

# Can ‘Soft Law’ Solve ‘Hard Problems’? Justice, Legal Form and the Durban- Mandated Climate Negotiations

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## Abstract

The relationship between legal form and justice and ethics has been neglected in climate change literature. This neglect stems from an assumption that legal form matters less than wide participation and the substance of commitments. This assumption seems to pervade negotiations in the lead-up to the Paris meeting of the UNFCCC. We dispute this assumption, arguing that principles of international and intergenerational justice require an effective regime and that a hard law agreement is more likely to deliver it.

Empirical studies offer limited guidance but, on balance, hard law treaties are preferred in terms of compliance and effectiveness. With a Paris agreement likely to include voluntary pledges in the form of ‘nationally determined contributions’ there is a risk that the requirements of justice are not met. But a deficit in distributional justice would be even greater under a soft law agreement due to weaker compliance. We elaborate the ideal form of the Paris agreement, including necessary anchoring provisions, to ensure a hard law outcome.

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Even if political feasibility leads to a soft agreement in Paris, weaknesses could be lessened by building in strong compliance and transparency provisions. We suggest strategies for moving from soft to hard obligations over time contingent on a stronger political will.

## I INTRODUCTION

While parties to the UN *Framework Convention on Climate Change* (UNFCCC)<sup>1</sup> appear to be negotiating on the assumption that the Paris agreement will at least contain a legally binding core agreement, disagreement over the ideal legal form is continuing. In particular, there is divergence over whether mitigation commitments should be legally binding. Mitigation commitments may be non-binding even if the core Paris agreement takes the form of a 'hard law' binding treaty instrument.<sup>2</sup>

However, legal form issues have tended to be ignored in recent climate change literature, owing to a perception that whether an international agreement takes the form of a hard law treaty or soft law commitments makes little practical difference to its effectiveness.<sup>3</sup> This article challenges this assumption.

Our focus is the issue of whether justice, both international and intergenerational, dictates a particular legal form for climate change obligations. More specifically, we address the distinct but interrelated questions of whether, firstly, the agreement which emerges from the UN climate negotiations in Paris should be a legally binding treaty-status instrument ('hard law instrument'). Secondly, we address the question of whether the mitigation commitments contained in or linked to such an agreement should be binding under international law ('hard law' obligations) or non-binding ('soft law' obligations). In addressing these questions we need to be clear about what we mean by 'justice' and 'legal form' ('hard' and 'soft law').

In the climate change context, justice refers to a fair distribution of the burdens and impacts of climate change and the equal protection of core human rights relating to life, health and subsistence between states in the lifetimes of those alive today and between current and future generations.<sup>4</sup> We argue that legal form, and whether the Paris agreement

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<sup>1</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 30822 (entered into force 21 March 1994).

<sup>2</sup> Lavanya Rajamani, 'The Warsaw Climate Negotiations: Emerging Understandings and Battle Lines on the Road to the 2015 Climate Agreement' (2014) 63(3) *International and Comparative Law Quarterly* 721, 730, 738.

<sup>3</sup> Gregory Shaffer and Mark A Pollack, 'Hard and Soft Law: What Have We Learned?' (Research Paper No 12-17, University of Minnesota Law School, 2012) 16.

<sup>4</sup> Simon Caney (2010), 'Climate Change, Human Rights and Moral Thresholds' in S Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2009),

is a 'hard' or 'soft' agreement, has strong links with justice. While the 'bottom up' self-differentiation model likely to be adopted in the Paris agreement may be an imperfect means of differentiating between states with differing levels of development, even greater injustice will result if this differentiation is undermined by states failing to implement their chosen mitigation commitments. A hard law agreement is more likely to be *effective*, therefore helping to prevent developing and small island states within current lifetimes, as well as future generations, from facing disproportionate mitigation burdens and impacts from climate change.

Both the concept of 'soft law' and whether there is a distinction between hard and soft law are disputed.<sup>5</sup> While there is no universal and precise definition of 'soft law', in essence it refers to non-legally binding social rules made by states and other subjects of international law that have 'special legal relevance'.<sup>6</sup> In this article our starting point is that 'soft law', while potentially influencing behaviour, falls short of the necessary requirements to constitute a norm binding under international law. Furthermore, we assume that while there may be varying levels of 'bindingness' as some theorists suggest, international obligations can be broadly categorised either as hard or soft law.<sup>7</sup> This is a distinction which states make in their practice and indeed, as pointed out by Michael Bothe, 'argue about'.<sup>8</sup> In addition to non-binding international agreements 'soft law' includes Conference of the Parties (COP) decisions,<sup>9</sup> a key possible 'soft law' outcome for the Paris climate COP. Soft law also includes vague or indeterminate provisions within a legally binding instrument.<sup>10</sup>

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reprinted in Stephen Gardiner et al (eds), *Climate Ethics Essential Readings* (Oxford University Press, 2010).

<sup>5</sup> Contrast, for example, Jutta Brunnée and Stephen J Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) VIII *Finch Yearbook of International Law* 273 against Jürgen Friedrich, *International Environmental "soft law": The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer-Verlag Berlin Heidelberg, 2013) and Dinah Shelton, 'Soft Law' (Research Paper No 322, George Washington University Law School, 2008).

<sup>6</sup> Daniel Thurer 'Soft Law' in Rüdiger Wolfrum, *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2009) 3.

<sup>7</sup> Cf Brunnée and Toope, above n 5, 288 who argue that there is in fact a spectrum of bindingness and that soft law can have a significant impact on state behaviour. This paper does not dispute that there is such a spectrum, but argues that international obligations and agreements can still broadly be categorised as either hard or soft law. The literature supports the argument that hard and soft law obligations do have different levels of impact on state behaviour.

<sup>8</sup> Michael Bothe, 'Legal and Non-Legal Norms—a meaningful distinction in international relations?' (1980) 11 *Netherlands Yearbook of International Law* 65-95 at 94.

<sup>9</sup> Lavanya Rajamani, 'Negotiating the 2015 Climate Agreement: Issues relating to Legal Form and Nature' (Research Paper Issue 28, Mitigation Action Plan & Scenarios, 2015) 11.

<sup>10</sup> Sebastian Oberthür, 'Options for a Compliance Mechanism in a 2015 Climate Agreement' (2014) 4 *Climate Law* 30, 31; Christine Chinkin points out that the Vienna

Conversely, 'hard law' refers to an agreement which is legally binding (i.e. a treaty status instrument), such as a Protocol under the UNFCCC. Whether an agreement is hard law is determined primarily by the intention of the parties.<sup>11</sup> Not all obligations contained within hard law instruments are necessarily hard law obligations, meaning that even if the Paris agreement is binding, states' mitigation commitments may not necessarily be. This will depend again on the intention of the parties, which can be gleaned from the legal status of the overarching agreement, the precision of the particular obligation, any delegation or oversight of implementation of the particular obligation and how it is linked to the core agreement (mitigation commitments are likely to be housed in an external document, for example).<sup>12</sup>

While the intention of the parties with respect to legal form can only be determined at the conclusion of the Paris negotiations, the political will to take on mitigation commitments in the form of hard law obligations appears to be lacking at this stage. The current state of play in the negotiations suggests strongly that the Paris agreement will represent a shift away from the mostly top-down approach of the Kyoto Protocol. In place of a bifurcated approach with quantified emissions reduction targets imposed upon developed countries, the negotiations have moved in the direction of a self-differentiated 'pledge and review' approach.

States in the lead up to the Paris Conference have been asked to submit their own 'Intended Nationally Determined Contributions' ('INDCs'). INDCs will contain each state's voluntarily determined mitigation commitment, including a justification as to how the commitment is based on the requirements of 'justice'. Unfortunately, the unwillingness of the US Congress to approve new climate commitments means that the US will likely only be able to agree to an instrument in which NDCs are not binding.<sup>13</sup> As one of the world's largest greenhouse gas emitters and also a key player in the negotiations,<sup>14</sup> the US' position could strongly influence the outcome of the negotiations. Instead of hard law mitigation commitments, we might see soft law political commitments akin to those

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Convention on the Law of Treaties does not require an agreement to create 'identifiable rights and obligations' in order to constitute a treaty. She refers to treaties with soft obligations as 'legal soft law'. See Christine Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851.

<sup>11</sup> Case Concerning the Frontier Dispute (*Burkina Faso v Republic of Mali*) (*Judgment*) [1986] ICJ Rep 69, [39].

<sup>12</sup> Oberthür, above n 10, 31; Rajamani, above n 2, 738.

<sup>13</sup> Daniel Bodansky, 'Legal Options for US Acceptance of a New Climate agreement' (Report, Centre for Climate and Energy Solutions, 2015) 29.

<sup>14</sup> *Ibid* 1.

submitted by Parties and adopted under the so-called Cancun agreements.<sup>15</sup>

The paper argues that a hard law instrument best meets the requirements of international and intergenerational justice. This ideal form comprises a benchmark that the Paris agreement and its mitigation commitments *ought* to have in order to achieve the requirements of justice. This benchmark is valuable as a goal in the lead up to the Paris Conference, and of continuing currency as the agreement develops into the future. We acknowledge that political feasibility may constrain what is practically possible in terms of reaching a hard law agreement in Paris.<sup>16</sup> We therefore include recommendations aimed at making the Paris agreement as effective as possible, in light of these political ‘real world’ constraints, while also including a strategy for moving towards a more effective ‘ideal form agreement’ in the future.

This article is a modest contribution to the neglected issues surrounding the relationship between legal form and normative frameworks of justice and ethics. The reasons as to why these issues have received such scant attention in the climate change literature are twofold.<sup>17</sup> Firstly there has been a tendency for experts in various disciplines working on climate change-related research to work in silos, with, for example, philosophers expert in ethics and justice only relatively recently addressing climate change issues.<sup>18</sup> Secondly, this may be related to a view that ethics and justice have very little to do with the harsh world of international environmental politics; indeed ‘realist’ international relations experts maintain the view that states act entirely out of self-interest.<sup>19</sup> However, there are good pragmatic reasons as to why the fairness of an international climate agreement matters. International relations studies demonstrate that without at least overlapping conceptions of fairness

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<sup>15</sup> Lavanya Rajamani, ‘The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves’ (2011) 60(2) *International and Comparative Law Quarterly* 499, 502.

<sup>16</sup> Pablo Gilabert and Holly Lawford-Smith, ‘Political Feasibility: A Conceptual Exploration’ (2012) 60 *Political Studies* 809.

<sup>17</sup> But see Peter Lawrence ‘Justice and Choice of Legal Instrument Under the Durban Mandate: Ideal and not so Ideal Legal Form’ in Dominic Roser and Clare Heyward (eds) *Climate Justice in a Non-Ideal World* (OUP forthcoming 2015); Lavanya Rajamani, ‘The Warsaw Climate Negotiations: Emerging Understandings and Battle Lines on the Road to the 2015 Climate Agreement’ (2014) 63(3) *International and Comparative Law Quarterly* 721, 730, 738 and Sylvia Karlsson-Vinkhuyzen and Antto Vihma, ‘Comparing the legitimacy and effectiveness of global hard and soft law: An analytical framework’ (2009) 3 *Regulation and Governance* 400.

<sup>18</sup> Stephen Gardiner et al (eds), *Climate Ethics Essential Readings* (Oxford University Press, 2010) ix.

<sup>19</sup> See critique of this view in Steve Vanderhieden, *Atmospheric Justice: A Political Theory of Climate Change* (Oxford University Press, 2008) 91 ff.

there usually will not be any agreement at all.<sup>20</sup> Fairer agreements may also be more likely to be complied with.<sup>21</sup>

This article is structured as follows. Part II explains the justice framework applied throughout the paper, drawing together common threads of theories of international and intergenerational justice. The article argues that justice is inexorably linked to effectiveness. Part III explains why the appropriate legal form in light of this framework is that of a hard law treaty instrument with binding mitigation commitments.<sup>22</sup> Part IV recommends that the Paris agreement take the form of a Protocol to the UNFCCC. It also elaborates on the means by which Parties' mitigation commitments can be integrated into such a Protocol as hard law obligations. Part V steps into the 'real world' and offers recommendations, calibrated to current political feasibility constraints, as to how to bolster the effectiveness of the Paris agreement in the absence of a hard law instrument or hard law mitigation obligations.

## II THE JUSTICE FRAMEWORK

The justice framework lens applied to the question of the ideal legal form of a Paris agreement rests on some key definitions and assumptions. Firstly, 'international justice' refers to whether a global regime is fair *between* states in terms of the distribution of the burden of reducing greenhouse gases. Secondly, 'intergenerational justice' refers to whether the present generation takes sufficient action to mitigate climate change emissions in order to spare future generations from the worst impacts of climate change and whether the mitigation burden is fairly distributed between those alive today and those born in the future.<sup>23</sup>

While the content of both international and intergenerational justice are disputed in some respects, they contain some widely accepted principles. The first of these is the principle of 'responsibility for harm' proportionate to one's contribution to the problem. The second is the 'capacity to pay' principle, according to which those with the greatest means should address a particular problem.<sup>24</sup> Thirdly, there is a notion of equal entitlement to a public resource. In the climate context this translates into equal per capita entitlements to a share of the Earth's

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<sup>20</sup> Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge University Press 2001).

<sup>21</sup> Thomas Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995).

<sup>22</sup> This article focuses primarily on the issue of climate change mitigation (as opposed to adaptation, finance or transparency).

<sup>23</sup> Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar, 2014) 11.

<sup>24</sup> Jonathan Pickering, Steve Vanderheiden and Seumas Miller, "If Equity's In, We're Out": Scope of Fairness in the Next Global Climate agreement,' (2012) 4 *Ethics and International Affairs* 423, 430.

capacity to absorb emissions.<sup>25</sup> Intergenerational justice builds on these principles and requires, additionally, that all persons' core human rights to life, subsistence and health are equally deserving of protection, regardless of when they are born.<sup>26</sup> There are differing views on the weight that should be given to historic emissions in allocating emission reduction burdens, particularly given that for most of the industrial age there was little to no knowledge of anthropogenic climate change.<sup>27</sup>

The above justice principles are only weakly embodied in the UNFCCC and Kyoto Protocol.<sup>28</sup> Article 3 of the UNFCCC contains the principle of so-called 'common but differentiated responsibilities' ('CBDR'), according to which 'the developed country Parties should take the lead in combating climate change and the adverse effects thereof'. Industrialised countries interpret CBDR to mean financial and technological capacity to pay and not responsibility for historic emissions, whereas developing countries interpret it as referring to obligations arising from industrialised countries causing the climate change problem in the first place.<sup>29</sup>

Meeting the principles of responsibility for harm and capacity to pay will to a large extent depend on the *substance* of the agreement, for example the level of emissions reduction targets that the parties are required to submit, as well as the strength of institutions relating to compliance, finance and technology transfer, which falls outside the scope of this paper. A further substantive issue affecting international and intergenerational justice is the level differentiation in obligations faced by developed and developing countries. While the UNFCCC and Kyoto Protocol differentiate mitigation burdens between developed and developing countries, the Paris Agreement is modelled on 'self-differentiation', with each state choosing the level of its own mitigation burden through its voluntarily determined INDC.<sup>30</sup> The 'justness' of this differentiation model is contentious, and falls outside the scope of this

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<sup>25</sup> Ibid.

<sup>26</sup> Simon Caney, 'Climate Change and the Future: Discounting for Wealth, Time, and Risk' (2009) 40(2) *Journal of Social Philosophy* 163, 168; Darrel Moellendorf points out that that human rights needs to be supplemented with other principles given the inevitable trade-offs involved in climate policy. See Darrel Moellendorf, *The Moral Challenge of Dangerous Climate Change* (Cambridge University Press 2014) 22, 220ff.

<sup>27</sup> Benito Müller, Niklas Höhne and Christian Ellermann, 'Differentiating (Historic) Responsibilities for Climate Change' (2011) 9(6) *Climate Policy* 593, 604.

<sup>28</sup> Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar, 2014) 99ff.

<sup>29</sup> Daniel Bodansky, 'The UN Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451, 503.

<sup>30</sup> For information on the mitigation effort represented in each states' NDC, see the assessment by Carbon Action Tracker (CAT) which comprises a consortium of climate research institutes including the Potsdam Institute for Climate Impact Research Institute: *Tracking INDCs*, Climate Action Tracker <<http://climateactiontracker.org/indcs.html>>.

paper.<sup>31</sup> However, even assuming that under the self-differentiation model states submit mitigation targets correlating with their respective capacities and historic responsibility, a just outcome will not be achieved unless states *implement* these commitments. As will be explained in Part III, legal form is integral to compliance and implementation and is therefore integral to the extent to which justice is addressed.

International justice requires the agreement be effective in mitigating climate change in order to prevent some states, particularly developing countries and small island states, facing disproportionate impacts from climate change within the lifetimes of people alive today. Intergenerational justice requires an effective agreement as failing to bequeath a functioning climate system to future generations would entail according less weight to the fundamental interests and rights of future persons than those of contemporaries.<sup>32</sup>

The definition of 'effectiveness' adopted in this paper is whether the instrument successfully addresses the environmental objectives of the regime.<sup>33</sup> In the Paris conference context, this would be the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.<sup>34</sup> The desired level of greenhouse gas concentrations has been agreed by Parties to the UNFCCC to be the level at which warming is limited to no more than 2°C.<sup>35</sup> It is important to note that an appropriate legal form is a necessary but not a *sufficient* requirement of justice. An agreement will still fail to meet the requirements of justice if the content of parties' mitigation obligations falls short of what is needed to keep global warming below 2°C, just as high emission reduction targets could fail to be effective if contained in an agreement lacking the ideal legal form and necessary institutional elements, including for example strong compliance and funding mechanisms.

### III IDEAL FORM UNDER THE JUSTICE FRAMEWORK

#### A *The Current Political Context*

As mentioned earlier, parties appear to be negotiating on the assumption that the Paris agreement will at least contain a legally binding core

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<sup>31</sup> Rajamani, above n 2, 731.

<sup>32</sup> Caney, above n 26.

<sup>33</sup> Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries, Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998) 4-5.

<sup>34</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 30822 (entered into force 21 March 1994) art 2.

<sup>35</sup> *Copenhagen Accord*, Decision 2/CP.15 of the Conference of the Parties to the UNFCCC, UN Doc FCCC/CP/2009/11/Add.1, 18 December 2009 [2].

agreement.<sup>36</sup> However, contention over legal form is continuing and even if the agreement takes the form of a legally binding treaty instrument, country mitigation commitments may not necessarily be binding. At the Durban COP in 2011 parties agreed to develop ‘a protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC applicable to all parties’, to be decided by 2015 and address the post-2020 period. This mandate leaves open a variety of legal options. The terms ‘protocol, another legal instrument ... applicable to all parties’ are generally interpreted as covering a treaty-status instrument binding under international law, which means that the additional words ‘agreed outcome with legal force’ must refer to another category of instrument, which could include a soft-law outcome.<sup>37</sup>

The reference to ‘agreed outcome with legal force’ was inserted at India’s insistence.<sup>38</sup> India argued that the Durban Platform should not be a vehicle for imposing mitigation burdens on developing countries, as this would involve reinterpreting the UNFCCC, and in particular would violate the principle of CBDR.<sup>39</sup> Rather, the differentiation between developed (Annex I) and developing (non-Annex I) countries under the UNFCCC and Kyoto Protocol should be maintained. This division has a strong basis in the abovementioned principles of ‘capacity to pay’ and ‘responsibility for harm’.<sup>40</sup>

The Least Developed Countries (‘LDCs’) have suggested not all non-Annex I parties take on mitigation commitments containing quantified emissions reduction targets, but only those in a position to do so.<sup>41</sup> In a similar vein, Brazil has suggested mitigation commitments for LDCs remain discretionary.<sup>42</sup> Many developing country parties have also

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<sup>36</sup> Rajamani, above n 2, 737.

<sup>37</sup> Remi Moncel, ‘Unconstructive Ambiguity in the Durban Climate Deal of COP 17/CMP 7’ (2011) 12 *Sustainable Development Law and Policy* 6: 7.

<sup>38</sup> Lavanya Rajamani, ‘The Durban Platform for Enhanced Action and the Future of the Climate Regime’ (2012) 61(2) *International and Comparative Law Quarterly* 501, 506. Some of the discussion in this and the following paragraph draws on Lawrence, above n 17.

<sup>39</sup> India, ‘Submission by India on the Work of the Ad-Hoc Working Group on the Durban Platform for Enhanced Action: Workstream I’, Submission to the ADP, 13 September 2013, 2.

<sup>40</sup> Article 3 of the *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 30822 (entered into force 21 March 1994) also reflects this principle.

<sup>41</sup> Nepal, ‘Submission by Nepal on Behalf of the Least Developed Countries Group on the ADP Co-Chairs’ Non Paper of 7 July 2014 on Parties Views and Proposal on the Elements for a Draft Negotiating Text’ Submission to the ADP, 21 October 2014, 2.

<sup>42</sup> Brazil, ‘Views of Brazil on the Elements of the New Agreement under the Convention Applicable to All Parties’ Submission to the ADP, 12 November 2014, 3.

insisted that mitigation efforts by developing countries should be conditional on financial assistance from developed parties.<sup>43</sup>

Implicit in India and some other states' submissions is the notion that hard law commitments impose unfair obligations on developing countries, in conflict with the notion of CBDR. This approach is entirely understandable from a negotiating perspective. Strictly, however, the assumption that hard, binding obligations necessarily involve unfair burdens on developing countries is false.<sup>44</sup> One can point to, for example, the Montreal Protocol on Ozone Depletion and other treaty level instruments which do involve differentiation of obligations.

The Like Minded Group of Developing Countries ('LMDCs') including China, India and Saudi Arabia, argue that the status of the agreement required by the Durban Platform remains open and the final legal form should be determined by the substance of the outcome of the negotiations.<sup>45</sup> In contrast, AOSIS,<sup>46</sup> the EU,<sup>47</sup> other developed countries,<sup>48</sup> the LDCs and the Environment Integrity Group argue that the Durban Mandate should be used to negotiate a treaty status instrument. In Lima, the EU, Switzerland, Marshall Islands and LDCs supported maintaining a reference to Convention Article 17 in the draft negotiating text initially drafted in Geneva in 2014 ('*Draft Text*').<sup>49</sup> Article 17 concerns the adoption of Protocols made under the UNFCCC. This

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<sup>43</sup> India, above n 39, 4.

<sup>44</sup> Lawrence, above n 17.

<sup>45</sup> China, 'China's Submission on the Work of the Ad Hoc Working Group on Durban Platform for Enhanced Action', Submission to the ADP, 5 March 2013, [9]; India, 'Submission by India On the work of the Ad-hoc Working Group on the Durban Platform for Enhanced Action: Workstream I', Submission to the ADP, 9 March 2013, [5.25]; for Saudi Arabia see Earth Negotiations Bulletin, 'Summary of the Geneva Climate Change Conference: 8-13 February 2015' (Report, No 12(626), International Institute for Sustainable Development, 16 February 2015) 9.

<sup>46</sup> Maldives, 'Statement by Maldives on behalf of the Alliance of Small Island States at the Opening of the Ad Hoc Working Group on the Durban Platform for Enhanced Action: Bonn, Germany' Submission to the ADP, 3 June 2015, 2.

<sup>47</sup> Italy, 'Submission by Italy and the European Commission on Behalf of the European Union and its Member States' Submission to the ADP, 14 October 2014, 3, 7.

<sup>48</sup> New Zealand, 'Submission to the Ad Hoc Working Group on the Durban Platform for Enhanced Action: Work Stream 1 - Elements' Submission to the ADP, 8 October 2014, [3]; Australia, 'Submission under the Durban Platform for Enhanced Action' Submission to the ADP, 26 March 2013, 4.

<sup>49</sup> Earth Negotiations Bulletin, 'Summary of the Lima Climate Change Conference: 1-14 December 2014' (Report, No 12(619), International Institute for Sustainable Development, 16 December 2014) 30. This draft text was developed at the Geneva meeting of the ADP in February 2015 and streamlined at the Bonn meeting in June 2015. It is merely a draft text and carries no formal weight, however it can be useful in identifying the various options that have been discussed by Parties in the negotiations to date. All references to the 'Draft Text' in this paper are to that of the Bonn streamlined text accessible from <[http://unfccc.int/meetings/bonn\\_jun\\_2015/session/8857/php/view/documents.php](http://unfccc.int/meetings/bonn_jun_2015/session/8857/php/view/documents.php)>.

implies a preference that the agreement take the form of a Protocol, which would be a treaty instrument and therefore hard law.<sup>50</sup>

As already mentioned, however, a legally binding treaty agreement can still contain non-binding obligations. For example, while New Zealand has argued for a binding core agreement, it suggests mitigation commitments should be contained in a separate agreement which is not legally binding.<sup>51</sup> Japan and the US have also advocated this approach.<sup>52</sup> In such a case, without a provision in the core agreement integrating the commitments into the agreement and creating an obligation to implement them, mitigation commitments would only exist as soft law obligations by virtue of states' unilaterally pledged NDCs.

It has become increasingly clear that the US Congress will not agree to a treaty imposing strong binding mitigation obligations.<sup>53</sup> This is in large part due to the US processes for approving international agreements. Where an agreement contains binding legal obligations it usually requires approval either by two thirds of the Senate<sup>54</sup> or by Congress to be adopted domestically by the US.<sup>55</sup> The US appears to be pushing for an agreement which contains no new obligations and could thus be approved through executive action.<sup>56</sup> Binding obligations could be derived directly from the UNFCCC, to which the US is already a party. The UNFCCC contains no quantified emissions reduction targets, so mitigation targets under the Paris agreement would need to remain soft law. The President may also be able to accept the Paris agreement through executive action if it contains only *procedural* obligations additional to the UNFCCC, such as an obligation to prepare and communicate mitigation commitments, but not an obligation to implement them.<sup>57</sup> Should the Paris agreement impose hard law substantive obligations beyond those already existing in the UNFCCC, there is a fear that not only the US but a number of other countries would choose not to participate, and that those who do participate would put forward less ambitious mitigation obligations.<sup>58</sup>

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<sup>50</sup> Rajamani, above n 38, 503.

<sup>51</sup> New Zealand, above n 48, 3.

<sup>52</sup> Japan, 'Ad Hoc Working Group on the Durban Platform for Enhanced Action: Submission by Japan' Submission to the ADP, 14 October 2014, 2; United States, 'US Submission' Submission to the ADP, 17 September 2014, 8-9.

<sup>53</sup> Bodansky, above n 12, 29.

<sup>54</sup> Pursuant to *United States Constitution* Art II.

<sup>55</sup> Bodansky, above n 13, 1, 5-6.

<sup>56</sup> Rajamani, above n 9, 6.

<sup>57</sup> Bodansky, above n 13, 1.

<sup>58</sup> This in itself further demonstrates the view among states that hard law commitments have greater force than soft law commitments. States are less willing to offer ambitious commitments under a hard law regime, suggesting a perception that there would be greater consequences should they fail to achieve their commitments under a hard law regime than under soft law.

This has led to the negotiations proceeding on the basis of a model whereby states decide their own mitigation commitments, submitted in their INDCs (which become nationally determined contributions, 'NDCs', once finalised in the agreement). According to a decision agreed at COP 20 in Lima in December 2014, Parties 'may' (not 'shall') indicate in their INDC 'how the Party considers that its intended nationally determined contribution is fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the UNFCCC as set out in its Article 2'<sup>59</sup> with 'fairness' remaining undefined.

Originally, the idea was that there would be a period of time between the submission of INDCs and the Paris meeting so that scrutiny by other states and civil society could result in an increase in ambition of INDCs at Paris. However, the Lima conference decision only requires the Secretariat to publish states' communicated INDCs on the UNFCCC website and prepare a synthesis report on their aggregate effect. 'This translates into an absence of any kind of *ex ante* review of individual contributions in 2015. Further, it also leaves parties with less than a month for possible upward adjustment prior to COP 21 in Paris in December 2015.'<sup>60</sup> In spite of this weakness, there is potential in a top-down review process providing at least some avenue for pressure on governments in terms of justifying the fairness of mitigation commitments, and such review processes will remain crucial post Paris.<sup>61</sup>

### B *Hard Law and the Justice Framework*

While states are divided in their positions as to legal form, there is some common ground in the normative assumptions behind these positions. India and others who oppose a treaty-status instrument imply that such instruments are more likely to entail strong obligations that have an impact in limiting their behaviour. Those arguing for a treaty more explicitly acknowledge the greater potential of a treaty to impact behaviour.<sup>62</sup> Thus, both sides in the debate explicitly or implicitly accept the greater strength of treaty level commitments.

The arguments of those advocating for a treaty instrument ultimately centre on the idea that treaty instruments are more *effective* than soft law instruments, at least in the climate context. In particular, arguments focus on the following propositions:

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<sup>59</sup> *Lima Call for Climate Action*, Decision -/CP.20 of the Conference of the Parties to the UNFCCC, UN Doc FCCC/CP/2014/10/Add 1, 2 February 2015 [14].

<sup>60</sup> Earth Negotiations Bulletin, above n 45, 49; Ibid [16].

<sup>61</sup> See Jonathan Pickering, *Top-down Proposal for Sharing the Global Climate Policy Effort Fairly: Lost in Translation in a Bottom-Up World?* (Working Paper No 6, University of Canberra, Institute for Governance and Policy Analysis 2015).

<sup>62</sup> See, for example, Italy, above n 47, 7.

- 1) without a treaty it is impossible to ensure high levels of compliance and hence effectiveness;
- 2) without a treaty, trade competitiveness concerns mean that states will be reluctant to take the required deep cuts in greenhouse gas emissions needed for the agreement to be effective;
- 3) without a treaty, a strong financial mechanism will not be possible. A financial mechanism is essential in facilitating technology transfer and a precondition for developing country participation and thus overall effectiveness; and
- 4) without a treaty, commitments will lack the stability required to ensure effectiveness through changes of government. These propositions will be briefly examined in turn.

### 1 *Compliance*

While compliance is necessary for effectiveness, it is not always sufficient.<sup>63</sup> An agreement with high levels of compliance can be ineffective if its obligations are weak or it is poorly designed. However, compliance is still a key ingredient in the overall effectiveness of an agreement. In this paper the term 'compliance' refers to the level of consistency between the behaviour of a state and a particular treaty rule.

There have been few empirical studies comparing the relative performance of treaties and soft law instruments in terms of levels of compliance.<sup>64</sup> One study which addressed the question of whether the formal status of a norm (binding or non-binding) made any difference in terms of compliance by state and non-state actors produced inconclusive results.<sup>65</sup> However, the report did note that domestic laws and institutions important in implementation of agreements were less likely to be created under soft law instruments than treaties.<sup>66</sup>

Studies which compare the effectiveness of hard and soft law suffer a number of weaknesses. One such weakness is a tendency to assume hard law instruments are more effective, without first examining empirical evidence to support this.<sup>67</sup> The Kyoto Protocol is an example of a hard law treaty which has suffered significant non-compliance issues, possibly stemming from compliance measures which do not include the possibility

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<sup>63</sup> Beth A Simmons, 'Compliance with International Agreements' (1998) 1 *Annual Review of Political Science* 75, 78.

<sup>64</sup> Shaffer and Pollack, above n 3, 15.

<sup>65</sup> Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000).

<sup>66</sup> Brown Weiss and Jacobson, above n 33, 536.

<sup>67</sup> Karlsson-Vinkhuyzen and Vihma, above n 17, 416.

of trade sanctions.<sup>68</sup> Further, even in relation to treaties with strong compliance records, it is difficult to demonstrate that compliance has occurred *because* of the treaty obligation. Governments tend to make agreements which suit the kinds of activities they are already willing to engage in, which can lead to bias in measuring whether international agreements lead to compliance.<sup>69</sup>

Despite a lack of empirical evidence showing a causal link between a hard law agreement and compliance, non-compliance with treaty obligations tends to entail higher reputational costs than non-compliance with soft law obligations.<sup>70</sup> This is due to the greater credibility and authority of binding norms.<sup>71</sup> Some international relations and international law theorists argue that the key incentive for compliance in international regimes is indeed reputation.<sup>72</sup> Downs and Jones argue, however, that the impact of reputation on compliance is not as great as traditional theory suggests.<sup>73</sup> They argue that reputation has a smaller effect on compliance when the agreement involved has fewer benefits.<sup>74</sup> Given the costs associated with emissions reductions, particularly for developing countries for whom heavy mitigation burdens may stifle economic development, some states may perceive that climate change mitigation will have high costs, at least in the short run. This could undermine the impact of reputation on compliance.

However, reputational implications are also linked to the value of the relationship involved.<sup>75</sup> In 2014 the US and China announced an agreement on climate and clean energy cooperation. In this announcement the US agreed to reduce its greenhouse gas emissions by 26-28% based on 2005 levels by 2025 and China agreed to an emissions peak by 2030. These commitments have been crystallised in the US' and China's INDCs.<sup>76</sup> The US-China relationship is arguably important enough for both the US and China to be concerned for its reputation in the context of upholding this announcement.

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<sup>68</sup> Jutta Brunnée, 'Climate Change and Compliance and Enforcement Processes' in Rosemary Rayfuse and Shirley V Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar, 2012) 290, 311.

<sup>69</sup> Simmons, above n 64, 89.

<sup>70</sup> Gregory Shaffer and Mark A Pollack, 'Hard vs Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706, 718. See further literature referred to in Shaffer and Pollack, above n 3, 16.

<sup>71</sup> Friedrich, above n 5, 450.

<sup>72</sup> Simmons, above n 64, 81.

<sup>73</sup> George W Downs and Michael A Jones, 'Reputation, Compliance and International Law' (2002) XXXI *Journal of Legal Studies* S95, S109.

<sup>74</sup> *Ibid* S111.

<sup>75</sup> *Ibid* S111.

<sup>76</sup> United States of America, 'US Cover Note, INDC and Accompanying Information', Submission to the UNFCCC, 31 March 2015; China, 'China's INDC', Submission to the UNFCCC, 30 June 2015.

Regimes which require significant changes in behaviour have been found to work better when sanctions are provided for.<sup>77</sup> A strong compliance mechanism offering sanctions can only exist in a hard law agreement with binding obligations. The presence of an enforcement arm with the power to impose sanctions in the Paris agreement seems unlikely, however, given the lack of support by important states.<sup>78</sup> Hard law treaties are also often implemented through domestic legislation, which opens up the possibility of domestic enforcement action to assist with a party's compliance.

## 2 *Trade Competitiveness*

Where an agreement will be likely to impact on parties' trade competitiveness, parties will likely look for an agreement with reciprocal obligations in order to protect their interests.<sup>79</sup> Binding treaty agreements lead to greater legal certainty than soft law agreements.<sup>80</sup> Such certainty may lead to greater confidence that parties will comply with the agreement and not undermine trade competitiveness concerns of others. Typically, agreements which do affect trade competitiveness have been embodied in binding treaty instruments. For example, the Marrakesh agreements under the WTO which contain tariff bindings take the form of binding treaties and compliance with WTO dispute panel decisions has been high.<sup>81</sup>

Climate policy involves 'high economic stakes'.<sup>82</sup> Mitigation efforts may lead to higher costs in the production of goods and services and require states to engage in costly research and development programs to develop and implement new technology and energy infrastructure, which may impact parties' trade competitiveness. To increase states' willingness to commit to and implement mitigation action it is therefore important to have a regime which provides assurance that others will also be held accountable to mitigation commitments.<sup>83</sup> A binding agreement will best provide this assurance.

## 3 *Finance*

Some developing countries have made it clear that implementation of their mitigation commitments will be wholly or partially contingent on an

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<sup>77</sup> George Downs, David M Rocke and Peter N Barsboom, 'Is the Good News About Compliance Good News about Cooperation?' (1996) 50(3) *International Organization* 379, 398.

<sup>78</sup> Oberthür, above n 10, 48.

<sup>79</sup> Simmons, above n 64, 81.

<sup>80</sup> Friedrich, above n 5, 450.

<sup>81</sup> Beth A Simmons, 'Treaty Compliance and Violation' (2010) 13 *Annual Review of Political Science* 273, 285. Note that it remains difficult to demonstrate that the high level of WTO compliance is linked to the binding nature of the commitments.

<sup>82</sup> Oberthür, above n 10, 34.

<sup>83</sup> *Ibid.*

adequate funding mechanism.<sup>84</sup> Under the UNFCCC parties have established a 'Green Climate Fund' designed to address these costs.<sup>85</sup> In Copenhagen states agreed to contributing US \$100 billion per year to this fund by 2020.<sup>86</sup> The Green Climate Fund is very likely to be linked to the Paris agreement.<sup>87</sup> Friedrich argues that 'only binding treaty obligations can meet with the necessary legal certainty the need for financial support, capacity building and technology transfer... Often states only reliably provide resources for purposes of financial mechanisms and capacity building under binding treaty obligations.'<sup>88</sup> The legal certainty (whether actual or perceived) offered by a treaty instrument minimises the risk involved in providing funding.

In the environmental context, a number of treaties have established implementation funds, including treaties relating to hazardous wastes (1989 *Basel Convention*), the world heritage (1972 *World Heritage Convention*) and persistent organic pollutants (2001 *Stockholm Convention*). While COP decisions (which are soft law) do play a role in establishing the operating procedures for financial mechanisms in these regimes, they always operate in conjunction with the rules of the treaty in question. This practice, along with the perceived lower risk involved in providing funding under a binding treaty instrument as compared to a soft law instrument, leads to the conclusion that strong support for the Green Climate Fund and any other financial mechanisms under the Paris agreement requires a binding treaty instrument.

#### 4 *Stability of Commitments*

On the face of it, treaties are more durable and likely to survive changes of government more readily than soft law instruments such as memoranda of understanding. As outlined above, legal certainty is important for both trade competitiveness and a strong financial mechanism. The flip side is that stable commitments may lead to inflexibility, for example with respect to scaling up commitments over time. Soft law instruments can provide greater flexibility in this regard.<sup>89</sup> However, such flexibility is also possible within a treaty instrument with the right provisions in place.<sup>90</sup> Therefore, so long as the Paris agreement is capable of being

<sup>84</sup> See, for example, India, above n 39, 4.

<sup>85</sup> *Launching the Green Climate Fund*, Decision 3.CP.17 of the Conference of the Parties to the UNFCCC, UN Doc FCCC/CP/2011/9/Add.1, 11 December 2011.

<sup>86</sup> *Copenhagen Accord*, above n 35, [8].

<sup>87</sup> In the Geneva Draft Text, section F deals with finance. Within this section, paragraph 89 refers directly to the Green Climate Fund in each of its six options.

<sup>88</sup> Friedrich, above n 5, 451.

<sup>89</sup> Shaffer and Pollack, above n 71, 718, 719.

<sup>90</sup> For example art 3(1) quater of the Doha Amendment to the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature on 16 March 1998, 2303 UNTS 30822 (entered into force 16 February 2005) provides a simplified amendment procedure for increasing the ambition of Annex I mitigation commitments.

flexible with respect to increasing ambition over time, a binding treaty instrument will be preferable to a soft law instrument as it will provide greater certainty into the future.

### 5 *The Current Regime*

The Kyoto Protocol and Copenhagen Accord present an interesting case study of the above analysis. The Kyoto Protocol is a hard law, binding treaty instrument with 192 Parties. The Copenhagen Accord, under which states made voluntary mitigation pledges (including many developing countries), is a soft law political instrument which has merely been 'taken note' of by the COP and has 141 states associated with it.<sup>91</sup> However, Rajamani argues the Copenhagen Accord is the most influential instrument to emerge recently from the climate negotiations. She argues the fact that it was negotiated by heads of state of major economies provides strong political guidance and that some of the political compromises in the Accord have since been fleshed out in the Cancun Agreements. The states associated with the accord represent 87.24% of global emissions, while those bound to reduce emissions under the Kyoto Protocol represent closer to 25%.<sup>92</sup>

Parties could not agree to a binding outcome in Copenhagen due in part to disagreements over whether non-Annex I states should take on binding mitigation commitments.<sup>93</sup> The outcome was a soft law agreement requiring action on the part of all states and more states have now committed under the Copenhagen Accord to mitigation reduction action than under the Kyoto Protocol which only places obligations on Annex I parties.<sup>94</sup> This reflects the perception that states will be more willing to participate and to offer more ambitious mitigation targets under a soft law agreement than under hard law.<sup>95</sup> However, a study by UNEP found that if country pledges for 2020 are fully implemented this will only result in a moderate reduction in global emissions below business-as-usual levels.<sup>96</sup> Moreover, a direct comparison between the Kyoto Protocol and the Copenhagen Accord is questionable given that the Copenhagen Accord was negotiated nine years after the Kyoto Protocol in a different political

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<sup>91</sup> Rajamani, above n 9, 13-14.

<sup>92</sup> Rajamani, above n 38, 516.

<sup>93</sup> Nikhil R Ullal, 'A Successor for the Kyoto Protocol – Challenges and Options' (2013) 17 *New Zealand Journal of Environmental Law* 81, 98.

<sup>94</sup> *Copenhagen Accord*, above n 35, [4]-[5].

<sup>95</sup> Rajamani, above n 9, 14.

<sup>96</sup> 'The Emissions Gap Report 2014: A UNEP Synthesis Report' (Report, United Nations Environment Program, 2014) xviii-xx. Note that on the whole mitigation pledges were comparable between developed and developing country parties, particularly when put in per capita terms: Frank Jotzo, 'Copenhagen Targets and Australia's Climate Commitment' (Policy Brief, Crawford School of Economics and Government, 2010) 1-2.

climate and its very purpose was to strengthen mitigation action taken by Parties to the UNFCCC, including developing country parties.<sup>97</sup>

#### 6 Summary

We acknowledge that there are some uncertainties as to the relative effectiveness of hard and soft law agreements, given the various weaknesses found in empirical studies. Nevertheless, there are convincing arguments in favour of hard law over soft law. A hard law instrument is, on balance, more likely than a soft law instrument to lead to compliance, ease trade competitiveness concerns, ensure a strong financial mechanism and provide greater stability in commitments over time. Taking the self-differentiation model of voluntarily determined NDCs as a given, a hard law outcome at Paris is therefore more likely to be effective and help to ensure a fairer distribution of the burdens and impacts of climate change between states during current lifetimes and between current and future generations,<sup>98</sup> than a soft law instrument.

### IV MEETING THE NEEDS OF JUSTICE IN THE PARIS AGREEMENT

A hard law outcome at Paris, would, therefore best meet the needs of international and intergenerational justice. However as described in Part 3.1, the legal form of the agreement remains contentious. The model of individually determined mitigation commitments is one aspect that is relatively settled. Rajamani, however, argues that this approach conflates equity with 'self-differentiation', effectively presuming that allowing parties to voluntarily choose their own mitigation burden will lead to a just approach.<sup>99</sup> This is in contrast to the division in obligations between Annex I and non-Annex I Parties to the UNFCCC and Kyoto Protocol, which has a basis in capacity to pay, responsibility for harm and CBDR.<sup>100</sup>

Whether or not the Paris agreement's self-differentiation approach also meets these justice principles, as well as ensuring a fair distribution of the burdens and impacts of climate change between states and amongst generations, remains to be seen. This depends to an extent on the substantive content of Parties' mitigation commitments. When submitting their INDCs, states are required to justify their mitigation commitment based on fairness. Reviews of Parties' NDCs post-Paris are likely to include a review of the fairness of commitments with respect to states' circumstances and capacity. This may help to provide a modest incentive for Parties to take on commitments they perceive as just, although this

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<sup>97</sup> *Bali Action Plan*, Decision 1/CP.13 of the Conference of the Parties to the UNFCCC, UN Doc FCCC/CP/2007/6/Add.1, 14-15 December 2007 [1], [11].

<sup>98</sup> Caney, above n 4, 168.

<sup>99</sup> Rajamani, above n 2, 731.

<sup>100</sup> *Ibid.*

discussion falls outside the scope of this paper.<sup>101</sup> The legal form of the agreement is important to help ensure that mitigation commitments, adopted within a self-differentiation model entrenched in the Paris agreement, are complied with.

#### A *Format of a Hard Law Agreement*

Should the Paris agreement be a binding treaty instrument, two possible forms it could take are an amendment to the UNFCCC or a Protocol.<sup>102</sup> Either option would be achieve the effects of a hard law treaty instrument, although an amendment may suffer issues of structural ambiguity as it would likely consist of changes and additions to existing treaty provisions, requiring both the text of the amendment and UNFCCC to be read in tandem. For this reason, this paper recommends a Protocol. This recommendation takes place in the ‘ideal world’, in which the legal form of the agreement would have no impact on state participation or ambition.

Choosing a Protocol as the form of the agreement is not determinative as to its bindingness. The key element which indicates whether an international agreement is a binding treaty instrument or not is the intention of the parties.<sup>103</sup> Determining whether the parties’ intended a binding treaty instrument depends on a careful examination of all the facts of the situation, including the actual terms of the agreement and the circumstances in which it was drawn up.<sup>104</sup> Therefore, in the context of the Paris agreement it would be necessary to examine both the text of the agreement and surrounding material, such as submissions by states and any intention expressed by parties through the negotiating process.

Within the context of the climate change regime, a decision by the parties to adopt a protocol instead of a COP decision would suggest the agreement is intended to be binding. This is in line with the format of current agreements under the UNFCCC. For example, Kyoto Protocol is accepted as a binding treaty instrument, while the Copenhagen and Cancun outcomes are in the form of COP decisions and are non-binding instruments.<sup>105</sup> It has been suggested that the Paris agreement will consist

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<sup>101</sup> Ibid.

<sup>102</sup> Sandrine Maljean-Dubois, Matthieu Wemaëre and Thomas Spencer, ‘A Comprehensive Assessment of Options for the Legal Form of the Paris Climate Agreement’ (Working Paper No 15/14, IDDRI, 2014) 8.

<sup>103</sup> The ILC considered the words ‘governed by international law’ in the definition of ‘treaty’ in Article 2 of the VCLT to encompass the element of ‘intention to create obligations under international law’: ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] II *Yearbook of the International Law Commission* 187, 220. See also: Case Concerning the Frontier Dispute (*Burkina Faso v Republic of Mali*) (Judgment) [1986] ICJ Rep 69, [39]; Case Concerning the Temple of Preah Vihear (*Cambodia v Thailand*) (Preliminary Objections) [1961] ICJ Rep 245, [31]–[32].

<sup>104</sup> Case Concerning the Frontier Dispute (*Burkina Faso v Republic of Mali*) (Judgment) [1986] ICJ Rep 69, [40].

<sup>105</sup> Rajamani, above n 9, 11.

of a combination of a protocol and a set of COP decisions.<sup>106</sup> These COP decisions could either further elaborate on the provisions of the Protocol or contain additional soft-law obligations which the parties do not intend to be binding. Ideally, all of the agreement's key obligations will be given binding legal force by being embedded in the binding protocol, with the COP decisions utilized for the further elaboration only.

## B *Ensuring Binding Mitigation Commitments*

### 1 *Necessary Provisions in the Core Agreement*

It is also crucial that the core Paris agreement contains the necessary provisions to ensure that states' mitigation commitments contained in their NDCs are binding. Mitigation is the preventative arm of the climate change regime, designed to limit the effects of climate change. It will help to achieve the distributional goals of the justice framework by minimising adverse impacts and burdens on vulnerable people in developing countries and small island states, as well as protecting the fundamental rights of future generations. This part will set out the provisions required to be included in the Paris agreement in order to ensure binding mitigation commitments. An assumption will be made that the Paris agreement will consist of a core Protocol. While this is not guaranteed, if there is no binding core agreement, mitigation commitments cannot be binding regardless of their legal form.

Should the Paris agreement take the form of a binding protocol, Parties' submissions (including the US,<sup>107</sup> New Zealand<sup>108</sup> and Japan,<sup>109</sup> for example) as well as the current Draft Text, suggest that states' NDCs will either be housed in an annex, appendix or attachment to the agreement or a document outside the agreement. Whether or not states' mitigation commitments are binding will therefore depend on how these NDCs are 'anchored' in the core agreement. There are also issues as to whether the implementation of NDCs will be binding, or merely the procedural requirements relating to the submission of NDCs (as preferred by numerous countries, including the US). If the latter is the case, states may be bound to prepare and communicate mitigation commitments as part of their NDCs, but will not be bound to actually implement these commitments.

Ultimately whether states are under an obligation to *implement* their mitigation commitment requires two elements. Firstly, the mitigation commitments must be an integral part of the agreement, and there must be an anchoring provision in the Paris agreement which requires mitigation

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<sup>106</sup> New Zealand, above n 48, [2].

<sup>107</sup> United States, above n 52, 8-9.

<sup>108</sup> New Zealand, above n 48, 3.

<sup>109</sup> Japan, above n 52, 2.

commitments to be implemented.<sup>110</sup> The commitments will be an integral part of the agreement if they are housed in an annex, appendix or attachment.<sup>111</sup> If they are housed elsewhere, for example in national schedules or registry COP decision, they could be made an integral part of the agreement through a provision such as paragraph 31 of the Draft Text which states ‘Parties’ commitments to be an integral part of the agreement’.<sup>112</sup>

The second element requires an anchoring provision obliging the implementation of mitigation commitments. One option for the mitigation obligation contained in the Draft Text requires ‘each Party to prepare, communicate and *implement* successive nationally determined mitigation commitments/contributions/actions’[emphasis added].<sup>113</sup> Another option for the same provision requires ‘developed country Parties to prepare mitigation commitments differentiated from developing countries’ contributions’.<sup>114</sup> While developed countries have to *prepare* mitigation commitments under this second option, it contains no obligation to *implement* mitigation commitments. Obligations to implement mitigation commitments would therefore only exist as soft law unilateral obligations by virtue of each state’s pledged NDC. This article therefore recommends a provision which, like the first option above, expressly requires implementation. The provision could be modelled on paragraphs 4-5 of the Copenhagen Accord which requires Annex I and non-Annex I Parties to *implement* their respective mitigation commitments.<sup>115</sup>

This implementation provision must also be binding. The provision will not necessarily be binding simply by virtue of being contained in a binding protocol.<sup>116</sup> Ideally the text of the Paris agreement will make it clear, based on the ordinary meaning of its words, that both the core agreement and the obligation to implement mitigation commitments are legally binding. If the words of the agreement are clear and unambiguous as to its legal force there will be no need to inquire further.<sup>117</sup> Unfortunately, the divergent views of parties as to whether mitigation commitments should be binding might result in ambiguity in the drafting which makes the legal force of commitments unclear.

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<sup>110</sup> Rajamani, above n 2, 738.

<sup>111</sup> Ibid.

<sup>112</sup> Maljean-Dubois, Wemaëre and Spencer, above n 102, 11.

<sup>113</sup> *Streamlined and Consolidated Text*, Informal Document, ADP, 11 June 2015, para 21, option 1.

<sup>114</sup> Ibid, para 21, option 7.

<sup>115</sup> *Copenhagen Accord*, above n 35, [4]-[5].

<sup>116</sup> Rajamani, above n 2, 737.

<sup>117</sup> *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 9, 8.

The Vienna Convention on the Law of Treaties ('VCLT') provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>118</sup> The VCLT is a codification of customary international law and is therefore universally applicable.<sup>119</sup> Subsequent agreement, subsequent practice and relevant rules of international law can be taken into account together with the context.<sup>120</sup> Preparatory work, which includes 'all documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation',<sup>121</sup> can provide a supplement in assisting with the interpretation of a treaty provision,<sup>122</sup> however the Draft Text and submissions of parties to date show a diverse and competing range of positions on every aspect of the Paris agreement, including mitigation commitments. It is uncertain whether any clarity will be provided by the preparatory materials that emerge at the Paris Conference.

In drafting the anchoring provision itself, the words of the provision should be chosen carefully so that the ordinary meaning of the words makes clear that the obligation to implementation mitigation commitments is binding. In their suggested draft text for the Paris agreement, Morgan, Dagnet and Tirpak suggest the following provision: 'each party shall... prepare, regularly update, and implement mitigation commitments, consistent with its common but differentiated responsibilities and respective capabilities, in light of different national circumstances'.<sup>123</sup> They argue that this provision will ensure the mitigation commitments contained outside the core text are robust by expressly requiring parties to implement the commitments.<sup>124</sup> The preciseness of commitments in an international agreement is another factor in determining whether they are hard or soft law.<sup>125</sup> The more precisely defined the expected characteristics, content and principles informing the mitigation component of NDCs, the easier it will be to conclude that the mitigation commitments are intended to be binding.

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<sup>118</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

<sup>119</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 92, [46].

<sup>120</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(a)-(c).

<sup>121</sup> Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press, 1961) 411, cited in Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 24.

<sup>122</sup> 'Draft Articles on the Law of Treaties with Commentaries' [1966] II *Yearbook of the International Law Commission* 187, 220.

<sup>123</sup> Jennifer Morgan, Yamide Dagnet and Dennis Tirpak, 'Elements and Ideas for the 2015 Paris Agreement' (Working Paper, Agreement for Climate Transformation, 2015) 10.

<sup>124</sup> *Ibid* 10.

<sup>125</sup> Oberthür, above n 10, 31.

When looking to the context of a provision, relevant aspects of the agreement to consider include the grammar, punctuation and syntax,<sup>126</sup> titles, headings and chapeaux,<sup>127</sup> the underlying structure or scheme,<sup>128</sup> related and contrasting provisions<sup>129</sup> and the preamble.<sup>130</sup> The ultimate interpretation of any anchoring provision will therefore depend on the agreement as a whole. At this stage, the Draft Text is of little assistance given the multiplicity of options provided for in almost every provision of the agreement. However, the current 'General/Objective' section does contain a number of options which require parties to implement their commitments under the agreement.<sup>131</sup> While there is a variation in the use of language, as well as in whether the obligation falls on all states or only developed countries, this does seem to be promising in that it indicates parties *must* implement their commitments, suggesting the content of each of their commitments is binding. Ideally the Paris agreement will contain an 'objectives' provision which uses robust language such as this, dispelling any doubt that parties are intended to be bound under the agreement to implement their mitigation commitments. Whether the language used in the provision anchoring mitigation commitments to the agreement is similar or dissimilar to that used in other provisions relating to finance, adaptation or technology transfer, for example, will provide further guidance as to which obligations are intended to be binding.

## 2 *Legal Form of NDCs and its Effect on Whether They are Binding Annex/Appendix/Attachment*

If states' NDCs are inscribed in an annex, appendix or attachment to the Paris agreement, they will be an integral part of the agreement. All that will be required to make mitigation commitments binding will therefore be an anchoring provision, ideally requiring parties to prepare, communicate *and* implement their commitments.<sup>132</sup> However, given the annex, appendix or attachment will be an integral part of the agreement, this binding obligation could arguably be situated in the annex/appendix/attachment itself if no such obligation is found in the main Paris agreement. For example the annex/appendix/attachment may contain the obligation in a chapeau, or each NDC itself may be expressed in such a way as to be a commitment to *implement* the relevant mitigation target specified.

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<sup>126</sup> Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 178.

<sup>127</sup> *Ibid* 180.

<sup>128</sup> *Ibid* 182.

<sup>129</sup> *Ibid* 185.

<sup>130</sup> *Ibid* 186.

<sup>131</sup> Streamlined and Consolidated Text, above n 114, para 21, para 10.

<sup>132</sup> Rajamani, above n 2, 738; Maljean-Dubois, Wemaëre and Spencer, above n 103, 11.

An annex/appendix/attachment is advantageous in that it is binding both internationally and nationally.<sup>133</sup> However, it may be difficult to both adopt and amend, potentially making it difficult to scale up commitments over time. It may be possible, however, to adopt a simplified procedure for amendments to the annex/appendix/attachment after its initial adoption.<sup>134</sup> For example, the Doha Amendment to the Kyoto Protocol provides that adjustments upwards by Annex I parties of their mitigation commitments contained in Annex B 'shall be considered adopted by the Conference of the Parties ... unless more than three-fourths of the Parties present and voting object to its adoption.'<sup>135</sup> Among the states supporting the use of annexes to house states' NDCs are Norway<sup>136</sup> and Nepal.<sup>137</sup>

#### *COP Decisions*

As mentioned above, there has been discussion that the Paris agreement might consist of a core binding agreement and a number of COP decisions.<sup>138</sup> The mitigation commitments could be contained in one of these COP decisions.<sup>139</sup> COP decisions are generally not legally binding.<sup>140</sup> If the mitigation commitments were housed in a COP decision they would therefore depend on a binding mitigation obligation in the protocol and an integration provision, such as paragraph 31 of the Draft agreement mentioned above, to integrate the commitments into the protocol.<sup>141</sup>

#### *Various External Documents*

Various options exist for housing NDCs in an external document, such as a series of national schedules is one option. This would follow the model of the General Agreement on Trade in Services ('GATS'). Parties to the GATS submit schedules outlining which services sectors the basic principles of the GATS (e.g. market access, national treatment and MFN treatment) will apply to within each country's jurisdiction.<sup>142</sup> The US<sup>143</sup>

<sup>133</sup> Maljean-Dubois, Wemaëre and Spencer, above n 102, 11.

<sup>134</sup> The Marshall Islands suggested this in their submission to the ADP: Republic of the Marshall Islands, 'Ambition in the ADP and the 2015 Agreement' Submission to the ADP, 21 October 2014, [18].

<sup>135</sup> Doha Amendment to the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature on 16 March 1998, 2303 UNTS 30822 (entered into force 16 February 2005) art 3(1).

<sup>136</sup> Earth Negotiations Bulletin, above n 49, 39.

<sup>137</sup> Nepal, above n 39, 2.

<sup>138</sup> Earth Negotiations Bulletin, above n 45, 13.

<sup>139</sup> Maljean-Dubois, Wemaëre and Spencer, above n 102, 12.

<sup>140</sup> Rajamani, above n 9, 11.

<sup>141</sup> Rajamani, above n 2, 738.

<sup>142</sup> Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions, World Trade Organisation <[https://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm)>.

<sup>143</sup> United States, above n 52, 10.

and Mexico<sup>144</sup> are among the states who have suggested NDCs should be housed in national schedules.

Parties could alternatively choose from a range of different document formats, whether styled on external documents used in other regimes or a format adopted specifically for the Paris agreement. The Cancun agreements, for example, took the form of a number of COP decisions, with mitigation commitments by parties listed in two separate informal notes, or 'INF documents'.<sup>145</sup> Whether the chosen format is that of national schedules, INF documents or another, the documents could be collected in a registry maintained by the Secretariat or an online record.<sup>146</sup> Japan and China have argued for the publication of NDCs on the UNFCCC website, although China objected to compilation of the NDCs in one document by the Secretariat.<sup>147</sup> Brazil noted that an online registry would make it easier to update the NDCs as needed.<sup>148</sup>

The type of external document chosen will not impact the legal bindingness of the NDCs. What is important is that the core Paris agreement contains an integration provision, along with a provision in the agreement requiring parties to implement their mitigation commitments. The advantage of an external document for housing NDCs is that they are unilateral, non-negotiated documents which will allow for easy updating as commitments are scaled up over time.

### 3 Summary

In terms of the ideal legal form of the Paris agreement, this paper recommends, firstly, that the Paris agreement takes the form of a binding Protocol to the UNFCCC, and secondly, contains legally binding mitigation commitments. As for the form of mitigation commitments, there are two broad options. Firstly, NDCs could be contained in an annex, appendix or attachment with a simplified procedure for

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<sup>144</sup> Earth Negotiations Bulletin, above n 49, 37.

<sup>145</sup> Elliot Diringer, Kate Cecys and Namrata Patodia Rastogi, 'Sixteenth Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change and Sixth Session of the Meeting of the Parties to the Kyoto Protocol' (Summary, Pew Center on Global Climate Change, December 2010) 3; *Compilation of Economy-Wide Emission Reduction Targets to be Implemented by Parties Included in Annex I to the Convention* UN Doc FCCC/SB2011/INF.1/Rev.1. INF documents are official UN documents. States could alternatively choose the document to be unofficial (meaning the document would not get a UN doc number or a masthead), but this would have no practical difference on the legal force of NDCs: Rajamani, above n 9, 12.

<sup>146</sup> Maljean-Dubois, Wemaëre and Spencer, above n 102, 12-13.

<sup>147</sup> Earth Negotiations Bulletin, above n 49, 28. For example, the Annex I parties' emissions reductions targets under the Cancun agreement were compiled into one document by the Secretariat: *Compilation of Economy-Wide Emission Reduction Targets to be Implemented by Parties Included in Annex I to the Convention* UN Doc FCCC/SB2011/INF.1/Rev.1.

<sup>148</sup> Brazil, above n 42, 4.

amendment. Alternatively, NDCs could be contained in a COP decision or external document. This option would require, in addition to a provision requiring parties to implement their mitigation obligations, a provision integrating NDCs into the core agreement. Either of these options would be sufficient, provided that all of the necessary provisions exist in the core agreement. These provisions in the core agreement should be worded clearly and accompanied by an objective or preamble provision, headings and surrounding text that make it unambiguously clear that Parties are under a binding obligation to implement mitigation commitments.

## V STEPPING INTO THE 'REAL WORLD'

The previous sections of this paper outline the ideal form of the Paris agreement if all political constraints could be overcome. This ideal should be strived for at the Paris Conference and in the subsequent development and amendment of the agreement. However, in reality, as outlined above, the political feasibility of a hard law agreement with hard law mitigation commitments is low. This part makes some 'real world' recommendations that could help to meet the requirements of justice in the absence of a hard law agreement at Paris.

### A *A Compliance Mechanism to Promote Effectiveness*

One possible option to shore up the effectiveness of the agreement is to incorporate a strong compliance mechanism. There are two traditional schools of thought in relation to compliance in international agreements. The 'facilitative' school of thought is based on the idea that states are non-compliant due to lack of capacity as opposed to lack of goodwill. This approach aims to 'facilitate' compliance by providing assistance to states in meeting their obligations in a non-confrontational manner.<sup>149</sup> The 'enforcement' school of thought, on the other hand, aims to punish or sanction states who are seen as able but unwilling to comply with their obligations.<sup>150</sup> Duyck argues that there is also a third compliance approach, the justificatory approach.<sup>151</sup> This approach is based on the desire among states to maintain a good reputation and the idea that the fear of 'being found out' is a powerful motivating factor in compliance with international regimes.<sup>152</sup>

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<sup>149</sup> Nils Goeteyn and Frank Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance' (2011) *Chinese Journal of International Law* 791, 799-800.

<sup>150</sup> *Ibid* 800.

<sup>151</sup> Sébastien Duyck, 'MRV in the 2015 Climate Agreement: Promoting Compliance through Transparency and the Participation of NGOs' (2014) 3 *Carbon and Climate Law Review* 175, 176.

<sup>152</sup> *Ibid* 176.

Clearly an enforcement approach to compliance in the Paris agreement could not work in the absence of a binding mitigation implementation obligation.<sup>153</sup> Moreover, positions taken by key players in the negotiations indicate that the Paris agreement is unlikely to include an enforcement mechanism and will instead rely on a justificatory approach, based on the regime's transparency processes, to ensure compliance.

#### 1 *A Justificatory Approach to Compliance*

Reputation has been highlighted previously as a key factor in compliance and therefore effectiveness,<sup>154</sup> despite some of the qualifications outlined in part 3. Failing to comply with soft law obligations is not considered to have the same reputational impact as non-compliance with hard law obligations.<sup>155</sup> However, a justificatory compliance approach can go some way to building similar reputational concerns. This approach relies on a regime's transparency system to provide public awareness and exposure to a state's compliance efforts, which can be used to apply pressure on governments.<sup>156</sup>

The most recent set of transparency mechanisms under the UNFCCC originate from the Cancun agreements and are referred to as International Assessment and Review (IAR) for developed countries and International Consultation and Analysis (ICA) for developing countries.<sup>157</sup> Under these processes states submit biennial reports which are analysed by technical experts and then undergo a 'multilateral assessment' (IAR) or a 'facilitative sharing of views' (ICA), during which other states can pose questions. The IAR and ICA allow for the public identification and discussion of mitigation commitments, including addressing any shortcomings, both in the adequacy of proposed future commitments and the implementation of current commitments.

It appears likely that the IAR and ICA processes will be retained in the Paris agreement.<sup>158</sup> The IAR and ICA, as they stand, do fulfil a justificatory purpose in subjecting states to peer pressure and public exposure of their mitigation action. However, Oberthür argues that the current processes lack the capacity to adequately address and follow up

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<sup>153</sup> Note that an enforcement approach could be applied in other areas of the Paris agreement. For example, should there be binding obligations to prepare and communicate mitigation commitments an enforcement approach could be employed. However, in terms of effectiveness, the primary area of concern is not whether states will prepare mitigation commitments, but whether they will carry them out. There may also be binding obligations with respect to other aspects of the Paris agreement, such as adaptation, finance or technology transfer to which an enforcement approach could apply, but these aspects of the agreement fall outside the scope of this paper.

<sup>154</sup> Simmons, above n 63, 81.

<sup>155</sup> Duyck, above n 151, 184.

<sup>156</sup> Duyck, above n 151, 176.

<sup>157</sup> Oberthür, above n 10, 42.

<sup>158</sup> Earth Negotiations Bulletin, above n 49, 37.

problems with mitigation commitments.<sup>159</sup> He suggests strengthening the processes, including:

- The establishment of a dedicated body for the multilateral review process;
- Providing third parties other than states the right to ask questions regarding implementation; and
- The possibility to explore these questions in depth.<sup>160</sup>

These suggestions would greatly strengthen the IAR and ICA processes as a justificatory compliance tool. Firstly, compliance is best achieved with a dedicated standing compliance body, rather than an ad hoc body.<sup>161</sup> Secondly, NGOs and civil society can help to put pressure on states to comply with obligations through domestic advocacy and giving public exposure to the successes and failures of governments in achieving their mitigation commitments.<sup>162</sup> Further, NGOs are often willing and able to provide independent information verifying reports provided by governments.<sup>163</sup> This could be capitalised upon by allowing NGOs to submit reports directly to the technical experts to complement states' biennial reports. Finally, the possibility to explore the questions asked and answers given during the IAR/ICA multilateral review process in greater depth could bolster the reputational impacts of the process through 'naming and shaming'.

The negotiations and Draft Text also suggest the possibility of a strategic aggregate review process.<sup>164</sup> This would likely include a review of the aggregate *ambition* of mitigation commitments but could also include an aggregate review of the progress of implementation.<sup>165</sup> A number of options in the Draft Text give the Secretariat or Governing body the power to recommend adjustments to Parties' commitments.<sup>166</sup> Such a process could complement the already existing (and ideally strengthened) IAR and ICA process. However, the aggregate review recommendations and reports would need to be able to single out mitigation progress by individual states to have any justificatory compliance mechanism.<sup>167</sup>

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<sup>159</sup> Oberthür, above n 10, 44.

<sup>160</sup> Ibid 45-6.

<sup>161</sup> Goeteyn and Maes, above n 149, 801.

<sup>162</sup> Duyck, above n 151, 186.

<sup>163</sup> Duyck, above n 151, 177.

<sup>164</sup> See South Africa, Switzerland, EU and AOSIS, for example, in Earth Negotiations Bulletin, above n 49, 39.

<sup>165</sup> Earth Negotiations Bulletin, above n 49, 9. *Streamlined and Consolidated Text*, above n 114, para 186, options 1, 2 and 4.

<sup>166</sup> *Streamlined and Consolidated Text*, above n 114, para 191.

<sup>167</sup> Friedrich, above n 5, 270.

Therefore, this mechanism will be strongest if the recommendations based on the aggregate review are individualised.

## 2 *A Facilitative Approach to Compliance*

A facilitative mechanism could also exist for voluntary use by parties who do wish to meet their NDC but are having trouble doing so. A purely voluntary approach is unlikely to be as effective as a facilitative mechanism relating to legally binding obligations. For example, under the Kyoto Protocol technical expert reviewers and other Parties can refer non-complying Parties to the facilitative branch of the Compliance Committee.<sup>168</sup> However, a facilitative approach could still offer valuable assistance to those states who do genuinely wish to achieve their NDCs. Goeteyn and Maes in fact suggest facilitative compliance mechanisms can lead to greater rates of compliance in multilateral environmental agreements (MEAs) than enforcement measures.<sup>169</sup> Facilitative mechanisms often include financial, technological and institutional assistance.<sup>170</sup> The Paris agreement is already shaping up to contain provisions relating to finance, through utilisation of the Green Climate Fund, and technology transfer. However, these mechanisms could be further bolstered and streamlined through the creation of a dedicated facilitative body.

Oberthür suggests that the multilateral consultative process (MCP) negotiated under the UNFCCC could be integrated into the Paris agreement.<sup>171</sup> While the MCP process has not been activated by parties, a draft text setting out the process and the creation of a multilateral consultative committee exists. The MCP is designed to 'provide the appropriate assistance in relation to difficulties encountered in the course of implementation, by: (a) Clarifying and resolving questions; (b) Providing advice and recommendations on the procurement of technical and financial resources for the resolution of these difficulties; (c) Providing advice on the compilation and communication of information'.<sup>172</sup> An alternative would be to establish a facilitative compliance committee modelled on the facilitative arm of the Kyoto Protocol's Compliance Committee. The Compliance Committee performs

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<sup>168</sup> *An Introduction to the Kyoto Protocol Compliance Mechanism*, United Nations Framework Convention on Climate Change <[http://unfccc.int/kyoto\\_protocol/compliance/items/3024.php](http://unfccc.int/kyoto_protocol/compliance/items/3024.php)>.

<sup>169</sup> Goeteyn and Maes, above n 150, 801.

<sup>170</sup> Friedrich, above n 5, 140.

<sup>171</sup> Oberthür, above n 10, 38.

<sup>172</sup> *Ibid* 39.

a similar function to the MCP in terms of the provision of advice and facilitation of financial and technical assistance.<sup>173</sup>

### B *Transition to Hard Law Obligations Over Time*

While a strong compliance mechanism could bolster the effectiveness of the agreement in the absence of binding obligations to implement mitigation commitments, the position of this paper remains that a hard law agreement with hard law, binding implementation obligations will have the greatest chance of being effective and meeting the requirements of justice. While this may not be currently politically feasible, it could become feasible in the future as worsening impacts of climate change lead to greater impetus for action. There are a number of ways in which the Paris agreement could be strengthened over time without the need for renegotiation, leading to the introduction of a binding implementation obligation.

This paper has consistently taken a positivist approach to the distinction between hard law and soft law. However, some authors argue that obligations with soft law origins can become hard law or achieve a hard law effect.<sup>174</sup> While the Paris agreement may contain no binding obligation to implement mitigation commitments, soft law unilateral obligations will exist by virtue of each state's pledged NDC. There are a number of means by which these soft law obligations could transition to hard law obligations integrated into the Paris agreement over time through the use of COP decisions.

COP decisions are frequently used to interpret provisions of MEAs. While COP decisions are generally not legally binding,<sup>175</sup> in instances where the MEA expressly provides for this interpretation (e.g. art 10(1) of the Montreal Protocol) the COP decision derives binding force from the provision in the MEA.<sup>176</sup> However, it is more common for COP decisions to be used to interpret provisions in MEAs where *not* expressly provided for, based on the experience of the operation of the MEA or various technical, scientific or other developments.<sup>177</sup> While such decisions cannot derive binding force from the MEA, they could be considered 'subsequent practice in the application of the treaty' which may be taken

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<sup>173</sup> Xueman Wang and Glenn Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol' (2002) 11(2) *Review of European, Comparative and International Environmental Law* 181, 190.

<sup>174</sup> Martin-Joe Ezeudu, 'From a Soft Law Process to Hard Law Obligations: The Kimberly Process and Contemporary International Legislative Process' (2014) 16(1) *European Journal of Law Reform* 104, 131.

<sup>175</sup> Friedrich, above n 5, 47.

<sup>176</sup> Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements' (2000) 94(4) *The American Journal of International Law* 623, 641.

<sup>177</sup> *Ibid* 641.

into account in the interpretation of a treaty according to Article 31(3)(b) of the VLCT.<sup>178</sup>

Therefore, in the face of increasing impetus to take action on climate change, Parties could in the future choose to adopt a COP decision interpreting the mitigation obligation to require parties to implement their commitments. Such a decision would increase the public pressure and reputational concern associated with the agreement and also allow for the development of an enforcement branch of a compliance mechanism. However, to achieve this, such a decision would depend on the words of the provision housing the mitigation obligation being broad enough to be interpreted to include an obligation to implement commitments. For example, the option above requiring ‘developed country Parties to prepare mitigation commitments’ would need to be interpreted such that ‘prepare’ is defined to mean ‘prepare and implement’, which is quite artificial and may not be an appealing option to many Parties.

Alternatively, a COP decision could be used to ‘flesh out’ or add further details to the provisions of the core agreement. This often occurs in MEAs.<sup>179</sup> This can be expressly provided for in agreements, and articles 6.2, 12.7 and 17 of the Kyoto Protocol provide examples.<sup>180</sup> However, such decisions go beyond interpreting the existing words of the agreement and, according to Brunnée, their legal effect is murky. Brunnée suggests that for such decisions to be binding, this must be explicitly stated. For example, the Montreal Protocol provides that adjustments to ozone depleting potentials in the annexes can be adopted by consensus or, at last resort, a two-thirds majority of the Parties and that these decisions will be binding.<sup>181</sup> There is nothing in the current negotiations to suggest that a similar provision, allowing for COP decisions ‘fleshing out’ the mitigation obligation to be binding, will be adopted in the Paris agreement.

However, similar to COP decisions interpreting the words of an MEA, COP decisions adding further details to a provision in an MEA could be considered subsequent state practice under art 31(3)(b) of the VCLT. The benefit of this approach is that there would be no need to twist the words of the existing provision in the Paris agreement so as to interpret it to include implementation. The disadvantage of all of these suggested approaches is that they rely on the political will of the Parties firming at some future date to create binding implementation obligations. While it is quite possible that such political will might develop in time, it is not

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<sup>178</sup> *Whaling in the Antarctic (Australia v Japan) (Judgment)* [2014] ICJ Rep 148, 46; Churchill and Ulfstein, above n 177, 641.

<sup>179</sup> Jutta Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreement’ (2002) 15(1) *Leiden Journal of International Law* 1, 23.

<sup>180</sup> *Ibid* 23.

<sup>181</sup> *Ibid* 21.

guaranteed that this would lead to the COP adopting a decision such as those recommended above.

Donat and Bodle have suggested that a dynamic adjustment mechanism for the automatic scaling up of the ambition of mitigation commitments should be incorporated into the Paris agreement and that such a mechanism could also be used to 'move towards legal bindingness of the commitment, or tighten its legal anchoring.'<sup>182</sup> For example, many states have suggested that NDCs should be reviewed and scaled upwards at 5 or 10 year intervals.<sup>183</sup> The legal bindingness of NDCs could also be tied to these intervals. The agreement could provide that at every 5-10 year interval, the legal strength of the mitigation obligation be reviewed and amended under a simplified amendment procedure. Alternatively, the agreement could provide for the fixed ratcheting up of the mitigation commitment. For example, the implementation obligation could become binding instantaneously after 5-10 years, or this could occur in a series of steps whereby the commitment is first incorporated expressly in the agreement as soft law and then becomes hard law over a number of periods. It is unlikely however that Parties would agree upon a provision which expressly provides for the legal force of the mitigation obligation to be strengthened along with ambition at these regular intervals given the current lack of political will to agree to binding mitigation commitments.

## VI CONCLUSION

We know that climate change will have potentially devastating impacts on humanity and that these impacts will be greater on developing countries and small island states, as well as on future generations. The principles of international and intergenerational justice concern the distribution of the burdens and impacts of climate change.

The link between these principles of justice and legal form, as well as climate change more generally, has received little attention in the climate change literature.<sup>184</sup> This may be in part due to a lack of interdisciplinary study in the field of climate change, the view that states act only in their self-interest and are not concerned with ideas of justice and the view that legal form of an agreement makes little practical difference with respect to justice. This article is a modest attempt to demonstrate that

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<sup>182</sup> Lena Donat and Ralph Bodle, 'A Dynamic Adjustment Mechanism for the 2015 Climate Agreement: Rationale and Options' (2014) 1 *Carbon and Climate Law Review* 13, 19.

<sup>183</sup> See for example, Switzerland, 'Switzerland's Intended Nationally Determined Contribution (INDC) and Clarifying Information', Submission to the UNFCCC, 27 February 2015, 2; Norway, 'Possible Structure of the 2014 Core Agreement', Submission to the ADP, 4 February 2015, 2; Brazil, above n 42, 3.

<sup>184</sup> But see Karlsson-Vinkhuyzen and Vihma, above n 17, 416.

interdisciplinary study is in fact immensely valuable in helping to determine the ideal outcome of the new climate agreement. International relations studies demonstrate that divergent conceptions of fairness can lead to failed negotiations and that fairer agreements may in fact be more likely to be complied with.<sup>185</sup> Justice is therefore clearly a concern in the climate change context. The legal form of the Paris agreement is integral to ensuring a just outcome, as legal form is linked strongly to effectiveness and to the fairness of differentiation in mitigation obligations between countries with differing levels of development.

The above analysis identified some key criteria relevant to the effectiveness of an agreement: compliance, addressing trade concerns, finance and the stability of commitments. Despite a lack of empirical research, sufficient arguments in favour of hard law exist to conclude that, on balance, a hard law treaty instrument best addresses each of these issues. The jury is still out on whether the self-differentiation of the Paris agreement will deliver mitigation commitments that meet the needs of international and intergenerational justice. In assessing this self-differentiation structure there are two issues. First is the issue of whether the commitments made by individual countries individually and collectively meet the requirements of justice, which falls outside the scope of this paper. Second is the question of whether the actual mitigation action taken by states meets the requirement of justice. The latter question involves an analysis of likely compliance with commitments and as we have demonstrated, legal form is a crucial aspect of this issue. While self-differentiation in the Paris agreement may lead to NDCs which are only moderately unjust, if these commitments are only weakly implemented this could result in a dramatically more unjust situation. Given that legal form is integral to compliance issues, it can therefore be seen that legal form is integral to the extent to which justice is addressed.

Ideally, the Paris agreement will take the form of a Protocol to the UNFCCC, which will be a hard law treaty instrument. However, the agreement needs to go further than this. Mitigation plays a central role in achieving the distributional goals of the justice framework, as mitigation is the preventative arm of the climate change regime, designed to limit the harmful effects of climate change and assist with the distribution of burdens and impacts. Given that parties' NDCs will most likely be contained in an annex, attachment, appendix or a document external to the core agreement and will not be inherently binding, it is vitally important that the core Paris agreement contains a binding obligation on parties to implement mitigation commitments. Without such an obligation the mitigation commitments contained in parties' NDCs will remain soft

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<sup>185</sup> Albin, above n 20; Franck, above n 21.

law obligations. Further, an implementation obligation will not be hard law merely by virtue of being contained in the agreement. The parties must *intend* the obligation to be binding, which can be made crystal clear through unambiguous language in the provision, the surrounding text and the Protocol as a whole. Should NDCs be housed in an external document, such as national schedules or an INF document, they will also require an integration provision in the core agreement.

Without a robust implementation obligation in the core text and an integration provision, the obligation on parties' to implement their mitigation commitments will remain soft law. While many states advocate a binding agreement, the desirability of high levels of participation, and particularly the participation of the US, may lead to a soft law outcome, at least with respect to mitigation commitments. The LMDCs have consistently argued that the legal form of the agreement remains open and depends on the substance of the agreement.<sup>186</sup> This suggests that legal form could be used as a bargaining chip, with some states only agreeing to stronger substantive provisions in exchange for a soft law agreement or soft law mitigation commitments.

High levels of participation and ambition are both important, and sacrifices may need to be made with respect to the bindingness of mitigation commitments or even the core agreement to ensure participation of key states such as the US. However, even with a soft law outcome, states should strive towards an effective agreement. One means by which to do this is an effective compliance mechanism, drawing on the justificatory and facilitative approaches, utilising the transparency process and inclusion of strong provisions on finance and technology transfer. A second is to ratchet up the mitigation implementation commitment over time until it becomes an integrated, hard law commitment within the Paris agreement. This could occur through the use of COP decisions or through an in-built dynamic adjustment mechanism.

Paris is an extremely important milestone in the global action against climate change. It is becoming increasingly urgent that states take strong and immediate action to mitigate climate change, to prevent irreversible harm to our planet. Those countries pushing for hard law mitigation commitments, along with advocacy groups and NGOs, should continue this push in the lead up to Paris and also beyond. The interests of justice, and the protection of those who are vulnerable now and into the future, demand a hard law agreement for this very hard problem.

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<sup>186</sup> China, above n 45, [9]; India, above n 45, [5.25]; Earth Negotiations Bulletin, above n 45, 9.