

The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations

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ABSTRACT

The 2015 Paris Agreement, a product of a deeply discordant political context rife with fundamental and seemingly irresolvable differences between Parties, is an unusual Agreement. It contains a mix of hard, soft and non-obligations, the boundaries between which are blurred, but each of which plays a distinct and valuable role. This article identifies various defining elements of legal character and tabulates the core provisions of the Paris Agreement across a spectrum from those that conform most closely to hard obligations to those that are best characterized as ‘non-obligations’. It explores political drivers for the carefully calibrated mix of hard, soft and non-obligations in the Paris Agreement, as well as the dynamic interplay between them, and their critical importance in delivering an agreement acceptable to all.

INTRODUCTION

The 2015 Paris Agreement¹—hailed by French President Hollande as a ‘major leap for mankind’²—is a curious instrument. Albeit a treaty within the meaning of the Vienna Convention on the Law of Treaties,³ the Paris Agreement is littered with provisions that either have weak normative content or seem to be wholly lacking in it. These provisions do not create rights and obligations for States, as one would expect operational provisions of a treaty to do, rather they provide context, offer reassurances and construct narratives. The proliferation of such provisions has led some scholars to characterise the Paris Agreement as a ‘voluntary’ agreement,⁴ or

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1 UNFCCC, Decision 1/CP.21, ‘Adoption of the Paris Agreement’ (29 January 2016) UN Doc FCCC/CP/2015/10/Add.1, Annex (Paris Agreement).

2 J Vidal and others, ‘World Leaders Hail Paris Climate Deal as “Major Leap for Mankind”’ *The Guardian* (London, 12 December 2015) <<http://www.theguardian.com/environment/2015/dec/13/world-leaders-hail-paris-climate-deal>> accessed 24 April 2016.

3 Vienna Convention on the Law of Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 8 ILM 679 (Vienna Convention), art 1(a).

4 Richard Falk, ‘“Voluntary” International Law and the Paris Agreement’ (16 January 2016) <<https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>> accessed 24 April 2016. (Richard Falk argues that ‘the Paris Agreement went to great lengths to avoid obligating the parties.’).

‘a statement of good intentions’.⁵ However, to dismiss the Paris Agreement thus would do grave injustice to this carefully negotiated instrument.

The deeply discordant political context that yielded the Paris Agreement played a determinative role in shaping its key contours, and in blurring the boundaries between law and non-law. Context setting, mutual reassurances and storytelling—usually the bread and butter of preambular recitals—feature in key provisions of the Paris Agreement. These provisions perform a critical function, however, in that they generate a shared understanding that underpins the cascading levels of treaty obligations in the Agreement and informs its purpose.⁶

This Analysis begins by providing a historical context to the issues of ‘legal form’ (of the 2015 agreement) and ‘legal character’ (of its provisions) that have plagued the climate negotiations for the last decade. After a brief discussion of ‘legal form’, it addresses the more challenging question of ‘legal character’ of the provisions in the Paris Agreement. The legal character of the Agreement’s provisions refers to the extent to which the provision creates rights and obligations for Parties, sets standards for State behaviour, and lends itself to assessments of compliance/non-compliance and the resulting visitation of consequences. The piece identifies various defining elements of legal character—location (where the provision occurs), subjects (who the provision addresses), normative content (what requirements, obligations or standards the provision contains), language (whether the provision uses mandatory or recommendatory language), precision (whether the provision uses contextual, qualifying or discretionary clauses) and oversight (what institutional mechanisms exist for transparency, accountability and compliance). It then proceeds to tabulate the core provisions of the Paris Agreement across a spectrum from those that conform most closely to hard obligations to those that are best characterised as ‘non-obligations’.⁷ This Analysis illustrates this spectrum by analysing the legal character of select core provisions, in particular, in the area of mitigation. It concludes by exploring political drivers for the carefully calibrated mix of hard, soft and non-obligations in the Paris Agreement, as well as the dynamic interplay between them, and their critical importance in delivering an agreement acceptable to all.

HISTORICAL CONTEXT: ISSUES RELATING TO LEGAL FORM AND CHARACTER

Ever since the Bali Action Plan 2007⁸ launched the previous phase of negotiations under the UN Framework Convention on Climate Change (UNFCCC),⁹ Parties have pondered the legal form that the ‘outcome’ to those negotiations should take.

5 Anne-Marie Slaughter, ‘The Paris Approach to Global Governance’ (Project Syndicate, 28 December 2015) <<https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>> accessed 24 April 2016.

6 On the notion of ‘cascading levels of treaty obligations’, see Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 194.

7 This characterisation—of what these provisions are not rather than what they are—is not intended either to undermine the importance of these provisions or to dismiss the efforts of Parties in negotiating these. Quite the contrary, as this article will demonstrate.

8 UNFCCC, Decision 1/CP.13, ‘Bali Action Plan’ (14 March 2008) UN Doc FCCC/CP/2007/6/Add.1.

9 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

The options ranged from legally binding protocols and amendments that can deliver the benefits of consistent application, certainty, predictability and accountability, to soft law options, such as decisions taken by the Conference of Parties (COP), which are not, save in the exception, legally binding. The term 'legally binding' is typically applied to negotiated legal instruments that render a particular state conduct mandatory as well as, at least in principle, judicially enforceable.¹⁰ The Alliance of Small Island States (AOSIS) and other vulnerable countries on the frontlines of climate impact have long argued that anything short of a legally binding instrument would be an affront to their grave existential crisis. Many developed countries too had consistently favoured a global and comprehensive legally binding agreement under the UNFCCC. Brazil, India and China, concerned about constraints on their development prospects, were initially reluctant to endorse the call for a legally binding instrument, but, in the final hours of the 2011 Durban climate negotiations that launched the most recent phase of negotiations, only India remained firm in its opposition to such an instrument. Eventually, India was prevailed upon to accept a compromise that launched negotiations towards a 'protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'.¹¹ In India's view, this still left the option open for a range of instruments, which may or may not be binding.¹²

Parties chose not to address the legal form of the 2015 agreement until the final year of the four-year negotiating process that followed. In 2013, the Warsaw conference invited Parties to submit 'intended nationally determined contributions' in the context of the 2015 agreement, but left unresolved the legal form of the 2015 agreement and, explicitly, the legal character of nationally determined contributions.¹³ The 'Elements text'¹⁴ for the 2015 agreement, produced by the 2014 Lima conference, and the 'Geneva Negotiating Text'¹⁵ also contained footnoted disclaimers in relation to the legal form and character of the agreement and its provisions. Thus in the lead up to Paris, Parties had yet to determine what legal form the 2015

10 Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 *Leiden J Intl L* 1, 32 (noting, however, that most norms that are enforceable in principle are often not enforced in practice). Legally binding instruments apply only to those states that have expressed their consent to be bound by means of ratification, acceptance, approval or accession. See Vienna Convention (n 3) art 11.

11 UNFCCC, Decision 1/CP.17 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' (11 December 2011) UN Doc FCCC/CP/2011/9/Add.1 (Durban Platform) para 2. See, generally, Lavanya Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61 *ICLQ* 501. See also Dan Bodansky, 'The Durban Platform Negotiations: Goals and Options' (2012) Harvard Project on Climate Agreements <http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf> accessed 1 April 2016.

12 Submission from India in UNFCCC, 'Views on a Workplan for the Ad Hoc Working Group on the Durban Platform for Enhanced Action: Submission from Parties' (30 April 2012) UN Doc FCCC/ADP/2012/MISC.3, 33.

13 UNFCCC, Decision 1/CP.19, 'Further Advancing the Durban Platform' (31 January 2014) UN Doc FCCC/CP/2013/10/Add.1 (Warsaw ADP Decision) para 2(b) and (c).

14 UNFCCC, Decision 1/CP.20, 'Lima Call for Climate Action' (2 February 2015) UN Doc FCCC/CP/2014/10/Add.1 (Lima Call for Climate Action) Annex: 'Elements for a Draft Negotiating Text'.

15 UNFCCC, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, pt eight, Geneva (8–13 February 2015) Agenda item 3: Implementation of all the elements of decision 1/CP.17 Negotiating text (25 February 2015) UN Doc FCCC/ADP/2015/1.

agreement would take, as well as resolve the legal character of its various provisions, in particular the nationally determined contributions that were expected to form an integral part of the Paris package.

LEGAL FORM OF THE 2015 PARIS AGREEMENT

The vast majority of Parties were keen that the 2015 agreement, many years in the making, take the form of a legally binding instrument. A legally binding instrument signals the highest expression of political will, and thus may be the only appropriate response to what UN Secretary General Ban Ki-moon characterised as the ‘defining issue of our age’.¹⁶ Legally binding instruments have several attributes that make them attractive to certain states in the UNFCCC process. As many scholars have noted, legally binding instruments generate credible commitments.¹⁷ They have the potential to crystallise international commitments into domestic legislative action, thereby co-opting domestic enforcement mechanisms and generating predictability and certainty in implementation as well as accountability at the domestic and international level. These effects are generated through the doctrinal operation of international law in some domestic legal orders, and also because binding international agreements ‘communicate[s] expectations’, ‘produce[s] reliance’, and generate[s] a compliance pull.¹⁸ And, their violation entails higher reputational costs for States. Such commitments also typically survive domestic political changes.¹⁹ However, legally binding instruments also entail significant real and perceived ‘sovereignty costs’²⁰ for States. States may lose autonomy over decision-making in the regulated areas as well as expose national processes to international scrutiny.²¹ Nevertheless, by the time Parties arrived in Paris, there was emerging consensus that the 2015 Agreement would take the form of a legally binding instrument.

India, despite its historical reluctance to accept a legally binding instrument, had softened its stance. The United States too appeared willing to accept one, despite significant domestic political constraints,²² albeit one that would not be titled a ‘Protocol’ as this carries a negative resonance for them, or be characterised as a

16 Secretary General Ban Ki-moon, ‘Opening Remarks at 2014 Climate Summit’ (2014) <http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=2355#.Vv21uBKANBc> accessed 24 April 2016.

17 Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ [2000] 54 Intl Org 421, 426.

18 Dinah Shelton, ‘Introduction’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 8.

19 *ibid* 10–13. See also Jake Werksman, ‘The Legal Character of International Environmental Obligations in the Wake of the Paris Climate Change Agreement’ (Brodie Environmental Law Lecture Series 2016); and Abbott and Snidal (n 17) 426. Although, of course, legally binding instruments do not always generate these benefits, as the experience of the Kyoto Protocol demonstrates.

20 Abbott and Snidal (n 17) 436–41.

21 *ibid*.

22 The United States envisioned the 2015 Agreement as having ‘final clauses’, thus signalling that the 2015 agreement would be a treaty within the meaning of the Vienna Convention. ‘U.S. Submission on Elements of the 2015 Agreement’ (12 February 2014) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf> accessed 1 April 2016, 10–11.

‘treaty’, as this has specific connotations in US constitutional law.²³ The softening of positions in relation to legal form can be traced to at least three developments. First, an irresistible political momentum had built up over time, due to the efforts of many vulnerable countries, towards a legally binding instrument. Second, the notion of ‘national determination’—privileging sovereign autonomy, respecting national circumstance and permitting self-differentiation—had gained considerable traction in the negotiations, thus offering reassurance to Parties concerned about the sovereignty costs attached to a legally binding instrument. Third, a clear distinction had emerged between the legal form of the instrument (ie could be binding) and the legal character of national-determined contributions (ie could be non-binding).

The Paris Agreement is a treaty, as defined in the Vienna Convention on the Law of Treaties.²⁴ It is titled the ‘Paris Agreement’ rather than the Paris Protocol, in deference to US sensitivities.²⁵ In any case, its nomenclature is legally irrelevant.²⁶ The Paris Agreement will apply to those states that have expressed their consent to be bound by means of ratification, acceptance, approval or accession.²⁷ Parties may not make reservations to the Agreement,²⁸ and they may withdraw by fulfilling certain procedural requirements.²⁹ The Agreement was opened for signature at a high-level signature ceremony convened by the Secretary General in New York on 22 April 2016, ‘Earth Day’.³⁰ A record 175 FCCC Parties signed the instrument on this day,³¹ and many are expected to ratify the instrument in 2016, thus increasing the likelihood of early entry into force.³²

The Paris Agreement is an agreement ‘under the United Nations Framework Convention on Climate Change’.³³ Indeed, China, until the final hours of the conference, had argued that the Paris Agreement should be titled ‘Paris Agreement Under the Framework Convention on Climate Change’. Although this was not agreed, Article 2 of the Agreement prefates the ‘purpose’³⁴ of the agreement with the words ‘in enhancing the implementation of the Convention’,³⁵ thus ensuring the centrality

23 See Lavanya Rajamani, ‘The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations’ (2015) 78 MLR 826; see also Werksman (n 19).

24 Vienna Convention (n 3).

25 For a full discussion, see Rajamani (n 23) 835.

26 The definition of treaties explicitly provides that ‘whatever its particular designation’ if it satisfies other requirements of being a treaty, it is a treaty. Anthony Aust notes that it is not the name that determines the status of the instrument, rather whether the negotiating states intended the instrument to be binding (or not) in international law: Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 23.

27 Paris Agreement (n 1) art 20. See generally, Vienna Convention (n 3) art 11.

28 Paris Agreement (n 1) art 27.

29 *ibid*, art 28.

30 Decision 1/CP.21 (n 1) paras 1–4.

31 See for a list of signatories <<http://newsroom.unfccc.int/paris-agreement/175-states-sign-paris-agreement/>> accessed 24 April 2016.

32 ‘Record support for advancing Paris Agreement entry into force’, UNFCCC press release (22 April 2016) <<http://newsroom.unfccc.int/paris-agreement/closing-paris-agreement-signing-press-release/>> accessed 24 April 2016.

33 Decision 1/CP.21 (n 1) para 1. This is in keeping with the Durban Platform, pursuant to which the Paris Agreement was adopted. See Paris Agreement (n 1), preambular recital 2.

34 See Paris Agreement (n 1) art 3 (characterizing art 2 as the purpose of the Agreement).

35 For a discussion of interpretative possibilities relating to this provision, see Lavanya Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’

of the Convention in the evolution of the climate regime. The Paris Agreement is a related legal instrument, as is the Kyoto Protocol. Some provisions of the Convention explicitly apply to related legal instruments.³⁶ In addition, the negotiating history of the term ‘under the Convention’, originating in the Durban Platform decision, as well as the numerous references to the term in the Paris Agreement,³⁷ suggests that the principles of the Convention, in particular, the principle of common but differentiated responsibilities and respective capabilities, apply to the Paris Agreement.³⁸ Further, specific provisions of the Convention are engaged when the Paris Agreement so provides.³⁹ Beyond this, there is a general legal imperative to interpret international agreements in good faith in accordance with their ordinary meaning,⁴⁰ in context⁴¹ and harmoniously in relation to legal instruments covering the same subject matter.⁴² The ambiguous nature of many provisions in both the Paris Agreement and the UNFCCC will in fact make it easier to achieve harmonious construction between them, and to avoid normative conflicts.

LEGAL CHARACTER OF PROVISIONS IN THE 2015 PARIS AGREEMENT

Parties agreed to a legally binding 2015 Agreement on the understanding that it would contain a range of provisions varying in legal character, some with greater legal force and authority than others.⁴³ As set out above, the legal character of a provision refers to the extent to which the provision creates rights and obligations for Parties, sets standards for State behaviour and lends itself to assessments of compliance/non-compliance and the resulting visitation of consequences. Ultimately, the legal character of a provision may determine how effective the provision is in inducing the desired behavioural change to meet the purpose of the agreement.⁴⁴ There are several defining elements of legal character including (but not limited to) the following:⁴⁵

(2016) ICLQ (available on CJO2016. doi:10.1017/S0020589316000130). See also, Annalisa Savaresi, ‘The Paris Agreement: A Rejoinder’ (*EJIL: Talk!*, 16 February 2016) <<http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>> accessed 24 April 2016.

36 These include the Convention’s objective, the powers of the COP to review the implementation of the Convention and any related legal instruments, and its provision on settlement of disputes: UNFCCC (n 9) arts 2, 7(2), 14(2).

37 See Rajamani (n 35) 18–19.

38 See Rajamani (n 11).

39 For instance, the financial mechanism of the Convention serves as the financial mechanism of the Agreement. Paris Agreement (n 1) art 9(8).

40 Vienna Convention (n 3) art 31(1).

41 *ibid*, art 31.

42 International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (1 May–9 June and 3 July–11 August 2006) UN Doc A/CN.4/L.682, 25 (noting ‘a strong presumption against normative conflict’ in international law and that ‘treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict’).

43 The United States, for instance, envisioned that only some elements would be ‘internationally legally binding’. US Submission (n 22) 7.

44 But see Abbott and Snidal (n 17) 421–26 (identifying various costs and limitation to ‘hard law’, and advantages of ‘soft law’).

45 See for variations on these elements, see Jake Werksman, ‘Legal Symmetry and Legal Differentiation Under a Future Deal on Climate’ (2010) 10 Climate Pol 672; and Werksman (n 19). See also Dan

- **Location:** It matters where the provision is located in an agreement. If it is located in the preamble, for instance, it provides context,⁴⁶ adds ‘colour, texture and shading’⁴⁷ to the interpretation of the agreement, including in determining the ‘object and purpose of the agreement’,⁴⁸ but it will not by itself create rights and obligations for Parties. On the contrary, if it is located in the operational part of the treaty, it has the capacity to generate rights and obligations for Parties.
- **Subjects:** It matters to whom the provision is addressed or who it identifies as actors. If the provision is addressed to ‘each Party’, it denotes an individual obligation. If it is addressed to ‘all Parties’, it could denote a collective obligation. If it refers to ‘Parties’, in some cases, depending on the context, it could be a cooperative or collective obligation; in others, it could be a blanket or universal reference to ‘Parties’, not necessarily signalling a collective or cooperative obligation. If it is addressed to ‘developed country Parties’ or ‘developing country Parties’, it could create rights, obligations and/or entitlements for groups of Parties. If the provision uses passive voice and no subject is identified, it may generate expectations of the regime and its institutions.
- **Normative content:** It matters whether the provision has a norm-generating quality or not. If the provision does not place requirements on States or set standards for their behaviour, for instance, it will not by itself create rights and obligations for Parties.
- **Language:** It matters how the provision is phrased. If the provision uses the imperative ‘shall’, it typically creates rights and obligations for Parties. If it uses ‘will’, it implies a promise or expectation. If it uses terms such as ‘should’, ‘strive’ or ‘encourage’, it is recommendatory.
- **Precision:** It matters how precise the provision is. The more precise the provision, the more likely it is to set standards and lend itself to assessments of compliance/non-compliance. If the provision uses discretionary, qualifying and contextual language (using phrases such as ‘as appropriate’), it will expand the space for self-serving interpretations by Parties, and constrict the space for consistent application. If the provision sets goals or prescribes action but is vague on how that aspiration is to be met or the actions carried out, it may not enable compliance.
- **Oversight:** It matters what mechanisms are in place to ensure oversight. The more rigorous the oversight regime—with transparency, accountability, global stock take and compliance procedures—the more likely it is that states will comply with their commitments and be in a position to demand compliance from others.

Taking these factors into account, the Paris Agreement contains provisions spread across the spectrum of legal character. Table 1 seeks to provide an impressionistic picture of this spread of provisions, and the cascading levels of treaty obligations designed collectively to meet the purpose of the Agreement.

Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) *Rev Eur Compar Intl L* (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735252> accessed 24 April 2016; and Kenneth Abbott and others, ‘The Concept of Legalization’ (2000) 54(3) *Intl Org* 401.

46 Vienna Convention (n 3) art 31(2).

47 WTO, *US – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R.

48 Aust (n 26) 424–27. See also Gardiner (n 6) 216–17.

Table 1 Legal character of provisions in the 2015 Agreement

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage	Provisions that set aspirations	Provisions that capture understandings
Individual (Each Party or A Party)	Mitigation: 4(2): 'Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.'	Mitigation: 4(3): Each Party's successive NDC ' will represent a progression' beyond the Party's then current NDC.	Adaptation: 7(10): 'Each Party should , as appropriate , submit and update periodically an adaptation communication...'			
	4(9): 'Each Party shall communicate' a nationally determined contribution (NDC) every five years. 4(17): 'Each party' to an agreement to act jointly ' shall ' be responsible for its emission level as set out in the terms of its joint fulfilment agreement.		Transparency: 13(8) 'Each Party should also provide information' related to climate change impacts and adaptation, ' as appropriate .'			
	Adaptation: 7(9): 'Each Party shall , as appropriate ,' engage in adaptation planning processes and the implementation of actions.					

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage	Provisions that set aspirations	Provisions that capture understandings
Collective or Cooperative "Parties" or "All Parties"	Transparency:					
	13(7): 'Each Party shall regularly provide' information on national inventories and to track progress in implementing its NDC.					
	13(11): Information submitted by 'each Party . . . shall undergo a technical expert review.'					
	13(11): '[e]ach Party shall participate in a facilitative, multilateral consideration of progress' with respect to efforts on finance, and 'implementation and achievement' of its NDC .					
	Education, Awareness, Public Participation:					
	12: Parties shall cooperate in taking measures, as appropriate , to enhance climate change education, training, public awareness, public participation and public access to information . . . '		Adaptation: 7 strengthen their cooperation on enhancing action on adaptation.'		Mitigation: 4(1): Parties aim to reach global peaking of greenhouse gas emissions as soon as possible . . . '	
			Loss & Damage: 8(3): Parties should enhance understanding, action and support, including through the			

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage aspirations	Provisions that set aspirations	Provisions that capture understandings
Blanket "Parties" or "All Parties"	Cross-cutting: 3: "... all Parties are to under- take and communicate ambi- tious efforts as defined in Articles 4, 7, 9, 10 and 11 ..."	Cross-cutting: 3: "The efforts of all Parties will represent a progres- sion over time, while rec- ognizing the need to support developing coun- try Parties for the effec- tive implementation of this Agreement."	Mitigation: 4(14): "In the context of their nationally deter- mined contributions, when recognizing and im- plementing mitigation ac- tions with respect to anthropogenic emissions and removals, Parties shall take into account, as appropriate, existing methods and guidance for their NDCs. In	Warsaw International Mechanism, as appropri- ate , on a cooperative and facilitative basis with re- spect to loss and damage associated with the ad- verse effects of climate change.'	Technology: 10(1): 'Parties share a long- term vision on the importance of fully realizing technology development and trans- fer in order to im- prove resilience to climate change and to reduce greenhouse gas emissions.'	Market-based: Approaches: 6(1): 'Parties recognize that some Parties choose to pursue voluntary co- operation in the imple- mentation of their nationally determined contributions ...' 6(8): 'Parties recognize the importance of inte- grated, holistic and bal- anced non-market
	Mitigation: 4(8): In communicating their NDCs, all Parties shall pro- vide the information necessary for clarity, transpar- ency and understanding ...' 4(13): 'Parties shall account'	Finance: 9(2): 'Other [than de- veloped country] Parties are encour- aged to provide or continue to provide	Capacity Building: 11(3): All Parties should cooperate to enhance the capacity of developing country Parties to imple- ment this Agreement.'			

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage aspirations	Provisions that set understandings	
	accounting for their NDCs, 'Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting . . . '		under the Convention . . . '	such support voluntarily.'	approaches being available to Parties . . . '	
	4(16) : Parties that have reached an agreement to act jointly ' shall notify the secretariat of the terms of that agreement' including the emission level allocated to each Party.		4(19) : 'All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies..'		Adaptation: 7(2) : 'Parties recognize that adaptation is a global challenge faced by all . . . '	
	4(15) : 'Parties shall take into consideration ' in implementing this Agreement the concerns of countries most affected by the impact of response measures.		Sinks: 5(1) : 'Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases . . . '		7(4) : 'Parties recognize that the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs.'	
	Market-based Approaches: 6(2) : 'Parties shall ', where engaging in cooperative market approaches 'promote sustainable development and ensure environmental integrity and transparency,				7(5) : 'Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach . . . '	
					7(6) : 'Parties recognize the importance of	

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage aspirations	Provisions that set aspirations	Provisions that capture understandings
Developed country Parties	including in governance, and shall apply robust accounting . . . ,					support for and international cooperation on adaptation efforts . . . ,
	Technology: 10(2): 'Parties, . . . shall strengthen cooperative action on technology development and transfer.'					Loss & Damage: 8(1): 'Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change . . . ,
	Capacity-building: 11(4): 'All Parties, enhancing the capacity of developing country Parties.. shall regularly communicate on these actions or measures on capacity - building.'					
Developed country Parties	Finance: 9(1): 'Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.'					
	Finance: 9(1): 'Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.'					
	Finance: 9(5): 'Developed country Parties shall biennially communicate indicative quantitative and qualitative information relating to					
Developed country Parties						

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage	Provisions that set aspirations	Provisions that capture understandings
Developing country Parties	provision and mobilization of finance. 9(7) : 'Developed country Parties shall provide transparent and consistent information on support for developing country Parties provided and mobilized through public interventions biennially . . . '		finance from a wide variety of sources . . . ' 11(3) : 'Developed country Parties should enhance support for capacity - building actions in developing country Parties.'			
	Transparency: 13(9) : 'Developed country Parties shall , and other Parties that provide support should, provide information on financial, technology transfer and capacity-building support provided to developing country Parties . . . '					
				Mitigation: 4(4) : 'Developing country Parties should continue enhancing their mitigation efforts . . . '	Mitigation: 4(4) : Developing country Parties 'are encouraged to move over time towards economy- wide emission reduction or limitation targets in the light of different	
				Capacity-building: 11(4) : 'Developing country Parties should regularly communicate progress made on		

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage	Provisions that set aspirations	Provisions that capture understandings
No addressee (passive voice)	<p>Mitigation:</p> <p>4(5): ‘Support shall be provided to developing country Parties for the implementation of this Article ...’</p> <p>Adaptation:</p>		<p>implementing capacity - building plans, policies, actions or measures to implement this Agreement.’</p> <p>Transparency:</p> <p>13(9): ‘... and other Parties that provide support should, provide information on financial, technology transfer and capacity- building support provided to developing country Parties ...’</p> <p>Capacity-building:</p> <p>13(10): ‘Developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received ...’</p>	<p>national circumstances.’</p> <p>Finance:</p> <p>9(5): Other (than developed country) Parties providing resources ‘are encouraged to communicate biennially such information on a voluntary basis.’</p> <p>Finance:</p> <p>9(7): Other (than developed country) Parties ‘are encouraged to’ provide information on support for developing countries mobilized through public interventions.</p>	<p>Provisions that set aspirations</p>	<p>Provisions that capture understandings</p>

(continued)

Table 1 Continued

Subject/ Addressee	Hard Obligations		Soft Obligations		Non-Obligations	
	Provisions that create obligations	Provisions that generate expectations	Provisions that recommend	Provisions that encourage	Provisions that set aspirations	Provisions that capture understandings
	7(13): Continuous and enhanced international support shall be provided to developing country Parties for the implementation of relevant adaptation actions.					
	Technology:					
	10(6): 'Support, including financial support, shall be provided to developing country Parties for the implementation of this Article . . . '					
	Transparency:					
	13(14): 'Support shall be provided to developing countries for the implementation of this Article.'					
	13(15): 'Support shall also be provided for the building of transparency-related capacity of developing country Parties . . . '					

Table 1 is intended to be illustrative rather than comprehensive.⁴⁹ It tabulates provisions based on the nature and subjects of these obligations. At one end of the spectrum are provisions that create rights and obligations for Parties, set standards and lend themselves to assessments of compliance/non-compliance. This is, for instance, the case with individual (each Party) obligations, framed in mandatory terms (shall), with clear and precise normative content, and no qualifying or discretionary elements. Such provisions can be characterised as hard obligations.⁵⁰ In the middle of the spectrum are provisions that identify actors (each Party or all Parties), set standards, albeit frequently with qualifying and discretionary elements and in recommendatory terms (should or encourage). These provisions can be characterised as soft obligations.⁵¹ At the other end of the spectrum are provisions lacking in normative content that capture understandings between Parties, provide context or offer a narrative. Albeit in the operational part of a legally binding instrument, these provisions are best characterised as non-obligations. These categories—hard, soft and non-obligations—are imprecise and fluid, and there is no bright line between them. Hard obligations meld into soft obligations and soft obligations into non-obligations. For instance, on adaptation, an individual obligation (each party) phrased in mandatory terms (shall) is combined with discretionary language (as appropriate).⁵² The Paris Agreement contains a mix of hard, soft and non-obligations between which there is dynamic interplay. Each provision contains a unique blend of elements of legal character, and thus occupies its own place in the spectrum of legal character from hard obligations to non-obligations. The combination of elements in each provision is a reflection of the demands of the relevant issue area as well as the particular politics that drove its negotiation. While most multilateral environmental agreements contain a mix of hard and soft obligations, it is unusual to find ‘non-obligations’ in operational provisions of treaties. Neither the Framework Convention on Climate Change nor the Kyoto Protocol contains such provisions, except in preambular recitals.

‘Hard Obligations’ in the Paris Agreement

Table 1 is revealing in several respects. The majority of ‘hard obligations’ in the Paris Agreement relate to mitigation and transparency.⁵³ Indeed, the only individual (each Party) obligations, framed in mandatory terms (shall), with no qualifying or discretionary elements occur in relation to mitigation and transparency.⁵⁴ Although there is an individual mandatory obligation in relation to adaptation planning, it is qualified by the phrase ‘as appropriate’, thus softening the

49 It focuses on provisions that are addressed to States, and not, for instance, provisions that create obligations for the Conference of Parties (such as art 14).

50 See Shelton (n 18) 10–13.

51 The term soft law is used to refer to ‘international prescriptions that are deemed to lack requisite characteristics of international normativity’, but which, nevertheless, ‘are capable of producing certain legal effects’. See Remarks by G Handl in W Michael Reisman and others, ‘A Hard Look at Soft Law’ (1988) 82 *Amer Soc Intl L Proc* 371.

52 Paris Agreement (n 1) art 7(9).

53 See **Table 1**, col 2.

54 See **Table 1**, arts 4(2), 4(9), 4(17), 13(7) and 13(11).

obligation.⁵⁵ There is a mandatory cooperative obligation in relation to climate-change education and public participation, but this too is qualified by the clause ‘as appropriate’.⁵⁶ There is a blanket mandatory obligation placed on Parties to strengthen technology development and transfer, but since there is no concrete guidance on how this is to be done, this in effect functions as a soft obligation.⁵⁷ There is a mandatory obligation to report on capacity-building actions taken by Parties,⁵⁸ thus bolstering transparency, but the obligation to enhance capacity building is crafted in the passive voice, and does not place the burden for doing so on Parties, either individually or collectively.⁵⁹ There are mandatory obligations for developed country Parties in relation to finance, but these continue existing obligations rather than create substantive new obligations.⁶⁰ To the extent that new mandatory obligations are created on capacity building, they relate to reporting on support provided.⁶¹ More broadly, the provisions on support relating to mitigation, adaptation, technology and transparency, although framed in mandatory terms, are in passive voice, and do not identify who is responsible for the provision of such support.⁶² The provisions relating to mitigation and transparency are thus distinctive—they conform more closely to notions of ‘hard law’ than other provisions in the Agreement. The hard obligations on mitigation are matched by hard obligations in relation to transparency⁶³ and accountability,⁶⁴ bolstering the legal character of these provisions. These oversight mechanisms include a technical expert review and a multilateral consideration of progress.⁶⁵ There are also hooks for the establishment of a global stocktake to assess collective progress towards achieving the purpose of the Agreement,⁶⁶ and a compliance mechanism to facilitate implementation of, and to promote compliance with, the Agreement’s provisions.⁶⁷

Even in the area of mitigation, however, given deeply entrenched and divergent views of Parties, each provision contains a carefully calibrated mix of the elements of legal character. This is demonstrated by Article 4(2), which is at the heart of the mitigation section and the Agreement itself. It reads: ‘Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving

55 Paris Agreement (n 1) art 7(9).

56 *ibid*, art 12.

57 *ibid*, art 10(2).

58 *ibid*, art 11(4).

59 *ibid*, art 11(5).

60 *ibid*, art 9(1).

61 *ibid*, arts 9(5), 9(7), 13(9).

62 *ibid*, arts 4(5), 7(13), 10(6), 13(13), and 13(14). This implies that no specific Party or group of Parties (such as developing or developed) is tasked with support responsibilities. It also leaves open the possibility that support could be provided through international institutions, the private sector etc.

63 *ibid*, arts 4(8) and 13. The transparency obligations relate to mitigation, adaptation and support, but the transparency obligations relating to mitigation are more stringent (‘Each Party shall’) than for adaptation (‘Each Party should’): *ibid*, art 13(7) and (8). In relation to finance, the transparency obligations are mandatory for developed countries but not for others: *ibid*, art 13(9).

64 *ibid*, art 4(13).

65 *ibid*, art 13(11).

66 *ibid*, art 14.

67 *ibid*, art 15. See Rajamani (n 35) for a detailed discussion of the system of oversight.

the objectives of such contributions.⁶⁸ This provision applies to ‘each Party’, and uses the imperative ‘shall’ in relation to preparing, communicating and maintaining national contributions, as well as pursuing domestic measures.⁶⁹ It also prescribes clear and defined actions to be undertaken by Parties. It thereby creates individual binding obligations for Parties. However, in deference to views of certain Parties, Article 4(2) contains obligations of conduct rather than result. The term ‘intends to achieve’ in the first sentence establishes a good faith expectation that Parties intend to achieve their contributions, but stops short of requiring them to do so. The second clause in the second sentence, ‘with the aim of achieving the objectives of such contributions’, performs a similar function. It requires Parties to aim at achieving the objectives of their contributions. Parties thus have binding obligations of conduct to prepare, communicate and maintain contributions, as well as to pursue domestic measures. There is also a good-faith expectation that Parties intend and will aim to achieve the objectives of their contributions. In the lead up to Paris, many Parties, including the European Union (EU) and small island States, had argued that Parties should be required to implement and/or achieve their stated contributions, imposing an obligation of result on them. This was strenuously opposed by the United States, China and India, among others, who did not wish to subject themselves to legally binding obligations of result. The Paris Agreement deferred to the latter, but ensured that Parties had binding obligations of conduct coupled with a good faith expectation of results. The good faith expectation of results is further underlined in later provisions that require each Party to provide the information necessary to track progress in implementing and achieving its nationally determined contribution,⁷⁰ and which subject Parties to a ‘facilitative, multilateral consideration of progress’ with respect to such implementation and achievement.⁷¹ Article 4(2) also performs another function—it firmly anchors nationally determined contributions in the Paris Agreement. It ensures that these contributions are an integral part of the Paris Agreement, notwithstanding the fact that they are to be recorded in a public registry maintained by the Secretariat,⁷² rather than appended to the Agreement.⁷³

‘Soft Obligations’ in the Paris Agreement

Table 1 also demonstrates that there are several soft obligations in the mitigation section of the Agreement. This is to be expected, given the sharply divergent views on mitigation, in the negotiations. For example, Article 4(4) reads: ‘Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their

68 The analysis that follows draws from Rajamani (n 35). See also Christina Voigt, ‘The Paris Agreement: What is the Standard of Conduct for Parties’ (*Questions of International Law*, 24 March 2016) <<http://www.qil-qdi.org/paris-agreement-standard-conduct-parties/>> accessed 24 April 2016.

69 Although the second sentence in art 4(2) uses the term ‘Parties’, given it is framed by the first sentence and flows from it. Arguably ‘Parties’ here is not intended to signal a collective obligation for *all* Parties, but is merely used to refer in a blanket way to Parties.

70 Paris Agreement (n 1) art 13(7) (b).

71 *ibid*, art 13(11).

72 *ibid*, art 4(12).

73 How the contributions should be recorded was a matter of considerable debate in the lead up to Paris: see further Rajamani (n 35).

mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.⁷⁴ This provision places obligations on an indeterminate cast of ‘developed’ and ‘developing’ country Parties. It uses recommendatory terms (should and encouraged to) that arguably set strong normative expectations on Parties. However, this provision does not create any new obligations for Parties, nor was it intended to. This provision urges developed countries to continue to undertake absolute emission reduction targets, which they had undertaken under the Cancun Agreements, and have pledged in their intended nationally determined contributions. It urges developing countries to continue to enhance their mitigation efforts, which they have done in the last decade. It further encourages them to move over time towards economy-wide targets in the light of different national circumstances. Since mitigation contributions are nationally determined, it is a normative expectation that Parties will exercise a particular choice, not a requirement that they do so. It is precisely because this provision creates no new obligations that the United States agreed to the Paris package. This provision was at the centre of the ‘shall/should’ controversy that nearly unravelled the Paris deal in the final hours. The ‘take it or leave it’ text presented by the French contained mandatory language (shall) in relation to developed-country targets, and recommendatory language (should) in relation to developing-country mitigation efforts. In addition to the lack of parallelism in the legal character of requirements placed on developed and developing countries, the use of mandatory language for developed countries’ targets posed a problem for the United States. The ‘shall’ had to go if the United States were to stay on board, but the prospect of changing such a critical word in a ‘take it or leave it’ text threatened to unravel the entire deal. Eventually, after furious huddling in the room, and high-level negotiations outside it, the ‘shall’ was declared a typographical error and changed to a ‘should’ by the FCCC Secretariat.⁷⁵

Another example of a ‘soft obligation’ in relation to mitigation is Article 4(3), which reads: ‘[e]ach Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution, and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances.’⁷⁶ This provision applies to ‘each Party’ and is thus an individual obligation. The use of the auxiliary verb ‘will’ signals a strong but not mandatory obligation that each Party will undertake more ambitious actions over time.⁷⁷ The provision still leaves to national determination what Parties’ contributions will be and how these will reflect their ‘highest possible ambition’ and ‘common but differentiated responsibilities and respective

74 Paris Agreement (n 1) art 4(4).

75 J Vidal, ‘How a ‘Typo’ Nearly Derailed the Paris Climate Deal’ *The Guardian* (London, 16 December 2015) <<http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal>> accessed 24 April 2016.

76 Paris Agreement (n 1) art 4(3).

77 The negotiating context and history shows that the use of ‘shall’ was considered and rejected, suggesting that ‘will’ is used here as describing a future event, thus implying a promise to perform, rather than creating an obligation.

capabilities, in light of different national circumstances'. It is, however, backed by the rigorous system of oversight discussed above.⁷⁸

Notwithstanding several 'soft' obligations in the mitigation section, Table 1 also reveals that the majority of obligations in relation to adaptation,⁷⁹ loss and damage,⁸⁰ finance,⁸¹ technology⁸² and capacity building⁸³ are soft obligations. In these areas, provisions recommend and encourage actions or set aspirations⁸⁴ for all Parties or for groups of Parties, rather than establish individual mandatory obligations. Many of these provisions also contain qualifying and discretionary elements.⁸⁵

'Non-Obligations' in the Paris Agreement

Finally, Table 1 records the presence of provisions in the Paris Agreement that cannot be characterised as obligations or even as law, according to the criteria of 'legal character' above. There are several such provisions in the adaptation section.⁸⁶ For instance, in Article 7(2), Parties recognise that adaptation is a global challenge. In Article 7(5), Parties acknowledge that adaptation action should follow a country-driven approach. In Article 7(6), Parties recognise the importance of support for adaptation efforts. These provisions apply in a blanket fashion to Parties, and do not prescribe, whether in mandatory, recommendatory or even cajoling terms, a particular course of action for Parties. They do, however, provide context, construct a narrative and generate mutual reassurances about the nature of the problem being addressed, particular ways of addressing them, and availability of support for doing so. In so doing, they perform a critical function. They capture shared understandings, endorse common conceptual underpinnings and tenets, and signal solidarity in addressing the problem. While such provisions are not typically the fare of operational provisions in a treaty, these were necessary given the negotiating context of the Paris Agreement and, indeed, essential to the Paris package.

An excellent example of such a provision is Article 7(4), in which Parties recognise that the current need for adaptation is significant, that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs. Although this provision does not demand any particular conduct from Parties, it was nevertheless difficult to secure. Many developing countries had stressed the links between mitigation ambition (or lack thereof) and the need for enhanced adaptation. The Africa Group had proposed a quantifiable adaptation goal that would assess adaptation impacts and costs

78 See nn 64–67. See also Harro van Asselt, 'International Climate Change Law in a Bottom Up World' (*Questions of International Law*, 24 March 2016) <<http://www.qil-qdi.org/international-climate-change-law-bottom-world/>> accessed 24 April 2016.

79 See eg Paris Agreement (n 1) arts 7(10), 7(7).

80 See eg *ibid*, art 8(3).

81 See eg *ibid*, arts 9(2), 9(3), 9(5), 9(7).

82 See eg *ibid*, art 10(1).

83 See eg *ibid*, art 11(3).

84 See eg *ibid*, arts 4(1), 10(1).

85 See eg *ibid*, arts 5(1), 7(10), 8(3).

86 See eg *ibid*, arts 7(2), 7(4), 7(5), 7(6).

flowing from the agreed temperature goal.⁸⁷ Implicit in this exercise was an assumption that the worst impacts would be borne by vulnerable countries that had contributed little thus far to creating the problem, and that such adaptation costs would have to be raised and borne by developed countries. This proved unpalatable to developed countries. The Paris Agreement does not contain a quantified adaptation goal, but in due deference to the concerns of many vulnerable countries, it recognises the critical inter-linkages between adaptation, mitigation and support, in Article 7(4). It also implicitly endorses, in the global stocktake provision, the inter-linkages between the achievement of long-term goals, including in relation to temperature, and efforts related to mitigation, adaptation and means of implementation.⁸⁸ Thus, although a ‘non-obligation’, Article 7(4) signals a shared understanding that was crucial to the acceptability of the larger political package.

POLITICAL CONTEXT AND DYNAMIC INTERPLAY BETWEEN HARD, SOFT AND NON-OBLIGATIONS

The spread of provisions in the Paris Agreement—the relatively hard obligations on mitigation and transparency, the softer obligations on adaptation, finance, technology and capacity building, and the presence of several non-obligations—can be traced to a fundamental disagreement between Parties on the scope of the Agreement. The Durban Platform decision had identified the focus of work for the 2015 Agreement as ‘mitigation, adaptation, finance, technology development and transfer, transparency of action, and support and capacity building’.⁸⁹ Developed countries, however, had long sought to focus on mitigation and transparency alone, while many developing countries had argued for parity in treatment across mitigation, adaptation, transparency and means of implementation (finance, technology and capacity building). This debate carried through to the scope of ‘nationally determined contributions’.⁹⁰ In the negotiations leading up to the Paris meeting, many countries insisted that contributions should only cover mitigation, and others argued that mitigation and adaptation should be accorded legal and material parity, and that contributions should be required in relation to finance as well.⁹¹ Parties’ contributions submitted in 2015 therefore varied substantively: some focused on mitigation alone⁹² while others covered all areas.⁹³ The Paris Agreement is egalitarian in its coverage of all areas, but,

87 See Submission by Swaziland on behalf of the African Group on adaptation in the 2015 Agreement (8 October 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_adaptation_20131008.pdf> accessed 24 April 2016.

88 Paris Agreement (n 1) art 14.

89 Durban Platform (n 11) para 5.

90 NDCs were first invited by the Warsaw ADP Decision. See Warsaw ADP Decision (n 13) para 2(b).

91 The Lima Outcome left the scope of NDCs open, although encouraged an adaptation component: UNFCCC, Decision 1/CP.20, ‘Lima Call for Climate Action’ (2 February 2015) UN Doc FCCC/CP/2014/10/Add.1, para 12 in particular.

92 See eg ‘Submission by Latvia and the European Commission on behalf of the European Union and its Member States’ (6 March 2015) <<http://www4.unfccc.int/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf>> accessed 24 April 2016.

93 See eg ‘Contribution of Gabon’ (1 April 2015) <<http://www4.unfccc.int/submissions/INDC/Published%20Documents/Gabon/1/20150331%20INDC%20Gabon.pdf>> accessed 1 April 2016; and ‘India’s Intended Nationally Determined Contribution: Working Towards Climate Justice’ (1 October

given the negotiating context, its treatment of these issues and the legal character of provisions in different areas varies.

Similar negotiating politics explains the presence of soft and even non-obligations in the sections on adaption and means of implementation. Through the four-year negotiation process, several developing countries argued not just for parity in treatment across these issue areas but also for the allocation of equal negotiating time to each issue area, and for the text in each issue area to be of similar length. However, in relation to means of implementation, there was little appetite among developed countries to accept 'hard obligations'. On adaptation, many developed countries believed that parity in treatment would not be an appropriate response in light of its fundamentally different nature to mitigation, including that it is primarily a domestic responsibility, albeit to be fulfilled with international support where available. Indeed there were suggestions that many of the provisions that currently feature in the adaptation section would be better placed in decisions taken by the Conference of Parties. Given this negotiating context, the Paris Agreement provided egalitarian coverage to all areas but with considerable variance in the legal character of obligations across the issue areas. The balanced, albeit differing, coverage of issue areas in the Paris Agreement served to build confidence among Parties that 'their' issues were given due importance. This confidence played a critical role in driving the final deal, delivering binding obligations of conduct in relation to mitigation and transparency, and the cascading levels of treaty obligations designed to meet the purpose of the Agreement.

CONCLUSION

The Paris Agreement is arguably an exemplar of the 'brave new world of international law' in which forms of law and lawmaking have 'mutated into fascinating hybrid forms'.⁹⁴ The Paris Agreement, a product of a deeply discordant political context, rife with fundamental and seemingly irresolvable differences between Parties, is an unusual Agreement. It contains a carefully calibrated mix of hard, soft and non-obligations, the boundaries between which are blurred. Each of these types of obligations plays a distinct and valuable role. The 'hard obligations' of conduct in mitigation and finance, in conjunction with a rigorous oversight system, form the core of the Paris Agreement. The 'soft obligations' peppered throughout the instrument in relation to mitigation, adaptation and means of implementation create good faith expectations of Parties. And the non-obligations, albeit unusual in operational provisions of treaties, provide valuable context, construct narratives and offer mutual reassurances. This delicate and unusual mix of obligations (hard and soft) and non-obligations—years in the making—was crucial in delivering the Paris Agreement. It remains to be seen if this mix of obligations will deliver us from climate change.

2015) <<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>> accessed 24 April 2016.

94 Harald Koh, 'A World Transformed' (1995) 20(2) Yale J of Intl L ix.