

# THE 2015 CLIMATE AGREEMENT: CONCEPTS AND CONSIDERATIONS ON ITS LEGAL ARCHITECTURE

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## INTRODUCTION

The key to accomplishing a durable and effective climate agreement may lie in finding the ideal legal form to ensure that it is acceptable to most Parties, yet specific and enforceable enough to actually reduce emissions. The content of the agreement is under wide discussion, but with only a year left before its scheduled adoption, not much progress seems to have been made on the legal form or architecture of the 2015 agreement.

A number of options are available under the directive given at the 2011 17<sup>th</sup> Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC, or the “Convention”) held in Durban, South Africa.<sup>1</sup> Having established the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), which is mandated to develop a new climate agreement to be adopted by the Paris COP in late 2015, the Durban Platform recognizes the need to strengthen the multilateral, rules-based regime under the Convention. Included in the ADP’s mandate is the provision that the form of the agreement shall be limited to “a *protocol*, another *legal instrument* or an *agreed outcome with legal force*.”<sup>2</sup>

Different forms could have implications on trade-offs between broad participation and strict enforceability. The operability and effectiveness of any international agreement does not rely merely on the stringency of its commitments, but also on the participation and compliance by States.<sup>3</sup> Less stringent commitments or narrower participation could be more effective in the long run, although

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there is no denying that there is a dire need to enforce strong commitments immediately. The legal form of the agreement, as much as its content, will largely determine both its level of participation and its enforceability. An additional consideration is that different forms tend to follow different processes for their adoption and enactment. In this paper, we outline the various forms that the 2015 agreement could take, and offer matters for consideration that may aid in moving discussions and negotiations on the agreement forward. We likewise offer a number of possible design options in the context of three propositions or scenarios developed through the ACT 2015 project. These design elements, however, need not be considered exclusive to each proposition and may be mixed with other elements or aspects to create a more robust option.

## **GUIDANCE FROM THE AD HOC WORKING GROUP ON THE DURBAN PLATFORM FOR ENHANCED ACTION**

The Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was established at the 17<sup>th</sup> COP in Durban in 2011, which recognized the “urgent and politically irreversible threat to human societies” posed by climate change, thus requiring actions to address the urgency of this problem.<sup>4</sup> Mandated to “launch a process to develop a *protocol, another legal instrument or an agreed outcome with legal force* under the Convention applicable to all Parties,”<sup>5</sup> the ADP’s goal is to deliver an instrument by 2015 that would shape international cooperation on climate change from 2020 onward. This agreement must further the Convention’s objective to stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system...within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”<sup>6</sup> This stabilization level has been identified as keeping the temperature change to below 2 or 1.5 degrees Celsius above pre-industrial levels.<sup>7</sup>

A major focus in discussions concerning the Durban Platform pertains to the advisability of the future climate change agreement’s taking shape as an international treaty (e.g., a protocol to the UNFCCC), or some other form. Apart from the phrase “protocol, another legal instrument or an agreed outcome with legal force,” no specifications as to the legal form of the 2015 climate agreement have been given, except for three qualifiers viewed in relation to references to the Framework Convention and international law in general. These are (a) “under the Convention,” (b) legal force, and (c) applicable to all.<sup>8</sup>

### **Under the Convention**

Understanding the meaning of the phrase “under the Convention” involves answering the question of what the COP is permitted by the Convention to do, and its implications on the kind of instrument(s) allowed. Under the Convention, for instance, the COP is tasked to “keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”<sup>9</sup> The COP’s functions include decision making for matters not already covered by decision making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.<sup>10</sup> Processes for amending the Convention,<sup>11</sup> amending and/or adopting annexes<sup>12</sup> and adopting a protocol<sup>13</sup> are likewise explicitly provided.

“Under the convention” in this context also implicitly integrates into the negotiations the principles and provisions of the Framework Convention on Climate Change, which include equity and common but differentiated responsibilities (CBDR).<sup>14</sup> The accomplishment of the ultimate objective of the Convention is to be regulated by its principles. Any related legal instruments adopted by the COP must, “[i]n their actions to achieve the objective of the Convention and to implement its provisions,”<sup>15</sup> be guided by the principles enumerated under Article 3. The COP decision establishing the Durban Platform further emphasizes that the ADP is to be “guided by the principles of the Convention.”<sup>16</sup>

### **Legal Force**

Strictly speaking, “legal force” and “legally binding” are not exactly the same. All legally binding instruments may have legal force, but an instrument with legal force

might not be legally binding in the way that a treaty, for instance, is binding. The inclusion of the phrase “agreed outcome with legal force” in the ADP mandate arose during discussions at the 2011 Durban COP, India being of the view that prioritizing content over form with regard to the agreement would be advisable. It pointed out that the Marrakech Accords, adopted by the 7<sup>th</sup> COP in Marrakech, Morocco, are an example of decisions by the COP and a Kyoto Protocol Meeting of the Parties (MOP) that had the force of law in practice, even though they were, strictly speaking, not binding in the same way that treaties are.<sup>17</sup> COP “decisions” are adopted by Parties, but unlike treaties, are not ratified (see the section on COP decisions, below).

An instrument “with legal force” signals something less stringent than a “legally binding” one. To be legally bound in the way that a treaty binds a Party means the Parties must accept accountability through a formal acknowledgment—often through national ratification of an internationally agreed instrument—of their commitment to obligations under the instrument. An instrument with legal force, conversely, acknowledges responsibility, but seems to prevaricate on strict accountability.

### Applicable to All

Another important consideration with regard to “legal force” is the question of who will be bound by the instrument. Discussions on CBDR and the so-called “fire wall” between developed and developing countries with regard to obligations and commitments under the new agreement have raised questions as to the intent or interpretation of the phrase “applicable to all.” In the context of legal architecture, however, the phrase “applicable to all” does not necessarily contravene any of the principles of the Convention. Article 3 of the Convention primarily guides the substantive content, not the form, of any agreement or instrument adopted. Thus, any form permitted by the Convention—and therefore “under the Convention”—may be deemed applicable to all, as all Parties to the 2015 agreement are Parties to the Convention in the first place.

During negotiations, the phrase “applicable to all” has been interpreted to mean that while the applicability of the future instrument may be *universal*, the commitments in the instrument are not necessarily *uniform*. It is in the commitments that the principles of the Convention are manifested.

When viewed in relation to current international law, only States may become parties to the 2015 climate agreement. Furthermore, “under the Convention” means that only Parties to the Convention may sign and ratify the agreement—although, of course, not all of them may choose to do so. It is important to note, however, that this does not prevent the inclusion of provisions that would facilitate or support the engagement of other stakeholders through the Parties.

The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT-SIO), an extension of the Vienna Convention on the Law of Treaties, seeks to grant international organizations the personality or capacity to sign treaties, although it is not yet in force. As of April 2014, 31 States had ratified the VCLT-SIO, 4 States short of the requisite 35 ratifications for enforcement.<sup>18</sup>

## ARCHITECTURAL OPTIONS

Taken together, the parameters for the 2015 climate agreement show that options for its form or architecture may include a protocol, an amendment to the Convention, additions and/or amendments to the annexes of the Convention, and one or a set of COP decisions.<sup>19</sup> This section briefly defines each option and details its enactment procedure.

### Option 1: Protocol

A protocol is generally understood as “a subsequent and separate legally binding agreement that adds or modifies an existing convention [, but] only for the States that become Parties to it.”<sup>20</sup> As such, it must undergo a separate process of signature and ratification by States party to the framework agreement, as a State’s ratification of the framework agreement or Convention does not lead to its automatic ratification of a new protocol.

Article 17 of the UNFCCC permits the COP to adopt protocols to the Convention at any ordinary session, and provides guiding rules for their adoption and implementation. One such guidance is that the Secretariat communicate the text of the proposed protocol to the Parties at least six months before an ordinary session.<sup>21</sup> An ordinary session refers to the annual session of the COP; “...ordinary sessions of the Conference of the Parties shall be held every year unless otherwise decided by the Conference of the Parties.”<sup>22</sup>

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COP Decision 2/CP.18 indicates that the *elements* for a draft negotiating text of the 2015 agreement are to be considered no later than the 20th COP in Lima, Peru in December 2014, while the negotiating text of the 2015 agreement is to be made available before May 2015. If this deadline is met, a protocol text can be negotiated in Paris, during the 21st COP in late 2015. However, this rule is not as stringent as it appears, as any proposed text submitted by any Party may be considered to fulfill the required text of a proposed protocol under Article 17.

The requirements for the protocol's entry into force must be established in the text of the protocol itself.<sup>23</sup> Only the Parties to the Convention may become Parties to the protocol.<sup>24</sup> Although the text of the protocol must be adopted by the COP through consensus, Parties to the Convention are not all required to sign and ratify it. Once the protocol is in force, only the Parties to the protocol may adopt decisions under the instrument.<sup>25</sup>

## Option 2: Amendment to the Convention

An amendment to the Convention may be proposed by any State Party to it.<sup>26</sup> Unlike a protocol, an amendment is not an agreement separate from the Convention. Rather, it adds to or modifies the existing agreement.<sup>27</sup> As with a protocol, to begin an amendment process, a State must submit the proposed amendment in time for the Secretariat to be able to communicate it to the Parties at least six months before the ordinary session of the COP during which it is scheduled to be adopted. The Secretariat must inform the Parties and the Secretary-General of the United Nations<sup>28</sup> of proposed amendments.<sup>29</sup>

Agreement on a proposed amendment to the Convention is preferably via consensus, although if the Parties fail to reach consensus despite all efforts, the proposed amendment may be adopted by a vote. A three-fourths majority of the Parties present and voting at the meeting is needed to adopt an amendment. The Secretariat communicates the amendment to the Depositary, which directs that it be circulated to all Parties for their acceptance.<sup>30</sup> Parties then deposit instruments of acceptance with the Depositary.<sup>31</sup>

Ninety days after the Depositary receives instruments of acceptance from at least three-fourths of the Parties to the Convention, the amendment enters into force for those

Parties. For other Parties, the amendment enters into force 90 days after they deposit an instrument of acceptance.<sup>32</sup> If a Party fails or refuses to submit an instrument accepting the change in the Convention, it shall not be bound by the amendment and will, instead, continue to be bound by the Convention's previous iteration.

## Option 3: New Annex or Amendment to Annexes

Article 16 of the UNFCCC emphasizes the importance of an annex to the Convention, stating that “[a]nnexes to the Convention shall form an integral part thereof, and unless otherwise expressly provided, a reference to the Convention constitutes at the same time a reference to any annexes thereto.”<sup>33</sup> Under the UNFCCC, however, such annexes are limited to “lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character,”<sup>34</sup> except for those that fall under the Convention's article on the settlement of disputes, namely an annex on arbitration and an annex on conciliation.<sup>35</sup>

Annexes to the Convention may either be (a) amended or (b) added. Amending an existing annex and adding a new annex follow a process similar to amending the Convention, in that any State party to the Convention may submit a proposed annex or a proposed amendment to an existing annex at least six months before the ordinary session of the COP during which it is scheduled to be adopted. Like the amendment of the Convention, the Secretariat communicates the proposal to the Parties and informs the signatories to the Convention and the Depositary of the proposed annex or amendment to an annex.<sup>36</sup>

The proposed annex or amendment is to be adopted through consensus, although if the Parties fail to reach consensus despite all efforts, adoption may still occur by putting the matter to a vote. As with an amendment to the Convention, the three-fourths majority vote of the Parties present and voting at the meeting is needed to adopt the annex or amendment. The amendment or addition is communicated by the Secretariat to the Depositary, which then communicates the adoption to the Parties.<sup>37</sup>

It is with regard to entry into force that the annex or annex amendment process differs from the Convention amendment process. Article 16.3 of the Convention states that the adopted annex or annex amendment shall enter into

force for all Parties to the Convention six months after the Depositary communicates its adoption to the Parties, “*except for those Parties that have notified the Depositary, in writing, within that period[,] of their non-acceptance of the annex.*”<sup>38</sup> (Emphasis added.) If, however, a Party that refuses to accept the amended or additional annex decides to withdraw its notification of nonacceptance, the amended or additional annex enters into force for that Party ninety days after the withdrawal is received by the Depositary.<sup>39</sup>

If a new or amended annex is adopted alongside an amendment to the main body of the Convention, it enters into force only after the amendment to Convention does so.<sup>40</sup>

#### Option 4: COP Decisions

Article 7 of the Convention tasks the Conference of the Parties with making “decisions necessary to promote the effective implementation of the Convention.”<sup>41</sup> Currently, the COP adopts decisions through consensus, given that the UNFCCC Rules of Procedure on voting are yet to be adopted. Strictly speaking, a decision adopted by the Conference of the Parties is not a treaty under the Vienna Convention on the Law of Treaties (VCLT), which requires instruments to undergo a process of ratification before they can be considered legally binding. Although there is a view that the binding nature of a decision ought to be considered legal given that it is reached through a negotiation and adoption process under a legally binding treaty, it may be preferable to explicitly state and clarify a decision’s binding nature to avoid further debate. This can be done through a clear delegation of authority in the instrument, where the exact intent of the Parties can be made evident.<sup>42</sup>

The Montreal Protocol on Substances that Deplete the Ozone Layer offers an example of a clear provision as to the binding nature of COP decisions. Article 2 of this protocol states that “[b]ased on the assessments made pursuant to Article 6, the Parties may decide whether... [a]djustments to the ozone depleting potentials specified in Annex A, Annex B, Annex C and/or Annex E should be made and, if so, what the adjustments should be; and... [t]he decisions, which shall be binding on all Parties, shall forthwith be communicated to the Parties by the Depositary. Unless otherwise provided in the decisions, they shall enter into force on the expiry of six months from the date of the circulations of the communication by the Depositary.”<sup>43</sup> (Emphasis added.)

Under the UNFCCC, a number of provisions have effectively done the same. Articles 4.1(a), 4.2(c) and 7.2(d), for instance, provide the authority for the COP to establish and thereafter adopt methodologies for national inventories, while Article 9.3 pertains to the elaboration and adoption of the Subsidiary Body for Scientific and Technological Advice (SBSTA)’s functions and terms of reference.<sup>44</sup> Article 4.2(d) of the UNFCCC and Article 17 of the Kyoto Protocol delegate the authority to establish rules for the modalities that concern joint implementation and emissions trading, respectively.<sup>45</sup>

Despite not being legally binding in the manner of a treaty, a COP decision nonetheless undeniably possesses legal force: when the COP adopts a decision, a legitimate expectation of State action in accordance with that decision is created as part of the Parties’ legally binding commitment under the Convention to promote its effective implementation.<sup>46</sup> Decisions “create good faith and political expectations” as to Parties’ compliance, and are to be used by some treaty bodies to “provide effective interpretations of the treaty that were not made explicit in the treaty.”<sup>47</sup> Some decisions may also identify guidelines on certain issues or topics that could eventually be used to embody or supplement an amendment or entirely different agreement.<sup>48</sup> The VCLT requires, in fact, that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” must be taken into account in the interpretation, and therefore implementation, of the treaty.<sup>49</sup>

#### Option 5: Combination of Options

Interestingly, the selection of any of these options does not bar use of others at the same time. No provision in the Convention does so, and it is commonly accepted that what is not prohibited by the law is therefore allowed by it. Article 16 of the Convention, in fact, explicitly acknowledges the possibility of an amendment to the Convention occurring at the same time its annexes are amended or a new annex is adopted. The silence of the Durban Platform on the architecture of the new agreement implies that it need not be limited to a single instrument. This is not surprising, as the adoption of the Kyoto Protocol was accompanied by the adoption of two COP decisions—Decision 1/CP.3 detailed the reasons the process for the development of a protocol was established and gave guidance for preparatory work toward its implementation, and Decision 2/CP.3 outlined the methodological

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issues related to the protocol. Both were adopted by the Conference of the Parties at the same time as the Kyoto Protocol during the 3rd COP. Thus COP decisions are a medium through which the text of a proposed agreement is submitted and adopted before it is opened for signature and ratification.

As seen earlier, the processes involved in the adoption of these options may vary. This, however, is merely a matter of procedure, and the key to accomplishing a durable and effective climate agreement may lie in finding the right combination of architectural options.

## 2015 CLIMATE AGREEMENT IN A SET OF MULTIPLE LEGAL INSTRUMENTS?

Much of what has been used to frame legal form discussions revolve around the mandate of the ADP, as well as the boundaries set by the Framework Convention itself, and rightly so. However, it remains that little progress has been made by way of determining the legal form or architecture of the 2015 agreement two years into the process. Locking into a balanced and effective instrument acceptable to all Parties may be more easily achieved by understanding the range of options available upon a better perception of the forms obligations can take.

### Hard and Soft Law

The question of whether an instrument is legally binding is fundamentally answerable by yes or no. It is in the nature of the obligations embodied in the instrument that discussion as to the stringency of the terms of the agreement lie. In other words, once an instrument is binding, it may be considered hard law—but this “hardness” may vary in degree.

Hard law is generally understood to result in specific and legally binding obligations, thereby endowing the parties to these instruments with rights and obligations.<sup>50</sup> Treaties, conventions, or international agreements are examples of hard law, binding the States party to them to the duties contained in the instruments. States commit to be bound by ratifying these instruments, thus agreeing to be made accountable to other States for the violation of their provisions.

Soft law, on the other hand, is generally understood not to bind parties or entities in the manner that treaties—through ratification—does, although it does carry some weight through statements or declarations contained in such instruments.

### General or Precise Provisions

Given that hard law gives rise to accountability, which accountability in international law is vis-a-vis the international community, the question then becomes: what actions are parties accountable for? The precision in terms of the crafting of obligations is where flexibility within a legally binding regime lies.

In the context of the UNFCCC and Kyoto Protocol, for instance, it can be said that both instruments are hard law, although the Kyoto Protocol’s commitments may appear to be “harder” in degree than those of the Convention. The Framework Convention is broadly inclusive and non-threatening, with minimal substantive commitments, such as Articles 4.2(a) and (b), which required Annex I Parties to reduce their greenhouse gas emissions to 1990 levels by the year 2000.<sup>51</sup> This makes it true to its nature as a framework convention, providing more general guidance rather than detailed implementing rules, which were intended to come from COP decisions. This gives the regime room to breathe and adjust to developments in the international and domestic spheres.

The Kyoto Protocol, conversely, provides for legally binding commitments that specify quantified emission targets among Annex I countries, with such commitments being ratified and translated into domestic laws, thus becoming more easily enforceable. By specifying quantified emission targets, the Kyoto Protocol provides for more precise obligations.<sup>52</sup>

### Obligations of Results or Conduct

Distinguishing between obligations of result and obligations of conduct is also important in determining the precision of provisions in the 2015 climate agreement. Obligations of result pertain to commitments to achieve or meet particular outcomes, while obligations of conduct require that certain actions are undertaken.<sup>53</sup> In other words, obligations of result are more prescriptive in that they rely more on commitments based on prescribed targets and timetables crafted around objective criteria, while

obligations of conduct are more facilitative.<sup>54</sup> Implementing an obligation of result might mean meeting an agreed emissions target by a certain date, with the methods left to the Party. Implementing an obligation of conduct may entail adopting a specific law or policy at the national level in line with conditions set by the international instrument, but with no precise guarantee of emissions reductions.<sup>55</sup>

The manner in which provisions and commitments are crafted affects the flexibility of an instrument, but does not necessarily detract from its legally binding nature. Parties can be legally bound to commitments or obligations that take into consideration national circumstances and capabilities. The Convention provides flexibility for Parties to make changes or adjustments to the legal regime through instruments allowed by the Convention's parameters, while maintaining the binding nature on the Parties of the Convention itself.

## THE VALUE OF A LEGALLY-BINDING INSTRUMENT

In its preamble, COP Decision 1/CP.17 highlights that the “global nature of climate change” calls not only for the “widest possible cooperation by all countries, but also their participation in an effective and appropriate international response.” Although the ADP's mandate does not require that the 2015 agreement be “legally binding,” a State's effective and appropriate participation in an international response, with the goal of accomplishing the objective of the Convention and acknowledging that time is of the essence, may suggest the necessity of having a legally binding 2015 agreement.

The pressing need to resolve the issue of climate change and prevent further adverse impacts runs contrary to a process that relies on a—likely prolonged—development of norms and expectations that may or may not bear fruit. The existence of a legally binding agreement would increase trust and credibility not only among the Parties to the agreement, but between the Parties and other stakeholders as well. Having a legally binding agreement would allow for more long-term strategic thinking, in that it goes beyond short-term State administration-centric thinking. A legally binding instrument would ensure that

the States party to it buy into the agreement as a country, and not as impermanent administrations whose priorities or development plans may change, depending on who may or may not remain in office. This would run counter to the objective being sought after in the agreement. Having a legally binding agreement takes into consideration inter-generational responsibility as well, by ensuring that future generations are guaranteed action by their governments that would address climate change. In all, a legally binding agreement would appear to be the more durable and credible option.

All the options discussed earlier require ratification or its equivalent (e.g. acceptance or approval) by the party, except for that of a COP decision. Assuming parties do decide upon a legally-binding agreement, they face certain considerations brought about by the nature of their mandate and the instruments they are to choose from. For instance, deciding to solely amend existing annexes could mean that the post-2020 climate change regime would remain very similar to the regime as it currently stands by way of principles, rights, commitments and obligations, with only the details amended. As annexes are limited to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character, any changes or additions to global climate governance would be limited. The addition of new annexes, on the other hand, would likely require the amendment of the framework convention, in order for them to be put into proper context. However, an amendment of the framework convention itself may meet a great deal of resistance, as this could open the convention as a whole to possible amendments. Doing so could pave the way for even more debate, and may, for some, endanger provisions best left untouched.

Adopting a legally binding agreement does not preclude the possibility of adopting COP decisions alongside it, or the inclusion of provisions that would permit or require Parties to eventually adopt decisions to further implement it. This would allow Parties to address issues that they were not able to resolve in time to meet the 2015 deadline, and provide them with the means to more quickly and efficiently adapt to changing circumstances, both national and international.

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## THREE PROPOSITIONS FOR A LEGAL FORM FOR THE 2015 CLIMATE AGREEMENT

With the possibility of using multiple forms in mind, three propositions are offered to serve as possible bases for the instrument's design, and to illustrate the rich variability of possibilities in determining the legal architecture of the 2015 climate agreement. As stated earlier, the purpose of this exercise is to advance discussions on the architecture of the 2015 agreement by putting forward ideas or scenarios that could spark further ideas or solutions. For all three propositions, it was assumed that the 2015 agreement would be legally binding, compatible with a 2-degree Celsius stabilization objective, and include mitigation, adaptation, and finance commitments. The three propositions offer full legal symmetry for all countries, in that they are equally bound by the agreement, although, as discussed earlier, being bound to the agreement does not mean being bound to perform the same types of commitments as the other Parties. Parties to the Kyoto Protocol, for instance, were similarly bound to it, although provisions reflected asymmetrical commitments and obligations in observance of the principles of the Convention.

In contemplating a set of instruments for the 2015 climate agreement, it is important to observe instrumental rationality and coherence to avoid conflicts in interpretation. This means that instruments created under the Convention are coherent and rational not only vis-à-vis the framework text, but also with each other.

The three propositions are based on scenarios developed through the ACT 2015 project to inform the process leading to a new international climate agreement in 2015. The propositions, (Steady, Dynamic and Pioneer) differ in the timing of emissions reduction. The Steady proposition assumes steady emissions reductions between 2020 and 2030; the Dynamic proposition assumes slower reductions until 2030 but faster reductions after that date; the Pioneer proposition assumes the fastest transition to low-carbon energy beginning now. Table 1 compares the legal forms suggested for the three propositions.

### The Steady Proposition

The first proposition, the Steady Proposition, is similar to the system currently in place, albeit more ambitious. Under this proposition, a legally binding core instrument is to be crafted, with internationally binding mitigation commitments for all countries and global financial targets expressly included. Thus precise binding obligations are to be encapsulated in the core agreement, with some level of differentiation in terms of commitments but full legal symmetry for all countries, in that none would be treated differently in legal terms.

Under this proposition, all parties put forward and agree to precise national targets and measures to reduce greenhouse gas emissions—therefore committing themselves to obligations of result that would collectively meet the 2-degree Celsius stabilization level. All parties to the Convention, including developing countries, take on mitigation commitments. However, a certain level of conditionality is attached to developing-country commitments, in that their fulfillment would depend on the provision of sufficient means of implementation, as indicated in Article 4.7 of the Convention.

General rules on measurement, reporting, and verification (MRV) are included in the core agreement, although some flexibility regarding reporting and accounting commitments are taken into account, and may be further elaborated in COP decisions. General obligations regarding finance and adaptation are included in the treaty, with further elaboration in COP decisions.

The core instrument contains (1) general rules on mitigation and the fulfillment of these commitments (which includes conditionalities that pertain to developing countries' commitments and their means of implementation), (2) mitigation commitments for all parties, (3) general rules and obligations pertaining to MRV, (4) general rules and obligations on finance and adaptation, and (5) provisions on the adoption and binding nature of COP decisions further elaborating on MRV, finance, adaptation, technology transfer, and capacity building.

## The Dynamic Proposition

Another proposed design, the Dynamic Proposition, would require parties to agree to a set of binding national targets and measures, although the level of ambition would be relatively low in the beginning. The heightened risk of failing to meet the stabilization level of 2 degrees Celsius is addressed by parties obligating themselves to ratchet up their commitments at regular intervals, as well as by including more adaptation finance commitments.

Mitigation commitments are obligations of result and must, therefore, be precise, although not necessarily uniform. Parties are also required to establish and implement national laws or regulations consistent with guidelines specified in the core agreement. To complement this, binding MRV requirements are adopted, with general obligations for reporting and accounting established in the agreement and applied to all parties. Differentiation in reporting is indicated, and takes into consideration certain distinctions or rubrics, such as those between developed and developing countries, emissions levels, economic capabilities, or levels of vulnerability, although further work may be done in COP decisions.

Precise provisions or commitments are included in a core instrument with regard to finance and adaptation, particularly given the greater risk of not meeting the agreed upon stabilization level, although the more detailed distribution or schedule of financial commitments may be fixed in subsequent COP decisions. This may be done alongside the process provided for the regular ratcheting up of mitigation commitments. Furthermore, a clear delineation is made between financial commitments for mitigation and for adaptation.

Under this proposition, the core instrument may contain (1) precise provisions on mitigation commitments for all parties, with targets and specific reference to their nationally binding character and the actions required to achieve this, (2) provisions on the ratcheting up of mitigation commitments, (3) general but internationally binding MRV provisions, with reference to differentiation and

the rubrics to be observed, (4) precise provisions on adaptation and finance, (5) provisions delineating mitigation and adaptation finance, and (6) provisions on the adoption and binding nature of COP decisions further elaborating on MRV differentiation, details on the numbers concerning finance and adaptation, and the results or progress on the ratchet-up mechanism.

## The Pioneer Proposition

The third design option is the Pioneer Proposition. It diverges most sharply from the current climate regime, as its focus is on phasing out greenhouse gas emissions to net zero by 2050. Mitigation commitments are obligations of conduct embodied in the core agreement, such that there may be no binding emissions targets outright, although there will be binding obligations to *develop and submit* such targets or other forms of mitigation commitments in line with achieving the global phase-out goal. Incentives may be provided for those who wish to commit more and/or move faster with regard to mitigation.

With regard to MRV, the status quo may be codified, but with a mandate to further elaborate on rules pertaining to different types of commitments. Finance and adaptation provisions in the core instrument govern general obligations of conduct, with the COP delving deeper into the specifics through decisions.

The core instrument contains (1) provisions concerning the global phase-out goal by 2050, (2) provisions on general obligations of conduct with regard to mitigation, adaptation, and finance, (3) general provisions on incentives for those who wish to move faster or do more regarding mitigation, (4) general provisions on MRV, reflecting the status quo, and (5) provisions on the adoption and binding nature of COP decisions that will elaborate on the parties' mitigation commitments, incentives, further rules on the implementation of the general finance and adaptation obligations, as well as more specific rules on the MRV of different types of commitments.

Table 1 | **Comparison of Three Proposals for Legal Forms for the 2015 Climate Agreement**

	STEADY	DYNAMIC	PIONEER
<b>CORE AGREEMENT</b>			
General provisions	<ul style="list-style-type: none"> <li>■ On mitigation by all Parties</li> <li>■ On obligations pertaining to MRV</li> <li>■ On obligations on finance and adaptation</li> </ul>	<ul style="list-style-type: none"> <li>■ On MRV with reference to differentiation and the rubrics to be observed</li> </ul>	<ul style="list-style-type: none"> <li>■ On MRV with reference to differentiation and the rubrics to be observed</li> <li>■ On MRV with reference to differentiation but elaborating on rules for different types of commitments</li> <li>■ On general finance and adaptation with detail in COP Decisions</li> <li>■ On general obligations of conduct with regard to mitigation, adaptation, and finance</li> </ul>
Precise provisions		<ul style="list-style-type: none"> <li>■ On binding low-level national emission targets and actions</li> <li>■ On provisions to ratchet up mitigation commitments</li> <li>■ On binding MRV targets</li> <li>■ On obligations of results and actions</li> <li>■ On finance and adaptation</li> <li>■ On mitigation financing</li> </ul>	<ul style="list-style-type: none"> <li>■ Develop and submit targets or other forms of mitigation commitments in line with achieving the global GHG phase-out goal by 2050</li> </ul>
<b>PROVISIONS IN CORE AGREEMENT TO BE ELABORATED ON IN LATER COP DECISIONS</b>			
	<ul style="list-style-type: none"> <li>■ Further elaborating on MRV, finance, adaptation, technology transfer, and capacity building</li> </ul>	<ul style="list-style-type: none"> <li>■ Further elaborating on MRV differentiation, details concerning finance and adaptation, and the results or progress on the ratchet-up mechanism</li> </ul>	<ul style="list-style-type: none"> <li>■ Further rules on the implementation of general finance and adaptation obligations</li> <li>■ Elaborating on the parties' mitigation commitments, incentives, implementation of the general finance, and adaptation obligations, as well as more specific rules on the MRV of different types of commitments</li> </ul>

As stated earlier, these three propositions identify design elements to encourage further discussion on what elements could be included in a core agreement and subsequent COP decisions, as well as other considerations that could come to light as this exercise is further pursued. They are not necessarily exclusive to each proposition, and may be mixed with other elements or aspects to create what may be a more robust option. These propositions likewise suggest scenarios that may encapsulate circumstances that reflect possible trajectories in the attempt to further the climate change discussion.

### Withdrawal Provision

An additional aspect that may be considered across all propositions is that of withdrawal from the agreement during its implementation, and whether to include provisions that would deal with such actions by Parties. The presence of such a provision does not mean that Parties shall not be permitted to withdraw from the 2015 agreement—it merely provides safeguards for the remaining Parties to the 2015 agreement in the event that a Party chooses to do so.

The withdrawal of any Party during the implementation of the agreement after its adoption, signing, and ratification would have a detrimental impact on the agreement's effectiveness because of the inevitable impact on the measures that have been agreed upon. Meeting the 2- or 1.5-degree Celsius stabilization level requires Parties to take on commitments that would have an impact not

just globally, but also on their domestic socioeconomic systems. Withdrawal of any Party would cause a shift in the allocation of targets and responsibilities, to the detriment of all other Parties. This could result in either other Parties having to take on more commitments, or in suffering the consequences of not meeting the stabilization target. Either way, damages will be incurred by other Parties.

These damages could form the basis for provisions on reparation or restitution in the agreement, as general principles of international law dictate that breaches that lead to injury result in a legal responsibility to make reparations to the injured party.<sup>56</sup> This could deter—but not entirely prevent—withdrawal at later stages, and would facilitate building trust among parties. It would also forge a more effective and credible agreement.

## CONCLUSION

Discussions on the acceptability of the 2015 agreement, although often dictated by conditions set by Parties commonly acknowledged as necessary signatories to the agreement, must make room for both the application of the principles of the Convention and the divergent domestic situations of the States party to the agreement. Although COP decisions appear bereft of specifications on the legal form of the 2015 climate agreement, qualifiers can be established based on references to the Framework Convention and international law in general. The phrase “under the Convention,” and reference to legal force, and the applicability of the instrument to all, in particular, delimit the options for the form of the 2015 agreement. Taken together, these qualifiers show that the options for form or architecture may include a protocol, an amendment to the Convention, additions and/or amendments to the Annexes of the Convention, one or a set of COP decisions, or a combination of these options.

“Under the convention” also integrates into the negotiations the principles and provisions of the Convention, which include equity and common but differentiated responsibilities. The ultimate objective of the Convention is, therefore, to be regulated by the observance of its principles. The adoption of a legally binding agreement does not detract from the observance of these principles, as it is the manner in which provisions and commitments

are crafted that affect the flexibility of an instrument. Thus Parties with legally binding commitments or obligations may still take into consideration national circumstances and respective capabilities.

A legally binding agreement—one ratified by the States—would increase trust and credibility not only among the Parties to the agreement, but among the Parties and other stakeholders as well, given that it allows for more long-term strategic thinking. It appears to be the more durable and credible option, as it ensures that the Parties buy into the agreement as States, rather than as impermanent administrations. The adoption of COP decisions or the inclusion of provisions that would permit or require Parties to eventually adopt decisions to further implement the agreement is not precluded by the adoption of a legally binding agreement. This would allow Parties to address issues that they were not able to resolve in time, as well as provide the means to quickly and efficiently adapt to any changing circumstances.

Three propositions suggest scenarios for moving discussions and negotiations forward. The *steady* proposition is characterized by ambitious commitments in 2015 with 2030 targets. It proposes moderate transparency, finance from the carbon market, and a strengthened adaptation framework. The *dynamic* proposition, allows for a lower level of ambition in 2015, with a ratchet-up mechanism to ensure the stability temperature level is achieved. It proposes targets for 2025, strong transparency, and focused public funding for adaptation. The *pioneer* proposition emphasizes a long-term greenhouse gas phase-out goal (approximately midcentury), and allows countries that wish to do so to move more quickly towards this goal. Viewing legal architecture in this context could therefore bring to mind the content that would be necessary to achieve the different goals, which in turn could be realized through a combination of legal forms. A core instrument or agreement, for instance, could enumerate framework or structural provisions and goals, then require the adoption of COP decisions that would go into more detail later on. The question of which provisions to include in the core agreement and which issues to assign to COP decisions would then vary in accordance with the specific objectives of the various scenarios.

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The ADP's goal is to produce an instrument to further shape international cooperation on climate change among the Parties to the Convention from the year 2020 onward. Given the urgency that must drive the climate change negotiations, and taking into consideration the history of the UNFCCC, a legally binding international instrument that is credible and effective is essential. Although States' overriding concern is meeting what they perceive to be their national interest and the needs of their citizens,<sup>57</sup> there is a general consensus that collective action is necessary to address the problem of climate change. Acting collectively does not preclude the achievement of national interests—not when climate change impacts are detrimental to all.

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## ENDNOTES

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## ACT 2015 Working Paper

This ACT 2015 paper is part of a series on elements of the 2015 climate agreement. It should be read in conjunction with the papers on adaptation and loss and damage, an ambition mechanism, characteristics of mitigation commitments, equity, finance, MRV and Accounting, options for compliance, and variable geometry and incentives.



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### ABOUT ACT 2015

The Agreement on Climate Transformation 2015 (ACT 2015) consortium is a group of the world's top climate experts from developing and developed countries that have come together to catalyze discussion and build momentum toward reaching a global climate agreement at the forthcoming UN Framework Convention on Climate Change (UNFCCC) summit in 2015.

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