



# Commitments by Developing Country Parties under the Paris Agreement\*

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## I. Introduction

In December 2015, the 21st Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement (the Agreement).<sup>1</sup> It establishes a general framework for a universal, long-term climate regime under the UNFCCC but leaves many details to be fleshed out in decisions to be adopted in the coming years. Following its entry into force, the Agreement will be formally binding on its Parties.

The Agreement re-affirms the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) (in Art.2 (2)), but moves away from the formalized binary approach of the UNFCCC and the Kyoto Protocol towards more nuanced forms of differentiation

(including self-differentiation). This is reflected in Parties' commitments: many are common to developed and developing country Parties, but they allow some flexibility to accommodate different national circumstances and capabilities. The Agreement (in Art.3) also recognizes that developing country Parties will need support in order for the Agreement to be implemented effectively. It accordingly prescribes a number of commitments (some mandatory, some not) on developed country Parties to provide support, which will potentially have an impact on developing country Parties' commitments: for example, enhanced support for developing country Parties will allow for higher ambition in their actions.

## Legal bindingness

In the academic literature, the level of legal bindingness of an international agreement is often considered to be dependent on a combination of different factors:

- the form or type of the relevant legal instrument (e.g. a treaty as opposed to a COP decision or a policy document like the Rio Declaration on Sustainable Development),
- whether its provisions are expressed in mandatory language e.g. "shall" or "must" not "should" or "may",
- the specificity with which the expected behaviour is expressed, and
- the potential enforceability of obligations (e.g. through a treaty's regulatory regime, compliance monitoring, rights of action or independent dispute settlement).<sup>2</sup>

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Whilst the Agreement will be formally binding on its Parties, only a limited number of provisions create legally binding commitments (ie obligations). These are almost exclusively obligations of conduct rather than result: e.g. they require the filing of nationally determined contributions (NDCs) and other information, but not the meeting of specific targets or other outcomes. They are expressed as “shall” whilst non binding ones are phrased in aspirational or voluntary terms (such as “should”). Specifically, there are no binding commitments related to the achievement of national mitigation targets or to scale up climate finance from current levels.

This paper focuses on developing country Parties’ commitments on all of the substantive areas of the Agreement (mitigation, etc.), distinguishing those that are mandatory from those that are voluntary. This does not, however, imply that only what is legally binding is relevant and important. To achieve the overall objective of the UNFCCC and “prevent dangerous anthropogenic interference with the climate system” (Art.2), parties should comply with all of their commitments in good faith.<sup>3</sup>

## 2. Mitigation Commitments

### a) NDCs

In line with the recognition that current mitigation efforts are not sufficient to keep to the 2°C goal<sup>4</sup> and need to be stepped up, the Agreement, whilst addressing all the elements of the Durban Platform mandate, focuses on mitigation. Parties are subject to a number of individual obligations in relation to national mitigation contributions. In particular, “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve” (Art. 4(2)). These will be recorded in a public registry maintained by the secretariat (Art.4(12)).

The use of “shall” in Article 4(2) indicates a binding obligation, whereas the subordinate clause “that it intends to achieve” reflects a general expectation.<sup>5</sup> In addition, Parties are required to communicate a new NDC every five years, to provide information necessary for clarity and transparency, and to account for their NDCs. In doing so, they should promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting (Art. 4(8), (9) and (13)). These provisions are also couched in mandatory terms (“shall”) creating binding obligations on Parties.

Each Party further commits to pursue domestic mitigation measures, with the aim of achieving its NDC objectives (Art. 4(2)). The phrase “pursue domestic mitigation measures” could arguably be interpreted as going further than a mere obligation of conduct<sup>6</sup>. However, without further

specifications, it probably does not go beyond the general requirement under international law that parties have to execute a treaty in good faith (e.g. not obstruct its purpose and meet reasonable expectations).

Thus, the Agreement imposes binding obligations of conduct on all Parties, but it does not make implementation or achievement of NDCs a binding obligation.<sup>7</sup> Whether NDCs encapsulate commitments that are binding on government entities under domestic law is a matter to be determined according to national and (in the EU) supranational law.

The Agreement also provides that each Party’s successive NDC “will represent a progression” beyond the previous one and reflect its highest possible ambition (Art. 4(3)).<sup>8</sup> Using “will” (not shall) in this provision may again signal a clear expectation but not necessarily a requirement, leaving it largely to the Parties to define “progression”.<sup>9</sup> This is supplemented by the provision that a Party may at any time adjust its existing NDC to enhance its level of ambition (Art. 4(11)).

While the core obligations to file NDCs, provide information and account for their NDCs are common to all Parties, other provisions incorporate differentiation: developed country Parties are expected (“should”) to take the lead and undertake absolute economy-wide reduction targets. Developing country Parties, in comparison, are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances (Art. 4(4)).

Similarly, the Agreement encourages (“should”) Parties to develop long-term low greenhouse gas emission development strategies, but it is for them to decide what these strategies should be, taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (Art.4(19)). Additional flexibility is given to the least developed countries (LDCs) and small island developing States (SIDS), who may prepare strategies that reflect their special circumstances (Art. 4(6)). These provisions set clear expectations on Parties, but stop short of requiring them to act in a particular way.

Support shall be given to developing country Parties for the implementation of their mitigation commitments (Art.4 (5)) but, in contrast to the UNFCCC (Art.4 (7)), the provision of support is not a precondition for meeting their obligations.

To prepare for the entry into force of the new Agreement and operation of the submission cycles, the Decision adopting the Agreement (Decision I/CP.21 –‘Adoption Decision’) contains guidance on the submission, harmonization and necessary adjustments to contributions.

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<sup>3</sup> Vienna Convention on the Law of Treaties, 1969, Art.26, 31. <sup>4</sup> FCCC/CP/2015/10/Add.1 Decision I/CP.21, para.17. The Decision is available at: <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>. <sup>5</sup> Lavanya Rajamani, ‘Ambition and differentiation in the 2015 Paris Agreement’: interpretative possibilities and underlying politics’, ICLQ 6, Available on CJO 2016 doi:10.1017/S0020589316000130. <sup>6</sup> The online Oxford Dictionary defines “pursue” as “Seek to attain or accomplish (a goal) over a long period”. It is doubtful that it creates an obligation of result, however; see, in particular, Daniel Bodansky: “Importantly, it does not create an individual obligation on each party to implement or achieve its NDC ...” in ‘The Legal Character of the Paris Agreement’, 2016, p.8 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735252](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735252). <sup>7</sup> Nor does it impose mandatory information requirements for the submission of contributions. Further guidance on this, features of NDCs and on accounting to facilitate the comparability of NDCs is to be developed in the coming years. <sup>8</sup> During the first cycle of contributions (2018-2020), by comparison, there is only a requirement to communicate or update (but not to strengthen) contributions. See Wolfgang Obergassel (né Sterk), Christof Arens et al, ‘Phoenix from the Ashes - An analysis of the Paris Agreement to the United Nations Framework Convention on climate change’, Wuppertal, January 2016, p.45 available at: [http://wupperinst.org/uploads/tx\\_wupperinst/Paris\\_Results.pdf](http://wupperinst.org/uploads/tx_wupperinst/Paris_Results.pdf). Contrast also this provision with the progression requirement in Article 3, which applies to “all Parties”, suggesting a collective rather than individual requirement possibly, and covers adaptation and support as well as mitigation. <sup>9</sup> L Rajamani, p.10.

Parties are invited to communicate their first NDC no later than when they join the Agreement. Unless a Party decides otherwise, this can be a previously submitted intended nationally determined contribution (INDC) (para.22). Parties that communicated INDCs with a 2030 timeframe are requested to update or re-submit their contributions by 2020 (para.24) and to do so every five years thereafter in accordance with the cycles envisaged under Art.4 (9) of the Agreement. Parties that provided a 2025 timeframe are urged to submit new NDCs reflecting consecutive five-year cycles by 2020 (para.23).

The clarifying information supporting NDCs should follow the existing guidance and may, for example, include quantifiable information on the reference point, scope and coverage of emissions, assumptions and methodological approaches, and how the Party considers its NDC a fair and ambitious contribution towards achieving the UNFCCC's objective (Adoption Decision, para.27).

Parties are required to submit NDCs at least 9–12 months before the relevant meeting of the Conference of the Parties serving as the meeting of the Parties to the Agreement (CMA) for any contribution cycle so that they are included in the relevant synthesis report prepared by the UNFCCC secretariat (para.25). The Ad Hoc Working Group on the Paris Agreement (APA) is tasked with elaborating further guidance (for consideration and adoption by the CMA) on the features of NDCs, the information to facilitate their clarity, transparency and understanding, and on common accounting methodologies and metrics to ensure comparability of NDCs (Adoption Decision, paras.26, 28 and 31).

## **b) Reporting and Review**

The Agreement relies heavily on reporting and review as a means of holding Parties to their pledges and tracking their progress towards the long-term goal. Accordingly, it establishes a transparency framework for action and support, with common reporting commitments for all Parties and additional flexibility for developing country Parties (Art.13 (1) and (2)). Its arrangements and procedures will take account of different national capacities and special rules will apply to LDCs and SIDS (Art.13 (3)). Support for compliance with reporting requirements shall be provided to developing country Parties (Art.13 (14)).

In terms of reporting on mitigation efforts, each Party is required to submit a national inventory report of GHG emissions by sources and removals by sinks using good practice methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC), and information necessary to track progress made in implementing and achieving its NDC (Art.13 (7)). These reports are to be submitted at least every two years, except in the case of LDCs and SIDS who may do so at their discretion (Adoption Decision, para 90). The Adoption Decision also envisages that developing

country Parties will be given flexibility in the scope, frequency and details of their reporting, and the scope of the review (para.89).

In addition, each Party commits to participating in a “facilitative, multilateral consideration of progress” in implementing and achieving its NDC (Art.13(11)), and with respect to its efforts on finance.

The new framework substantially increases the reporting requirements for mitigation actions by developing country Parties, but ensures support will be available to meet these requirements. By requiring developed country Parties to increase the transparency of their provision of support and encouraging developing country Parties to also report on support needed and received (see below, section on Finance), it lays the groundwork for a clearer picture of support flows, and promotes Parties' accountability.

## **c) REDD+ and Cooperative Approaches**

Whilst the presence of a separate article on REDD+ signals a recognition of the importance of forests, Article 5(1) essentially reiterates - in aspirational rather than mandatory terms (“should take action”) - the Parties' existing commitment under the UNFCCC to conserve and manage emission sinks and reservoirs. Article 5(2) encourages Parties in general terms to also reduce emissions from deforestation and forest degradation in developing country Parties though the existing REDD+<sup>10</sup> framework established under the UNFCCC.

The Agreement allows Parties to cooperate in the implementation of their NDCs, including through the use of “internationally transferred mitigation outcomes” (Art. 6(2)). Such use will be voluntary (Art.6(3)). The rules and regulations for this cooperation will have to be developed over the coming years. The Agreement already states that, if engaging in such transfers, Parties are required to avoid ‘double counting’ in accordance with guidance adopted by the CMA (Art.6(2)).

The Agreement also establishes a new mechanism to succeed the Kyoto Protocol's Clean Development Mechanism (CDM), whose scope is broader in that all Parties using it (“on a voluntary basis”) are expected to have some form of mitigation commitment. It aims to “deliver an overall mitigation in global emissions” (Art.6 (4)(d)) or net mitigation impact, rather than the carbon offsetting-focused CDM.<sup>11</sup>

## **3. Commitments in Other Areas**

### **a) Adaptation**

With regard to adaptation, the Agreement introduces a commitment for each Party to, as appropriate, engage in adaptation planning and action.<sup>12</sup> This may include the process of formulating and implementing national adaptation plans (NAPs), the assessment of climate change impacts and

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<sup>10</sup> REDD+ is often used to informally refer to REDD (reducing emissions from deforestation and forest degradation) plus conservation and enhancement of forest carbon stocks and sustainable management of forests in developing countries. <sup>11</sup> NewClimate Institute, ‘What the Paris Agreement means for global climate change mitigation’, 14 December 2015 p.6 available at: <http://newclimate.org/2015/12/14/what-the-paris-agreement-means-for-global-climate-change-mitigation/>. <sup>12</sup> Under the Convention, all Parties are required to “implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change..., and measures to facilitate adequate adaptation to climate change” (Art.4.1 b). For developing country Parties, however, this has been contingent on the provision of financial resources and transfer of technology (Art.4.7).

vulnerability to determine priority actions or building the resilience of socioeconomic and ecological systems (Art.7(9)). The phrase “as appropriate” (after “shall”) allows for a degree of flexibility and weakens the binding character of the norm.

Parties should also - but, in contrast to their reporting on mitigation, are not bound to - communicate their adaptation actions and needs (Art.7(10) and Art.13(8)). If a communication is submitted, it shall be, as appropriate, updated periodically as a component of, or in conjunction with, other communications such as, for example, NAPs, NDCs or national communications (Art.7(11)). It will also be recorded in a public registry maintained by the secretariat. The Agreement explicitly emphasizes that these communications should not create any additional burden for developing country Parties (Art.7(10)).

Specific support will be available to developing country Parties to meet these reporting commitments (Arts. 13(14) and (15)). Adaptation will also be part of the global stocktake (Art.14 (1)), offering an opportunity to review the overall progress towards the global goal and to ratchet up adaptation action and support.

## b) Finance

The Adoption Decision envisages a review and increase of financial commitments (para.53), but the Agreement does not impose new binding commitments on developed country Parties to scale up climate finance from current levels: it commits those Parties to provide finance “in continuation of their existing obligations under the Convention” (Art.9 (1)) and recognizes that they should continue to take the lead in mobilizing climate finance from various sources (Art.9 (3)). “Other Parties” (than developed country Parties) are “encouraged” to contribute as well. This would be on a voluntary basis only and there is no binding obligation to contribute (Art.9 (2)).

In relation to reporting, the requirements are different for developed and developing country Parties. Developed country Parties must communicate biennially “indicative quantitative and qualitative information” on future support (Art.9(5)) and on actual support provided and mobilized through public interventions (Art.9(7)). Other Parties that provide support should also report on this (Art.13(9)). Developing country Parties are encouraged to provide information on financial support needed and received (Art.13(10)). What this information will consist of is to be determined by the Parties in the coming years.

## c) Technology Development and Transfer

The provisions on technology development and transfer are expressed as expectations and recommendations rather than binding obligations: all Parties are to strengthen cooperative action on technology development and transfer (Art.10(2)). Although framed in mandatory language (“Parties... shall strengthen...”), the provision does not create any specific legally binding obligation for individual Parties.

The Agreement further envisages that developing country Parties will receive support, including financial support, in implementing this commitment (Art.10(6)). They are encouraged (“should”) to report on technology transfer support needed and received (Art.13(10)) whilst developed country Parties shall and “other Parties” should report on technology transfer support provided (Art.13(9)).

## d) Capacity-building

The provisions on capacity-building do not impose binding obligations on Parties either: under Article 11(3), all Parties are expected (“should”) to cooperate in enhancing the capacity of developing country Parties to implement the Agreement. In addition, developing country Parties are encouraged to report on “progress made in implementing capacity-building plans, policies, actions or measures to implement this Agreement” (Art.11(4)) and on capacity-building support needed and received (Art.13(10)). Developed country Parties shall report and “other Parties” providing such support should also report on it (Art.13(9)).

## e) Education

Article 12 does not really go beyond Article 6 of the UNFCCC on the necessity of education, training and public awareness regarding climate change. Thus, it is little more than a general reminder that measures at all levels to educate, train and allow the public to participate in relevant decision-making processes are an important part of successful climate change policy-making.

It invites Parties to cooperate in taking measures to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under the Agreement. Although it uses mandatory language (“shall”), the provision only creates a general expectation on all Parties to cooperate, rather than resulting in new specific obligations for each Party.

The Legal Response Initiative (LRI) is a UK based charity that provides legal assistance free of charge to delegates from poor and climate vulnerable developing countries as well as civil society observer organisations. LRI does this with the support of a global network of lawyers from law firms, barrister chambers and universities who produce legal opinions in response to specific queries raised in connection with the climate negotiations.

The opinions and legal briefing papers are available through LRI's database at <http://legalresponseinitiative.org/legal-assistance>. Using the database is free of charge but you need to register using a valid e-mail address.

If you require legal advice, please contact us on: [enquiries@legalresponseinitiative.org](mailto:enquiries@legalresponseinitiative.org)



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