The Paris Agreement: Points of Interest on its Legally Binding Nature

The final stretch of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) process has begun, with the group having transmitted to the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) a Draft Paris Outcome for ministerial negotiations. This years-long process is expected to deliver on the ADP mandate “to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”\(^1\) in two days’ time by producing a balanced, durable and effective agreement that will shape global climate governance from the year 2020 onwards.

Although the ADP’s mandate does not require that the agreement be “legally binding,” accomplishing the objective of the United Nations Framework Convention on Climate Change (UNFCCC) within a shrinking window of time available to keep climate change “at a level that would prevent dangerous anthropogenic interference with the climate system”\(^2\) strongly suggests the need for the 2015 agreement to be so. At the beginning of the process, the ADP’s mandate qualified the form that the new agreement could take as being (a) “under the Convention,” (b) with legal force, and (c) applicable to all. This allowed the ADP to look towards the adoption of a protocol, an amendment to the Convention, a new Annex, amendment/s to existing Annexes, Conference of the Parties (COP) decisions, or a combination of such, as options. The ADP process throughout indicated a preference for an instrument in the form of an agreement, but with a number of Parties shying away from explicitly referring to it as a protocol.

The current Draft Paris Outcome was transmitted to the COP Presidency on the 5th of December 2015, to be the basis of negotiations of ministers from the 196 Parties to the UNFCCC during the second week of the COP. It consisted of a draft decision that contained provisions pertaining to the operationalization of the Paris outcome before it takes effect in 2020, as well as provisions adopting the Agreement, which is attached as an Annex. This is the same format through which the Kyoto Protocol (KP) was adopted in 1997. The text of the protocol was attached as an annex to Decision 1/CP.3, which set out its adoption. It outlined the reasons for the process behind the development of the protocol, and gave guidance for preparatory work before its implementation. Another decision accompanied this, Decision 2/CP.3, which dealt with methodological issues related to the protocol.

\(^1\) Decision 1/CP.17, United Nations Framework Convention on Climate Change

\(^2\) Art. 2, UNFCCC
A new text is expected on the 10th of December, building on a series of ministerial discussions and consultations that took place after a previous draft was released the day before. However, while its substance may change, its legal architecture in terms of a combination of a COP decision and an annexed Agreement text will most likely remain the same.

The combination of a COP decision and an agreement creates an interesting paradox, as although consensus is needed for the adoption of the latter, this agreement does not necessarily bind all Parties. The legally binding nature of the Agreement does not make it universally binding per se. Under the UNFCCC, the COP is tasked to make decisions necessary for the effective implementation of the Convention. COP decisions are adopted via consensus, as the UNFCCC Rules of Procedure on voting have not yet been adopted. There is a view that COP decisions are not legally binding in themselves, as they do not go through a process of ratification, approval or accession. They do, however, have legal force.

When COP decisions are adopted, there is a legitimate expectation of State action on the part of States party to the Convention. This stems from their legally binding commitment under the Convention to promote its effective implementation. That Parties are expected to show good faith and meet the political expectations that COP decisions create is not unusual, as COP decisions are typically used by some treaty bodies to “provide effective interpretations of the treaty that were not made explicit” in the treaty text itself. According to the Vienna Convention on the Law of Treaties, “any subsequent agreement between the parties regarding the interpretation of the treaty of the application of its provisions” must be taken into consideration in the interpretation – and thus implementation – of the treaty.

The adoption and implementation of decisions is the way through which Parties to UNFCCC attempt to actualize its provisions. The Paris Agreement, as an instrument “under the Convention” to promote the realization of its objective, is thus adopted through a Decision that must meet consensus. The only United Nations legal instrument that seems to define consensus is the 1982 Convention on the Law of the Sea, which refers to it as “the absence of any formal objection.” Strictly speaking, therefore, the adoption of a decision does not mean that all Parties need to agree – it merely means no one must disagree, or object to it, during its adoption.

The adoption of a decision annexing the text of the agreed Paris Agreement is only the first step to its becoming a legally binding instrument. Once a decision is adopted, Parties must then go through a process of ratification, wherein the Parties to the Convention, in accordance with their national laws, confirm the Agreement. Under the Vienna Convention on the Law of Treaties, international instruments are required to undergo a process of ratification before they can be considered legally binding.

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3 Art. 7.2, UNFCCC
4 Ibid.
7 Art. 161(8)(e), Convention on Law of the Sea
Provisions that reflect the need for this process can be seen in the draft Paris Agreement, which highlights the Parties’ intention for it to be legally binding. Articles 16, 17 and 18 on ‘Signature and Instruments of Ratification, Acceptance, Approval or Accession,’ ‘Further Requirements and Decision-Making Rights,’ as well as ‘Entry Into Force,’ respectively, highlight this. They indicate the legally binding nature of the instrument, although they do not, as yet, bind the Parties.

There are additional factors that could affect the process of ratification. One is that the Paris Outcome is a package that is supposed to contain a legally binding agreement, as well as a set of decisions that would lead to its adoption and operationalization. Parties and other stakeholders are anticipating and preparing for the adoption of implementing decisions, from the point of the Agreement’s adoption to before its effectivity, that would, in effect, get everything ready for when the Agreement takes effect. The decisions that would be adopted post-Paris would most likely affect whether or not ratification occurs, as Parties gauge the acceptability of their substance.

Another factor to be considered is the binding nature of the Agreement vis-à-vis the binding nature of its provisions. In other words, although the instrument itself may be legally binding, the language used in its provisions might not actually give rise to binding conditions or commitments. The use of may, should and shall in the operative provisions of the Agreement, for instance, indicate whether or not Parties are bound by their content.

Ratification affects whether or not the Agreement will actually take effect. International instruments require certain number of ratifications before they take effect. Until it does, Parties are not bound by the instrument. The current draft of the Paris Agreement requires the submission of at least 50 or 60 instruments of ratification, acceptance, approval or accession before it takes effect, and even then it would not do so before 2020.

In sum, a three-step process is needed before Parties are to be bound by the soon-to-be-adopted Paris Agreement. First, the decision containing the Agreement text must be adopted by consensus. Second, upon the adoption of the decision, the Agreement will undergo a process of ratification in the different States Party to the Convention. This process could take years to both initiate and complete. Finally, the requisite number of ratifications must be met before the Agreement takes effect.

On the first day of the COP, Heads of State present at the opening of the conference indicated their preference for a legally binding Paris Agreement. It becomes apparent, however, that this refers primarily to the form of the Agreement, which would then allow them to undergo the process necessary on their parts to be bound. More than ever, therefore, it seems that instead of signaling the end of a process, the adoption of the Paris Agreement starts a new and even more critical one.