

# AMBITION AND DIFFERENTIATION IN THE 2015 PARIS AGREEMENT: INTERPRETATIVE POSSIBILITIES AND UNDERLYING POLITICS

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**Abstract** The 2015 Paris Agreement represents a historic achievement in multilateral diplomacy. After years of deeply discordant negotiations, Parties harnessed the political will necessary to arrive at a climate change agreement that strikes a careful balance between ambition and differentiation. The Paris Agreement contains aspirational goals, binding obligations of conduct in relation to mitigation, a rigorous system of oversight, and a nuanced form of differentiation between developed and developing countries. This article will explore the key building blocks of the Paris Agreement—ambition and differentiation—with an eye to mining the text of the Agreement for its interpretative possibilities and underlying politics.

**Keywords:** climate change regime, Framework Convention on Climate Change (FCCC), global stocktake, nationally determined contributions, obligations of conduct, Paris Agreement, transparency.

## I. INTRODUCTION

UN Secretary General Ban Ki-moon characterized the 2015 Paris Agreement, adopted after years of deeply contentious multilateral negotiations, as a ‘monumental triumph’.<sup>1</sup> Indeed, it is—but not because it decisively resolves the climate crisis, it does not, but because the Paris Agreement represents a historic achievement in multilateral diplomacy. Negotiations rife with fundamental and seemingly irresolvable disagreements wound their way to a successful conclusion in Paris on 12 December 2015. These negotiations, driven by unprecedented political will,<sup>2</sup> were expected to reach an agreement. However the fact

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<sup>1</sup> ‘COP21: UN chief hails new climate change agreement as “monumental triumph”’ (UN News Centre, 12 December 2015) <<http://www.un.org/apps/news/story.asp?NewsID=52802#.Vrh45f96Uk>>.

<sup>2</sup> 150 Heads of State and Government attended the leaders event, see ‘Leaders Event and High Level Segment’ (Paris COP Information Hub) <<http://newsroom.unfccc.int/cop21/parisinformationhub/cop-21cmp-11-information-hub-leaders-and-high-level-segment/>>.

that they reached a finely balanced and highly ambitious agreement, despite the many criss-crossing red lines of Parties, is a testament to the powers of multilateral diplomacy.

In the years leading up to Paris, an understanding emerged on the critical relationship between the ambition of global efforts to lower greenhouse gas (GHG) emissions, differentiation between developed and developing countries, and mobilization of the financial resources needed to support climate change efforts. The greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries, as well as for increased financial resources to support these ambitious efforts. Developed countries—scarred by the Kyoto Protocol that obliged them alone to take on absolute emission reduction targets<sup>3</sup>—were fiercely resistant to another differentiated climate agreement. They were also reluctant, with their faltering economies, to finance global efforts to combat climate change. Developing countries, for their part, were loath to relinquish the differential treatment that had benefitted them thus far, and to assume a share of the financial burden for lowering emissions. Something had to give. Ambition, it was assumed.

The resulting Paris Agreement, however, is ambitious, containing aspirational goals, binding obligations of conduct in relation to mitigation, a rigorous system of oversight, and a nuanced form of differentiation between developed and developing countries. While it may not have satisfied those who sought to replicate the 1992 Framework Convention on Climate Change<sup>4</sup> or those who believed this agreement alone would halt global climate change, the Paris Agreement represents the most ambitious outcome possible in a deeply discordant political context. And, it became possible because it struck a fine balance between ambition and differentiation. This article will explore these key building blocks of the Paris Agreement—ambition and differentiation—with an eye to mining the text of the Agreement for its interpretative possibilities and underlying politics.

## II. THE ROAD TO PARIS

The international climate change regime is comprised principally of the 1992 Framework Convention on Climate Change, the 1997 Kyoto Protocol and the decisions of Parties under these instruments. Although these instruments are important first steps towards addressing climate change and its impacts, they are widely regarded as inadequate, as well as inadequately implemented. At the Durban Conference in 2011, Parties launched a process, known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), to negotiate a new climate agreement by 2015 that would come into effect from 2020.<sup>5</sup> This agreement would be expected to govern, regulate and incentivize the next generation of climate actions.

The Durban Platform provided limited guidance on the form and content of the 2015 Agreement.<sup>6</sup> Primarily, it should take the form of a 'Protocol, another legal instrument or

<sup>3</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) FCCC/CP/1997/7/Add.1 (Kyoto Protocol) art 3.

<sup>4</sup> United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (FCCC).

<sup>5</sup> UNFCCC, 'Decision 1/CP.17 Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011' (15 March 2012) FCCC/CP/2011/9/Add.1 (Durban Platform).

<sup>6</sup> L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61(2) ICLQ 501; and see also, D Bodansky, 'The Durban Platform Negotiations:

agreed outcome with legal force’,<sup>7</sup> be agreed ‘under the Convention’ and ‘applicable to all’.<sup>8</sup> Each of these terms is a work of art and has been explored elsewhere.<sup>9</sup> Suffice it to say, disagreements emerged over these terms and the extent of their influence on the 2015 agreement. The Durban Platform also indicated the coverage of the 2015 agreement —‘inter alia, mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building’.<sup>10</sup> These came to be characterized as the Durban ‘pillars’.

At the Warsaw Conference in 2013, Parties were invited to prepare and submit ‘intended nationally determined contributions’ in 2015,<sup>11</sup> marking a key moment in the negotiations. Until then, an architectural battle had been raging between those favoring a Kyoto-style top-down prescriptive agreement and those favouring a Copenhagen-style bottom-up facilitative agreement. The Warsaw decision firmly posits the bottom-up approach as the starting point. The framing of national contributions—their scope, coverage, stringency, and whether they will be conditional—at least in the first instance, is left solely to the discretion of nations. At the Warsaw Conference, the ADP was also mandated to ‘identify ... the information that Parties will provide when putting forward their contributions’.<sup>12</sup> There was general agreement that these contributions would need to be accompanied by information sufficient to generate clarity about the nature, type and stringency of the contributions.

The Lima Conference in 2014, however, could only provide tentative guidance on the information that Parties were to put forward with their nationally determined contributions.<sup>13</sup> The Lima decision listed, in a non-prescriptive manner, the types of information to be provided by Parties while communicating their contributions. This included information relating to the base year, time frames, scope and coverage, assumptions and methodologies, and information on how a state considers its contribution to be ‘fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention’ in Article 2.<sup>14</sup> The Lima decision requested the FCCC Secretariat to prepare a ‘synthesis report on the aggregate effect of the intended nationally determined contributions’.<sup>15</sup>

The Lima Conference also produced the ‘elements of a draft negotiating text’ for the 2015 agreement.<sup>16</sup> Parties built on this text and adopted the Geneva Negotiating Text in February 2015.<sup>17</sup> This text and a series of ‘non-papers’ prepared by the ADP Co-Chairs provided the basis for negotiations in 2015.<sup>18</sup> In addition, Parties began to submit their

Goals and Options’ (Harvard Project on Climate Agreements, Massachusetts July 2012) <[http://belfercenter.ksg.harvard.edu/files/bodansky\\_durban2\\_vp.pdf](http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf)>.

<sup>7</sup> Durban Platform (n 5) para 2.

<sup>8</sup> *ibid.*

<sup>9</sup> L Rajamani, ‘The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations’ (2015) 78(5) MLR 826.

<sup>10</sup> Durban Platform (n 5) para 5.

<sup>11</sup> UNFCCC, ‘Decision 1/CP.19 Further Advancing the Durban Platform’ (31 January 2014) FCCC/CP/2013/10/Add.1 (Warsaw Decision) para 2(b).

<sup>12</sup> *ibid.*, para 2(c).

<sup>13</sup> UNFCCC, ‘Decision 1/CP.20 Lima Call for Climate Action’ (2 February 2015) FCCC/CP/2014/10/Add.1 (Lima Call for Climate Action) para 11.

<sup>14</sup> *ibid.*, para 14.

<sup>15</sup> *ibid.*, para 16.

<sup>16</sup> *ibid.*, Annex: ‘Elements for a draft negotiating text’.

<sup>17</sup> UNFCCC, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (8–13 February 2015) Agenda item 3: Implementation of all the elements of decision 1/CP.17 Negotiating text (25 February 2015) FCCC/ADP/2015/1 (Geneva Negotiating Text).

<sup>18</sup> See eg Ad Hoc Working Group on the Durban Platform for Enhanced Action, ‘Non-paper: Note by the Co-Chairs’ (5 October 2015) ADP.2015.8.InformalNote; and Ad Hoc Working Group

intended nationally determined contributions. A total of 119 contributions from 147 Parties covering 86 per cent of global emissions were submitted and considered in the Secretariat's Synthesis Report produced on 30 October 2015.<sup>19</sup> A further 14 contributions have been submitted since.

Parties arrived in Paris armed with a 54-page informal note covering the full breadth of issues and range of Parties' proposals.<sup>20</sup> Two weeks of late nights and frenetic negotiations later, and with skilled leadership from the French, Parties reached the historic 2015 Paris Agreement.

### III. AMBITION: GOALS, OBLIGATIONS AND OVERSIGHT

The Paris Agreement is ambitious in several respects. It sets an ambitious 'direction of travel' for the climate regime and complements this with extensive obligations, including binding obligations of conduct in relation to mitigation contributions for Parties. It also establishes a rigorous and binding regime of oversight.

#### *A. Ambitious Goals*

The Paris Agreement resolves to hold the increase in global average temperature to 'well below 2°C' above pre-industrial levels, and to pursue efforts towards a 1.5°C temperature limit.<sup>21</sup> This was a key demand of the small island States and least developed countries—for them even a 'well below 2°C' temperature increase poses an existential threat. The world is not currently on a pathway to 1.5°C, far from it. Such a pathway would dramatically shrink the remaining carbon space, with troubling implications for countries like India that have yet to lift the vast majority of their citizens from the scourge of poverty.<sup>22</sup> Nevertheless, the 'well below 2°C' target and aspirational 1.5°C goal sets an ambitious direction of travel for the climate regime. It also signals solidarity with the small island States on the frontlines of climate impacts.

This ambitious long-term temperature goal is to be achieved, *inter alia*, through global peaking of GHG emissions as soon as possible, and rapid reductions thereafter 'so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the century'.<sup>23</sup> Although Parties had proposed quantitative global mitigation goals such as those identifying specific peaking dates or percentage reductions from 2010 levels,<sup>24</sup> in the end only this qualitative goal that built on FCCC

on the Durban Platform for Enhanced Action, 'Non-paper on elements for a draft negotiating text: Updated non-paper on Parties' views and proposals' (11 November 2014) ADP.2014.11.NonPaper.

<sup>19</sup> See UNFCCC, Synthesis report on the aggregate effect of the intended nationally determined contributions: Note by the secretariat (30 October 2015) FCCC/CP/2015/7. 'INDCs as communicated by Parties' <<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>>.

<sup>20</sup> Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action Work of the ADP contact group (6 November 2015, reissued on 11 November 2015) ADP.2015.11. InformalNote.

<sup>21</sup> UNFCCC, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1, Annex (Paris Agreement) art 2(1).

<sup>22</sup> See G Ananthakrishnan, '1.5°C target is a tall order', *The Hindu*, 9 December 2015.

<sup>23</sup> Paris Agreement (n 21) art 4(1). <sup>24</sup> See Informal note (n 20) art 3.

language and tipped a hat to the ‘net zero’ concept proved possible. The net zero GHG emissions concept requires anthropogenic GHG emissions to be reduced as far as possible with the remainder made up through enhanced removals of GHGs.<sup>25</sup> In addition, Parties are to ‘strive to formulate and implement’ long-term low GHG emission development strategies,<sup>26</sup> as these would play a critical role in shifting development trajectories and investment patterns towards meeting the long-term temperature goal.

The extent to which Parties are able to effectively embark on a pathway to meeting the long-term temperature goal will determine the extent of adaptation Parties will need to engage in. The Paris Agreement thus adopts a qualitative ‘global goal on adaptation’ to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change.<sup>27</sup> The Africa Group had proposed a quantifiable goal that would assess adaptation impacts and costs flowing from the agreed temperature goal.<sup>28</sup> Although the notion of a quantifiable adaptation goal did not garner sufficient support, the Paris Agreement recognizes the critical interlinkages between the achievement of long-term goals, including in relation to temperature, and efforts related to mitigation, adaptation and means of implementation.<sup>29</sup>

### *B. Extensive Obligations*

In order to meet the long-term temperature goal, Parties are subject to binding obligations of conduct in relation to national mitigation contributions.<sup>30</sup> The most significant of these is contained in Article 4(2), which reads: ‘Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.’

There are many treasures to be mined in this carefully negotiated text. First, unlike the majority of provisions in the Paris Agreement that apply to ‘Parties’,<sup>31</sup> this provision applies to ‘each Party’, thus creating individual obligations for Parties. Second, this provision, like selective provisions in the Paris Agreement,<sup>32</sup> uses the imperative ‘shall’ both in relation to preparing, communicating and maintaining national contributions, as well as pursuing domestic measures. Third, while these are binding obligations, they are obligations of conduct rather than result. The term ‘intends to

<sup>25</sup> See, K Levin, J Morgan and J Song, ‘Insider: Understanding the Paris Agreement’s Long-term Goal to Limit Global Warming’ (World Resources Institution, 15 December 2015) <<http://www.wri.org/blog/2015/12/insider-understanding-paris-agreement%E2%80%99s-long-term-goal-limit-global-warming>>.

<sup>26</sup> Paris Agreement (n 21) art 4(19).

<sup>27</sup> *ibid*, art 7(1).

<sup>28</sup> See Submission by Swaziland on behalf of the African Group on adaptation in the 2015 Agreement (8 October 2013) <[http://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_african\\_group\\_workstream\\_1\\_adaptation\\_20131008.pdf](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_adaptation_20131008.pdf)>.

<sup>29</sup> Paris Agreement (n 21) art 14.

<sup>30</sup> See contra, R Falk, ‘“Voluntary” International Law and the Paris Agreement’ (16 January 2016) <<https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>>.

<sup>31</sup> Paris Agreement (n 21) arts 3, 4(1), 4(2), 4(8), 4(13), 4(15), 4(16), 4(19) 5(1), 5(2), 6(1), 6(3), 6(8), 7(2), 7(4), 7(5), 7(6), 7(7), 8(1), 8(3), 9(2), 10(1), 10(2), 11(4), 12, and 14(4).

<sup>32</sup> *ibid*, arts 4(2), 4(5), 4(8), 4(9), 4(13), 4(15), 4(16), 4(17), 7(9), 7(13), 9(1), 9(7), 10(2), 10(6), 11(4), 12, 13(7), 13(9), 13(11), 13(13) and 13(14).

achieve' in the first sentence establishes a good faith expectation that Parties intend to achieve their contributions, but stops short of requiring them to do so. The second clause in the second sentence, 'with the aim of achieving the objectives of such contributions', performs a similar function. It requires Parties to aim at achieving the objectives of their contributions.<sup>33</sup>

Parties thus have binding obligations of conduct to prepare, communicate and maintain contributions, as well as pursue domestic measures. There is also a good faith expectation that Parties intend to and will aim to achieve the objectives of their contributions. In the lead-up to Paris many Parties, including the European Union (EU) and small island States, had argued that Parties should be required to implement and/or achieve their contributions, thus imposing an obligation of result on them. This was strenuously opposed by the US, China and India, among others, who did not wish to subject themselves to legally binding obligations of result. The Paris Agreement deferred to the latter in this respect, but ensured that Parties had binding obligations of conduct coupled with a good faith expectation of results. The good faith expectation of results is further underlined in provisions later in the Agreement that require each Party to provide the information necessary to track progress in implementing and achieving its nationally determined contribution,<sup>34</sup> and subject Parties to a 'facilitative, multilateral consideration of progress' with respect to such implementation and achievement.<sup>35</sup>

The term 'objectives' in this provision also merits scrutiny. The nationally determined contributions Parties have submitted thus far contain a range of objectives—some quantitative, such as absolute emission reduction targets,<sup>36</sup> and others qualitative, such as goals to adopt climate friendly paths.<sup>37</sup> Some contributions are conditional (as for instance on the provision of international support),<sup>38</sup> while others are unconditional.<sup>39</sup> In the circumstances, an obligation of result, had one existed, may not lend itself to enforcement.

The nationally determined contributions referred to in Article 4(2) are to be recorded in a public registry maintained by the Secretariat.<sup>40</sup> The US, Canada and New Zealand, among others, favoured this approach, arguing that housing contributions outside the treaty would enable speedy and seamless updating of contributions. Others were concerned that if contributions were housed outside the treaty, Parties would enjoy excessive discretion in revising their contributions, potentially even downwards. The

<sup>33</sup> The comma ensures that the final clause modifies Parties who 'pursue' those measures rather than the measures themselves. Thus the 'with' functions not as a preposition qualifying 'measures' but as a conjunction qualifying 'pursue'.

<sup>34</sup> Paris Agreement (n 21) art 13(7)(b).

<sup>35</sup> *ibid*, art 13 (11).

<sup>36</sup> eg United States' Intended Nationally Determined Contribution (31 March 2015), all INDCs at <<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>>.

<sup>37</sup> India's Intended Nationally Determined Contribution (2 October 2015) 28–9. In addition to quantitative emissions intensity targets, India's INDC identifies qualitative objectives such as to 'propagate a healthy and sustainable way of living based on traditions and values of conservation and moderation'.

<sup>38</sup> Arguably India's. See India's INDC, *ibid*.

<sup>39</sup> eg Brazil's Intended Nationally Determined Contribution (28 September 2015) 2. It is worth noting that Parties considered the possibility of requiring all contributions to be unconditional. No agreement proved possible on this in Paris, but the Ad Hoc Working Group on the Paris Agreement (APA) has been tasked with developing further guidance on 'features' of nationally determined contributions for consideration and adoption by the CMA. See Decision 1/CP.21 (n 21) para 26.

<sup>40</sup> *ibid*, art 4(12).

Paris Agreement, however, provides for the development of modalities and procedures for the operation and use of the public registry.<sup>41</sup> These modalities and procedures will presumably circumscribe the discretion Parties have. The Agreement also permits Parties to adjust their contributions, but only with a view to enhancing their level of ambition.<sup>42</sup> In any case, notwithstanding the fact that contributions are housed outside the instrument, Article 4(2) implicitly signals that national contributions are an integral part of the Paris Agreement.

In addition to the binding obligation to prepare, communicate and maintain contributions as well as to take domestic measures, Parties are subject to further obligations of conduct. Parties are required to communicate their contributions every five years.<sup>43</sup> While communicating their nationally determined contributions, Parties are required to provide the information necessary for clarity, transparency and understanding.<sup>44</sup> These provisions are phrased in mandatory terms ('shall'), and thus constitute binding obligations for Parties. These provisions also oblige Parties to comply with decisions to be taken by the supreme decision-making body for the new agreement, known as the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA). The Paris Agreement requires Parties to communicate contributions every five years<sup>45</sup> and provide information necessary for their clarity, transparency and understanding<sup>46</sup> in accordance with decision 1/CP.21<sup>47</sup> and 'relevant decisions' of the CMA.<sup>48</sup> It could be argued that the Paris Agreement by incorporating these decisions makes them binding per se,<sup>49</sup> or it may be possible to read the Paris Agreement as having authorized the CMA to engage in binding law-making. In either case Parties are obliged to comply with the relevant decisions. It is worth noting that the 'relevant decisions' may provide Parties with discretion. In relation to information, for instance, decision 1/CP.21 agrees that Parties 'may include, as appropriate, inter alia' several listed pieces of information.<sup>50</sup>

The Paris Agreement also requires Parties to account for their nationally determined contributions in accordance with 'guidance' adopted by the CMA.<sup>51</sup> Although the Agreement requires Parties to do so in mandatory terms, the use of the word 'guidance' may militate against an argument that the decision containing the guidance is intended to bind Parties. Much will depend on the terms—mandatory or discretionary—in which the decision is drafted.

Multilateral environmental agreements do not typically permit their supreme bodies, often referred to as the Conference of Parties (COP) to make legally binding decisions.

<sup>41</sup> Decision 1/CP.21 (n 21) para 29.

<sup>42</sup> Paris Agreement (n 21) art 4(11).

<sup>43</sup> *ibid*, art 4(9).

<sup>44</sup> *ibid*, art 4(8).

<sup>45</sup> *ibid*, art 4(9). <sup>46</sup> *ibid*, art 4(8).

<sup>47</sup> This is the decision accompanying the Paris

Agreement.

<sup>48</sup> These decisions are to be negotiated in the next few years and adopted after the Paris Agreement enters into force.

<sup>49</sup> See eg for a similar provision, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted on 4 August 1995, entered into force 11 December 2001) A/CONF.164/37, art 10(c).

<sup>50</sup> Decision 1/CP.21 (n 21) para 27.

<sup>51</sup> Paris Agreement (n 21) art 4(13). See also Decision 1/CP.21 (n 21) paras 31 and 32. It is worth noting that the guidance on accounting applies only to second and subsequent contributions, although Parties could choose to apply it before.

The legal status of COP decisions<sup>52</sup> depends on their enabling clause,<sup>53</sup> the language and content of the decisions, and Parties' behaviour and legal expectations. All of these are typically prone to varying interpretations. From a formal legal perspective COP decisions are not, absent explicit authorization in the treaty, legally binding.<sup>54</sup> Neither the FCCC nor the Kyoto Protocol explicitly authorize binding law-making by the COP. The FCCC requires Parties to use 'comparable methodologies' to be agreed upon by the COP.<sup>55</sup> The Kyoto Protocol requires Parties to use 'guidelines' to be adopted by the Meeting of the Parties.<sup>56</sup> Both these provisions could be read to provide implied authority to the COP to engage in binding law-making, and the decisions, should they be phrased in mandatory terms, could be binding.

The fact that the Paris Agreement provides for potentially binding law-making in relation to five-yearly communication, provision of information and accounting is reflective of the fact that these rules of the game are crucial elements of the Paris package for some Parties, in particular the EU. It was not possible, however, to finalize them in Paris. These provisions permit Parties to continue the law-making exercise. The strength of these provisions, as well as the transparency framework, discussed below, can be attributed to the concerted efforts of an informal group of key negotiators from developed and developing countries, including South Africa, the EU, the US, Switzerland, New Zealand, Australia and others, as well as the Singaporean diplomat who facilitated the formal negotiations. This informal group that came to be called 'Friends of Rules' formed after Lima when they realized that the rules of the game, of profound importance to the integrity of the agreement, were getting short shrift in a process focused primarily on the headline political issues.

In addition to this array of obligations, the Paris Agreement sets a firm expectation that for every five-year cycle Parties must put forward contributions more ambitious than their last. The relevant provision reads: '[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution, and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances'.<sup>57</sup>

This provision applies to 'Each Party' not to 'Parties' in general. The use of the auxiliary verb 'will' signals a strong expectation, albeit not a mandatory obligation, that each Party will undertake more ambitious actions over time. This notion, that finds reflection in the Lima decision,<sup>58</sup> had come to be characterized in the

<sup>52</sup> COP decision may be considered as a 'subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions', Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31 (3)(a). See *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 248 (para 46).

<sup>53</sup> The enabling clause in the relevant treaty may authorize a COP decision to be binding as in the case of Article 2(9), Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3, or explicitly require further consent for it to be binding, as for example in the case of art 18, Kyoto Protocol, see J Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 LJIL 1, 24. <sup>54</sup> See, Brunnée (n 52) 32. <sup>55</sup> FCCC (n 4) art 4(1).

<sup>56</sup> Art 7(1) read with art 7(4), Kyoto Protocol, and Decision 15/CMP.1. UNFCCC, 'Decision 15/CMP.1 Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol' (30 March 2006) FCCC/KP/CMP/2005/8/Add.2.

<sup>57</sup> Paris Agreement (n 21) art 4(3).

<sup>58</sup> Lima Call for Climate Action (n 13) para 10.



negotiations as ‘no-backsliding’. Many developing countries advocated it as a way to ensure that developed countries did not take on commitments less rigorous than their Kyoto commitments. It also formed the basis for Brazil’s ‘concentric differentiation’ approach that envisioned gradual progression towards more ambitious type and scale of commitments over time for all Parties.<sup>59</sup>

It is worth noting that the provision still leaves to national determination what Parties contributions will be and how these will reflect their ‘highest possible ambition’ and ‘common but differentiated responsibilities and respective capabilities, in light of different national circumstances’. Progression could be reflected in several ways. It could be demonstrated through more stringent numerical commitments of the same form, ie a decrease in emissions intensity from a base year over a previous intensity target, or an increase in absolute reductions over an earlier absolute reduction target. It could also be reflected in the form of commitments. For instance, Parties that have currently undertaken sectoral measures could be expected to take on economy-wide emissions intensity or business as usual (BAU) deviation targets, those that currently have economy-wide emissions intensity or BAU deviation targets could be expected to take on economy-wide absolute emissions reduction targets. The provision on progression is not prescriptive in relation to how progression (ie in form or rigour) is determined, and it is ambiguous on who determines progression, thus implicitly leaving progression to self-determination.

In addition to the requirement that Parties are to undertake more ambitious mitigation contributions over time, the Paris Agreement provides that ‘[t]he efforts of all Parties will represent a progression over time’.<sup>60</sup> This cross-cutting provision extends the progression requirement beyond mitigation to areas such as adaptation and support. This provision is distinct from the mitigation progression provision in two respects. First, it applies to ‘all Parties’ not ‘each Party’ indicating that it could be interpreted as a collective rather than individual requirement. Second, it uses the term ‘efforts’ rather than ‘nationally determined contributions’. This is because the term ‘efforts’ captures a range of actions that includes mitigation contributions,<sup>61</sup> adaptation planning and implementation,<sup>62</sup> and provision of financial resources to developing countries.<sup>63</sup> Both these provisions, however, are similar in that they use the auxiliary verb ‘will’ and at a minimum set strong expectations of more ambitious actions over time. Indeed, given the negotiating context, the rigorous system of oversight and the expectation of good faith implementation, Parties will be constrained to comply with these provisions.

Whether they place collective or individual expectations on Parties, and even if progression is self-determined, together these provisions bear tremendous significance, as they are designed to ensure that the regime as a whole is moving towards ever more ambitious and rigorous actions from Parties—that there is a ‘direction of travel’ for the regime, as it were. These provisions are also designed to ensure there will be continuing differentiation in the near future, since developed and developing countries, given the current balance of responsibilities in the FCCC and Kyoto Protocol, are at different starting points.

<sup>59</sup> See ‘Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties’ (6 November 2014) <[http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73\\_99\\_130602104651393682-BRAZIL%20ADP%20Elements.pdf](http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf)>.

<sup>60</sup> Paris Agreement (n 21) art 3.

<sup>61</sup> *ibid*, art 4(2).

<sup>62</sup> *ibid*, art 7(9).

<sup>63</sup> *ibid*, art 9(1).

The Paris Agreement also places requirements on Parties in relation to adaptation, albeit softer ones peppered with phrases like ‘as appropriate’ that permit discretion. Parties are obliged to engage in adaptation planning and implementation of adaptation actions (‘Each Party shall’), and nudged to (‘Parties should’) submit and update adaptation communications,<sup>64</sup> strengthen cooperation on adaptation,<sup>65</sup> and enhance understanding, action and support with respect to loss and damage.<sup>66</sup>

### *C. Rigorous Oversight*

The Paris Agreement establishes a rigorous system of oversight to ensure effective implementation of the many requirements it places on Parties. This system of oversight is vital to the conceptual apparatus of the Agreement. In the lead-up to the Paris Conference, common ground emerged amongst Parties that the Paris Agreement, unlike the Kyoto Protocol, should reflect a hybrid architecture combining ‘bottom up’ nationally determined contributions with ‘top down’ elements such as rules on transparency. Battle lines were drawn, however, on how prescriptive the top-down elements should be. Although some Parties were keen to retain as much autonomy as possible, others fearing that boundless self-determination would be exercised in self-serving ways sought a more prescriptive regime. The more autonomy Parties enjoy, they believed, the less certain it is that the regime will meet its long-term temperature goal. The Paris Agreement strikes a balance between these competing demands—it preserves autonomy for States in the determination of their contributions but strengthens oversight of these contributions through a robust transparency system, a global stocktake process, and a compliance mechanism. In so doing, it circumscribes the self-serving nature of self-determination and generates normative expectations.

#### *1. Transparency*

The Paris Agreement creates a robust ‘transparency framework for action and support’ that places extensive informational demands on all Parties,<sup>67</sup> and subjects information on mitigation and finance to close scrutiny.<sup>68</sup> This transparency framework, unlike the existing arrangements,<sup>69</sup> is a framework applicable to all countries albeit with ‘built-in flexibility’ tailored to Parties’ differing capacities.<sup>70</sup> In the lead-up to Paris, and until the end of the conference, many developing Parties, in particular the Like Minded Developing Countries (LMDCs),<sup>71</sup> argued for a bifurcated system that placed differing transparency requirements on developed and developing countries. The Umbrella Group and the EU eventually prevailed on the LMDCs, and the Paris Agreement contains a framework applicable to all.

<sup>64</sup> *ibid.*, art 7(10) read with art 13(8).

<sup>65</sup> *ibid.*, art 7(7).

<sup>66</sup> *ibid.*, art 8(3).

<sup>67</sup> *ibid.*, art 13.

<sup>68</sup> *ibid.*, art 13(11).

<sup>69</sup> Communication of Information under FCCC (n 4) Article 12, and 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’ (15 March 2011) FCCC/CP/2010/7/Add.1 (Cancun Agreements (LCA)) paras 40 and 44 (Annex I Parties) and paras 60 and 63 (non-Annex I Parties).

<sup>70</sup> Paris Agreement (n 21) art 13(1) and 13(2).

<sup>71</sup> The LMDCs are a coalition of developing countries comprising Bolivia, China, Cuba, Dominica, Ecuador, Egypt, El Salvador, India, Iran, Iraq, Malaysia, Mali, Nicaragua, Philippines, Saudi Arabia, Sri Lanka, Sudan and Venezuela.

The purpose of the transparency framework is to ensure clarity and tracking of progress towards achieving Parties' nationally determined contributions and adaptation actions,<sup>72</sup> as well as to provide clarity on support provided and received by Parties.<sup>73</sup> Towards this end, all Parties are required biennially<sup>74</sup> to provide: a national inventory report of GHG emissions and removals;<sup>75</sup> information necessary to track progress in implementing and achieving mitigation contributions;<sup>76</sup> and information related to climate impacts and adaptation.<sup>77</sup> Further, developed countries are required to provide information on financial, technology and capacity building support they provide to developing countries,<sup>78</sup> and developing countries are to provide information on the support they need and receive.<sup>79</sup> It is worth noting that there is a hierarchy in the legal character of the informational requirements placed on Parties. Informational requirements in relation to mitigation are mandatory individual obligations applicable to all ('each Party shall'). Informational requirements in relation to finance are mandatory collective obligations for developed countries ('developed country Parties shall') and recommendations for developing countries ('developing country Parties should'). Informational requirements in relation to adaptation are recommendations ('each Party should'), and allow Parties discretion ('as appropriate').

The information submitted by all Parties in relation to mitigation and by developed country Parties in relation to the provision of support will be subject to a technical expert review.<sup>80</sup> This review will consider the support provided to Parties, the implementation of their contributions, and the consistency of the information they provide with common modalities, procedures and guidelines for transparency of action and support.<sup>81</sup> In addition each Party is expected to participate in a 'facilitative, multilateral consideration of progress' with respect to its efforts in relation to finance, and the implementation and achievement of its mitigation contributions.<sup>82</sup> Both expert reviews<sup>83</sup> and multilateral assessments<sup>84</sup> build on elements of the existing transparency arrangements. It is unclear at this point, however, how these processes will be conducted, who will conduct them, what its outputs will be, and how these outputs will feed into the global stocktake. The modalities, procedures and guidelines, elaborating on these processes that will supersede the existing arrangements, are to be developed by 2018 and applied after the Paris Agreement enters into force.<sup>85</sup>

## 2. *Global Stocktake*

The transparency framework is complemented by a 'global stocktake' every five years to assess collective progress towards long-term goals.<sup>86</sup> The global stocktake is crucial to the system of oversight. In its absence it would be impossible to gauge if national efforts add up to what is necessary to limit temperature increase to 2°C. It will also be difficult to

<sup>72</sup> Paris Agreement (n 21) art 13(5).

<sup>73</sup> *ibid.*, art 13(6).

<sup>75</sup> Paris Agreement (n 21) art 13(7)(a).

<sup>78</sup> *ibid.*, art 13(9).

<sup>80</sup> *ibid.*, art 13(11), read with Decision 1/CP.21 (n 21) paras 97 and 98.

<sup>81</sup> *ibid.*, art 13(12).

<sup>84</sup> Cancun Agreements (LCA) (n 68) paras 44 and 63.

<sup>86</sup> *ibid.*, art 14.

<sup>74</sup> Decision 1/CP.21 (n 21) para 90.

<sup>76</sup> *ibid.*, art 13(7)(b).

<sup>77</sup> *ibid.*, art 13(8).

<sup>79</sup> *ibid.*, art 13(10).

<sup>83</sup> Kyoto Protocol (n 3) art 8.

<sup>85</sup> Paris Agreement (n 21) art 13(12).

assess if States are contributing as much as they should given their responsibilities and capabilities.

The Paris Agreement provides broad guidance on the nature, purpose, tasks for and outcome of the stocktake, and leaves the mechanics to be finalized by Parties before entry into force.<sup>87</sup> The Paris Agreement envisions the stocktake as a ‘comprehensive and facilitative’<sup>88</sup> exercise—thus reinforcing the notion that the Paris Agreement addresses not just mitigation but also adaptation and support, and that it is a facilitative rather than a prescriptive instrument. Further, the Agreement is expressively silent on whether the stocktake extends only to the implementation of Parties’ current contributions or also to the ambition of proposed contributions; arguably it covers both.

The purpose of the stocktake is to ‘assess the collective progress towards achieving the purpose of this Agreement and its long term goals’.<sup>89</sup> The ‘purpose’ of the Agreement is in Article 2, which includes the long-term temperature goal, and the context for implementation.<sup>90</sup> It is unclear what the ‘long term goals’ are. While mitigation<sup>91</sup> and adaptation<sup>92</sup> (albeit qualitative) goals have been identified in the Agreement, there are no clearly identifiable goals in relation to finance, technology and capacity-building. This introduces an element of uncertainty into the assessment of progress. Moreover, the stocktake is only authorized to consider ‘collective’ progress, thus insulating individual nations from any assessments of adequacy in relation to their actions.<sup>93</sup>

The agreement sets various tasks for the stocktake, as for instance reviewing the overall progress made in achieving the global goal on adaptation.<sup>94</sup> It also identifies initial inputs to the stocktake, including information provided by Parties on finance,<sup>95</sup> available information on technology development and transfer<sup>96</sup> and information generated through the transparency framework.<sup>97</sup> Others inputs will be identified in the years to come.<sup>98</sup>

The global stocktake is required to assess collective progress ‘in the light of equity and the best available science’.<sup>99</sup> The inclusion of ‘equity’ was a negotiating coup for several developing countries, in particular the Africa Group, that had long championed the need to consider Parties’ historical responsibilities, current capabilities and development needs in setting expectations for nationally determined contributions.<sup>100</sup> It is unclear at this point how equity, yet to be defined in the climate regime, will be understood and incorporated in the global stocktake process. Nevertheless, the inclusion of equity in the global stocktake leaves the door open for a dialogue on equitable burden sharing. Finally, the outcome of the stocktake is required to inform Parties in updating and enhancing their actions and support ‘in a nationally determined manner’.<sup>101</sup> This is a

<sup>87</sup> Decision 1/CP.21 (n 21) paras 99–101.

<sup>88</sup> Paris Agreement (n 21) art 14(1).

<sup>89</sup> *ibid.*

<sup>90</sup> Art 2 is identified as the ‘purpose’ of the Agreement by art 3, *ibid.*

<sup>91</sup> *ibid.*, art 4(1).

<sup>92</sup> *ibid.*, art 7(1).

<sup>93</sup> The transparency system does not assess adequacy either.

<sup>94</sup> Paris Agreement (n 21) art 7(14)(d).

<sup>95</sup> *ibid.*, art 9(6).

<sup>96</sup> *ibid.*, art 10(6).

<sup>97</sup> *ibid.*, art 13(5) and 13(6).

<sup>98</sup> Decision 1/CP.21 (n 21) para 99 identifying sources of input ‘including but not limited to’.

<sup>99</sup> Paris Agreement (n 21) art 14(1).

<sup>100</sup> See, Submission by Swaziland on behalf of the African Group Under Workstream I of the ADP (8 October 2013) <[https://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_african\\_group\\_workstream\\_1\\_20131008.pdf](https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf)>.

<sup>101</sup> Paris Agreement (n 21) art 14(3).

carefully balanced provision. On the one hand, it links the outcome of the stocktake with the process of updating Parties' contributions,<sup>102</sup> thus generating strong expectations that Parties will enhance the ambition of their actions in line with the findings of the stocktake. On the other hand, it underscores the 'nationally determined' nature of contributions, thus addressing concerns over external ratchets for enhanced actions and loss of autonomy.

The first stocktake is set to take place in 2023,<sup>103</sup> once the mechanics of the stocktake have been worked out, and the Agreement has entered into force. There was a felt need for an earlier stocktake to guide Parties, especially those with contributions set to five-year time frames, in updating and revising their contributions. Parties agreed therefore to convene a 'facilitative dialogue' in 2018 to take stock of the collective efforts of Parties in relation to the long-term mitigation goal identified in the Agreement, and for this stocktake to inform the preparation of their nationally determined contributions.<sup>104</sup>

The global stocktake is cleverly designed to ensure both that it subtly constrains national determination in service of the long-term goals, and that it is palatable to all. Even to the LMDCs, for whom any assessment process (as it would necessarily impinge on sovereign autonomy) was an anathema. The global stocktake is a facilitative process. It assesses collective not individual progress. It assesses collective progress on mitigation as well as on support. It will consider not just science but also equity in determining adequacy of collective progress. And, finally, ratcheting of contributions as a result of the stocktake, if any, will be left to national determination.

### 3. Compliance

The Paris Agreement establishes a mechanism to facilitate implementation of and promote compliance with its provisions. The skeletal provision establishing this mechanism provides only minimal guidance on the nature of the compliance mechanism, leaving the modalities and procedures to be negotiated in the years to follow.<sup>105</sup> The relevant provision requires the mechanism to address both implementation of and compliance with the Agreement. This mechanism is to consist of an expert-based facilitative committee that is to function in a transparent, non-adversarial and non-punitive manner.<sup>106</sup> This guidance addresses concerns of those who feared—across the developed–developing country divide—that the Paris Agreement would recreate a Kyoto-like compliance committee with an enforcement branch and severe compliance consequences.

#### IV. DIFFERENTIATION: ARTICULATION AND OPERATIONALIZATION

The ambitious goals, extensive obligations and rigorous oversight of the Paris Agreement, if applied uniformly, would act as a straitjacket for most developing countries. The Paris Agreement therefore is firmly anchored in the principle of common but differentiated responsibilities and respective capabilities, albeit in the

<sup>102</sup> See also *ibid.*, art 4(9).

<sup>103</sup> *ibid.*, art 14(2).

<sup>105</sup> Paris Agreement (n 21) art 15(3), and Decision 1/CP.21 (n 21) paras 102 and 103.

<sup>106</sup> Paris Agreement (n 21) art 15(2).

<sup>104</sup> Decision 1/CP.21 (n 21) para 20.

light of different national circumstance. It also captures a nuanced form of differentiation in favour of developing countries, and extends financial, technological and capacity-building support to developing countries. It is this compromise on differentiation and support that untied the proverbial Gordian knot and cleared the way for the Paris Agreement to be adopted.

Prior to the Paris Conference, Parties had locked horns on three interrelated issues: the relationship of the 1992 Framework Convention on Climate Change, a deeply differentiated instrument, to the Paris Agreement ‘applicable to all’;<sup>107</sup> the articulation of the principle of common but differentiated responsibility and respective capabilities, a much cited and beloved principle for some, in the Paris Agreement; and the operationalization of this principle across the Durban pillars.

#### *A. Relationship of the 2015 Paris Agreement to the 1992 Framework Convention on Climate Change*

The 1992 Framework Convention on Climate Change is unabashedly favourable to developing countries—from the recognition in its preamble that the share of emissions from developing countries will grow to meet their social and development needs<sup>108</sup> to annex-based differentiation that exempts developing countries from emission reduction obligations.<sup>109</sup> Developed countries ensured in Durban that the Paris Agreement would be ‘applicable to all’,<sup>110</sup> while developing countries ensured that the Paris agreement would be ‘under the Convention’.<sup>111</sup> Developed and developing countries were pitched against each other in Paris. While the former envisioned the Paris Agreement as containing a distinct vision, representing a paradigm shift from the FCCC, the latter were keen to ensure that the Paris Agreement flows from the FCCC, and is guided by and interpreted in the light of it. This disagreement rippled through negotiations on the entire text, but was in evidence in particular in the negotiations on the chapeau to the purpose of the agreement, which reads: ‘[t]his Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty’.<sup>112</sup>

Parties disagreed on whether the Paris Agreement should enhance the implementation of the Convention, as most developing countries argued it should, or just the objective of the Convention,<sup>113</sup> as most developed countries favoured. The former would engage the entirety of the Convention, including its conceptual architecture of which differentiation is such an important part. The latter would only engage the GHG stabilization objective of the Convention, thus implicitly permitting a different set of arrangements, including on differentiation, in service of the objective of the Convention. The final resolution, excerpted above, a carefully balanced compromise between China and the Umbrella Group,<sup>114</sup> is cloaked in ambiguity. The phrase ‘in enhancing the implementation of

<sup>107</sup> Durban Platform (n 5) para 5.

<sup>108</sup> FCCC (n 4) preambular recital 3.

<sup>109</sup> See *ibid.*, art 4 read with Annex I and II.

<sup>110</sup> Durban Platform (n 5) para 5.

<sup>111</sup> *ibid.* It is worth noting that until the final days of the Paris negotiations, China continued to urge Parties to title the 2015 Agreement, the ‘Paris Agreement under the UN Framework Convention on Climate Change’.

<sup>112</sup> Paris Agreement (n 21) art 2(1) chapeau.

<sup>113</sup> FCCC (n 4) art 2.

<sup>114</sup> The Umbrella Group usually includes Australia, Canada, Japan, New Zealand, Kazakhstan, Norway, the Russian Federation, Ukraine and the US.

the Convention, including its objective' could be read as an acceptance of the developing country position that this Agreement *will enhance* the implementation of the Convention. This would permit the entirety of the Convention to be engaged in interpreting the provisions of the Paris Agreement. The phrase could also be read as a statement of fact that the Agreement, such as it is, *enhances* the implementation of the Convention. Thus limiting, by implication, the engagement of the entirety of the Convention in interpreting the Paris Agreement. In this reading, the Convention is engaged only in so far as it is specifically referred to in the Paris Agreement.<sup>115</sup>

The Paris Agreement, adopted pursuant to the Durban Platform,<sup>116</sup> is an agreement 'under the Convention'. It is a related legal instrument, as is the Kyoto Protocol. Some provisions of the Convention explicitly apply to related legal instruments.<sup>117</sup> In addition, the negotiating history and context to the term 'under the Convention' in the Durban Platform decision suggests that the principles of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, apply to the Paris Agreement. Further, specific provisions of the Convention are engaged when the Paris Agreement so provides.<sup>118</sup> Beyond this, there is a general legal imperative to interpret agreements in good faith in accordance with their ordinary meaning,<sup>119</sup> in context,<sup>120</sup> and harmoniously in relation to legal instruments covering the same subject matter.<sup>121</sup> The ambiguous nature of many provisions in both the Paris Agreement and the FCCC will make it easier to achieve harmonious construction between them, and to avoid normative conflicts.

### *B. Articulating the CBDRR Principle in the Paris Agreement*

The principle of common but differentiated responsibilities and respective capabilities—the CBDRR principle—finds expression in the FCCC, and is the basis of the burden-sharing arrangements crafted under the FCCC and its Kyoto Protocol. As it is considered the ideological inspiration for the contentious annex-based differentiation, every instance of its articulation in the Paris Agreement is a product of careful negotiation.

The Durban Platform that launched the negotiating process towards the 2015 agreement, unusually so for the time, contained no reference to common but differentiated responsibilities and respective capabilities. Developed countries had argued that references to 'common but differentiated responsibilities' must be qualified with a statement that this principle must be interpreted in the light of contemporary economic realities. Many developing countries, argued in response that this would be tantamount to amending the FCCC. The text was thus drafted such that this new agreement was to be 'under the Convention'<sup>122</sup> thereby implicitly engaging its principles, including the CBDRR principle. The Doha and Warsaw decisions in 2012 and 2013 contained a general reference to 'principles' of the

<sup>115</sup> See eg Paris Agreement (n 21) arts 1, 4(14), 5, 7(7), 9(1), 9(8) and 9(10).

<sup>116</sup> *ibid*, preambular recital 2.

<sup>117</sup> FCCC (n 4) arts 2, 7(2) and 14(2).

<sup>118</sup> For instance the financial mechanism of the Convention serves as the financial mechanism of the Agreement, Paris Agreement (n 21) art 9(8). <sup>119</sup> VCLT (n 51) art 31(1). <sup>120</sup> *ibid*, art 31.

<sup>121</sup> International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) A/CN.4/L.682, 25 (noting 'a strong presumption against normative conflict' in international law and that 'treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict').

<sup>122</sup> Durban Platform (n 5) para 2.

Convention,<sup>123</sup> but no specific reference to the CBDRRRC principle. The Lima Call for Climate Action of 2014 contains an explicit reference to the CBDRRRC principle, but it is qualified by the clause ‘in light of different national circumstances’.<sup>124</sup> This qualification—which represents a compromise arrived at between the US and China<sup>125</sup>—arguably shifts the interpretation of the CBDRRRC principle. The qualification of the principle by a reference to ‘national circumstances’ introduces a dynamic element to the interpretation of the principle. As national circumstances evolve, so too will the common but differentiated responsibilities of States. It is this version of the principle of common but differentiated responsibilities with the qualifier ‘in light of different national circumstances’ that features in the Paris Agreement.

The Paris Agreement contains references to the CBDRRRC principle in a preambular recital,<sup>126</sup> and in provisions relating to the purpose of the agreement,<sup>127</sup> progression<sup>128</sup> and long-term low greenhouse gas development strategies.<sup>129</sup> The most significant of these references is Article 2 that sets the long-term temperature goal and frames the implementation of the entire agreement. It reads: ‘[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’.<sup>130</sup> It grew evident in the lead-up to Paris that any reference to CBDRRRC would include the Lima qualifier ‘in light of different national circumstances’, however, the battle over the extent to which the Paris Agreement would mainstream this principle was still being waged in Paris. Most developing countries, in particular the LMDCs and the Africa group were keen that equity and CBDRRRC should form the context for implementing the Paris Agreement. They proposed mandatory language to this end (‘shall be implemented on the basis of’).<sup>131</sup> The Umbrella group and the EU were reluctant to introduce equity and CBDRRRC, with its unwieldy ‘annex’ baggage, into an operational paragraph of the agreement. They also argued that the meaning and implications of these terms are uncertain, and it would not be appropriate to introduce a note of uncertainty in the implementation of the agreement. They favoured language recognizing that the agreement ‘reflects’ equity and CBDRRRC.<sup>132</sup> This, however, would have been problematic for developing countries, as it would have implied that the particular balance of responsibilities captured in the Paris Agreement would henceforth be synonymous with CBDRRRC. Since their preferred interpretation of CBDRRRC is in line with the expression of CBDRRRC in the Kyoto Protocol rather than in the Paris Agreement, such a provision would have narrowed the range of interpretative possibilities of CBDRRRC. The compromise eventually struck was to generate an expectation that the agreement will

<sup>123</sup> See UNFCCC, ‘Decision 1/CP.18 Agreed outcome pursuant to the Bali Action Plan’ (28 February 2013) FCCC/CP/2012/8/Add.1, recital to Part I; and Warsaw Decision (n 11) preambular recital 9.

<sup>124</sup> Lima Call for Climate Action (n 13) para 3.

<sup>125</sup> See the White House, US-China Joint Announcement on Climate Change, Beijing, China, 12 November 2014 (Office of the Press Secretary, 11 November 2014) para 2.

<sup>126</sup> Paris Agreement (n 21) preambular recital 3.

<sup>127</sup> *ibid.*, art 2(2).

<sup>128</sup> *ibid.*, art 4(3).

<sup>129</sup> *ibid.*, art 4(19).

<sup>130</sup> *ibid.*, art 2(2).

<sup>131</sup> As reflected in Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Paris Outcome: Revised draft conclusions proposed by the Co-Chairs (5 December 2015) FCCC/ADP/2015/L.6/Rev.1 .

<sup>132</sup> As reflected in the Non-paper of 5 October 2015 (n 18).



reflect equity and CBDRRC ('will be implemented to reflect'). This preserves the range of interpretative possibilities of CBDRRC for developing countries yet stops short of prescribing equity and CBDRRC in the implementation of the agreement.

It is worth noting that the CBDRRC principle in Article 2 of the Paris Agreement could arguably be interpreted as distinct from the Convention's CBDRRC principle, both because of the inclusion of the Lima qualifier, 'in light of different national circumstances' as well as the nature of differentiation in the Paris Agreement. To the extent that the Paris Agreement reflects an operationalization of the principle different to that in the Convention, it is arguable that the Paris Agreement actually contains a distinct rather than derivative version of the principle.

In addition to the CBDRRC principle, the Paris Agreement contains reassuring references to the related notions of equity,<sup>133</sup> sustainable development,<sup>134</sup> equitable access to sustainable development,<sup>135</sup> poverty eradication<sup>136</sup> and climate justice.<sup>137</sup> While some of these notions feature in the FCCC and others in COP decisions, they have arguably acquired a distinct character in the Paris Agreement. For instance, the references in the FCCC to poverty eradication recognize it either as a 'legitimate priority need'<sup>138</sup> or an 'overriding priorit[y]',<sup>139</sup> whereas in the Paris Agreement it is recognized merely as part of the 'context' for action.<sup>140</sup>

### *C. Operationalizing the CBDRRC principle in the Paris Agreement*

The FCCC and the Kyoto Protocol operationalize the CBDRRC principle by requiring developed countries (alone), identified in its Annexes, to assume ambitious GHG mitigation targets. This form of differentiation has proven deeply controversial over the years, and the troubled waters the Kyoto Protocol has navigated in the last decade stand testimony to this. The Paris Agreement represents a step change from the FCCC and Kyoto in relation to differentiation. The Paris Agreement operationalizes the CBDRRC principle not by tailoring commitments to categories of Parties as the FCCC and the Kyoto Protocol do, but by tailoring differentiation to the specificities of each of the Durban pillars—mitigation, adaptation, finance, technology, capacity-building and transparency. In effect this has resulted in different forms of differentiation in different areas. It has also resulted, arguably, in transitioning differentiation from an ideological to a pragmatic basis.

#### *1. Differentiation in Mitigation*

The mitigation provisions of the Paris Agreement embrace a bounded self-differentiation model. The Warsaw decision invited parties to submit 'intended nationally determined contributions' in the context of the 2015 agreement.<sup>141</sup> In submitting these contributions, Parties were able to determine the scope of their contributions, their form, their rigour,

<sup>133</sup> Paris Agreement (n 21) preambular recital 3, arts 2(2), 4(1) and 14(1).

<sup>134</sup> *ibid*, preambular recital 8, arts 2(1), 4(1), 6, 7(1), 8(1) and 10(5).

<sup>135</sup> *ibid*, preambular recital 8.

<sup>136</sup> *ibid*, preambular recital 8, arts 2(1), 4(1) and 6(8).

<sup>137</sup> *ibid*, preambular recital 13.

<sup>138</sup> FCCC (n 4) preambular recital 21.

<sup>139</sup> *ibid*, art 4(7).

<sup>140</sup> See eg Paris Agreement (n 21) arts 2(1), 4(1) and 6(8).

<sup>141</sup> See Warsaw Decision (n 11) para 2(b).

and the information that will accompany them. In so far as Parties chose their own contributions and tailored these to their national circumstances, capacities and constraints, they differentiated themselves from every other nation. This form of differentiation has come to be characterized as self-differentiation. And, it is the starting point for differentiation in the mitigation section of the Paris Agreement.

First, it is worth noting that many of the provisions in the mitigation section are undifferentiated, in particular key provisions prescribing individual binding obligations of conduct for Parties.<sup>142</sup> Second, the provisions that incorporate differentiation are couched either in recommendatory terms<sup>143</sup> or phrased to set expectations rather than bind.<sup>144</sup> Even these cede to sovereign autonomy. For instance, in relation to the requirement placed on Parties that every successive mitigation contribution will represent a progression beyond their current contribution, as discussed above,<sup>145</sup> it is for Parties to determine what constitutes progression, and reflects its highest possible ambition and its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. In relation to the requirement that all Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies,<sup>146</sup> it is for Parties to determine what these are to be, taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

There are, however, normative expectations attached to the flexibility afforded to Parties, which may function to discipline self-differentiation. Article 4(4), which seemingly endorses a Conventional form of differentiation, reads: 'Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.'<sup>147</sup>

The use of the terms 'developed country Parties' and 'developing country Parties' and the notion of leadership is reminiscent of the Convention. These terms evoke the burden-sharing arrangements of the Convention. And, this provision sets strong normative expectations on Parties. However, it is neither intended to nor does it create any new obligations for Parties. It urges developed countries to continue to undertake absolute emission reduction targets, which they had undertaken under the Cancun Agreements, and have pledged in their intended nationally determined contributions. It urges developing countries to continue to enhance their mitigation efforts, which they have done in leaps and bounds in the last decade. It further encourages them to move over time towards economy-wide targets in the light of different national circumstances. Since mitigation contributions are nationally determined, this is a normative expectation that Parties will exercise a particular choice, not a requirement that they do so.

Indeed it is precisely because this provision creates no new obligations that the US agreed to the Paris package. This provision was at the centre of the 'shall/should' controversy that

<sup>142</sup> See text accompanying nn 30–32.

<sup>143</sup> Paris Agreement (n 21) art 4(4) and 4(19).

<sup>145</sup> See text accompanying nn 56–66.

<sup>146</sup> Paris Agreement (n 21) art 4(19).

<sup>144</sup> *ibid*, art 4(3).

<sup>147</sup> *ibid*, art 4(4).

nearly unravelled the Paris deal in the final hours.<sup>148</sup> The ‘take it or leave it’ text presented by the French contained mandatory language (‘shall’) in relation to developed country targets, and recommendatory language (‘should’) in relation to developing country mitigation efforts. In addition to the lack of parallelism in the legal character of requirements placed on developed and developing countries, the use of mandatory language for developed countries’ targets posed a problem for the US. In the light of long-standing and intractable resistance to climate treaties in the Senate, the US had been priming the Paris Agreement to ensure that it could be accepted as a Presidential-executive agreement. This would likely only be possible if the Paris Agreement is consistent with existing US domestic laws, and can be implemented through them.<sup>149</sup> Since the US does not currently have a domestic emissions target, it could not accept an international agreement obliging them to have one through a Presidential-executive agreement.<sup>150</sup> The ‘shall’ had to go if the US were to stay, but the prospect of changing such a critical word in a ‘take it or leave it’ text, endangered the entire deal. The LMDCs in particular threatened to revisit other compromises in the text if this word were to change. Eventually, after furious huddling in the room, and high-level negotiations outside it, the ‘shall’ was declared a typographical error and changed to a ‘should’ by the FCCC Secretariat.

Thus the mitigation section of the Paris Agreement operationalizes the CBDRRC principle through self-differentiation, but sets normative expectations in relation to the types of actions developed and developing country Parties should take, and in relation to progression through successive cycles of contributions. Thus arguably disciplining self-differentiation. Self-differentiation is the pragmatic choice for mitigation, the most contentious section of the Paris Agreement, because it provides flexibility, privileges sovereign autonomy and encourages broader participation. However, while it respects ‘national circumstances’ and ‘respective capabilities’, it leaves little room for tailoring commitments to differentiated responsibilities for environmental harm. In this it represents a departure from the FCCC and its Kyoto Protocol.

## 2. *Differentiation in transparency*

The transparency provisions of the Paris Agreement are premised on provision of flexibility to Parties based on their capacities. Parties rejected a bifurcated transparency system, on the table until the end, in favour of a framework applicable to all countries albeit with ‘built-in flexibility’ tailored to Parties’ differing capacities.<sup>151</sup> These provisions place uniform informational requirements on Parties in relation to mitigation and adaptation,<sup>152</sup> but differentiated requirements in relation to support.<sup>153</sup> Since Parties have differentiated obligations in relation to support the informational requirements are accordingly differentiated. Developed countries report on support they provide, developing countries on the support they receive and need. Information provided by all Parties, developed and developing, on mitigation and support is

<sup>148</sup> J Vidal, ‘How a ‘typo’ nearly derailed the Paris climate deal’ (The Guardian, 16 December 2015) <<http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal>>.

<sup>149</sup> D Bodansky, ‘Legal Options for U.S. acceptance of a new Climate Change Agreement’ (Centre for Climate and Energy Solutions, May 2015).

<sup>151</sup> Paris Agreement (n 21) art 13(1) and (2).

<sup>150</sup> *ibid.*, 3–4.  
<sup>152</sup> *ibid.*, art 13(7) and (8).

<sup>153</sup> *ibid.*, art 13(9) and 13(10), and text accompanying nn 77–78.

subject to a ‘technical expert review’ and ‘facilitative, multilateral consideration of progress’. However, for those developing country Parties that need it, the review shall include assistance in identifying capacity-building needs.<sup>154</sup> Further, the review is tasked with paying particular attention to ‘respective national capabilities and circumstances of developing country Parties’.<sup>155</sup> And, support is provided to developing countries for implementing transparency requirements,<sup>156</sup> and building transparency-related capacity.<sup>157</sup>

Differentiation in the transparency provisions is thus a pragmatic tailoring of informational demands to capacities. While distinct from self-differentiation in the mitigation provisions, this too represents a departure from the FCCC that places different informational burdens set to different time frames on developed and developing countries.<sup>158</sup>

### 3. *Differentiation in finance*

The finance provisions of the Paris Agreement are perhaps the most ‘Conventional’ in the form of differentiation they embody. Developed countries are required in mandatory terms (‘shall’) to provide financial resources to developing country Parties<sup>159</sup> ‘in continuation of their existing obligations under the Convention’. It is the latter clause that permitted the US to accept this mandatory construction of their financial obligations. Developed countries are also required to continue to take the lead in mobilizing climate finance.<sup>160</sup> This obligation is given concrete content in the decision accompanying the Paris Agreement which captures an agreement to continue the collective developed countries’ mobilization goal through 2025, and to set before 2025, a ‘new collective quantified goal from a floor of USD 100 billion per year’.<sup>161</sup> Developing countries had negotiated to include such a goal in the Paris Agreement, however, in light of the strong financial obligations developed countries agreed to in the text, developing countries agreed to move this quantified goal to the accompanying decision. The Paris Agreement also obliges developed countries to biennially communicate ‘indicative quantitative and qualitative information’ in relation to provision and mobilization of finance.<sup>162</sup> This information will feed into the global stocktake of collective progress.<sup>163</sup>

Although the responsibility for provision and mobilization of financial resources is placed primarily on developed countries, in a departure from the FCCC,<sup>164</sup> the Paris Agreement expands the donor base to ‘[o]ther parties’.<sup>165</sup> Other Parties, presumably, developing country Parties, are ‘encouraged’ to provide such support ‘voluntarily’.<sup>166</sup> And, they have correspondingly less demanding reporting requirements placed on them in relation to such support.<sup>167</sup> In the lead-up to Paris, various options were explored for expanding the donor base, regarding the Parties it would apply to (Parties in a ‘position’ or ‘with capacity’ to do so) and the expectations that would be placed on them (‘shall’ or ‘should’).<sup>168</sup> However such options were met with fierce resistance from

<sup>154</sup> *ibid.*, art 13(11).

<sup>155</sup> *ibid.*, art 13(12).

<sup>156</sup> *ibid.*, art 13 (14).

<sup>157</sup> *ibid.*, art 13(15).

<sup>158</sup> FCCC (n 4) art 12; and Cancun Agreements (LCA) (n 68) para 40 (Annex I Parties) and para 60 (non-Annex I Parties).

<sup>159</sup> Paris Agreement (n 21) art 9(1).

<sup>160</sup> *ibid.*, art 9(3).

<sup>161</sup> Decision 1/CP.21 (n 21) para 53.

<sup>162</sup> Paris Agreement (n 21) art 9(5).

<sup>163</sup> *ibid.*, art 9(6).

<sup>164</sup> See FCCC (n 4) art 4(3).

<sup>165</sup> Paris Agreement (n 21) art 9(2).

<sup>166</sup> *ibid.*

<sup>167</sup> *ibid.*, art 9(5) and 9(7).

<sup>168</sup> Informal note (n 20) art 6, option 1.

many developing countries who believed that this would open the door to assessments of which countries were in a 'position' or had the 'capacity' to provide support. These countries would then be leaned on to provide support. Parties finally compromised on 'other parties', which was suitably neutral, and language encouraging voluntary provision of support by these parties. It is because of this expanded donor base in the Paris Agreement, that provisions on support across the Agreement are phrased in passive voice ('support shall be provided')<sup>169</sup> that precludes the need to identify who is to provide such support. Nevertheless, it is remarkable that the provision of support to developing countries is a central cross-cutting feature of the Paris Agreement. The Paris Agreement also recognizes in operational paragraphs that enhanced support for developing countries will allow for higher ambition in their actions,<sup>170</sup> and that developing countries will need to be supported to ensure effective implementation of the Agreement.<sup>171</sup>

Needless to say the terms 'developed' and 'developing' countries have not been defined in the Paris Agreement. In Paris, countries with 'economies in transition' as well as those whose 'special circumstances are recognized' by the COP, viz, Turkey, sought to ensure that they would be included in the category of 'developing countries' and thus entitled to any benefits that might flow thereon.<sup>172</sup> This proved contentious until the end, but the term 'developing countries' was eventually left open and undefined. To many developed countries the use of these terms raises the spectre of the Convention's Annexes. It remains to be seen if some developing countries will seek to engage the embattled Annexes to provide concrete content to these terms.

Differentiation in the finance provisions is thus relatively close to the type of differentiation seen in the FCCC. Although there is a departure in that the donor base has been gently expanded, it is a less radical departure from the Convention than, for instance, the self-differentiation (albeit bounded) seen in the mitigation provisions.

## VI. CONCLUSION

The Paris Agreement represents a landmark in the UN climate negotiations. Notwithstanding enduring and seemingly intractable differences, Parties harnessed the political will necessary to arrive at an agreement that strikes a careful balance between ambition and differentiation. The Paris Agreement contains ambitious goals, extensive obligations and rigorous oversight. Admittedly the goals are aspirational, the obligations largely of conduct, and much of the mechanics of the oversight mechanisms have yet to be fleshed out. Further, the Paris Agreement in a show of solidarity with developing countries is also firmly anchored in the CBDR principle, and contains nuanced differentiation tailored to the needs of each Durban pillar—mitigation, adaptation, finance, capacity building, technology and transparency.

<sup>169</sup> See eg Paris Agreement (n 21) art 4(5), 7(13), 10(6) and 13(14).

<sup>170</sup> *ibid*, art 4(5).

<sup>171</sup> *ibid*, art 3.

<sup>172</sup> Draft Text on COP 21 agenda item 4 (b) Durban Platform for Enhanced Action (decision 1/CP.17)

Adoption of a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all Parties, Version 1 of 9 December 2015 at 15:00, Draft Paris Outcome, Proposal by the President <<http://unfccc.int/resource/docs/2015/cop21/eng/da01.pdf>> fn 7.

Admittedly, the nature of differentiation in the Paris Agreement is distinct from that in the FCCC and its Kyoto Protocol, beloved of developing countries, and differentiation once inspired by principle is now firmly in the realm of practical politics.

Nevertheless, its many tenuous compromises and infirmities aside, the Paris Agreement represents hard-fought agreement between 196 nations. Countries across the developed and developing country divide made significant concessions from long-held positions in the dying hours of the conference to make the final agreement possible. The remarkable political will on display if not the regime created by the Paris Agreement will over time overcome the climate challenge.