



# Legal Response Initiative

Briefing paper 1/15

## In focus: the Lima ADP outcomes\*

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### Introduction

In the Ad-hoc Working Group on the Durban Platform for Enhanced Action (ADP) Parties to the UN Framework Convention on Climate Change (UNFCCC) are currently negotiating a new international agreement on climate change. Parties have agreed to adopt this agreement in Paris in December 2015 and to implement it from 2020. With only one year left to conclude its work, the Conference of the Parties (COP) in Lima adopted the final decision before Paris related to the work of the ADP. It is titled “The Lima Call for Climate Action” (Lima Decision).<sup>1</sup> Major differences over its content caused the conference to overrun by more than a day.

The decision provides the general framework for the work of the ADP and its Parties in 2015 on their way “to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”. For that purpose, the text on “Elements for a draft negotiation text” (at present 39 A4 pages including different substantive options, approaches and textual proposals annexed to the decision) has been accepted as the basis for further negotiations (ElementsText).

This briefing paper highlights the key implications of the Lima Decision relating to workstream I of the ADP on the development of a new agreement. It focuses on the main areas of discussion and divergence amongst the Parties.

### Intended Nationally Determined Contributions

During previous climate meetings, Parties had agreed to outline what actions they would be willing to take under a new agreement before the climate conference in Paris in December 2015 (or by March 2015 for countries in a position to do so). These commitments are known as Intended Nationally Determined Contributions (INDCs).

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**1** The advanced unedited version of the COP decision is currently 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)

This document is an output from a project commissioned through the Climate and Development Knowledge Network (CDKN). CDKN is a programme funded by the UK Department for International Development (DFID) and the Netherlands Directorate-General for International Cooperation (DGIS) for the benefit of developing countries. The views expressed and information contained in it are not necessarily those of or endorsed by DFID, DGIS or the entities managing the delivery of the Climate and Development Knowledge Network, which can accept no responsibility or liability for such views, completeness or accuracy of the information or for any reliance placed on them.

Their scope remains much disputed amongst the Parties.

In Lima many developed country Parties argued that INDCs were intended to be mitigation-specific. Some 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 in particular resistance on the part of developed country Parties to include finance within the INDCs. In their view, this would prejudice the negotiations on the content of the 2015 agreement.

Parties eventually agreed that INDCs would have to cover mitigation and could also, at the choice of each party, include their adaptation undertakings or an “adaptation component in their INDCs”.<sup>2</sup> INDCs to the new agreement can contain information on, for example, greenhouse gas (GHG) emission reference points, periods for implementation, or methodological approaches to account for GHG emissions, as well as an indication of how the Party considers that its INDC is fair and ambitious in light of national circumstances.

The Lima Decision confirms the previous timeline for the submission of INDCs (prior to Paris or – for those ready to do so – by the first quarter of 2015) as well as the special circumstances of the least developed countries (LDCs) and Small Island developing States (SIDS). In the context of their INDCs, these countries may communicate information on strategies, plans and actions for low carbon development.<sup>3</sup>

To prevent Party’s backsliding, the Lima Decision specifies that each Party’s INDC “will represent a progression beyond the current undertaking of that Party”.<sup>4</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.

## Transparency

The Lima Decision spells out certain complementary information that Parties may provide when communicating their INDCs for the purposes of facilitating clarity, transparency and understanding. This includes, for example, quantifiable information on the reference point, time frames for implementation, assumptions and methodological approaches used in estimating emissions. However, given the language used in paragraph 14 (“may include, as appropriate”), the provision of such

complementary information is entirely voluntary.<sup>5</sup>

The complementary information provided by a Party may also include why 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>6</sup> This could be described as an “equity self-assessment” that may not generate the joint global efforts be ambitious and rigorous enough to secure a low-carbon, climate-resilient and safe future.

A failure to provide comprehensive and accurate complementary information will hinder the transparency of INDCs and, essentially, make the comparisons between INDCs very difficult. It is, therefore, critical that each Party is encouraged to provide as much complementary information as possible. This is especially important because there is still no agreed common format for the submission of INDCs.

## Publication and synthesis report

Many countries supported a review process by which they would scrutinize one another’s INDCs, assessing equity and adequacy prior to the INDCs being inscribed in the 2015 agreement. Nevertheless, no formal review process was adopted in Lima. The Lima Decision settles on merely publishing INDCs on the UNFCCC website, and requests the secretariat to prepare a synthesis report on the aggregate effect of INDCs communicated by Parties by October 2015.<sup>7</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 (to prevent dangerous anthropogenic climate change). 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. While there is unlikely to be a review of INDCs in 2015, the idea of the review has not been abandoned. The “ex ante review” concept remains in the Elements Text<sup>8</sup> and could be included in the 2015 agreement, with the review process in respect of the initial

<sup>2</sup> Lima Decision, paragraph 12.

<sup>3</sup> Lima Decision, paragraph 11.

<sup>4</sup> Lima Decision, paragraph 10.

<sup>5</sup> Previous drafts of the Lima Decision used different language regarding potential complementary information.

<sup>6</sup> Lima Decision, paragraph 14.

<sup>7</sup> Lima Decision, paragraph 16.

<sup>8</sup> Elements Text, Section K, paragraph 76.

cycle of INDCs occurring after the adoption of the new agreement, but before its implementation from 2020.

## Adaptation, loss and damage

In Lima, developing countries argued for adaptation to be given more prominence in the future regime. They expect adaptation to play a central role in the future climate regime and are concerned that both the 2015 agreement and the INDC process will be overly mitigation focused. Like the preamble of the COP decision adopted in Warsaw, the Lima Decision's preamble therefore refers to adaptation. The Lima Decision, however, goes further and affirms the Parties' determination to strengthen adaptation through the 2015 agreement.<sup>9</sup>

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 COP decisions on the ADP. While the Lima Decision does not expressly discuss loss and damage in the context of the 2015 agreement, its inclusion in the preamble provides an entry point for Parties that seek to address loss and damage in the 2015 agreement and how it contributes towards achieving the objectives of the Convention.

## Finance

The Lima Decision further 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".<sup>10</sup>

This is the first time that in a COP decision relating to the ADP, developed country Parties have been explicitly asked, in general terms, to support financially mitigation and adaptation in developing countries. However, the additional qualification "ambitious" is open to interpretation and the reference to "complementary support" underlines the possibility for any Party (with the capacity to do so) to contribute financially – not just those developed country Parties listed in Annex II to the Convention.

## Differentiation between Parties

The Lima Decision is also the first time that the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) has been explicitly quoted in a COP decision on the ADP. However, the new agreement is supposed to reflect the principle "in light of different national circumstances".<sup>11</sup> The link to current national circumstances indicates that the work of the ADP

and the content of the 2015 agreement is unlikely to strictly follow the same binary Annex I and non-Annex I approach to differentiation which applies in the pre-2020 regime.

Many developing countries, in particular the group of like-minded developing countries (LMDCs), have tried to retain this type of differentiation in the ADP. Developed country Parties have consistently argued that any application of CBDRRC 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.

This difference in opinion has led to the exclusion of an express reference to CBDRRC in previous ADP related COP decisions. For the time being, the Lima Decision resolves the conflict, by requiring CBDRRC to be reflected in the 2015 agreement albeit "in light of different national circumstances". How this will be interpreted and applied in the context of specific provisions in the 2015 agreement remains to be seen.

## Elements of the 2015 Agreement

In line with previous COP 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>12</sup> These items 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, for example, relating to loss and damage and compliance within the scope of the 2015 agreement.

Parties' key task in 2015 will be to focus on, streamline and finally adopt a text capturing their substantive agreement. This text will build on the Elements Text annexed to the Lima Decision. Parties will continue to go through the different sections in parallel, use track changes and

<sup>9</sup> Lima Decision, fourth preambular paragraph

<sup>10</sup> Lima Decision, paragraph 4.

<sup>11</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, 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); and Summary of roundtable on workstream 1, 7 February 2013, particularly paragraphs 15 to 22, at <http://unfccc.int/resource/docs/2012/adp1/eng/6infsum.pdf>.

<sup>12</sup> Lima Decision, paragraph 2. See also: Decision 1/CP.17, paragraph 5 (which does not refer to transparency of action and support); Decision 2/CP.18, paragraph 6; and Decision 1/CP.19, paragraph 2(a).

<sup>13</sup> The so called "6 months rule" under Article 17 paragraph 2 UNFCCC.

<sup>14</sup> Lima Decision, paragraph 7.

produce various iterations increasingly focusing on detailed language. The UNFCCC secretariat has been requested to circulate draft text to all Parties in line with the formal requirements for the adoption of protocols.<sup>13</sup> However, this is without prejudice to the legal form of the 2015 agreement.<sup>14</sup>

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. It includes the following sections: preamble; definitions; general/objective; mitigation (including long term and global aspects, substantive nature of obligations and institutional arrangements); adaptation (separate sections for adaptation and loss and damage); finance (e.g. guiding principles, anchoring institutions in a legal agreement, scale of resources, contributions and sources); technology development and transfer (commitments and institutional arrangements); capacity-building; transparency of action and support; obligation cycles, review processes and ambition (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. Paragraph 32, for example, contains three options with respect to loss and damage: Including specific provisions; only referring to the Warsaw International Mechanism; and not mentioning loss and damage at all. Equally, paragraph 76 offers the option of a detailed ex ante review process with numerous sub-options or none. Divergent visions of the application of CDRRC are also reflected in both the context of the proposed general<sup>15</sup> and operational provisions<sup>16</sup>.

There remains a large number of controversial elements of substance within the Elements Text that need to be further discussed and clarified. In addition, the question of the legal architecture of the 2015 Agreement, its formal and possibly legally binding nature, remains unresolved. The Lima Decision did not address this matter, leaving discussions about one of the most pressing, yet most sidestepped issues in the negotiation process, for a later date.

<sup>15</sup> See, for example, Elements Text, section C, paragraphs 1 to 8.

<sup>16</sup> In respect of mitigation see, for example, Elements Text, section D, paragraphs 15 to 23.

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](mailto:coordinator@legalresponseinitiative.org). If you require legal advice in connection with the international climate negotiations please contact: [enquiries@legalresponseinitiative.org](mailto:enquiries@legalresponseinitiative.org)



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