international treaty on climate change was unlikely, the Obama Administration worked to craft an agreement that the executive branch could join under its authority alone.⁵ In September 2016, the United States joined the Paris Agreement by Executive Order.⁶ On June 1, 2017, under a new administration, the United States announced its intent, through the exercise of executive authority alone, to withdraw from the Agreement.⁷ Unless the Administration reverses its decision, U.S. withdrawal will become effective November 4, 2020, the day after the U.S. Presidential elections.⁸

After briefly describing the Agreement's essential features, I turn to the issue of its legal character, describing for whom, how, and why this issue became such a key aspect of the Paris negotiations.⁹ I describe what I understand to be the dimensions of legal character, and how the Paris Agreement can be tested against these dimensions.¹⁰ I then focus specifically on the provisions at the heart of the Paris Agreement that describe each Party's commitment to reduce its greenhouse gas emissions.¹¹ A deal was reached on these provisions by preserving two distinctions: firstly, the distinction between the legal form of the Agreement and the legal character of these provisions; and secondly the distinction between obligations of conduct and obligations of result.

Since its adoption, the international legal character of the Paris Agreement has continued to be the subject of academic debate—particularly in the United States—with many concluding that it is an

4. See *infra* Section V.

5. See *infra* Section VII(B).

6. Tanya Somanader, *President Obama: The United States Formally Enters Paris Agreement*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Sept. 3, 2016), <https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>.

7. *Remarks Announcing United States Withdrawal From the United Nations Framework Convention on Climate Change Paris Agreement*, 2017 DAILY COMP. PRES. DOC. 373 (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>.

8. Chris Mooney, *Trump Can't Actually Exit the Paris Deal Until the Day After the 2020 Election. That's a Big Deal*, WASH. POST (Dec. 12, 2018), https://www.washingtonpost.com/energy-environment/2018/12/12/heres-what-election-means-us-withdrawal-paris-climate-deal/?utm_term=.99ee26f9c89a; see also G.A. Res. 1/CP.21, art. 28, Paris Agreement (Dec. 12, 2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf [hereinafter Paris Agreement].

9. See *infra* Section IV.

10. See *infra* Section VI.

11. See *infra* Section VII.

internationally legally binding treaty, with a mixture of “top-down” binding elements and “bottom-up” flexibility that leaves much to the discretion of its Parties.¹² In the three years since the Agreement was adopted, its Parties have concluded negotiations on the “Paris Rulebook” —a set of decisions that provide detailed guidance on how the Agreement will be implemented.¹³ These remarks will not address the relationship between the Rulebook and the Agreement’s legal character, but in my view, by setting out how Parties will report regularly on their emissions and how they will track progress toward implementing and achieving their targets, the Rulebook will strengthen the Agreement’s normative force.

II. THE ESSENTIAL FEATURES OF THE PARIS AGREEMENT

The Paris Agreement sets ambitious long term goals by clarifying the temperature and emissions limits associated with a stable climate system.¹⁴ It aims to hold global average temperature rise to well below 2 degrees Celsius and to pursue efforts to limit this rise to 1.5 degrees Celsius.¹⁵ To achieve these goals, its Parties aim to reach a global peaking of greenhouse gas emissions as soon as possible, and climate neutral emissions—a balance of emissions from sources and removals by sinks—in the second half of this century.¹⁶

To this end, the Agreement will catalyze domestic climate policies and policymaking processes, through a requirement that each of its Parties prepare, communicate, and regularly update an emissions reduction target (“nationally determined contributions”—

12. Daniel Bodansky notes that the debate over the legal character of the Paris Agreement has continued—particularly among US academics—even after the Agreement was adopted and entered into force. Bodansky, *supra* note 3. He summarizes the source of the debate as confusion about the different characteristics of legal form. *Id.* He concludes that the Paris Agreement is a treaty within the definition of the Vienna Convention on the Law of Treaties, but not every provision of the agreement creates a legal obligation. *Id.* It contains a mix of mandatory and nonmandatory provisions. *Id.* The debate clearly has additional political and legal dimensions in the US, where even supporters of the Agreement consistently refer to it as the “Paris Accord” in an apparent effort to support the Obama Administration’s decision to ratify the Agreement by executive authority rather than through the treaty approval powers of the US Senate. *Id.*

13. *Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December*, UNFCCC (Mar. 19, 2019), https://unfccc.int/sites/default/files/resource/cma2018_3%28report%29_advance.pdf.

14. Paris Agreement, *supra* note 8, art. 2(1)(a).

15. *Id.*

16. *Id.* arts. 2(1)(a), 4(1).

or NDC)¹⁷ every five years. The Agreement also puts in place a mandatory and robust transparency and accountability system to track each Party's implementation and achievement of its NDC.¹⁸

Further, the Agreement calls for continued financial and technical support to poor and vulnerable countries, both to cut their emissions, as well as to prepare for the impacts of climate change.¹⁹ It creates a new paradigm for climate governance through a contemporary understanding of how to share common but differentiated responsibilities and respective capabilities between richer and poorer countries. The Agreement leaves behind the outdated definitions of developed and developing countries that were agreed to in 1992, and that had divided climate politics for decades. Under Paris, each Party determines for itself the level of ambition it considers a fair contribution to achieving the Agreement's goals.²⁰

III. LEGAL CHARACTER OVER THREE DECADES OF CLIMATE NEGOTIATIONS

The legal character of the Paris Agreement became an obsession for climate negotiators. This needs to be understood in the context of the treaties and other decisions that came before Paris. The Paris Agreement is the third internationally legally binding treaty on climate change negotiated since the early 1990s. The first is the 1992 UN Framework Convention on Climate Change (UNFCCC), a treaty that sets out basic principles, institutions, and procedures for reporting on emissions and policies, but no clear targets or timetables for reducing emissions.²¹ The UNFCCC establishes the regime's governing body—the Conference of the Parties (COP).²² The second treaty, the 1997 Kyoto Protocol to the UNFCCC, contains legally binding emissions budgets (2008-2012); internationally authorized

17. *Id.* arts. 4(2), 4(9), 14.

18. *Id.* arts. 13(1), 13(2), 13(6), 13(7)(b).

19. Paris Agreement, *supra* note 8, art. 4(5).

20. Rep. of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10, ¶ 27.

While the terms “developed” and “developing” are used throughout the Paris Agreement, these are undefined, and many of the Agreement's main commitments are applicable to all Parties. There are strong political expectations that those countries classified as developed in 1992 continue to take the lead under the Agreement by fulfilling the developed country commitments to provide climate finance (Article 9(1)) and to maintain economy-wide emissions reduction targets (Article 4(4)). *See* Paris Agreement, *supra* note 14.

21. U.N. Framework Convention on Climate Change, *opened for signature* June 4, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

22. *Id.* ¶ 7.

carbon markets and a compliance system authorized to impose binding sanctions—but its substantive obligations apply only to those industrialized countries—primarily the European Union and its Member States—that agreed to join and remain within its constraints.²³

An effort to draw the rest of the world’s emitters into a new legally binding treaty failed spectacularly at the 2009 COP in Copenhagen.²⁴ This led to a period of experimentation between 2012-2020 with a two track system—the developed country Parties to the Kyoto Protocol were persuaded to negotiate a second commitment period of binding targets, while the rest of the world would participate through a system of voluntary “pledges” and review set up by non-binding COP decisions under the Convention.²⁵

The design of the post-2020 regime began in earnest at the Durban COP in 2011. The “Durban mandate,” which set the terms of reference for the negotiation of what became the Paris Agreement established “a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”²⁶ This language allowed sufficient ambiguity for the negotiations to move ahead with the support of the European Union and other progressive Parties, which favored a treaty with binding targets based on the Kyoto Protocol,²⁷ countries like India, which preferred an outcome based on COP decisions, like the

23. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, 2303 U.N.T.S. 162; *see also Kyoto Protocol Fast Facts*, CNN (Mar. 21, 2018), <https://www.cnn.com/2013/07/26/world/kyoto-protocol-fast-facts/indx.html>.

24. *Key Powers Reach Compromise at Climate Summit*, BBC (Dec. 19, 2009), <http://news.bbc.co.uk/2/hi/europe/8421935.stm>; John Vidal et al., *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, THE GUARDIAN (Dec. 18, 2009), <https://www.theguardian.com/environment/2009/dec/18/copenhagen-deal>.

25. Jacob Werksman, *Q&A: The Legal Character and Legitimacy of the Cancun Agreements*, WORLD RESOURCES INSTIT. (Dec. 17, 2010), <https://www.wri.org/blog/2010/12/qa-legal-character-and-legitimacy-cancun-agreements>.

26. Rep. of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011, U.N. Doc. FCCC/CP/2011/9/Add.1, at 2 [hereinafter *Durban Mandate*].

27. Nuno S. Lacasta et al., *Consensus Among Many Voices: Articulating the European Union’s Position on Climate Change*, 32 GOLDEN GATE U. L. REV. 351, 400 (2002).

existing system of “pledge and review;”²⁸ and those like the United States, which were looking for an indeterminate something in between.²⁹

In the midst of the Durban mandate, at the Warsaw COP in 2013, Parties returned to the issue of legal character when deciding whether the emissions reduction targets in the Agreement, would be characterized as “commitments” (a word which to many implied a binding form) or “contributions” (a word chosen because it was devoid of meaning).³⁰ While characterized as an outcome that did not “prejudge” the legal character of a final deal, agreeing to use the term “nationally determined contributions” at this stage of the negotiations very likely weakened the prospects that the legal character of the targets would be binding and strengthened the prospects that the form of the Agreement would be binding.

In 2015, in the weeks before the Paris COP, the debate and confusion around legal character flared up again. The press fanned some flames between U.S. Secretary of State John Kerry and French Minister Laurent Fabius (who would brilliantly chair the Paris COP) lit by a mischaracterization in a *Financial Times* headline that read “Paris Climate Deal Will Not Be A Legally Binding Treaty.”³¹ What Sec. Kerry had in fact said, as reported in the body of the article, was that there were “not going to be legally binding reduction targets like Kyoto.”³² He was referring not to the legal form of the Agreement, but rather to the targets (“contributions”) that would be contained within the agreement.³³

Even the final moments of the Paris negotiations were marked by controversy over legal character. In the final plenary of the COP, the French COP presidency presented the Parties with a compromise,

28. MINISTRY OF ENV'T AND FORESTS, GOV'T OF INDIA, CLIMATE CHANGE NEGOTIATIONS: INDIA'S SUBMISSIONS TO THE UNFCCC 29–31 (2009), http://www.moef.nic.in/downloads/public-information/UNFCCC_final.pdf; see also, Armin Rosencranz et al., *Climate Change Adaption, Measures, and Policies in India*, 22 GEO. INT'L. ENVTL. L. REV. 575.

29. Jason Obold et al., *Impressions from Durban: COP-17 and Current Climate Change Policies*, 23 COLO. J. OF INT'L. ENVTL. L. & POL'Y 389, 394–96 (2012).

30. Fiona Harvey, *As the Warsaw Climate Talks End, the Hard Work is Just Beginning*, THE GUARDIAN (Nov. 25, 2013), <https://www.theguardian.com/environment/2013/nov/25/warsaw-climate-talks-end-cop19-2015>.

31. Demetri Sevastopulo & Pilita Clark, *Paris Climate Deal Will Not Be a Legally Binding Treaty*, FIN. TIMES (Nov. 11, 2015), <http://www.ft.com/intl/cms/s/0/79daf872-8894-11e5-90de-f44762bf9896.html#axzz3zTw0Re5w>.

32. *Id.*

33. *Id.*

to the surprise of many. It had substituted the word “should” in a previous draft with the word “shall” in a provision describing the expectation that developed countries undertake economy-wide absolute emissions reduction targets as their NDCs.³⁴ The United States objected on the basis of legal form and on differentiations between developed and developing countries.³⁵ With the COP Presidency taking responsibility for what it described as a clerical “error,” the UNFCCC Secretariat reinstated the word “should” alongside other largely cosmetic adjustments to the text.³⁶ The incident was allowed to pass and the Paris Agreement, with one more “should” and one fewer “shall,” was adopted by acclamation.³⁷

IV. WHY DOES LEGAL CHARACTER MATTER?

Why did the European Union and other Parties care so much about the legal character of the Paris Agreement? In essence, advocates for “a legally binding agreement” believe that a binding agreement is more likely to affect state behavior, as well as the behavior of other actors.³⁸ A binding agreement is the highest form of the expression of the political will of its Parties and of the political priority of the issues it addresses.³⁹ It is an expression of the Parties’ intent to be bound and an indication that others can act in reliance on that intent.⁴⁰

Internationally, the legally binding character of an agreement provides the foundation for institution building, including the legislative functions of the COP and the legal personality of its Secretariat. Internationally, robust legal agreements often bring with them the institutions and procedures for transparency and accountability appropriate to any serious contract between Parties.⁴¹ The legal character of an international agreement can catalyze other international agreements and institutions in an important way. For

34. Paris Agreement, *supra* note 8, art. 4(4).

35. Yong-Xiang Zhang et al., *The Withdrawal of the U.S. From the Paris Agreement and Its Impact on Global Climate Change Governance*, 8 KEA1 213, 215 (2017).

36. See generally John Vidal, *How a ‘Typo’ Nearly Derailed the Paris Climate Deal*, THE GUARDIAN (Dec. 16, 2015), <https://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal>.

37. *Id.*

38. Daniel Bodansky, *Legally Binding Versus Non-Legally Binding Instruments*, in TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME, 155 (Scott Barrett, Carlo Carraro, & Jaime de Melo eds., 2015).

39. *Id.*

40. *Id.*

41. *Id.* at 162.

example, international trade agreements increasingly contain commitments that promote the implementation of international environmental treaties,⁴² and the World Bank environmental safeguards relate to environmental treaties to which host countries are bound.⁴³

The international legal character of the regime helps mobilize the highest level of participation by governments, the private sector and the media. The Paris COP would not have broken records (i.e., the number of heads of state and government, as well as mayors, and CEOs in attendance; the public and private sector financial resources mobilized; the international headlines captured)⁴⁴ had the Paris COP not been a treaty-based body, negotiating a new treaty.

Domestically, internationally binding agreements more often engage parliaments in their ratification, leading to the codification or strengthening of domestic implementation laws and regulations.⁴⁵ If properly ratified by more than one branch of government, such agreements can better survive changes in political cycles.⁴⁶ They provide a higher profile focus for domestic stakeholders and constituencies, and may be justiciable in national courts or otherwise actionable.⁴⁷

In the course of four years of negotiations, from Durban to Paris, this view in favor of a legally binding agreement was challenged—as naïve, positivist, and even dangerous—by both delegations and academics.⁴⁸ Some argued, for example, that, in the absence of

42. See, e.g., Gerda van Roozendaal, *The Inclusion of Environmental Concerns in US Trade Agreements*, 18(3) ENVTL. POL. 431, 431–38 (2009).

43. Among the Operational Principles that are to inform a World Bank Environment Assessment include assessing “the adequacy of the applicable legal and institutional framework, including applicable international environmental agreements, and confirm that they provide that the cooperating government does not finance project activities that would contravene such international obligations.” *Table A1 – Environmental and Social Safeguard Policies—Policy Objectives and Operational Principles*, WORLD BANK (July 2005), <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Environmental%20and%20social%20safeguard%20policie.pdf>.

44. *The Paris COP21 Climate Summit in Numbers*, LOCAL FRANCE (Nov. 30, 2015), <https://www.thelocal.fr/20151130/cop-21-in-numbers-the-facts-and-figures-to-know>.

45. Bodansky, *supra* note 38, at 161 (“[T]reaties must be formally ratified by states, usually with the approval of the legislature. So acceptance of a treaty generally signals greater domestic buy-in and commitment than acceptance of a political agreement, which typically can be done by the executive acting alone.”).

46. *Id.*

47. *Id.* (noting that international tribunals and domestic courts can apply legal obligations).

48. Steve Herz, *Paris Climate Deal Needs to be Politically, Not Legally Binding*,

2019]INTERNATIONAL LEGAL CHARACTER OF THE PARIS AGREEMENT 351

enforcement mechanisms, a legally binding agreement was no more likely to change state behavior than a non-binding instrument.⁴⁹ Others argued that while bindingness might be a worthwhile characteristic, in this circumstance it could discourage participation, or even lower ambition.⁵⁰

The famously binding Kyoto Protocol was offered as an example of a treaty that had both scared Parties away and failed to react when its Parties didn't comply or withdrew.⁵¹ Proponents of a legally binding agreement argued in response that the Kyoto Protocol failed not because of its legal form, but because of the unwillingness of the United States and other major economies to act on climate change.⁵² In other words, with regard to the Kyoto Protocol, there was a misalignment from the outset between the depth of key Parties' political will and the design of the agreement.

V. POLITICAL PERSPECTIVES BEHIND THE DEBATE OVER LEGAL CHARACTER

The debate over the legal character of the Paris Agreement can be seen from three political perspectives:

First, that of major developing country economies and middle-income countries that had never before undertaken binding commitments to reduce greenhouse gases. Among these countries, India, which has grown to become one of the world's largest emitters of greenhouse gases, still has more than 300 million people living off the grid.⁵³ These countries wanted to avoid signing up to binding

CLIMATE CHANGE NEWS (July 26, 2017), <https://www.climatechangenews.com/2017/07/26/paris-climate-deal-needs-politically-not-legally-binding/>.

49. *Id.* ("Most legal analysts, climate negotiators, and other close observers of the process have taken the position that the agreement itself makes emission reduction pledges essentially voluntary, since countries have free rein to set their own targets and policies and are not required to meet the targets they put forward.").

50. *Id.*

51. Brad Plumer, *Stay in or Leave the Paris Climate Deal? Lessons from Kyoto*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/climate/paris-climate-agreement-kyoto-protocol.html>.

52. *Id.*

53. Vanita Awasthi & Rohit Kumar Gupta, COP 21: THE PARIS PARADIGM, INT'L JOURNAL OF LEGAL AND SOCIAL STUDIES (Dec. 2016), <https://ijlss.wordpress.com/2016/12/21/cop-21-the-paris-paradigm-by-vanita-awasthi-rohit-kumar-gupta-volume/> ("India's priority is economic growth and the eradication of poverty. A fifth of its population does not have access to electricity, so electrification is a priority for the country. Indian government agencies are preparing plans for domestic climate action, but these would only slow the growth of carbon emissions.").

commitments that could compromise their development priorities.⁵⁴ They were accustomed to signing up to climate agreements that had binding obligations for richer countries, but not for them, and continued to see this as a dimension of “equity” and a reflection of “historical responsibility.”⁵⁵

Second, as has been described, the Obama Administration was keen to shape and join the Paris Agreement but faced constitutional and political constraints.⁵⁶ The United States made it clear that it could not join if the form of the Agreement would require the advice and consent of a Republican dominated and historically reluctant Senate.⁵⁷ But it is fair to say that during the negotiations, the boundaries of the President's Executive Authority to bind the state were not well-understood. Finding a way to understand and accommodate these concerns without gutting the agreement occupied a lot of time. Politically, the United States could not sign onto an agreement that held it, as a developed country, party to a higher standard of “bindingness” than developing countries, particularly China.⁵⁸ The European Union, and the rest of the industrialized countries, shared this political constraint.

Third, the European Union and other progressive countries were pushing for higher ambition and saw a binding legal character as a key aspect of ambition.⁵⁹ For the European Union, this was also about raising its competitors up to the same standards to which it had been held under the Kyoto Protocol.⁶⁰ For small islands, this was an “existential issue”—they needed confidence that the agreement on which their survival depended would be as strong as possible.⁶¹ Many governments shared a concern that a deal struck between the United States and major emerging economies, each uncomfortable with bindingness for different reasons, would lead to a low common denominator agreement, including one with a weak legal character.

54. *Id.* at 21.

55. *Id.* at 22.

56. Raymond Clemencon, *The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough*, 25 J. ENV'T & DEV. 3, 6 (2016).

57. See generally David A. Wirth, *Is the Paris Agreement on Climate Change a Legitimate Exercise of the Executive Agreement Power?*, LAWFARE (Aug. 29, 2016), <https://www.lawfareblog.com/paris-agreement-climate-change-legitimate-exercise-executive-agreement-power>.

58. Clemencon, *supra* note 56, at 5.

59. Paris Agreement, EUROPEAN COMM'N., https://ec.europa.eu/clima/policies/international/negotiations/paris_en (last visited Mar. 23, 2019).

60. *Id.*

61. EUROPEAN COMM'N, CLEAN ENERGY FOR ISLANDS INITIATIVE 1 (2018).

These differing perspectives on legal character led negotiators to explore the design of an internationally legally binding agreement, containing provisions with variable legal character.⁶² Participation in a binding treaty could be encouraged by enabling each Party to determine nationally the form of target and level of ambition it was prepared to bind itself to. The needle of U.S. constitutional and political constraints could be threaded with an agreement containing commitments (or rather "contributions") that amount to binding obligations of conduct, without being binding as to their result. A high degree of "functional bindingness" could be built into the Paris Agreement by ensuring it had the highest standard transparency and accountability provisions. And the legal character of Parties' contributions could evolve over time. Paris has the potential to be dramatically more inclusive than both the Convention and the Kyoto Protocol in terms of the participation of Parties and its coverage of global emissions.

VI. THE FOUR DIMENSIONS OF THE LEGAL CHARACTER OF THE PARIS AGREEMENT

The legal character of an international agreement can be said to have four essential dimensions. The first is the legal form of the Agreement itself.⁶³ This dimension examines whether the Agreement is a treaty under international law.⁶⁴ The second is the mandatory or prescriptive nature of the provisions within the Agreement.⁶⁵ Third, the specificity and precision of these provisions: the details of what a Party must actually do to abide by the terms of the Agreement.⁶⁶ Finally, the rules, procedures, and institutions in place to hold Parties accountable for their commitments, and to compel their compliance.⁶⁷

62. See *infra* Section VI.

63. Daniel Bodansky, *The Legal Character of the Paris Agreement: A Primer*, OPINIO JURIS (Feb. 12, 2015), <http://opiniojuris.org/2015/12/02/the-legal-character-of-the-paris-agreement-a-primer/> (arguing the Paris Agreement is a treaty within the meaning of the Vienna Convention on the Law of Treaties); see also *infra* Section VI(A).

64. *Id.*

65. *Id.* ("Often treaties contain a mix of mandatory and hortatory elements ... So even though the Paris agreement will be a treaty, not every element of it need be legally binding on the parties."). See also *infra* Section VI(B).

66. *Id.*; see also *infra* Section VI(C).

67. *Id.*

A. The Legal Form of the Agreement

On its face, the Paris Agreement is a treaty within the meaning of the Vienna Convention on the Law of Treaties. As such, it (a) requires any country that wishes to be a Party to notify its consent to be bound (through ratification, acceptance, approval or accession);⁶⁸ (b) allows for no reservations;⁶⁹ and (c) provides that Parties will remain bound unless and until they withdraw.⁷⁰

The Paris Agreement is a “related legal instrument” to the UNFCCC, adopted by its COP, and since signed, ratified and brought into force by its Parties.⁷¹ It is not a “protocol” by name but it is legally indistinguishable in its basic legal form from the Kyoto Protocol (i.e. it is a treaty), and it meets the only relevant UNFCCC rule on the adoption of protocols: the text that led to its adoption was circulated to UNFCCC Parties six months before it was adopted.⁷²

As a treaty, and consistent with the Durban mandate that set the terms of reference for its negotiation, the Paris Agreement is an outcome with legal force (based on its form, and as we shall see, its content).⁷³ It was characterized by the Obama administration under U.S. law as an executive agreement.⁷⁴ It does not carry the title of a “treaty” or “Protocol” due to U.S. constitutional and political sensitivities.⁷⁵

*B. The Mandatory and Specific Nature of the Commitments: or
“Who is Bound to do What, and by When?”*

The Paris Agreement contains a variety of guiding provisions. Article 2 sets out “the purpose” of the Paris Agreement.⁷⁶ Within that purpose there seems to be multiple “aims,” referred to elsewhere

68. Paris Agreement, *supra* note 8, art. 20.

69. *Id.* art. 27.

70. *Id.* art. 28.

71. UNFCCC, art. 7.2.

72. UNFCCC, art. 17.2.

73. Kayla Clark, *The Paris Agreement: Its Role in International Law and American Jurisprudence*, 8 NOTRE DAME J. OF INT’L & COMP. L. 107, 117–18 (2018).

74. *Id.*

75. *Id.*

76. Paris Agreement, *supra* note 8, art. 2.

in the Agreement as “goals.”⁷⁷ There is also a reference to the Convention's “objective” as well as a reframing of a couple of the Convention's “principles.”⁷⁸

The Agreement contains a range of more specific provisions described variably as contributions, efforts, actions, targets, strategies and plans.⁷⁹ These provisions are framed in language that ranges from “shall,” “should,” “will,” and “strive.”⁸⁰ The provisions are directed at each Party, at all Parties, at categories of Parties (developed, developing, etc.), at institutions, and at no one in particular.⁸¹ Some obligations are specific, some general, a few are indecipherable (these are rare), but a number are sufficiently precise and prescriptive to be both mandatory and, presumably, in some jurisdictions, justiciable.

The core of what each Party will do in substance is nationally determined and nationally tailored in terms of its specific and prescriptive nature.⁸² Indeed, some contributions, as designed nationally, are conditioned on the actions of other Parties in providing support and/or on the performance of their own economies, by linking emissions reductions to growth in GDP.⁸³

Such a variety in the legal character of different provisions is not unusual in international agreements, which often must balance multiple issues and priorities.⁸⁴ However, to a degree, this may be unique to the Paris Agreement and to the issue of climate change.

The variety of obligations becomes clear when comparing the Agreement's provisions on mitigation, support and adaptation. While Article 3 calls for all Parties to make “nationally determined contributions” in each of these areas of climate policy, they are do so “as defined” in the relevant articles of the Agreement.⁸⁵ Article 4 (discussed in more detail below) addresses mitigation, and contains the most Party-specific obligations, applicable to all Parties.⁸⁶

77. *Id.*

78. *Id.* art. 2.

79. *Id.*

80. *Id.*

81. Paris Agreement, *supra* note 8, art. 2.

82. Lavanya Rajamani & Jutta Brunnee, *The Legality of Downgrading Nationally Determined Contributions Under the Paris Agreement: Lessons From the US Disengagement*, 29 OXFORD J. OF INT'L LAW 537, 541 (2017).

83. *Id.* at 538.

84. Rajamani, *supra* note 83, at 547.

85. Paris Agreement, *supra* note 8, art. 3.

86. *Id.* art. 4.

Articles 9, 10, and 11 describe the more general obligations of developed Parties to provide finance, technology, and capacity building to developing countries, whereas Article 7, on adaptation, has the most general obligation.⁸⁷ The main reason that individual commitments on finance are relatively weak was the unwillingness and the constitutional inability of many traditional donors to commit in advance, and in a binding way to specific financial targets. One of the reasons the provisions on adaptation are very soft in their legal character is because setting baselines and measuring progress on a country's "resilience" to climate change is difficult. The actions necessary are not well-understood, and many vulnerable countries were reluctant to take on specific commitments that could become burdens of implementation, or conditions for accessing funding. So what might appear in the Paris Agreement to be a random pattern of legal character, reflects a shared sense that the provisions related to mitigation should be the most prescriptive and precise.

C. Procedures and Institutions for Transparency, Accountability and Compliance

One of the biggest challenges, and perhaps the most important accomplishment of the Paris Agreement, was to bridge the divide between developed and developing countries through an enhanced transparency framework for the measuring, reporting and verification of Parties' performance, applicable to all Parties, but with flexibilities that take into account differences in national circumstances and capacities.⁸⁸ Each Party will be required to report every two years in accordance with agreed methodologies and comment metrics.⁸⁹

The transparency framework is also applicable to all the Agreement's provisions, but with tailored approaches to accounting and/or transparency rules for mitigation, finance, and even for adaptation.⁹⁰ The transparency framework, with regard to mitigation and the provision of support, is backed by a three-part accountability system: (1) an expert review process with the purpose of "tracking progress towards achieving" NDCs, and a mandate to "identify areas

87. *Id.* arts. 7, 9–11.

88. *Transparency of support under the Paris Agreement*, UNFCCC, <https://unfccc.int/topics/climate-finance/workstreams/transparency-of-support-ex-post/transparency-of-support-under-the-paris-agreement> (last visited April 28, 2019).

89. *What is the Paris Agreement?*, UNFCCC, <https://unfccc.int/proces-and-meetings/the-paris-agreement/what-is-the-paris-agreement> (last visited Apr. 28, 2019).

90. *Transparency of support under the Paris Agreement*, *supra* note 88.

of improvement;”⁹¹ (2) a multilateral consideration or peer review process that will consider each Party's respective “implementation and achievement” of its NDC;⁹² and (3) a mechanism to facilitate implementation and compliance with (all provisions) of the Agreement, under a Standing Committee of experts that will operate in a “facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties.”⁹³

Together, these procedures will not only provide an evidence base of whether Parties are performing against their commitments, but create regular moments of institutionalized political accountability for progress made at the international and domestic level. The rules build capacity at the country level to measure and to manage emissions. While there are no “consequences” for non-compliance identified in the Paris Agreement, the system can evolve over time.⁹⁴ Nonetheless, together these elements add up to one of the most robust and comprehensive transparency and accountability frameworks of any international environmental agreement.⁹⁵

VII. THE LEGAL CHARACTER OF PARIS AGREEMENT'S EMISSIONS REDUCTION TARGETS (NDCs)

While the Paris Agreement sets out bold long term temperature goals and calls for climate neutrality in coming decades, it is Parties' individual NDCs and how well they perform against them that will determine whether these ambitious goals are met. The nationally determined nature of the NDCs has led nearly every Party to the Paris Agreement to communicate an NDC, with many of them taking on,

91. Paris Agreement, *supra* note 8, arts. 13(5), 13(12).

92. *Id.* art. 13(11).

93. *Id.* art. 13(3).

94. Anders Corr, *Expect Climate Catastrophe: Paris Agreement Lack Enforcement*, FORBES (Dec. 1, 2016), <https://www.forbes.com/sites/anderscorr/2016/12/01/expect-climate-catastrophe-paris-agreement-lacks-enforcement/#1a0987a83313> (“Enforcement mechanisms for climate change targets are not being implemented, including in the Paris Agreement of December 2015.”).

95. *Paris Agreement*, EUROPEAN COMM'N, https://ec.europa.eu/clima/policies/international/negotiations/paris_en (last visited Mar. 23, 2019) (noting that “[g]overnments agreed to ... track progress towards the long-term goal through a robust transparency and accountability system”).

for the first time, a target to reduce greenhouse gas emissions.⁹⁶ The NDCs are therefore the Agreement's greatest strength—and also, potentially, its greatest vulnerability.

The unique legal character of the NDCs under the Paris Agreement is determined by how the mitigation contributions are set and anchored in the Paris Agreement, how and where the targets are “housed,” and how they are made operational.

A. How are the mitigation contributions set?

The content of each mitigation contribution has been nationally determined.⁹⁷ The precision and prescriptiveness of each Party's contribution will, in part, determine what that Party is bound to do. For most of the 189 Parties to the Paris Agreement, the Intended Nationally Determined Contributions (INDCs) received by the Secretariat in the run up to Paris became NDCs when they joined the Agreement.⁹⁸ These documents are remarkably diverse in their form and content: from the EU's 10-year carbon target 2021-2030, to the US point target for 2025, to China's pledge to peak its CO₂ emissions “around 2030,” to a diverse mix of policies and measures, conditioned and unconditional.⁹⁹

The Paris Agreement encourages all Parties to move over time towards more precise and prescriptive mitigation contributions that are economy-wide emission reduction or limitation targets.¹⁰⁰ It includes guidance on how Parties will improve the clarity and comparability of their NDCs.¹⁰¹ All Parties are required to account for the net emissions and removals corresponding to their contributions in a way that “promote[s] environmental integrity, transparency, accuracy, completeness, comparability, and consistency.”¹⁰²

96. *NDC Registry (interim)*, UNFCCC, <https://www4.unfccc.int/sites/NDCStaging/Pages/Home.aspx> (last visited Mar. 23, 2019) (“[One hundred and eighty-two Parties have submitted their first NDCs. [One] Party has submitted their second NDCs.”).

97. Paris Agreement, *supra* note 8, art. 4(2).

98. U.N. Framework Convention on Climate Change, Synthesis Rep. by the Secretariat, U.N. Doc. FCCC/CP/2016/2 (May 2, 2016), <https://unfccc.int/resource/docs/2016/cop22/eng/02.pdf>.

99. *The NDC Platform: A Comprehensive Resource on National Climate Targets and Action*, WORLD BANK (Oct. 20, 2016), <http://www.worldbank.org/en/topic/climatechange/brief/the-ndc-platform-a-comprehensive-resource-on-national-climate-targets-and-action>.

100. Paris Agreement, *supra* note 8, art. 4(4).

101. *Id.* art. 4(8).

102. *Id.* art. 4(13).

Thus, while nationally determined, the Paris Agreement puts in place processes designed to improve the prescriptiveness and precision of targets over time.¹⁰³ While these new rules will not apply until the next round of contributions (for most Parties this is post 2030), any Party at any time can update its contribution to enhance its level of ambition.¹⁰⁴

B. How the Mitigation Contributions Anchored?

This was the most contentious part of the discussions on legal character—how each Party's obligation with regard to its NDC is expressed—the textual "anchor." Here the three perspectives I mentioned—the reluctant major emerging economy, the constitutionally challenged United States, and the aligned progressives—came most sharply into focus.

While some emerging economies remained cautious about the legal character of contributions, their primary concern was to ensure they would not be bound in a way that compromised their development priorities.¹⁰⁵ This concern was largely addressed through the nationally determined nature of the contributions.

The main battle ground, what is now Article 4(2) of the Agreement, saw a struggle between the United States and the progressives in the context of a rather fluid understanding of U.S. constitutional and political constraints. In order for the United States to join the Agreement under the President's Executive authority, negotiators came to understand the Agreement would need to meet a three-part test:

It would have to fall within the general foreign policy powers of the President as set out in the U.S. Constitution;

It could not commit the United States to international obligations beyond the scope of those necessary to implement the UNFCCC, which the Senate had already ratified; and

103. *What is the Paris Agreement?*, *supra* note 93.

104. Rep. of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10, ¶¶ 31–32.

105. Matthew Dalton & Gabriele Steinhäuser, *Compromises Make Global Climate Deal More Possible*, WALL STREET J. (Feb. 16, 2019), <https://www.wsj.com/articles/developing-nations-hesitant-to-embrace-global-warming-limits-1449768622> (noting that priority of the developing-nation group is fighting poverty rather than cutting greenhouse-gas emissions).

Its implementation would need to be consistent with authorities the Executive had already been granted by Congress under existing legislation.¹⁰⁶

No one could claim to fully understand these boundaries as applied to these particular negotiations. But the Obama Administration was clearly keen to provide the United States with a comfortable legal buffer, in a context where there were limited analogous precedents and even less jurisprudence.

It was understood that the U.S. President can, through an Executive Agreement, enter into an international legally binding agreement and that the Paris Agreement was emerging as one that would be seen as in furtherance of the implementation of the UNFCCC, which the Senate had already ratified.¹⁰⁷ But the President could not bind the United States internationally to achieving a specific target of the kind it had included within its INDC unless it had full confidence that it could achieve that target without additional Congressional action.¹⁰⁸

There was much at stake. Accommodating the U.S. constitutional constraints would weaken the international legal character of all Parties' mitigation contributions. But reaching an agreement that would a priori exclude U.S. participation was unthinkable. It fell in part to the European Union to push the United States to be bound to its target as tightly as possible, while at the same time reassuring other progressive Parties that the compromise on offer was worth pursuing. We came to an understanding that a compromise could lie in a classic distinction between an obligation of result (what Kerry referred to as “Kyoto style” targets),¹⁰⁹ and an obligation of conduct. Targets binding as to outcome, as we

106. Luke Kemp, *US-proofing the Paris Climate Agreement*, 17 CLIMATE POL'Y 86 (2017), <https://www.tandfonline.com/doi/full/10.1080/14693062.2016.1176007>.

107. Senate Consideration of Treaty Document 102-38, United Nations Framework Convention on Climate Change (Oct. 7, 1992), <https://www.congress.gov/treaty-document/102nd-congress/38/resolution-text>.

108. See generally Kemp, *supra* note 106.

109. Demetri Sevastopulo & Pilita Clark, *Paris Climate Deal Will Not be a Legally Binding Treaty*, FIN. TIMES (Nov. 11, 2015), <http://www.ft.com/intl/cms/s/0/79daf872-8894-11e5-90de-f44762bf9896.html#axzz3zTw0Re5w> (noting that John Kerry “stressed there were ‘not going to be legally binding reduction targets like Kyoto,’ a reference to the 1997 Kyoto [P]rotocol”).

2019]INTERNATIONAL LEGAL CHARACTER OF THE PARIS AGREEMENT 361

understood it, were a step too far, as these would require Congressional action in a context where the Executive's regulatory authority proved insufficient to achieve that target.

On the other hand, if an obligation of conduct was expressed in sufficiently precise terms and connected to the objectives of the NDC, this could produce a meaningful and verifiable obligation. In this context, it was very helpful to be able to point to the level of effort the Obama Administration had been making in the lead up to Paris to achieve its non-binding pledges under the accords agreed to in Copenhagen¹¹⁰ and Cancun.¹¹¹ The European Union could accept and sell to others a commitment that would bind a future U.S. Administration to do the same—to pursue, if not to achieve, its target.

The resulting language in Article 4(2) should be read exactly as it is written, with the parentheticals I provide for emphasis:

Each Party shall [is legally bound to] prepare, communicate, and maintain successive nationally determined mitigation contributions that it intends to achieve. Parties shall [are legally bound to] pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.¹¹²

These provisions create binding and specific “obligations of conduct” requiring each Party to have a mitigation contribution, and to take identifiable steps towards achieving that contribution.¹¹³ Article 4(2) does not, on the other hand, convert NDCs into “Kyoto style targets,” or obligations of result.¹¹⁴

110. *Information Provided by Parties to the Convention relating to the Copenhagen Accord*, U.N. CLIMATE CHANGE, <https://unfccc.int/process/conferences/pastconferences/copenhagen-climate-change-conference-december-2009/statements-and-resources/information-provided-by-parties-to-the-convention-relating-to-the-copenhagen-accord> (last visited Mar. 23, 2019); *Letter from Todd Stern, U.S. Special Envoy for Climate Change, to Yvo de Boer, Exec. Sec'y*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (Jan. 28, 2010), https://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/unitedstatescopenhagen_accord_app.1.pdf (containing “the submission of the United States concerning its emissions reduction target, in the format set forth in Appendix 1 to the Copenhagen Accord”).

111. *Intro to Cancun Agreements*, U.N. CLIMATE CHANGE, <https://unfccc.int/process/conferences/the-big-picture/milestones/the-cancun-agreements> (last visited Mar. 23, 2019).

112. Paris Agreement, *supra* note 8, art. 4(2).

113. *Id.*

114. *Id.*

C. How are the Mitigation Contributions Housed?

Each mitigation contribution will be communicated by each Party and recorded by the Secretariat in a public registry.¹¹⁵ Thus, the contributions in the registry will not be adopted or ratified by the Parties and can be changed by the respective Party without amending the Agreement.¹¹⁶ This arrangement reinforces the view that the content of the NDCs is not part of the Agreement, and therefore not binding on the Party concerned.

D. How are the Mitigation Contributions Made Operational?

While Parties are not legally bound to achieve their NDCs, the mitigation contributions are nonetheless integral to the operation of the Agreement, and essential to achieving its objectives. They are what will be tracked on an individual basis.¹¹⁷ They will be aggregated collectively as part of the global stock take to assess whether the Parties are on track collectively to reaching the Paris goals.¹¹⁸ NDCs must be communicated, updated, or made new every five years.¹¹⁹ NDCs should become the key planning tool for inward investment, foreign investment and, for eligible Parties, development assistance. They will, under the Paris Agreement, remain nationally determined, and obligations of conduct. Because Parties will update them every five years, they should obviate the need for the negotiation of any new climate change treaty. In other words, the NDCs are both the means by which the Paris COP succeeded, and they will determine whether the Paris Agreement succeeds.

VIII. CONCLUSION

In retrospect, where does the Paris Agreement and the compromises it strikes, leave the role of international law in shaping state behavior? Is this a ground breaking and bold experiment, a pragmatic and functional hybrid, a model for other areas of multilateral negotiations that need to capture ambition across very

115. Paris Agreement, *supra* note 8, art. 4(12) (“Nationally determined contributions communicated by Parties shall be recorded in a public registry maintained by the secretariat.”).

116. *Id.*

117. Paris Agreement, *supra* note 8, art. 13(7)(b) (providing that parties shall provide “[i]nformation necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4”).

118. Rep. of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10, ¶ 99(a)(i).

119. Paris Agreement, *supra* note 8, art. 4(9).

diverse Parties? Or is it an expedient fudge necessary to accommodate the constitutional dysfunction of one country and its continued reluctance and that of many others to fully embrace the need for change?

Perhaps the Paris Agreement is both. But I am hopeful that we landed upon a unique compromise in which international obligations to prepare, communicate, pursue, account for, track, and successively, as well as progressively, update targets will, in the bright light of regular international attention and in the heat of a warming planet, sink deep roots into domestic legal and political systems—perhaps more deeply than Kyoto-style targets.

These roots will need to reach emerging constituencies of demand in all major economies, concerned about climate change and inspired by the Agreement's goals and visions: avoiding dangerous temperature rise, peaking emissions, and achieving climate neutrality. Like any political process, these roots need to be nurtured by the belief that it is possible to succeed. The Paris COP brought that belief to the international stage. The challenge now is to bring it home to all of the Agreement's Parties.

Since these remarks were first made, and following the U.S. announcement of its intent to withdraw, more countries have signed up to the Paris Agreement, and none have left.¹²⁰ Support for the Agreement, from governments, local authorities, the private sector, and civil society—including within the United States, has only grown stronger.¹²¹ And in December 2018, the first meeting of the parties to the Agreement concluded its work on a first edition of the “Paris rulebook,” a set of mandatory and non-mandatory instructions that will guide, among other things, how the Parties will hold themselves transparent and accountable for the commitments they have made under the Paris Agreement.¹²²

120. Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html> (noting that Syria and Nicaragua signed recently, leaving the United States as the only country that has rejected the Agreement).

121. Robinson Meyer, *Most Americans Support Staying in the Paris Agreement*, THE ATLANTIC (Feb. 19, 2019), <https://www.theatlantic.com/science/archive/2017/05/most-americans-support-staying-in-the-paris-agreement/528663/>.

122. Rebecca Hersher, *Nations Agree on Rules to Put Paris Climate Agreement Into Action*, NPR (Feb. 19, 2019), <https://www.npr.org/2018/12/15/677109487/nations-agree-on-rules-to-put-paris-climate-agreement-into-action>.