

The Legal Character of the Paris Agreement

Daniel Bodansky*

From start to finish, the question of legal form or character was central to the Paris negotiations. 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. It contains a mix of mandatory and non-mandatory provisions relating to parties' mitigation contributions, as well as to the other elements of the Durban Platform, including adaptation and finance. One cannot definitively say how much the legally binding character of the Paris Agreement matters. Making the agreement legally binding may provide a greater signal of commitment and greater assurance of compliance. But transparency, accountability and precision can also make a significant difference, and legal bindingness can be a double-edged sword if it leads States not to participate or to make less ambitious commitments. Thus, the issue of legal character, though important, is only one factor in assessing the significance of the Paris outcome.

INTRODUCTION

From start to finish, the question of legal form or character was central to the Paris negotiations. The final issue decided at the 2011 Durban Conference, when the negotiations began, concerned the legal form of the instrument to be developed. And the last issue decided in Paris, when the negotiations concluded, concerned the legal character of one of the Paris Agreement's provisions. In both cases, the question of legal character was resolved obliquely – in Durban, by adopting a formulation whose meaning no one understood, and in Paris, by correcting an error in the text, which had converted a provision intended to be non-binding into a binding obligation, by using the verb 'shall' rather than 'should'.

The obsession with the Paris outcome's legal character may seem curious to scholars sceptical that international law significantly affects State behaviour.¹ Whether or not the Paris Agreement is legally binding, it lacks enforcement machinery and is not necessarily

justiciable, at least in some countries. Nevertheless, States clearly thought the issue of legal form mattered, and this belief itself became an important reality in the negotiations, which significantly shaped the ultimate result.

Confusion about the legal character of the Paris Agreement is widespread, and reflects a failure to distinguish carefully between seven related but distinct issues: (i) the legal form of the agreement itself, that is, whether it is a treaty under international law; (ii) whether individual provisions of the agreement create legal obligations; (iii) whether the provisions of the agreement are sufficiently precise that they serve to constrain States; (iv) whether the agreement can be applied by courts; (v) whether the agreement is enforceable; (vi) whether the agreement otherwise promotes accountability, for example, through systems of transparency and review; and (vii) the domestic acceptance process and legal status of the agreement.² Even a scholar as knowledgeable as Anne-Marie Slaughter, former president of the American Society of International Law, confuses the issues of legal form, enforceability and domestic acceptance, when she writes that treaties must contain 'enforceable rules' with 'sanctions for non-compliance' and must be 'ratified by domestic parliaments so that they become a part of domestic law'. Because the Paris Agreement is 'none of these things', she concludes that it is 'essentially a statement of good intentions' rather than law.³ Similarly, another leading international law scholar, Richard Falk, describes the Paris Agreement as 'voluntary' and says that there is not 'even an obligation to comply'.⁴ At least as a matter of international law, none of these statements is true. The Paris Agreement does qualify as a treaty within the meaning of international law; it does create legal obligations for its parties; and compliance with these obligations is not voluntary.

² To some extent, some of the confusion results from using the term 'legally binding' in different ways. F. Sindico, 'Is the Paris Agreement Really Binding', Strathclyde Centre for Environmental Law and Governance, Policy Brief No. 03/2015 (2015).

³ A.-M. Slaughter, 'The Paris Approach to Global Governance', *Project-Syndicate* (28 December 2015), found at: <<https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>>.

⁴ R. Falk, 'Voluntary International Law and the Paris Agreement' (16 January 2016), found at: <<https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>>. Along similar lines, Falk says that the Paris Agreement raises 'serious questions as to whether anything at all had even been agreed' and 'went to great lengths to avoid obligating the parties'. *Ibid.*

* Corresponding author.

Email: Daniel.Bodansky@asu.edu

¹ J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (Oxford University Press, 2005).

Slaughter and Falk are correct in saying that the Paris Agreement cannot necessarily be applied by domestic courts,⁵ that it may not require legislative approval in some countries or be part of domestic law, and that it lacks 'enforcement' mechanisms. But these are not the tests of whether an international agreement qualifies as a treaty. Nor does the fact that some of the Paris Agreement's provisions do not create legal obligations mean that none of them do, or that the agreement as a whole is not law. Not every provision of a legal instrument necessarily creates a legal obligation, the breach of which entails non-compliance.

This article will consider two of the seven issues identified earlier: first, what is the legal form of the Paris Agreement; and, second, what is the legal character of its constituent provisions? The former requires examining the Paris Agreement as a whole, while the second depends on the language of the individual provision in question – for example, whether it is phrased as a 'shall' or a 'should'. The first issue dominated the discussions in Durban concerning the mandate for the negotiations, but by the time of the Paris conference, it had been tacitly resolved in favour of a treaty outcome (in the international sense of that term).⁶ The second issue dominated the debates in Paris. This article will consider each of these issues in turn, and then return to the broader issue of whether the legally binding character of the Paris outcome matters and, if so, how and why.

DISTINGUISHING THE CONCEPT OF LEGALLY BINDING FROM OTHER DIMENSIONS OF BINDINGNESS

In considering the legal character of the Paris Agreement and its various provisions, it is important to distinguish the concept of legal character from several other dimensions of 'bindingness'.⁷ First, the legal character of a norm differs from whether the norm is justiciable – that is, whether it can be applied by courts or other tribunals. In general, courts can apply only legal rules, so justiciability depends on legal form. But the converse is not the case – the legally binding character

of a norm does not depend on whether there is any court or tribunal with jurisdiction to apply it.

Second, the concept of legally binding character is distinct from that of enforcement. Enforcement typically involves the application of sanctions to induce compliance. As with justiciability, enforcement is not a necessary condition for an instrument or norm to be legally binding. If a norm is created through a recognized law-making process, then it is legally binding, whether or not there are any specific sanctions for violations. Conversely, enforcement does not depend on legal form, since non-legal norms can also be enforced through the application of sanctions.⁸ The same is true of other means to promote accountability, such as systems of transparency and review: on the one hand, they need not be included in legal instruments or apply to legally binding norms; on the other hand, they can be included in non-legal instruments or apply to non-legal norms.⁹

Third, the legal form of a norm is distinct from its precision. Of course, the more precise a norm, the more it constrains behaviour. But legally binding norms can be very vague, while non-legal ones can be quite precise. So the constraining force of precision is different from the constraining force of law.

If legal bindingness does not imply judicial application, enforcement or precision, what is the import of saying that the Paris Agreement is a legal instrument or that one of its provisions is legally binding? It is difficult, if not impossible, to answer this question in a non-circular way. Ultimately, legal bindingness reflects a state of mind – most importantly of officials who apply and interpret the law (judges, executive branch officials and so forth), but also to some degree of the larger community that the law purports to govern. It depends on what the British philosopher H.L.A. Hart referred to as their 'internal point of view', a sense that a rule constitutes a legal obligation and that compliance is therefore required rather than merely optional.¹⁰

In domestic legal systems, the elements of legal form, judicial application and enforcement often go together. But this is much less common internationally. Many, if not most, international legal agreements provide no mechanisms for judicial application and little enforcement.

⁵ Whether the Paris Agreement can be applied by domestic courts may vary from country to country, depending on the country's doctrines regarding judicial application of treaties.

⁶ The term 'treaty' has a narrower sense in United States (US) law, referring to international agreements sent to the Senate for advice and consent to ratification pursuant to Article 2 of the US Constitution.

⁷ J. Goldstein *et al.* (eds.), *Legalization and World Politics* (MIT Press, 2001); D. Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2009), Chapter 5; R. Stavins *et al.*, 'International Cooperation: Agreements and Instruments', in: O. Edenhofer *et al.* (eds.), *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), 1001.

⁸ For example, US law provides for the imposition of trade sanctions against States that 'diminish the effectiveness' of an international conservation programme, whether or not a State has committed any legal violation (Pelly Amendment, 22 USC 1978).

⁹ D.G. Victor, K. Raustiala and E.B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press, 1998), at 18.

¹⁰ H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1994).

HISTORICAL BACKGROUND

Throughout the history of the United Nations (UN) climate change regime, debates about legal character have been a recurrent theme. In the negotiation of the UN Framework Convention on Climate Change (UNFCCC),¹¹ perhaps the most difficult issue to resolve was the legal character of the emissions targets for developed countries. Although the UNFCCC was itself a treaty, and hence 'legally binding' under the Vienna Convention on the Law of Treaties,¹² Article 4.2 was formulated as a non-binding aim rather than as a legal obligation.¹³

The same issue resurfaced three years later at the first Conference of the Parties (COP1) to the UNFCCC in Berlin, when parties decided to initiate the Kyoto Protocol negotiations. The Berlin Mandate specified that the Kyoto Protocol would be a treaty, like the UNFCCC, but was silent as to the legal character of developed country emission targets.¹⁴ It was not until the following year in Geneva that this issue was resolved, when a large majority of parties adopted the Geneva Ministerial Declaration, calling for the negotiation of legally binding targets for developed countries.¹⁵ These were elaborated in Annex B of the Kyoto Protocol.¹⁶

The question of legal character was perhaps an even more central issue in the next phase of the UN climate change regime, addressing what to do after 2012, when the Kyoto Protocol's first commitment period ended. The Kyoto Protocol's targets applied to only a small group of countries, comprising about one quarter of global emissions at the time Kyoto came into force. The question going forward was whether a new instrument, applicable on a more global basis, would also be a treaty and, if so, would establish legally binding limits on emissions.

The Bali Action Plan,¹⁷ which initiated negotiations on the post-2012 climate change regime, did not specify the legal form of the outcome. Nevertheless, many hoped and assumed that the Copenhagen conference

would adopt a new climate change treaty¹⁸ and were bitterly disappointed when the Copenhagen Accord proved instead to be 'only' a political agreement.¹⁹ By the time parties met again the following year in Cancún, however, expectations had come into closer alignment with reality, and the Cancún Agreements,²⁰ which formally incorporated the Copenhagen architecture into the UNFCCC process, were widely celebrated, despite the fact they were non-legally binding COP decisions.

THE LEGAL FORM OF THE PARIS AGREEMENT

The issue of legal form continued to play a central role in drafting the 2011 Durban Platform, which provided the mandate for the Paris negotiations.²¹ On one side, a broad coalition of developed and developing countries – including the European Union, other European States with Kyoto targets (such as Switzerland and Norway), the Umbrella Group countries (including the United States), small island States and least developed countries – pushed for a mandate to negotiate a new legal agreement to supplement or replace the Kyoto Protocol; on the other side, India, in particular, insisted that the Durban Platform leave open the possibility of a COP decision.

The result was a mandate to develop 'a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties',²² a purposefully obscurantist formulation adopted only after the conference had been extended for more than 36 hours. Of the three options listed, the first two clearly constituted treaties. But the third option, 'agreed outcome with legal force', was ambiguous. The reference to 'legal force' satisfied the European Union and other States that sought a new treaty, because it suggested that the outcome would have a legal character. But it also permitted the Indian delegation to argue that a COP decision memorializing actions with legal force under domestic law would satisfy the Durban Platform.²³ Because the phrase, 'agreed outcome with legal force', had no accepted meaning, no one could say with

¹¹ United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994) ('UNFCCC').

¹² Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; in force 27 January 1980), Article 26.

¹³ D. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', 18:2 *Yale Journal of International Law* (1993), 451, at 516–517.

¹⁴ UNFCCC, Decision 1/CP.1, The Berlin Mandate: Review of the Adequacy of Article 4, Paragraph 2(a) and (b), of the Convention, Including Proposals Related to a Protocol and Decisions on Follow-Up (UN Doc. FCCC/CP/1995/7/Add.1, 6 June 1995), at paragraph 2(a).

¹⁵ UNFCCC, Geneva Ministerial Declaration (UN Doc. FCCC/CP/1996/15/Add.1, Annex, 29 October 1996), at paragraph 8.

¹⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997; in force 16 February 2005).

¹⁷ UNFCCC, Decision 1/CP.13, Bali Action Plan (UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008).

¹⁸ See, e.g., J. Werksman and K. Herbertson, 'The Legal Character of National Actions and Commitments in the Copenhagen Agreement: Options and Implications' (World Resources Institute, 2009).

¹⁹ D. Bodansky, 'The Copenhagen Conference: A Post-Mortem', 104:2 *American Journal of International Law* (2010), 230, at 232–233.

²⁰ UNFCCC, Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011).

²¹ UNFCCC, Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012).

²² *Ibid.*, at paragraph 2.

²³ L. Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime', 61:2 *International and Comparative Law Quarterly* (2012), 501, at 507.

total authority what it really meant. It thus served as an acceptable compromise, by allowing both sides to maintain their positions.

For the first several years of the Paris negotiations, the ambiguity of the Durban Platform was left undisturbed. The Ad Hoc Working Group on the Durban Platform (ADP) proceeded with no decision about the issue of legal form. But as the Paris negotiations moved into their final year, it became increasingly important to decide what was being negotiated, a treaty or a COP decision, because this had implications for what provisions needed to be included and what procedural requirements satisfied. For example, if the outcome was to be a protocol, it needed to satisfy the six-month rule,²⁴ which requires a new protocol text to be tabled six months prior to the meeting at which it is to be adopted.

Somewhat surprisingly, given the intensity of the debate in Durban and before, the question of legal form essentially faded away in the last year of the negotiations, and was not a major issue in Paris. Although no decision was ever specifically taken, an unspoken presumption had emerged by the beginning of 2015 that the Paris Agreement would be a treaty. This became apparent at an informal, off-line meeting of legal experts in February 2015 in Mont Pelerin, Switzerland, where there was an impressive degree of consensus that, in order to satisfy the Durban Platform mandate, the Paris conference would need to adopt an instrument that constituted a treaty within the meaning of the Vienna Convention on the Law of Treaties – that is, an agreement between States in written form governed by international law.²⁵ Virtually all participants agreed that a COP decision would not satisfy the Durban Platform mandate, because COP decisions generally lack legal force under the UNFCCC.

This emerging consensus was not seriously challenged in the run-up to Paris. All of the iterations of the negotiating text included final clauses, which made sense only if the Paris Agreement was to be a treaty. As adopted, the Paris Agreement includes provisions addressing how States express their consent to be bound (through ratification, accession, acceptance or approval),²⁶ the minimum requirements for entry into force (acceptance by 55 States representing 55% of global greenhouse gas emissions),²⁷ reservations, withdrawal and who will serve as depositary (the UN).²⁸

Interestingly, the instrument is styled the ‘Paris Agreement’ rather than the ‘Paris Protocol’ or the ‘Paris Implementing Agreement’. As the Vienna Convention provides, the title of an instrument does not affect its legal status.²⁹ Although multiple factors may have been involved, the choice of ‘agreement’ rather than ‘protocol’ or ‘implementing agreement’ may have reflected a desire by some States to avoid an implication that the new agreement is subordinate to the UNFCCC.

LEGAL CHARACTER OF PARTICULAR PROVISIONS

Although the Vienna Convention proclaims the rule of *pacta sunt servanda*, which provides that a treaty is ‘binding upon the parties to it and must be performed by them in good faith’,³⁰ this does not mean that every provision in a treaty creates a legal obligation for individual parties. Treaties often contain a mix of different types of provisions: obligations, recommendations, factual observations, statements of the parties’ opinion and so forth. The particular character of a provision is usually determined by the choice of verb: for example, ‘shall’ generally denotes that a provision in a treaty creates a legal obligation,³¹ ‘should’ (and to a lesser degree, ‘encourage’) that the provision is a recommendation, ‘may’ that it creates a licence or permission, and various non-normative verbs (such as ‘will’, ‘are to’, ‘acknowledge’ and ‘recognize’) that the provision is a statement by the parties about their goals, values, expectations or collective opinions.

In addition to these differences in legal character, the provisions of the Paris Agreement vary in terms of who is the subject of the obligation. Some apply to ‘each party’³² or to ‘all parties’:³³ these provisions clearly create individual obligations. Others do not have a subject; for example, Article 4.5 provides that ‘[s]upport shall be provided to developing country Parties for the implementation of this Article’. These provisions appear to create general institutional obligations for the regime as a whole, but not obligations for individual parties. Finally, some provisions have a plural subject (e.g., ‘parties’,³⁴ ‘developed country parties’³⁵). Although the plural subject

²⁴ UNFCCC, n. 11 above, Article 17.2.

²⁵ Vienna Convention, n. 12 above, Article 2.1(a). The author helped organize the Mont Pelerin meeting and his observations about the meeting are based on his personal experience. A subsequent meeting of legal experts at the University of Stockholm in May 2015, in which the author also participated, reached similar conclusions.

²⁶ Paris Agreement (Paris, 12 December 2015; not yet in force), Article 20.

²⁷ *Ibid.*, Article 21.

²⁸ *Ibid.*, Articles 26–28.

²⁹ Vienna Convention, n. 12 above, Article 2.1(a).

³⁰ *Ibid.*, Article 26.

³¹ Of course, when the verb ‘shall’ is used in a non-binding instrument like the Copenhagen Accord, it does not create a legal obligation.

³² E.g., Paris Agreement, n. 26 above, Articles 4.2, 4.3, 4.9, 4.17 and 7.9.

³³ E.g., *ibid.*, Articles 4.8, 4.19 and 11.3.

³⁴ E.g., *ibid.*, Articles 4.13, 4.15 and 12.

³⁵ E.g., *ibid.*, Articles 9.1, 9.5 and 9.7.

usually suggests that these provisions are intended to create collective rather than individual obligations, in at least some cases this does not appear to be true. For example, Article 4.13 uses the plural formulation, ‘parties shall account for their nationally determined contributions’; nevertheless, read in context, the provision seems intended to create an individual obligation on accounting for each party to the agreement.

The issue that received the most attention in the Paris negotiations concerned the legal character of parties’ nationally determined contributions (NDCs): would the Paris Agreement make NDCs legally binding or not? But the choice between ‘shall’ and ‘should’ cropped up in many other parts of the agreement as well, including the provisions addressing adaptation, finance and transparency.

With respect to NDCs, the European Union in particular sought a formulation that would allow them to characterize NDCs as legally binding. The option of requiring parties to ‘achieve’ their NDCs was not possible, since this would have given NDCs the same legal status as the Kyoto Protocol’s emissions targets, which many countries had already rejected – not only the United States, but also big developing countries such as China and India. So the European Union instead sought to include a requirement that countries ‘implement’ their NDCs, which differs from an obligation to ‘achieve’ because it constitutes an obligation of conduct rather than result.³⁶ The United States did not view an obligation to implement as sufficiently different from an obligation to achieve to make it acceptable, but agreed with the European Union in supporting strong procedural obligations relating to NDCs, including obligations to communicate successive NDCs every five years and to regularly report on progress in implementing and achieving NDCs.

The Paris Agreement includes comparatively strong procedural obligations. Specifically, it requires each party individually to:

- Prepare, communicate and maintain successive NDCs that it intends to achieve (Article 4.2).
- Provide the information necessary for clarity, transparency and understanding, when communicating their NDCs (Article 4.8).
- Communicate a successive NDC every five years, which will represent a progression beyond the Party’s current NDC (Articles 4.3 and 4.9).
- Account for its NDC so as to promote environmental integrity and avoid double counting (Article 4.13).
- Regularly provide a national greenhouse gas inventory and the information necessary to track progress in implementing and achieving its NDC (Article 13.7).

In addition to the procedural obligations in the first sentence of Article 4.2 to ‘prepare, communicate and maintain successive’ NDCs, the second sentence of Article 4.2 provides that ‘Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs’. The first part of this sentence, before the comma, reiterates parties’ existing obligation under Articles 4.1(b) and 4.2(a) of the UNFCCC to ‘pursue domestic mitigation measures’, but adds, after the comma, ‘with the aim of achieving the objectives of [their] NDCs’. In doing so, the sentence draws a connection between the pursuit by parties of domestic mitigation measures and their NDCs. Importantly, it does not create an individual obligation on each party to implement or achieve its NDC, given that (i) the provision requires parties only to ‘pursue’ domestic measures, rather than to actually implement them; (ii) a very similar formulation in Article 4.2 of the UNFCCC, which also used the word ‘aim’, is generally considered not to have created a legal obligation;³⁷ (iii) the obligation to pursue domestic mitigation measures is arguably a collective rather than an individual obligation, since it is formulated as an obligation applicable to ‘parties’ rather than ‘each party’ (although, as noted earlier, the plural form is not used consistently throughout the Paris Agreement to denote a collective obligation); and (iv) the aim specified in Article 4.2 is to achieve the ‘objectives’ of the NDCs, whatever that might mean, rather than their specific content.

Apart from Article 4.2, the agreement requires parties to take into consideration the concerns of countries most affected by the impact of response measures (Article 4.15), and creates special requirements relating to regional economic integration organizations such as the European Union (Articles 4.16–4.18). Otherwise, the substantive provisions of the agreement relating to mitigation are formulated as recommendations or expectations rather than legal obligations:

- The agreement establishes a collective aim to reach global peaking of emissions as soon as possible and to undertake rapid reductions thereafter, so as to achieve net zero emissions in the second half of this century (Article 4.1).
- It recommends that developed country parties undertake economy-wide, absolute emission targets and that developing countries continue to advance their mitigation efforts, and encourages developing countries to move over time towards economy-wide targets (Article 4.4).
- It recommends that all parties strive to formulate and communicate long-term low greenhouse gas emission strategies (Article 4.19).

³⁶ See D. Bodansky, n. 7 above, at 76.

³⁷ See D. Bodansky, n. 13 above, at 516–517.

- It recommends that parties (whether individually or collectively is not clear) take action to conserve and enhance sinks (Article 5.1) and encourages parties to take action to implement and support reduced emissions from deforestation and forest degradation (or 'REDD+'; Article 5.2).

The other parts of the Paris Agreement, addressing adaptation and means of implementation, also impose relatively few legal obligations. These include requirements that:

- Each party engage in adaptation planning and implement adaptation actions, as appropriate (Article 7.9).
- Parties strengthen cooperative action (presumably collectively) on technology development and transfer (Article 10.2).
- All parties regularly report on any actions or measures they take to enhance the capacity of developing countries (Article 11.4).
- Parties cooperate to enhance climate change education, training, public awareness, public participation and public access to information (Article 12).

In addition, the Paris Agreement requires developed country parties to:

- Provide financial resources to assist developing country parties with both mitigation and adaptation (Article 9.1).
- Communicate biennially on financial support provided or mobilized, including projected levels of public funding if available (Articles 9.5 and 9.7).
- Report on financial, technology transfer and capacity-building support provided to developing countries (Article 13.9).

Arguably, these represent collective rather than individual obligations, since they apply to 'developed countries' parties' rather than to 'each developed country party'. Importantly, the only new financial obligations on developed countries relate to reporting, since the substantive obligation to provide financial resources expressly states that it is 'in continuation of [developed country Party] obligations under the Convention' (Article 9.1).

Most of the provisions on adaptation and means of implementation are expressed, not as legal obligations, but rather as recommendations, expectations or understandings. For example, the agreement:

- Recognizes that adaptation is a global challenge (Article 7.2), that the current need for adaptation is great and that greater needs can create higher costs (Article 7.4).
- Acknowledges that adaptation should be country-driven (Article 7.5).
- Recommends that parties (collectively) strengthen their cooperation on adaptation in a variety of ways (Article 7.7).

- Recommends that each party submit and periodically update an adaptation communication (Article 7.10).
- Recommends that parties (presumably collectively) enhance action and support with respect to loss and damage (Article 8.3).
- Recommends that developed countries' parties (presumably collectively) continue to take the lead in mobilizing climate finance (Article 9.3).
- Encourages other parties to provide support (Article 9.2).
- Recognizes that accelerating, encouraging and enabling innovation is critical for a long-term climate strategy (Article 10.5).
- Recommends that all countries cooperate to enhance the capacity of developing countries (Article 11.3).
- Recommends that each party report on climate change impacts and adaptation (Article 13.8).
- Recommends that developing country parties provide information on support needed and received (Article 13.10).

Similarly, Article 3, which crosscuts mitigation, adaptation, finance, technology, capacity building and transparency, provides that parties are to undertake and communicate ambitious efforts.

In addition to these provisions directed at the parties, either individually or collectively, the Paris Agreement also includes a number of provisions phrased in mandatory terms that do not have a subject and appear to be of a more general institutional nature. For example, the agreement provides that:

- Support shall be provided to developing countries to implement the mitigation and adaptation articles (Articles 4.5 and 7.13).
- NDCs and adaptation communications shall be recorded in public registries maintained by the Secretariat (Articles 4.12 and 7.12).
- The use of internationally transferred mitigation outcomes (the new phraseology for emissions trading) shall be voluntary (Article 6.3).
- Emission reductions shall not be double counted (Article 6.5).

Finally, the Paris Agreement also gives mandates to different institutions, again phrased as 'shalls'. For example, it directs the COP to consider common time frames for NDCs (Article 4.10) and to ensure that a share of the proceeds from the new market mechanism is used to assist particularly vulnerable developing country parties (Article 6.6). Similarly, the Paris Agreement directs the Warsaw International Mechanism on Loss and Damage to collaborate with existing bodies (Article 8.5), and it directs the global stocktake to take into account information on climate finance (Article 9.6).

LEGAL CHARACTER OF THE PARIS COP DECISION AND FUTURE COP DECISIONS

The COP21 decision adopting the Paris Agreement³⁸ also included in its Section III a set of decisions relating to the agreement. What is the status of these COP decisions? Generally, the UNFCCC does not authorize the COP to make legally binding decisions.³⁹ But, in a few cases, the UNFCCC does invest a COP decision with legal force. For example, Article 4.1(a) of the UNFCCC requires parties to use ‘comparable methodologies to be agreed by the COP’ in preparing their greenhouse gas inventories. As a result, COP decisions on inventory methodologies can be binding on the parties if they are phrased in mandatory terms. Similarly, the legal status of a decision of the parties under the Paris Agreement depends on whether the underlying treaty provision gives the decision legal force.

With only one exception, the COP21 decisions about the Paris Agreement do not create legal obligations for States. Most of these decisions either are directed at institutions like the UNFCCC subsidiary bodies or the newly created Ad Hoc Working Group on the Paris Agreement (APA) or, when directed at the parties, do not use mandatory language – they ‘invite’, ‘request’, ‘call upon’ or ‘urge’ parties to do various things, rather than decide that parties ‘shall’ do something.

In three cases, the COP21 decisions are phrased in obligatory terms, so with respect to these paragraphs, the question arises, do these provisions have legal force under the Paris Agreement?

First, paragraph 25 ‘*decides* that Parties *shall* submit’ future NDCs 9–12 months in advance of the relevant COP.⁴⁰ Since Article 4.9 of the Paris Agreement specifically states that parties ‘shall communicate’ an NDC every five years ‘in accordance with decision 1/CP.21’, paragraph 25 will become legally binding when the Paris Agreement enters into force.

Second, paragraph 32 ‘*decides* that Parties *shall* apply the [accounting] guidance in paragraph 31’ to their second and subsequent NDCs. Assuming this decision is ratified by the meeting of the Paris Agreement’s parties

(CMA), after the agreement comes into force, the accounting guidance in the COP21 decision will be legally binding, since Article 4.13, requires parties to account for their NDCs in accordance with guidance adopted by the CMA.

Third, paragraph 90 ‘*decides* that all parties, except for least developed countries and small island developing States, *shall* submit the information referred to in Article 13, paragraphs 7, 8, 9 and 10, as appropriate, no less frequently than on a biennial basis’. This provision appears not to be legally binding in itself, because Article 13 of the agreement does not specifically require parties to act in accordance with the modalities, procedures and guidelines adopted by the COP. However, paragraph 90 might be seen as reflecting the contemporaneous understanding of the parties of the requirement in Article 13.7 that parties report ‘regularly’.

Several provisions of the Paris Agreement also authorize the CMA to adopt binding decisions, by requiring parties to act in ‘accordance’ with decisions of the CMA. Provisions of this type include:

- Article 4.8, on the upfront information parties are to provide when communicating their NDCs.
- Article 4.9, on the procedures for parties to communicate successive NDCs every five years.
- Article 4.11, on the adjustment of NDCs.
- Article 4.13, on accounting rules.
- Article 7.3, on the recognition of adaptation efforts of developing countries.
- Article 9.7, on the provision of information by developed countries about the support they provide to developing countries.
- Article 13.7(a), on the preparation of national greenhouse gas inventories.

Whether the decisions that the CMA adopts pursuant to these articles are legally binding will depend on whether they are phrased in mandatory terms.

Finally, paragraph 51 of the COP21 decision on the Paris Agreement is worth noting. It provides that Article 8 on loss and damage ‘does not involve or provide a basis for any liability or compensation’. This provision does not create a legal obligation; rather, it is intended to do the reverse: to interpret Article 8 so as to exclude legal liability.

DOES THE LEGALLY BINDING CHARACTER OF A RULE MATTER AND, IF SO, HOW?

Why did people in Paris care so much about the issue of legal character, if it merely reflects a state of mind, and

³⁸ UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement (UN Doc. FCCC/CP/2015/10, Add.1, 29 January 2016).

³⁹ But see Jutta Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’, 15:1 *Leiden Journal of International Law* (2002), 1 (arguing that COPs have wider law-making authority).

⁴⁰ Presumably, the relevant COPs will be those in 2020, 2025 and every five years thereafter, since paragraph 23 of the Paris COP decision requests parties whose NDCs have a 2025 time frame to submit a new NDC by 2020, and paragraph 24 requests parties whose NDCs have a 2030 time frame to do so.

does not necessarily entail judicial application or enforcement? Why did the European Union push to include a legal obligation on parties to implement their NDCs? Why did developing countries seek to include new financial commitments? And why did the United States work so hard in Paris to make these provisions 'shoulds' rather than 'shalls'.

First, those who pushed for legally binding outcomes believed that they would make the Paris Agreement more effective. Legal bindingness might promote effectiveness in several ways, even in the absence of judicial application or enforcement.⁴¹ With respect to the legal form of the Paris Agreement as a whole, treaties 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.⁴² In addition, the internal sense of legal obligation, if sincerely felt, means that legal obligations exert a greater 'compliance pull' than political commitments, independent of any enforcement.⁴³ Moreover, to the extent that States take legal commitments more seriously than political commitments, this not only makes States more likely to self-comply; it causes them to judge non-compliance by other States more harshly. As a result, States risk greater costs to their reputation and to their relations with other States if they violate a treaty commitment than a political commitment, making non-compliance less attractive. Finally, legally binding agreements tend to have greater effects on domestic politics than political agreements, through their influence on bureaucratic routines and by helping to mobilize and empower domestic advocates.⁴⁴ All of these reasons underlay the European Union's efforts to include an obligation to implement NDCs in the Paris Agreement.

Despite claims about the importance of legal bindingness, however, the relationship between legal character and effectiveness is complex, and, thus far, empirical studies have not yet provided any definitive answers.⁴⁵ Including an obligation to implement NDCs might have made States more likely to act, as the European Union argued. But, as the United States argued in response, it might also have weakened effectiveness if it caused fewer States to participate or if States put forward weaker NDCs in response, because they were more worried about non-compliance. Arguably, far fewer countries would have participated in the Copenhagen

Accord and put forward emissions pledges, if the Accord had made those pledges legally binding, like the Kyoto Protocol. Moreover, both the United States and European Union agreed that, whether or not making NDCs legally binding would enhance compliance, the inclusion of transparency and accountability mechanisms in the Paris Agreement would serve a similar purpose. By making it more likely that poor performance will be detected and criticized, these mechanisms will raise the reputational costs of failing to achieve one's NDC, and help mobilize and empower domestic supporters of the Paris Agreement.⁴⁶

Second, some may have pushed for legal commitments in the Paris Agreement for 'optical' reasons, to make Paris more easily sellable as a success. Whether or not legal bindingness in fact increases effectiveness, the general public tends to think it does. So including legal obligations can be important for public relations and marketing purposes.⁴⁷

Third, the same factors that made the legal bindingness of the Paris Agreement attractive for some countries made other countries nervous about the costs to sovereignty entailed by legally binding obligations. In general, countries are more careful when negotiating and accepting legally binding commitments than political commitments, precisely because they impose a greater constraint on their behaviour. So making parties' NDCs legally binding might have limited participation or caused countries to put forward less ambitious contributions.

Finally, the United States had an additional reason for caring about the issue of legal bindingness, namely, the potential implications for its domestic process to enter into the agreement.⁴⁸ Unlike most countries, US law recognizes several ways for entering into an international agreement; the choice among them depends, in part, on what the agreement provides. The United States accepted the desirability of a legally binding outcome in Paris, but it wanted to ensure that the Paris Agreement's obligations were ones that the President could accept, either because they were procedural in nature, because they reiterated obligations the Senate had already approved in the UNFCCC, or because they

⁴¹ K. W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', 54:3 *International Organization* (2000), 421.

⁴² K. Raustiala, 'Form and Substance in International Agreements', 99:3 *American Journal of International Law* (2005), 581, at 592.

⁴³ T.M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).

⁴⁴ B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

⁴⁵ See R. Stavins *et al.*, n. 7 above.

⁴⁶ By way of analogy, the 1975 Helsinki Declaration has been one of the most successful human rights instruments, despite its explicitly non-legal nature, because of its regular review conferences, which provided domestic advocates with a basis for mobilization and focused international scrutiny on the Soviet bloc's human rights performance. See E.B. Schlager, 'A Hard Look at Compliance with "Soft" Law: The Case of the OSCE', in: D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2003), 346.

⁴⁷ This paragraph is based on my personal observations at several informal off-line meetings in which I participated involving government negotiators.

⁴⁸ D. Bodansky, *Legal Options for U.S. Acceptance of a New Climate Change Agreement* (Center for Climate and Energy Solutions, 2015).

reflected and complemented existing US law. On the key provisions, the United States was successful in excluding provisions that arguably would have exceeded the President's authority:

- The Paris Agreement does not require parties to implement their NDCs; instead, it simply requires parties to pursue domestic mitigation measures, an obligation they already have under the UNFCCC, with the aim of achieving the objectives of their NDCs (Article 4.2).
- The Paris Agreement does not require developed country parties such as the United States to undertake economy-wide absolute emission targets; instead, it simply says that they 'should' do so (Article 4.4). This was the final issue to be resolved in Paris.
- The Paris Agreement includes an obligation on developed country parties to provide financial resources to assist developing countries, but this is simply 'in continuation of their existing obligations under the Convention' (Article 9.1).

For the United States, all of these issues of legal character were crucial, because of their potential effect on the choice among domestic approval processes.

CONCLUSION

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. It contains a mix of mandatory and non-mandatory provisions relating to parties' mitigation contributions, as well as to the other elements of the Durban Platform, including adaptation and finance.

One cannot definitively say how much the legally binding character of the Paris Agreement and its various provisions matters. Making a provision legally binding may provide a greater signal of commitment and greater assurance of compliance. But transparency, accountability and precision can also make a significant difference, and legal bindingness can be a double-edged sword, if it leads States not to participate or to make less ambitious commitments. Thus, the issue of legal character, though important, is only one factor in assessing the significance of the Paris outcome.

Daniel Bodansky is Foundation Professor at the Sandra Day O'Connor College of Law, Arizona State University. He is the author of the *Art and Craft of International Environmental Law* (Harvard University Press, 2010) and co-editor of *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007). He served as Climate Change Coordinator at the US Department of State from 1999 to 2001, and has consulted on the climate change issue for the United Nations Climate Change Secretariat, the Swiss Federal Office for the Environment and the Center for Climate and Energy Solutions (C2ES), formerly the Pew Center on Climate Change. He attended COP21 as an adviser to C2ES.

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