

## **The Lima Call for Climate Action – Reflections and Prospects\***

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### **1 Introduction**

The latest instalment of the international climate change negotiations concluded in Lima over a day later than scheduled, on Saturday 13 December 2014, with the adoption by the twentieth session of the Conference of the Parties (COP20) of the United Nations Framework Convention on Climate Change (Convention) and the tenth session of the Conference of the Parties serving as the Meeting of the Parties (CMP10) to the Kyoto Protocol of a number of important decisions.<sup>1</sup>

Amongst these is one of particular importance: the decision related to the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP). At COP17 in Durban, parties adopted a decision (the Durban Decision)<sup>2</sup> which launched a process to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”, to be adopted by 2015 and implemented by 2020 (the 2015 Agreement). The process was to be conducted in the ADP. The ADP was also mandated to consider ways to increase ambition in the international climate change regime pre-2020.<sup>3</sup>

One year later at COP18 in Doha, after often fractious and difficult exchanges of views in a “roundtable format”, parties made relatively little progress. A decision was adopted in Doha (the Doha Decision)<sup>4</sup> which (i) endorsed the establishment of the ADP Bureau and the ADP’s agenda and organisation of work, (ii) reiterated the parties’ determination to adopt the 2015 Agreement at COP21 in Paris, (iii) decided that a negotiating text for the 2015 Agreement should be made available before May 2015; and (iv) decided to identify and explore ways to close the pre-2020 ambition gap.

In December 2013 in Warsaw, parties adopted a decision (the Warsaw Decision)<sup>5</sup> which started to develop concepts relating to the 2015 agreement. In particular, it (i) requested the ADP to elaborate elements for a draft negotiating text in 2014,<sup>6</sup> and (ii) importantly, introduced the concept of

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<sup>1</sup> The full list of decisions adopted is available at: <http://unfccc.int/2860.php#decisions> (accessed on 16 January 2015).

<sup>2</sup> FCCC/CP/2011/9/Add.1, Decision 1/CP.17.

<sup>3</sup> The details of the pre-2020 ambition workstream are beyond the scope of this briefing paper.

<sup>4</sup> FCCC/CP/2012/8/Add.1, Decision 2/CP.18.

<sup>5</sup> FCCC/CP/2013/10/Add.1, Decision 1/CP.19.

<sup>6</sup> Warsaw Decision, paragraph 2(a).

“intended nationally determined contributions” (INDCs).<sup>7</sup> These INDCs are intended to be a key element of the 2015 Agreement and are to be prepared by all parties and communicated to the secretariat (by the first quarter of 2015 by those parties ready to do so). Parties are expected, in these INDCs, to identify the actions they are prepared to take in the context of the 2015 Agreement. The Warsaw Decision was silent on whether INDCs should cover all aspects of the 2015 Agreement or be limited to mitigation only. Instead, it requested the ADP in 2014 to identify the complementary information that parties should provide when putting forward their INDCs.<sup>8</sup>

The work of the ADP stepped up a gear in 2014. Four separate negotiation sessions were held (over six weeks) and negotiations were conducted in the more formal “contact group” setting rather than the “roundtable” and “consultation” formats of previous years. The work of the ADP in 2014 concluded, after no less than six drafts were considered and rejected, with the decision adopted by the COP in respect of the work of the ADP (the Lima Decision).<sup>9</sup>

The Lima Decision can be broken down into the following sections: preamble; provisions relating to the 2015 Agreement (paragraphs 1 to 7 and the annex); provisions relating to INDCs (paragraphs 8 to 16); provisions relating to pre-2020 ambition (paragraphs 17 to 20); and general provisions (paragraphs 21 and 22).

In this briefing paper, we:

1. review the preamble and provisions relating to the 2015 Agreement and INDCs (section 2);
2. analyse the key issues of disagreement in Lima relating to these provisions (section 3); and
3. offer some thoughts on the process for 2015 and potential outcomes at COP21 (section 4).

## **2 The Lima Decision**

### **(a) Preamble**

Unlike the lengthier preamble in the Warsaw Decision, the Lima Decision’s preamble is relatively concise (similar to the Durban and Doha Decisions).

However, it varies materially to the preambles in the prior COP decisions relating to the ADP (the ADP Decisions). This raises a number of important questions in relation to how the Lima Decision should be interpreted and whether such variations are intended to affect the legal form of the 2015 Agreement.

Like the previous ADP Decisions, the Lima Decision’s preamble confirms that the work of the ADP is to be under the Convention and guided by its principles. It also notes the gap between the pre-2020 mitigation pledges and emissions pathways consistent with having a likely chance of holding the increase in global temperature below 2°C or 1.5°C above pre-industrial levels.<sup>10</sup>

As in the Warsaw Decision’s preamble, reference to adaptation is included in the Lima Decision’s preamble, with the Lima Decision going further to affirm the parties’ determination to strengthen

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<sup>7</sup> Warsaw Decision, paragraph 2(b).

<sup>8</sup> Warsaw Decision, paragraph 2(c).

<sup>9</sup> The “Lima call for climate action”, Advance unedited version, available at: [http://unfccc.int/files/meetings/lima\\_dec\\_2014/application/pdf/auv\\_cop20\\_lima\\_call\\_for\\_climate\\_action.pdf](http://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf) (accessed on 16 January 2015).

<sup>10</sup> Lima Decision, first and sixth preambular paragraphs. See also: Durban Decision, second preambular paragraph; Doha Decision, third and seventh preambular paragraphs; and Warsaw Decision, third and ninth preambular paragraphs.

adaptation through the 2015 Agreement.<sup>11</sup> This was included to give comfort to developing countries, who are concerned that both the 2015 Agreement and the INDC process will be overly mitigation focused, that adaptation has a central role in the future climate change regime.

The Lima Decision's preamble also "recalls" the decision on the Warsaw International Mechanism for Loss and Damage. This is the first time that loss and damage has been referred to in any ADP Decision. While the Lima Decision does not expressly discuss loss and damage in the context of the 2015 Agreement, its inclusion in the preamble is highly significant and provides an entry point for parties who believe that loss and damage should be addressed in the 2015 Agreement (see sections 2(b)(i) and 3(a)(ii) below for more details).

Finally, the preamble is interesting for what has not been included. There is no reference to the IPCC's Fifth Assessment Report (see sections 2(c)(iii) and 3(b)(iii) below for more details) despite such reference being included in the Warsaw Decision's preamble.<sup>12</sup> There is no paragraph warning of the "*urgent and potentially irreversible threat*" that climate change represents and that "*substantial and sustained reductions of greenhouse gases*" will be required to limit climate change.<sup>13</sup> Perhaps most significantly, there is no affirmation that "*fulfilling the ultimate objective of the Convention will require strengthening of the multilateral, rules-based regime under the Convention*".<sup>14</sup> These omissions are partially mitigated by the reference to the previous ADP Decisions (which do include these references) and the reference to the objective of the Convention.<sup>15</sup>

However, taken together, the lack of express reference to the latest available science, the requirement for substantial and sustained emissions reductions and the need to strengthen the multilateral, rules-based regime is concerning and leaves open the possibility that the 2015 Agreement may not need to address these fundamental ideas.

## **(b) 2015 Agreement**

Parts of the Lima Decision relating to the 2015 Agreement simply restate prior ADP Decisions. For example, paragraph 1 confirms that the ADP shall complete its work as soon as possible in order for COP21 to adopt the 2015 Agreement.<sup>16</sup> Similarly, paragraph 6 decides that the ADP should intensify its work with a view to making available a negotiating text before May 2015.<sup>17</sup>

In addition, the Lima Decision elaborates upon certain substantive and procedural matters relevant in the context of the 2015 Agreement. This includes the scope of the 2015 Agreement, the role of the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC), the provision and mobilisation of finance, the elements of the negotiating text and communication of the draft negotiating text.

### **(i) Scope**

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<sup>11</sup> Lima Decision, fourth preambular paragraph.

<sup>12</sup> Warsaw Decision, first preambular paragraph.

<sup>13</sup> Durban Decision, first preambular paragraph; Doha Decision, second preambular paragraph; and Warsaw Decision, second preambular paragraph.

<sup>14</sup> Durban Decision, third preambular paragraph; Doha Decision, fourth preambular paragraph; and Warsaw Decision, fourth preambular paragraph.

<sup>15</sup> Lima Decision, second and third preambular paragraphs.

<sup>16</sup> See also: Durban Decision, paragraph 4; Doha Decision, paragraph 4; and Warsaw Decision, paragraph 2.

<sup>17</sup> See also: Doha Decision, paragraph 9; and Warsaw Decision, eighth preambular paragraph.

As with previous ADP Decisions, the Lima Decision specifies that the 2015 Agreement shall address, *inter alia*, mitigation, adaptation, finance, technology development and transfer, capacity-building, and transparency of action and support.<sup>18</sup>

The Lima Decision also specifies that these items shall be addressed “*in a balanced manner*”. As with the reference to adaptation in the preamble (see section 2(a) above), this has been included to ensure that the 2015 Agreement is not mitigation-focused and that adaptation, in particular, is given equal treatment (and, importantly, negotiating time) to mitigation.

The items specified in paragraph 2 (and previous ADP Decisions) are not an exhaustive list; the use of the phrase “*inter alia*” is the entry point through which parties may seek to include other issues within the scope of the 2015 Agreement. In particular, issues relating to loss and damage and compliance under the 2015 Agreement could be included using this entry point (on loss and damage, see section 3(a)(ii) below).

(ii)     CBDR&RC

Paragraph 3 of the Lima Decision states that the COP:

*“Underscores its commitment to reaching an ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances”* (emphasis added).

The express inclusion of the principle of CBDR&RC (albeit qualified by “*different national circumstances*”) is significant. This is the first time that CBDR&RC has been expressly stated in a COP decision relating to the ADP and, specifically, the first time that there has been an acknowledgement in a COP decision that the parties are committed to reach an ambitious 2015 Agreement that “*reflects the principle of [CBDR&RC]*”.<sup>19</sup>

By contrast, the Durban Decision does not mention the general or specific principles of the Convention; it merely refers to the ADP being “*under the Convention*”.<sup>20</sup> Likewise, the Doha Decision does not expressly refer to CBDR&RC but does state in the preamble that the work of the ADP “*shall be guided by the principles of the Convention*”. The same applies to the Warsaw Decision.

This paragraph was included in the final draft of the Lima Decision<sup>21</sup> at the very last minute in response to repeated calls by the like-minded developing countries (LMDCs) for CBDR&RC to be reflected in the final text (see section 3(a)(i) below for more details).

It should be noted, however, that the inclusion of CBDR&RC does not necessarily mean that the work of the ADP and the content of the 2015 Agreement will follow the same binary Annex I / non-Annex I differentiation which applies in the pre-2020 regime.

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<sup>18</sup> Lima Decision, paragraph 2. See also: Durban Decision, paragraph 5 (which does not refer to transparency of action and support); Doha Decision, paragraph 6; and Warsaw Decision, paragraph 2(a).

<sup>19</sup> This is not, however, the first reference to “national circumstances” in the ADP negotiations. See, for example, Summary of roundtable on workstream 1, 26 September 2012, available at

[http://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_rt\\_workstream1\\_26092012.pdf](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_rt_workstream1_26092012.pdf) (accessed on 16 January 2015); and Summary of roundtable on workstream 1, 7 February 2013, particularly paragraphs 15 to 22, available at <http://unfccc.int/resource/docs/2012/adp1/eng/6infsum.pdf> (accessed on 16 January 2015).

<sup>20</sup> For more on this point, see *Bavishi*, ‘Unwrapping the Durban Package’, LRI Briefing Paper, 12 March 2012, paragraphs 58-66, available at <http://legalresponseinitiative.org/wp-content/uploads/2013/09/BP40E-Briefing-Paper-Unwrapping-the-Durban-Package-12-March-2012.pdf> (accessed 16 January 2015).

<sup>21</sup> FCCC/CP/2014/L.14, Draft Decision -/CP.XX, 13 December 2014.

While developing countries, and the LMDCs in particular, have tried to retain this type of differentiation in the ADP, developed countries have consistently argued that any application of CBDR&RC in the ADP must take into account evolving circumstances (e.g. the rapid and growing increase of emissions in larger developing countries) and that the world as it exists today does not reflect the world as it was in 1992 when the binary approach to differentiation was first adopted.

For this reason, inclusion of an express reference to CBDR&RC in the COP decisions relating to the ADP has not been possible. The Lima Decision resolves the conflict, at least for now, by requiring CBDR&RC to be reflected in the 2015 Agreement “*in light of different national circumstances*”.

How this will be interpreted and applied in the ADP negotiations in 2015 remains to be seen, particularly with respect to how the specific obligations in the 2015 Agreement may be drafted. However, there are two primary, alternative interpretations.

First, that the Annex I / non-Annex I differentiation continues to exist as the primary application of CBDR&RC but that as between Annex I parties and as between non-Annex I parties, national circumstances can be taken into account so as to more expressly differentiate the obligations between, for example, the USA and Poland (with respect to Annex I) and between China and Tuvalu (with respect to non-Annex I). This approach is not particularly different from the Convention<sup>22</sup> or, more recently, the agreed outcome of the Bali Action Plan which, for example, in respect of mitigation, differentiates between developed and developing country obligations and, within the developing countries, treats least developed countries (LDCs) and small island developing states (SIDS) differently to other developing countries.<sup>23</sup>

The alternative interpretation, and one which is supported by developed countries, is that differentiation under the 2015 Agreement should be determined on a party-by-party basis, such determination being made on the grounds of individual national circumstances. Such circumstances may vary from time to time depending on when the relevant determination is made and would include, but not be limited to, a party’s responsibility and capability.<sup>24</sup>

Resolution of this issue will be one of the most difficult negotiations in the ADP in 2015, with both developed and developing countries reserving their position on what concessions they may be willing to offer on this point. It is likely to be only in Paris, if at all, that this issue will be finally resolved.

### (iii) Finance

The Lima Decision urges developed countries to provide and mobilise enhanced financial support to developing countries for ambitious mitigation and adaptation action, especially to parties that are particularly vulnerable to the adverse effects of climate change.<sup>25</sup>

This is the first time in COP decisions relating to the ADP that developed parties have been asked, in general terms, to “*provide*” financial support to mitigation and adaptation action in developing countries. In Warsaw, the COP, in the context of pre-2020 ambition specifically, had urged developing countries to increase “*technology, finance and capacity-building support to enable ambitious mitigation action in developing countries*”.<sup>26</sup>

### (iv) Elements Text

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<sup>22</sup> E.g. Convention, Article 4, paragraph 1 and Article 7, paragraph 2(b).

<sup>23</sup> See, for example, FCCC/CP/2011/9/Add.1, Decision 2/CP.17, paragraph 32

<sup>24</sup> For examples of what might be relevant national circumstances, see Summary of roundtable on workstream 1, 7 February 2013, n22 above, paragraphs 16 and 17.

<sup>25</sup> Lima Decision, paragraph 4.

<sup>26</sup> Warsaw Decision, paragraph 4(e).

Paragraph 2(a) of the Warsaw Decision required the ADP to elaborate elements for a draft negotiating text. Over the course of 2014, based on submissions made by parties, a number of contact group meetings were held on these draft elements. A non-paper describing parties' views and proposals was prepared by the ADP Co-Chairs following negotiations in June.<sup>27</sup>

Parties discussed this document at the intersessional pre-Lima and a new version of the elements text was released in the run up to the Lima COP.<sup>28</sup> A significant amount of time was spent in the first week of the Lima COP on the draft elements text, leading to a revised version of the elements text being released at the beginning of the second week.<sup>29</sup> During the second week, ADP negotiations focused more on the draft Lima Decision than the elements text and a slightly revised (and final) elements text was released on 10 December 2014.<sup>30</sup>

The Lima Decision acknowledges the progress made in elaborating the elements for a draft negotiating text and includes the version from 10 December 2014 in its annex (the Elements Text).<sup>31</sup> This formalises the Elements Text within the UNFCCC; prior to that point, it remained a document of the Co-Chair's only.

(v) Timing for communication of negotiating text

The COP also decided that the ADP should intensify its work, with a view to making the full negotiating text for the 2015 Agreement available to parties before May 2015.<sup>32</sup> The decision also requested the secretariat to communicate it to all parties in accordance with the provisions of the Convention and the rules of procedure, and noted that the communication shall not prejudice the legal form of the 2015 Agreement.<sup>33</sup> The intention of this is to ensure that the negotiating text will comply with the 'six-month rule' set out in the Convention and the rules of procedure in the event that the legal form of the 2015 Agreement is a protocol or another legal instrument.<sup>34</sup>

(vi) Legal form

Other than as referred to above, the issue of legal form was largely ignored in Lima. As in Warsaw, many parties have reserved their position on the legal form question until the substance of the 2015 Agreement becomes clearer and have been very careful in their consideration of related issues not to prejudice their consideration of this question.

(c) **INDCs**

The details relating to the INDCs, a concept first formally introduced into the ADP in Warsaw, were one of the key focuses in Lima. The Warsaw Decision had outlined several key points relating to INDCs: their preparation and communication was to be without prejudice to their legal nature; they should be communicated well in advance of COP21 (and by the first quarter of 2015 by those parties ready to do so); they must be communicated in a manner that "*facilitates the clarity, transparency*

<sup>27</sup> ADP.2014.6.NonPaper, available at <http://unfccc.int/resource/docs/2014/adp2/eng/6nonpap.pdf> (accessed on 16 January 2015).

<sup>28</sup> ADP.2014.11.NonPaper, available at <http://unfccc.int/resource/docs/2014/adp2/eng/11nonpap.pdf> (accessed on 16 January 2015).

<sup>29</sup> Elements for a draft negotiating text, 8 December 2014 at 06:30, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/elements\\_for\\_a\\_draft\\_negotiation\\_text\\_20141208.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/elements_for_a_draft_negotiation_text_20141208.pdf) (accessed on 16 January 2015).

<sup>30</sup> Elements for a draft negotiating text, version 2 of 10 December 2014 at 06:30, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_3\\_10dec2014t\\_np.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_3_10dec2014t_np.pdf) (accessed on 16 January 2015).

<sup>31</sup> Lima Decision, paragraph 5 and annex.

<sup>32</sup> Lima Decision, paragraph 6. See also: Doha Decision, paragraph 9; and Warsaw Decision, eighth preambular paragraph.

<sup>33</sup> Lima Decision, paragraph 7.

<sup>34</sup> See, for example, Articles 15, 16 and 17 of the Convention relating to amendments to the Convention, amendments to the annexes to the Convention and the adoption of protocols to the Convention and rule 37 of the draft rules of procedure (FCCC/CP/1996/2).

*and understanding of the intended contributions*"; and the purpose of the INDCs is to achieve the objective of the Convention as set out in Article 2.<sup>35</sup> These are all repeated in the Lima Decision.<sup>36</sup>

The Warsaw Decision also requested developed countries, the operating entities of the Convention's financial mechanism and any other organisations in a position to do so to provide support for their preparation and communication as early as possible.<sup>37</sup> Again, this is repeated in the Lima Decision.<sup>38</sup>

The COP in Warsaw also requested the ADP to identify the complementary information that parties should provide when putting forward their INDCs.<sup>39</sup> Such information, and other points relevant to INDCs, are detailed in paragraphs 10-12, 14 and 16 of the Lima Decision.

(i) Scope of INDCs

A key area of disagreement in Lima centred on the scope of INDCs. Many developed countries argued that INDCs were intended to be mitigation-specific, while many developing countries wanted the INDCs to cover all aspects that might ultimately be covered in the 2015 Agreement, including, mitigation, adaptation, technology development and transfer, finance and capacity-building. There was resistance on the part of developed countries to include finance within the INDCs (on the grounds that this would prejudice the negotiations on the content of the 2015 Agreement) and parties ultimately agreed that INDCs would, mandatorily, cover mitigation and could, at the option of each party, include their adaptation undertakings or an adaptation component.<sup>40</sup>

Significantly with respect to mitigation, the Lima Decision specifies that each party's INDC "*will represent a progression beyond the current undertaking of that party*".<sup>41</sup> This ensures that its first "contribution" under the 2015 Agreement (which is to be implemented from 2020) must be more ambitious than its commitments during the second commitment period of the Kyoto Protocol, its quantified economy-wide emission reduction targets or its nationally appropriate mitigation actions pre-2020. The purpose of this is to prevent a party backsliding from its previous actions or commitments and, if this concept is retained with respect to future INDC cycles, could prove to be a particularly valuable tool for ensuring sustained and effective ambition under the 2015 Agreement.

The Lima Decision also recognises the special circumstances of LDCs and SIDS, allowing them to communicate, in the context of their INDCs, information on strategies, plans and actions for low greenhouse gas emission development.<sup>42</sup>

(ii) Transparency of INDCs

Paragraph 14 sets out the complementary information that may be provided by parties when communicating their INDCs for the purposes of facilitating clarity, transparency and understanding. The relevant information includes:

*"quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and, as appropriate, removals"*.

<sup>35</sup> Warsaw Decision, paragraph 2(b).

<sup>36</sup> Lima Decision, paragraphs 8, 9 and 13.

<sup>37</sup> Warsaw Decision, paragraph 2(d).

<sup>38</sup> Lima Decision, paragraph 15.

<sup>39</sup> Warsaw Decision, paragraph 2(c).

<sup>40</sup> Lima Decision, paragraphs 10 and 12.

<sup>41</sup> Lima Decision, paragraph 10.

<sup>42</sup> Lima Decision, paragraph 11.

This is a more streamlined version of potential complementary information relating to mitigation contributions than was included in previous drafts of the Lima Decision.<sup>43</sup>

The complementary information provided by a party may also include how that party considers that its INDC *“is fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention”*.<sup>44</sup> This information goes to the heart of allowing parties to determine whether a party’s INDC is equitable in light of their national circumstances and adequate in light of the objective of the Convention.

The critical concern in the whole INDC process, however, is that the provision of the complementary information specified in paragraph 14 of the Lima Decision is voluntary. The provision of such information is crucial to facilitating clarity, transparency and understanding of each party’s INDC, yet its voluntary nature means that failure to provide such information will hinder the transparency of INDCs and, crucially, will make comparisons between INDCs very difficult. This could be problematic, particularly for those countries, like the USA, who will need to convince their domestic constituencies that relevant other countries are proposing INDCs appropriate to their circumstances before allowing their executive to adopt the 2015 Agreement.

It is critical, therefore, that notwithstanding their voluntary nature, each party is encouraged to provide as much complementary information as possible alongside their INDC. This is especially important in light of the fact that there is no agreed common format for INDCs.

(iii) Publication of INDCs and Considerations of Equity and Adequacy

As mentioned above, one of the main reasons for requesting the complementary information specified in paragraph 14, was to allow other parties to consider the equity and adequacy of a particular party’s INDC based on the complementary information provided (i.e. relating to timeframes, base years, scope and coverage and accounting practices).

In order to facilitate this, the Lima Decision requests the secretariat to publish the communicated INDCs on the UNFCCC website and to prepare a synthesis report on the aggregate effect of the INDCs communicated to the secretariat by 1 October 2015.<sup>45</sup>

The intention of the synthesis report is to demonstrate the extent to which the INDCs, collectively, contribute to achieving the objective of the Convention. However, there is no formal review of each party’s INDC, no express reference to comparing the aggregate effect of the INDCs to the scenarios examined in the IPCC’s Fifth Assessment Report and no guidance as to what should happen if the synthesis report demonstrates that there is an ambition gap between the aggregate INDCs and the objective of the Convention.

This will need to be addressed in 2015 in order to ensure that the 2015 Agreement, and the INDCs that form a core part of it, are fit for purpose.

### **3 Key Areas of Disagreement**

#### **(a) 2015 Agreement**

##### **(i) CBDR&RC**

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<sup>43</sup> Previous drafts included, as an annex, lists of potential information that should be communicated with the INDCs, such lists covering, mitigation, adaptation, finance, technology and capacity-building (see sections 3(b)(i) and 3(b)(ii) below for more details).

<sup>44</sup> Lima Decision, paragraph 14.

<sup>45</sup> Lima Decision, paragraph 16.



CBDR&RC continues to be the main issue of contention between the parties in the ADP negotiations. Although addressed in the Lima Decision by including it expressly, in light of different national circumstances, the principle still needs to be operationalised in the provisions of the 2015 Agreement. If the negotiations relating to CBDR&RC in the ADP Decision are anything to go by, this will be a difficult process.

For example, in relation to the general provisions in the Lima Decision relating to the 2015 Agreement, a previous draft of paragraph 4 of the Lima Decision caused particular disagreement. The final language reads as follows:

*“Urges developed country Parties to provide and mobilize enhanced financial support to developing country Parties for ambitious mitigation and adaptation actions, especially to Parties that are particularly vulnerable to the adverse effects of climate change; and recognizes complementary support by other Parties”.*

In the draft of the Lima Decision dated 11 December,<sup>46</sup> the equivalent paragraph reads as follows:

*“Agrees that developed country Parties and other Parties in a position to do so will, in the context of the protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all Parties, mobilize and provide support for ambitious mitigation and adaptation action, especially for Parties particularly vulnerable to the adverse effects of climate change”* (emphasis added),

while the equivalent paragraph in the draft from 12 December<sup>47</sup> reads as follows:

*“Urges developed country Parties to provide and mobilize support to developing country Parties for ambitious mitigation and adaptation actions, especially to Parties that are particularly vulnerable to the adverse effects of climate change; and invites other Parties willing to do so to complement such support”* (emphasis added).

In both cases, developing countries strongly pushed back on the proposed text on the basis that they both sought to shift the burden of providing finance (which under the Convention and the agreed outcome of the Bali Action Plan has been an obligation of developed countries) onto developing countries and break down the differentiation built into the Convention in this respect. As a result, the paragraph was ultimately amended to urging developed countries to provide the relevant support and merely acknowledging the complementary support provided by other countries.

To emphasise the point relating to differentiation, developing countries insisted on including a reference to the 2015 Agreement reflecting CBDR&RC in the Lima Decision. In order for this to be accepted by developed countries, the qualifier *“in light of different national circumstances”* was added. As discussed above, it is not yet clear how this will be applied in the context of the specific provisions in the 2015 Agreement.

It is likely, however, that this, along with the issue of the legal form of the 2015 Agreement, will be the final two issues to be resolved at COP21. Accordingly, parties would be prudent to prepare (and present) textual options for the differing alternative applications of CBDR&RC in advance of COP21 to ensure that the outcome in Paris is not held to ransom on the basis that parties have not had the opportunity to consider the alternative texts.

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<sup>46</sup> Draft Text, Version 2 of 11 December 2014 at 22:30, paragraph 6, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_11dec14t2230\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_11dec14t2230_dt.pdf) (accessed on 16 January 2015).

<sup>47</sup> FCCC/ADP/2014/L.5, paragraph 3.

(ii) Scope

The Durban Decision set out the broad parameters of the 2015 Agreement as:

*“inter alia ... mitigation, adaptation, finance, technology development and transfer and capacity-building”* (emphasis added).<sup>48</sup>

In Doha and Warsaw, the COP expanded the scope of the 2015 Agreement to include:

*“inter alia ... mitigation, adaptation, finance, technology development and transfer, capacity-building, and transparency of action and support”* (emphasis added).<sup>49</sup>

However, in Warsaw, parties also agreed on the establishment of the Warsaw International Mechanism on Loss and Damage (L&D Mechanism).<sup>50</sup> Although placed under the Cancun Adaptation Framework, subject to a review at COP22 as a compromise,<sup>51</sup> many developing countries argued that loss and damage was an issue that went beyond adaptation, an idea that was acknowledged in the decision’s preamble.<sup>52</sup>

Developed countries, concerned with the implications that the L&D Mechanism might have in the future, especially with respect to liability for climate change and the requirement to provide additional finance, and although conceding to the establishment of the L&D Mechanism, have consistently sought to argue that loss and damage falls within the concept of adaptation. In doing so, they sought to limit the scope of the L&D Mechanism and their own obligations relating to the provision of finance. They also argued that listing loss and damage as its own separate element of the 2015 Agreement would prejudice the outcome of the L&D Mechanism’s review at COP22.

Given the acknowledgement in Warsaw that loss and damage in some cases goes beyond adaptation and the possibility that it might be moved from under the Cancun Adaptation Framework to become a standalone item under the Convention, many developing countries (particularly the LDCs), argued in Lima that loss and damage should nevertheless be included as a stand-alone element. In support of this, they argued that the use of the term *“inter alia”* in the previous ADP Decisions suggested that the list of elements for the 2015 Agreement was not an exhaustive list.

An early draft Lima Decision sought to reconcile these two conflicting positions by deciding that the 2015 Agreement:

*“shall include provisions on, inter alia, mitigation, adaptation, including loss and damage, finance, technology development and transfer, capacity-building, and transparency of action and support”* (emphasis added).<sup>53</sup>

However, notwithstanding the express inclusion of loss and damage, developing countries were unable to accept this formulation on the basis that it treated loss and damage as part of adaptation and therefore would also prejudice the outcome of the COP22 review of the L&D Mechanism. A proposal to delete the word *“including”*<sup>54</sup> (thus leaving loss and damage as a stand-alone element)

<sup>48</sup> Durban Decision, paragraph 5.

<sup>49</sup> Doha Decision, paragraph 6; and Warsaw Decision, paragraph 2(i).

<sup>50</sup> FCCC/CP/2013/10/Add.1, Decision 2/CP.19.

<sup>51</sup> FCCC/CP/2013/10/Add.1, Decision 2/CP.19, paragraph 1.

<sup>52</sup> FCCC/CP/2013/10/Add.1, Decision 2/CP.19, fourth preambular paragraph.

<sup>53</sup> Draft Text, Version 1 of 8 December 2014 at 06:30, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_08dec0630\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_08dec0630_dt.pdf) (accessed on 16 January 2015).

<sup>54</sup> Draft Text, Screen version of work on 10 December 2014 at 20:00-00:21, paragraph 5, Alt 1, available at: [http://unfccc.int/files/bodies/awg/application/pdf/adp2-7\\_i3\\_10dec1300\\_dt\\_cg\\_wednesday\\_end.pdf](http://unfccc.int/files/bodies/awg/application/pdf/adp2-7_i3_10dec1300_dt_cg_wednesday_end.pdf) (accessed on 16 January 2015).

was rejected by developed countries and later draft of the Lima Decision which deleted the comma before the word “including” was similarly rejected by developing countries.<sup>55</sup>

Ultimately, this issue was irreconcilable in Lima. To move forward, however, developing countries required comfort that the issue of loss and damage was relevant in the context of the ADP and the 2015 Agreement. The compromise reached was to delete the references to loss and damage in paragraph 2 of the Lima Decision and to include reference to the L&D Mechanism in the preamble.<sup>56</sup>

This ensures that loss and damage is taken into consideration when parties begin work on the Elements Text in 2015. In addition, the Elements Text, as annexed to the Lima Decision, includes a section E for “*Adaptation and Loss and Damage*”. Interestingly, however, both adaptation and loss and damage have their own sub-sections within section E.<sup>57</sup>

Whilst this is not determinative of whether or how loss and damage will be addressed in the 2015 Agreement, it provides a basis for developing countries to elaborate their position on this issue during what will undoubtedly be very difficult negotiations in 2015.

## **(b) INDCs**

### **(i) CBDR&RC**

As with the provisions in the Lima Decision relating to the 2015 Agreement, the extent and manner of differentiation in the provisions relating to INDCs were hotly contested.

First, there was significant discussion on the extent to which differentiation should be applied in connection with INDCs. To an extent, this has been resolved in the inherent nature of INDCs. Each party’s INDC is to be nationally determined by that party, subject only to that party justifying how it considers its INDC to be equitable, meaning that the INDC model is one of self-differentiation. However, the INDC itself and the complementary information referred to in section 2(c)(ii) above are two different things. While parties are free to justify the ambition of their INDC, there is no specific differentiation with respect to the complementary information.

Throughout 2014 and until the final 2 drafts of the Lima Decision, the draft ADP texts relating to INDCs included a draft annex which specified detailed complementary information which could be communicated alongside an INDC. This included complementary information not included in paragraph 14 of the Lima Decision such as, in respect of mitigation, specifying a peaking year.<sup>58</sup> In addition, the draft annex contained complementary information relating to adaptation and support (e.g. finance, technology development and transfer and capacity-building). As the year progressed, a number of options were included in respect of each of mitigation, adaptation, finance, technology development and transfer and capacity-building.<sup>59</sup>

Ultimately, however, the annex approach was not adopted for two reasons:

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<sup>55</sup> Draft Text, Version 2 of 11 December 2014 at 22:30, paragraph 2, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_11dec14t2230\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_11dec14t2230_dt.pdf) (accessed on 16 January 2015).

<sup>56</sup> Lima Decision, fifth preambular paragraph.

<sup>57</sup> Elements Text, pages 9 to 12 for adaptation and pages 12 to 13 for loss and damage.

<sup>58</sup> See, for example, Draft Text, ADP.2014.7.DraftText, 7 July 2014, annex, available at <http://unfccc.int/resource/docs/2014/adp2/eng/7drafttext.pdf> (accessed on 16 January 2015).

<sup>59</sup> See, for example, Draft Text, Version 1 of 8 December 2014 at 06:30, annex II, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_08dec0630\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_08dec0630_dt.pdf) (accessed on 16 January 2015).

1. as discussed in section 2(c)(i) above, parties were unable to agree on the inclusion of means of implementation (and, particularly, finance, on which see section 3(b)(ii) below for more details) in INDCs; and
2. developing country parties were concerned that the list of complementary information requirements in the proposed annexes did not sufficiently differentiate between developed and developing countries. They were apprehensive that such failure to differentiate would mean that they would be expected to provide the same level of detail in the complementary information which accompanied their INDCs as developed countries and believed that this would be inappropriate in light of their different national circumstances.

Notwithstanding the above, and despite the deletion of the annex, other than in the context of demonstrating the equity of a party's INDC, the complementary information to be provided by parties to facilitate the clarity, transparency and understanding of their INDCs still does not differentiate between developed and developing countries. Instead, this has been addressed by making the submission of this complementary information voluntary, allowing developing countries the option to intentionally not provide all (or any) of the complementary information specified in the Lima Decision alongside their INDCs. However, this applies equally to developed countries as well, though it may be politically more difficult for them to justify taking this approach.

Secondly, the Lima Decision repeats the call made in the Warsaw Decision for developed countries, the operating entities of the Convention's financial mechanism and any other organisations in a position to do so to provide support for the preparation and communication of INDCs of parties that may need such support.<sup>60</sup>

Early drafts of the decision had also urged or requested "*other parties in a position to do so*" provide such support. For the same reasons referred to in section 3(a)(i) above, this was rejected by developing countries as an attempt to reinterpret the Convention and the Warsaw Decision.<sup>61</sup>

Finally, in relation to the "Ex Ante Review" of parties' INDCs (which was also ultimately not included in the Lima Decision, see section 3(b)(iii) below for more details), developing countries (particularly the LMDCs) strongly objected to being subject to the same level of review as developed countries (even on a voluntary basis), arguing that this was not in accordance with the principle of CBDR&RC.

#### (ii) Means of implementation

As discussed in section 2(c)(i) above, the Lima Decision does not expressly require parties to provide their INDC on means of implementation (i.e. finance, technology development and transfer and capacity-building).

Earlier drafts of the Lima Decision, however, did allow for, or require, the inclusion of means of implementation as part of an INDC, either implicitly through the list of complementary information detailed in an annex<sup>62</sup> or expressly in the decision text.<sup>63</sup>

In particular, the draft text from 8 December 2014, required developed countries to, starting in 2019:

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<sup>60</sup> Lima Decision, paragraph 15.

<sup>61</sup> Warsaw Decision, paragraph 2(d).

<sup>62</sup> See, for example, Draft Text, 24 October 2014, paragraph 10 and annex, available at [http://unfccc.int/files/meetings/bonn\\_oct\\_2014/in-session/application/pdf/adp2-6\\_i3\\_24oct2014t1530.dt.pdf](http://unfccc.int/files/meetings/bonn_oct_2014/in-session/application/pdf/adp2-6_i3_24oct2014t1530.dt.pdf) (accessed on 16 January 2015).

<sup>63</sup> See, for example, Draft Text, Version 1 of 8 December 2014 at 06:30, paragraph 14(a), available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_08dec0630\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_08dec0630_dt.pdf) (accessed on 16 January 2015).

*“consider annual quantitative contributions on means of implementation to support ambitious mitigation and adaptation action, in particular for Parties particularly vulnerable to the adverse effects of climate change”.*<sup>64</sup>

This paragraph caused significant disagreement. On the one hand, developing countries argued that this information should be communicated as part of developed country INDCs starting in 2015 as it would allow them to determine the extent and ambition of their own mitigation and adaptation INDCs, particularly where such INDCs (or part thereof) may be conditional on the provision of means of implementation by developed countries.

On the other hand, developed countries argued that including financial contributions in the 2015 INDCs would prejudice the finance negotiations related to the 2015 Agreement to be conducted in 2015 and that they could not accept them in this context. They argued that this was equally true with respect to providing such information starting 2019.

As a result, no agreement could be reached on this issue and the initial scope of INDCs is limited to mitigation and, at the proposer’s option, adaptation. The provisions in 2015 Agreement relating to the provision of means of implementation, including in respect of quantum, sources and whether developing countries should also be required to contribute in this regard, will be another difficult set of negotiations for parties to contend with in 2015.

(iii) Ex Ante Review

One material ADP casualty in Lima was the concept of an “*ex ante review*” of submitted INDCs. The review could have had multiple purposes; assessing the equity of each party’s INDC in light of its national circumstances; assessing the adequacy of the aggregate effect of all INDCs in light of the objective of the Convention (which would have included reference to the IPCC’s Fifth Assessment Report); enhancing the clarity, transparency and understanding of each party’s INDC; and facilitating efforts by parties that had not communicated their INDCs. The review would have taken place prior to INDCs being inscribed in the 2015 Agreement.

The concept of a review of INDCs appeared in every draft of the Lima Decision from the draft dated 7 July 2014<sup>65</sup> to the penultimate draft dated 12 December 2014.<sup>66</sup> The purpose of the review and its modalities varied in detail and rigour from draft to draft.

At its strongest, the objective of the review process would have been to facilitate the clarity, transparency and understanding of the aggregate effect of parties’ INDCs and how the INDC communicated by each party constitutes a fair and equitable contribution by that party. The review would have been conducted in two in-session dialogues (to be held in conjunction with ADP sessions in 2015).<sup>67</sup> The review could have also allowed for parties, in advance of the dialogue, to ask questions of other parties in respect of their INDCs and to urge parties to respond to any such

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<sup>64</sup> Draft Text, Version 1 of 8 December 2014 at 06:30, paragraph 14(a), available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_08dec0630\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_08dec0630_dt.pdf) (accessed on 16 January 2015).

<sup>65</sup> Draft Text, ADP.2014.7.DraftText, 7 July 2014, paragraphs 7 and 8, available at <http://unfccc.int/resource/docs/2014/adp2/eng/7drafttext.pdf> (accessed on 16 January 2015).

<sup>66</sup> FCCC/ADP/2014/L.5.

<sup>67</sup> Draft Text, Version 2 of 11 December 2014 at 22:30, paragraph 11, Option 3, available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_11dec14t2230\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_11dec14t2230_dt.pdf) (accessed on 16 January 2015).

questions in a timely manner.<sup>68</sup> In two drafts, admitted observer organisations would also have been entitled to submit such questions via electronic means.<sup>69</sup>

The weakest formulation of the review was included in the penultimate draft of the Lima Decision,<sup>70</sup> and reads as follows:

*“Requests the [ADP] to organize a non-intrusive and facilitative dialogue, respectful of national sovereignty, at the sessions of the [ADP]Ad Hoc Working Group on the Durban Platform for Enhanced Action starting in June 2015 with the objective of facilitating the clarity, transparency and understanding of the intended nationally determined contributions of those Parties willing to do so” (emphasis added).*

The concept of a review was strongly supported by, amongst others, LDCs, SIDS and the Africa Group. In their view, knowing that a party’s INDC would be subject to a review process would encourage that party to communicate its most ambitious INDC in order to prevent being shamed for lack of ambition during the review process.

However, many developing countries were not comfortable with developing country INDCs being treated the same as developed country INDCs (even on a voluntary basis, in accordance with the above draft text). In their view, to do so would be to apply CBDR&RC in a way other than in accordance with their preferred application of the principle. A number of developing parties also expressed their view that such a review process was unhelpful for the purposes of ambition, arguing that opening themselves up to a review would make parties less likely to participate in the review process and, potentially, the 2015 Agreement as well.

Accordingly, their preference was for INDCs to only be published on the UNFCCC website. This suited a number of developed countries, although they did not expressly state this, particularly those who favour a pure-bottom up approach to the 2015 Agreement.

In light of this, parties settled on merely publishing the INDCs, as communicated, on the UNFCCC website and requested the secretariat to prepare a synthesis report on the aggregate effect of the INDCs communicated by parties by 1 October 2015.

One further point to note relates to the request to the secretariat to prepare a synthesis report. The drafts of the Lima Decision from 8 December, 10 December and 12 December all refer to a technical paper rather than a synthesis report. Synthesis reports are generally used within the UNFCCC to summarise datasets and extract high-level trends whereas technical papers tend to be requested when substantive analytical work is required. The request for a synthesis report, rather than a technical paper, suggests that the output from the secretariat will merely be a summary of the INDCs rather than a science-based analysis of them.

Given this, it is highly likely that NGOs and think-tanks will attempt to fill the gap left by the Lima Decision and produce their own science-based analyses of the INDCs. They, and other NGOs, are likely to then use such information to lobby parties to increase the level of ambition in the 2015 Agreement.

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<sup>68</sup> Draft Text, Version 1 of 8 December 2014 at 06:30, paragraph 14(a), available at [http://unfccc.int/files/meetings/lima\\_dec\\_2014/in-session/application/pdf/adp2-7\\_i3\\_08dec0630\\_dt.pdf](http://unfccc.int/files/meetings/lima_dec_2014/in-session/application/pdf/adp2-7_i3_08dec0630_dt.pdf) (accessed on 16 January 2015).

<sup>69</sup> Draft Text, 24 October 2014, paragraph 12, available at [http://unfccc.int/files/meetings/bonn\\_oct\\_2014/in-session/application/pdf/adp2-6\\_i3\\_24oct2014t1530.dt.pdf](http://unfccc.int/files/meetings/bonn_oct_2014/in-session/application/pdf/adp2-6_i3_24oct2014t1530.dt.pdf) (accessed on 16 January 2015); and Draft Text, ADP.2014.12.DraftText, 11 November 2014, paragraph 16, available at <http://unfccc.int/resource/docs/2014/adp2/eng/12drafttext.pdf> (accessed on 16 January 2015).

<sup>70</sup> FCCC/ADP/2014/L.5, paragraph 14.

In light of the above, there is unlikely to be a review of INDCs in 2015 but that is not to say that the concept of the review is dead. The “*ex ante review*” concept remains in the Elements Text<sup>71</sup> and could be included in the 2015 Agreement, with the review process in respect of the initial cycle of INDCs occurring after the adoption of the 2015 Agreement, but before it is implemented in 2020.

#### **4 Next steps and implications for the 2015 agreement**

##### **(a) Process for 2015**

The second session of the ADP was not formally closed in Lima. In accordance with previous practice in the ADP, the Co-Chairs suspended ADP’s second session (seventh part) at the end of the ADP’s deliberations in Lima.

Accordingly, the new Co-Chairs (Mr Ahmed Djoghla of Algeria and Mr Daniel Reifsnyder of the USA), elected by acclamation in Lima, will be able to resume the ADP’s second session (eighth part) when the ADP convenes in Geneva from 8 to 13 February 2015 without having to deal with issues relating to the adoption of an agenda for the work of the ADP.

Parties will, however, have to decide on the organisation of their work. In 2014, a single contact group was convened. In 2015, parties may wish to consider convening multiple contact groups (provided that the interests of smaller delegations are not prejudiced in doing so) to consider different elements of the 2015 Agreement, e.g. one for mitigation, one for adaptation etc. (as was the practice under the Ad Hoc Working Group on Long-Term Cooperative Action).

This would allow for different elements to be considered in parallel. This could be helpful, particularly considering there are only five weeks of formal negotiations currently scheduled (though a sixth week at least is likely to be arranged and held in between the meeting of the subsidiary bodies in June and COP21 in December 2015).

Given this relative lack of negotiating time, parties must press ahead with a renewed sense of urgency and a willingness to compromise to ensure that they are in a position to (i) have a negotiating text circulated before May 2015 and (ii) adopt a meaningful and effective 2015 Agreement in December 2015.

Parties must also remain mindful that negotiations must be conducted in a transparent and inclusive manner to ensure that parties do not feel that their concerns have not been heard, thus giving them an excuse to use procedural tools to block the adoption of the 2015 Agreement in Paris.

##### **(b) Consideration of the Elements Text**

Parties’ key task in 2015 will be to focus on, streamline and agree on a negotiating text. This text, to be communicated to all parties before May 2015, will build on the Elements Text annexed to the Lima Decision.

The Elements Text, as it stands, offers relatively little guidance on what might ultimately be included in the 2015 Agreement. Through the use of options, the Co-Chairs, under the guidance of the parties, have produced a document which is effectively a ‘shopping list’ of different parties’ proposals. As a result, the Elements Text includes sections relating to the 2015 Agreement’s: preamble; definitions; general / objective; mitigation (including long term and global aspects, substantive nature of obligations and institutional arrangements); adaptation (including separate sections for adaptation and loss and damage); finance (including guiding principles, anchoring institutions in a legal

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<sup>71</sup> Elements Text, Section K, paragraph 76.

agreement, scale of resources, contributions and sources); technology development and transfer (including commitments and institutional arrangements); capacity-building; transparency of action and support; obligation cycles, review processes and ambition (including steps following review of INDCs); compliance mechanism; and procedural and institutional provisions (including, in the case of a legally binding outcome, provisions relating to final clauses).

Many of the options reflected in the Elements Text are in direct conflict with each other. For example, paragraph 32 contains three options with respect of loss and damage: including specific provisions relating to loss and damage; referring to the L&D Mechanism; and making no reference to loss and damage. Equally, paragraph 76 contains two options for an ex ante review process: no ex ante review process; and details for an ex ante review process (with numerous sub-options).

Divergent visions of the application CBDR&RC are also reflected in the Elements Text, both in the context of the proposed general provisions<sup>72</sup> and the operational provisions.<sup>73</sup>

As is evident from the above, the task facing parties this year is significant. Early high-level ministerial guidance could be helpful in cutting through some the disagreements and should be actively encouraged. In addition, Ministers must arrive in Paris for the final endgame fully briefed to ensure that when they arrive, negotiations step up a further gear. A swift decision in Geneva on how the ADP will organise its work in 2015 would also be helpful and welcome in this respect.

### **(c) Potential outcomes and legal form**

Like the issue of CBDR&RC, the issue of legal form remains unresolved. An early indication of what the legal form of the 2015 Agreement will be immensely helpful in terms of assisting with how the specific obligations, and the 2015 Agreement as a whole, will need to be drafted.

However, the issue of legal form has taken a relative back seat to more recent negotiations on INDCs and the content of the Elements Text and it is, in practice, likely that this will be one of the last issues to be resolved in Paris. To ensure a late decision on this issue does not hold up the conclusion of COP21, parties would be well advised to prepare for any eventuality and have appropriate drafting (for COP decisions, amendments to the Convention and/or a new protocol) available for submission in the final part of the COP in Paris.

The range of potential legal form outcomes is extremely varied. The options are not exclusively a new protocol, amendments to the Convention or COP decisions. The 2015 Agreement could comprise any combination of these as well as multilateral and bilateral political declarations, regional arrangements and national legislation.

Given the nature and progress of the present negotiations, it seems unlikely that a purely top-down legally binding agreement containing all elements of the ADP mandate in respect of the 2015 Agreement will be adopted in Paris.

For one thing, parties have already agreed that the initial round of INDCs will be nationally determined and have not yet agreed a process to increase the ambition of such INDCs pursuant to international negotiations.

For another, there remains a significant reluctance, for different reasons, on the part of many developed and larger developing countries to incorporate mitigation and finance contributions

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<sup>72</sup> See, for example, Elements Text, Section C, paragraphs 1 to 8.

<sup>73</sup> In respect of mitigation, for example, see Elements Text, Section D, paragraphs 15 to 23.



within a legally binding agreement. That is not to say, however, that such an outcome is not achievable if there is sufficient international and domestic pressure and genuine political will.

It may be that it is possible for parties to agree to a certain core, potentially covering general principles, monitoring and verification of the implementation of commitments / contributions / actions, ex ante review and ambition mechanics and institutional arrangements, which would be legally binding under international law, with other elements such as the specific commitments / contributions / actions of individual parties sitting in COP decisions or in non-binding national schedules or annexes to the core agreement.

To provide legal certainty, parties may want to consider whether the commitments / contributions / actions could be made legally binding over time, introducing them into the core agreement in a phased manner and in accordance with the principle of CBDR&RC, in light of different national circumstances.

Another option, often utilised in international human rights treaties, would be for parties to enter into international legal obligations pursuant to which parties commit to pass legislation at the domestic level to implement the commitments / contributions / actions specified in COP decision and / or the non-internationally-binding national schedules or annexes.<sup>74</sup>

Parties should be cautious, however, on insisting that the entirety of the 2015 Agreement should be legally binding under international law. There is a correlation between the stringency and specificity of obligations and the legal form of the document in which they are contained on the one hand and the extent of participation in such an agreement on the other. An effective agreement requires a balance between both of these elements.

Stringent and specific obligations contained in a legally binding 2015 Agreement may limit the participation of parties therein. An insistence that the entirety of the 2015 Agreement must be legally binding may equally lead to a watering down of its obligations in order to achieve a broad participation of parties. In both cases, the effectiveness of the 2015 Agreement will be reduced.

As a result, parties will need to carefully consider which of the following options is more likely to ensure both broad participation and environmental effectiveness:

- an outcome where all elements are legally binding and which has stringent and specific substantive obligations;
- an outcome where all elements are legally binding but which has weak substantive obligations, for example, because they are nationally determined;
- an outcome with some core elements which are legally binding and others which are not, where the substantive non-binding obligations are stringent, specific and are captured in some way at the international level, whether in COP decisions, political declarations or non-binding national schedules or annexes; or
- an outcome with some core elements which are legally binding and others which are not, where the substantive non-binding obligations are not stringent or specific, regardless of whether they are captured in some way at the international level; or

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<sup>74</sup> For further details on the potential options for the legal form of the 2015 Agreement, see Maljean-Dubois, S., Wemaëre, M., Spencer, T. (2014). *A comprehensive assessment of options for the legal form of the Paris Climate Agreement*, Working Papers N°15/14, IDDRI, Paris, France, available at [http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/WP1514\\_SMD%20MW%20TS\\_legal%20form%202015.pdf](http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/WP1514_SMD%20MW%20TS_legal%20form%202015.pdf) (accessed 16 January 2015).

- an outcome where no elements are legally binding, regardless of whether the substantive obligations are stringent and/or specific.

## **5 Conclusion**

After two years of exchanging ideas and exploring concepts in “roundtable” and “consultation” formats, parties spent 2014 starting to grapple with the detail of the 2015 Agreement. For the first time, contact groups were established, substantive negotiations conducted and textual proposals for the 2015 Agreement and INDCs seriously engaged with.

There remain, however, fundamental and ideological differences between parties, particularly with respect to the application of CBDR&RC in, and the legal form of, the 2015 Agreement. Equally, there remain a large number of controversial elements of substance within the Elements Text, such as the inclusion of loss and damage as a stand-alone element, whether there is any role for a mechanism providing an ex ante review process for INDCs and the nature, source and extent of finance to be provided to developing countries.

Parties will need to address these issues, some of which have been unresolved for a long time, head on and as early as possible to ensure the success of COP21 in Paris later this year.