



Legal Response Initiative

BRIEFING PAPER 3/14

Nationally Determined Contributions (NDCs)*

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Introduction

In Durban in 2011, at the 17th session of the Conference of the Parties (COP 17), the Parties agreed to develop a new agreement under the United Nations Framework Convention on Climate Change (the Convention) to apply post 2020.¹ They launched a process to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” and established the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) to implement this mandate by 2015.²

At COP 18 (Doha) in 2012, the Parties agreed to an ADP work plan. The work plan includes considering elements for a draft negotiating text by December 2014 (COP 20 in Lima) and for negotiating text to be available by May 2015.³

Then, one year later at COP 19 (Warsaw), the Parties agreed to further elaborate elements for a draft negotiating text in the context of the 2015 agreement and to initiate or intensify domestic preparations for

their intended nationally determined contributions (NDCs).⁴ They requested for NDCs to be communicated in a way that facilitates their clarity, transparency and ability to be understood well in advance of COP 21 (Paris), and by the first quarter of 2015 for Parties that are able to do so.⁵ By COP 20 Parties will also have to identify the information they will provide when putting forward their contributions.⁶

* By Subhi Barakat and Sarah Jones, Liaison Officers for the Legal Response Initiative.

¹ Decision 1/CP.17.

² Decision 1/CP.17, paragraph 2.

³ Decision 2/CP.18, paragraph 9.

⁴ Decision 1/CP.19, paragraph 2(b). The term “nationally determined contribution” appears to have replaced the earlier formulation of “actions or commitments” – see, for example Decision 1/CP.18 (Agreed outcome pursuant to the Bali Action Plan), section II (A) which refers to “nationally appropriate mitigation commitments or actions [...] by all developed country Parties [...]” and section II (B) which refers to “nationally appropriate mitigation actions by developing country Parties [...]”.

⁵ Decision 1/CP.19, paragraph 2(b).

⁶ Decision 1/CP.19, paragraph 2(c).

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This work began in March 2014 during the fourth part of the second session of the ADP in Bonn (ADP 2-4). It was the first opportunity for Parties to begin defining what constitutes NDCs and discussions on NDCs dominated the session.⁷

This briefing paper provides an overview of the notion of NDCs, Parties' interpretations of NDCs and the main legal issues raised during the ADP's March 2014 session in Bonn.

Scope

Many developed and developing country Parties suggest that the global temperature goal (of holding the increase in global average temperature below 2 °C or 1.5 °C above pre-industrial levels)⁸ will not be reached without all Parties contributing to mitigation efforts. Beyond including mitigation action, discussions during ADP 2-4 show that the potential scope of NDCs currently swings between two extreme positions.

Developing country Parties have so far stressed that:

- NDCs should cover all the pillars of the 2015 agreement - mitigation, adaptation, finance, technology development and transfer, capacity-building and transparency of action and support;
- NDCs should include information by developed country Parties on the support they will provide to developing country Parties; and
- NDCs by developing country Parties would depend on support.

Developed country Parties on the other hand asserted that:

- NDCs should only cover mitigation and not adaptation⁹ or support;
- All Parties should have mitigation pledges; and
- NDCs by developing country Parties should not be contingent on support although these Parties could indicate additional actions they could take with support.

Differentiation

There was broad consensus during ADP 2-4 that NDCs would need to be differentiated among Parties but there was the usual divergence on the rationale for differentiation and how differentiation would be implemented. In general, Parties emphasised that

NDCs should be "nationally determined" by each Party according to their own national circumstances but that Parties should not be able to arbitrarily determine their NDCs.

Some Parties reiterated the expression of differentiation found in the Convention (implicitly factoring in (i) the historical responsibility of developed countries for the current levels of greenhouse gases in the atmosphere and (ii) the binary developed/developing country distinction crystallised in the Convention Annexes – the so-called "firewall").¹⁰

Other Parties stressed capacity and capability as the main bases of differentiation.¹¹ Developed country Parties emphasised that the 2015 agreement presents an opportunity to move away from differentiation based on the Convention Annexes.¹² They argue that the Convention Annexes reflect a certain moment in history (when the Convention was adopted in 1992) and are not dynamic enough to reflect the evolving circumstances of each Party more than 20 years later.¹³ They also stress that the 2015 agreement needs

7 The ADP co-Chairs also sought to facilitate domestic preparations for Parties' intended NDCs with a workshop where a number of Parties presented their experiences and domestic preparations for submitting NDCs.

8 Decision I/CP.19, preambular paragraph 3.

9 During ADP 2-4, the United States and New Zealand noted that adaptation will be an important element of the 2015 agreement but that it is not appropriate for NDCs to extend to adaptation since adaptation is site-specific and difficult to operationalise as a global adaptation goal.

10 Parties included in Annex I of the Convention are generally industrialised countries with a historical and continued contribution to greenhouse gas levels in the atmosphere. They typically also have more resources and capability to address climate change. For these two reasons the Convention requires them to take the lead in addressing climate change. Parties not included in Annex I are essentially developing countries and generally need support from Annex I countries for their climate change activities. The Convention recognises this need for support and their priorities of poverty eradication and sustainable economic development. It tries to balance these priorities through differentiation and the principles of common but differentiated responsibilities and respective capabilities (CBDRRC) and equity.

11 For example, Switzerland advocated this position during ADP 2-4 and argued that although it was not historically responsible for greenhouse gas emissions in the atmosphere its capability required it to act.

12 For example, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (the Kyoto Protocol) includes internationally legally binding quantified emissions limitation and reduction targets only for Annex I countries.

13 For example, some Parties argue that the level of economic development and emissions profile of some countries has changed radically since the Convention and the Kyoto Protocol were first negotiated.

to be “applicable to all” so the existing developed/developing country “firewall” should not apply to NDCs.¹⁴

This point was strongly contested by a number of developing country Parties who emphasise that the 2015 agreement is not an opportunity to renegotiate the Convention, its Annexes or its core principles.¹⁵ These Parties argue that the Convention principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC) apply to how NDCs are determined and differentiated since NDCs need to be framed in the context of the 2015 agreement which itself needs to be “under the Convention”.¹⁶

There was wide recognition based on the principles of the Convention that the vulnerability and limited capability of the Least Developed Countries (LDCs) and Small Island Developing States (SIDS) needed to be reflected in the differentiation mechanism. For example, these countries could have non-binding contributions with the potential to enhance their ambition depending on support.

Aside from agreement regarding particularly vulnerable countries, the forthcoming talks will continue to revolve around the highly polarised issue of how NDCs should be differentiated between Parties in general. They will also centre around the future of the “firewall” based on the Convention Annexes.

Nature

Parties agreed at COP 19 that the elaboration and preparation of NDCs was explicitly without prejudice to their legal nature to encourage open discussion on NDCs.¹⁷ As a result Parties were spread across a wide range of positions, from (bottom-up) non-binding domestic pledges to (top-down) internationally legally binding commitments with a variety of mixed approaches in between.

A number of Parties advocated for a spectrum approach to NDCs¹⁸ - a range of agreed types of NDCs - which gives countries flexibility based on their national circumstances and respective capabilities, including:

- Absolute economy-wide emissions targets;
- Intensity targets;
- Sector specific targets (for example in relation to land use);

- Quantified or quantifiable “best effort” mitigation commitments;¹⁹
- NDCs based on a set of options;²⁰ and
- Non-binding NDCs with scope for increased ambition based on support for LDCs and SIDS.²¹

Each of these options could be non-binding, domestically binding or internationally binding for some or all Parties (depending on the mechanism for differentiation Parties will agree to).

How NDCs would be incorporated into the 2015 agreement is also still unclear because the legal form of the agreement is not yet decided. Options include using COP decisions, annexes, schedules or a combination of these approaches.

Information

At COP 19 the Parties agreed to identify the information they will need to provide when putting forward their NDCs²² but they did not elaborate on the content or nature of this information. In this context, Parties began to consider issues of transparency, accounting, compliance and review of NDCs to understand what kind of information was required.

There was general agreement during ADP 2-4 that the 2015 agreement should build on existing accounting rules and that there should be both an ex ante review of Parties’ initial NDCs and an ex post review to ensure that NDCs are fair and equitable and that

14 See Decision I/CP.17, paragraph 2.

15 For example, India advocated this position during ADP 2-4.

16 See Decision I/CP.19, paragraph 2. See also Decision I/CP.17. China and India, for example, advocated this interpretation in discussions during ADP 2-4.

17 Decision I/CP.19, paragraph 2(b).

18 See, for example, the European Union’s submission to the ADP (3 March 2014) (https://unfccc.int/files/bodies/application/pdf/el-02-28-eu_adp_wsl_submission.pdf). For a further discussion on the notion of a “spectrum” of NDCs see, Steffen Kallbekken, Håkon Sælen and Arild Underdal, *Equity and Spectrum of Mitigation Commitments in the 2015 Agreement*, Nordic Council of Ministers, 2014.

19 Position advocated by the United States during ADP 2-4.

20 Position advocated by the Africa Group during ADP 2-4.

21 Advocated by Grenada and Trinidad and Tobago during ADP 2-4.

22 Decision I/CP.19, paragraph 2(c).

aggregate contributions will be ambitious enough to meet the Convention objective.²³

Some Parties also underscored the need to go “beyond transparency” and to establish a compliance system to hold Parties accountable with legally binding “commitments” rather than softer “contributions”. The United States also called for a three to six month consultation period allowing parties to examine other Parties’ proposed NDCs.

As the Parties agreed (on the last day of ADP 2-4) to establish a contact group to begin developing draft text on the elements of the 2015 agreement, there were debates about whether the elaboration of the elements of the agreement and the accounting rules should come before NDCs are prepared and shared. Particularly vulnerable country Parties cautioned against holding off on commitments until accounting rules are agreed while some Parties felt it was counterproductive to elaborate contributions without knowing what they would need to contain or how they would be assessed.

Conclusion

High-level discussion on NDCs at the March 2014 ADP session brought out a number of unresolved issues, including: what NDCs should cover and which Parties should submit them; what information was needed to support NDCs put forward; whether NDCs should be legally binding and whether on a domestic or international level; how they would be differentiated between Parties; and how to assess and

review NDCs and their individual and aggregate adequacy.

None of these types of issues are new to the climate change negotiations. The balance between mitigation and adaptation action, the flow of support to developing countries, the legally binding nature (or not) of actions and support, and the basis for differentiation among Parties are the same issues that currently stifle progress on the overall 2015 agreement under the ADP and that slowed progress on the Bali Action Plan²⁴ in the past.

These issues will need to be resolved and the main contentions continue to be around the scope and nature of NDCs since they are closely linked to the very contentious issue of differentiation under the Convention. As with the development of the 2015 agreement itself, agreeing on an effective and equitable approach for determining NDCs likely means considering all of the above issues holistically. There is no single correct approach and the NDC system will need to be more than the sum of its parts to reach a fair, ambitious and universal agreement in 2015.

23 The overriding objective of the Convention (Article 2) is to stabilise greenhouse gas concentrations “at a level that would prevent dangerous anthropogenic interference with the climate system.” See for example Decision I/CP.19, preambular paragraph 3, “underlining the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways to have a likely chance of holding the increase in global average temperature below 2° C or 1.5° C above pre-industrial levels.”

24 Decision I/CP.13.

The international negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) are amongst the most complex multilateral law and policy making processes ever. Meetings are characterized by the use of technical jargon, reference to legal principles and procedural norms. The Legal Response Initiative (LRI) supports delegates from poor and particularly climate vulnerable developing countries as well as civil society observer organizations free of charge through a global network of lawyers from law firms, barrister chambers and universities. They provide hands-on assistance during meetings, publish briefing papers and build the capacity of lawyers and negotiators from developing countries. We constantly seek experienced lawyers with expertise in one or more areas of the law from any jurisdiction with a good command of English to extend our network of pro bono legal expert advisers. Please contact the advice coordinator directly if you are interested in joining the network: coordinator@legalresponseinitiative.org. If you require legal advice in connection with the international climate negotiations please contact: enquiries@legalresponseinitiative.org



Legal Response Initiative

c/o Simmons & Simmons, CityPoint, One Ropemaker Street, London EC2Y 9SS, UK

enquiries@legalresponseinitiative.org www.legalresponseinitiative.org

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