THE WARSAW CLIMATE NEGOTIATIONS: EMERGING UNDERSTANDINGS AND BATTLE LINES ON THE ROAD TO THE 2015 CLIMATE AGREEMENT

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Abstract The Warsaw conference, 2013, marked the halfway point from the Durban conference, 2011, that launched negotiations towards a 2015 climate agreement and the Paris conference, 2015, slated as the deadline for these negotiations. As such, the Warsaw conference needed to register a step change in the process—from the airing of differences to negotiating them. It also needed to create the conditions necessary to reach agreement in 2015. This article analyses the outcome of the Warsaw negotiations with a view to determining the extent to which it paves the way for a 2015 climate agreement. In particular, this article explores the divisions over, prospects for and contours of a likely 2015 agreement. The 2015 agreement is likely to be shaped by the resolution Parties arrive at on three overarching issues. These are: architecture—whether the agreement will be 'top-down' (prescriptive) or 'bottom-up' (facilitative) or a hybrid version of the two; differentiation—the nature and extent of it, and in particular whether it will eschew or replicate the Kyoto model of differentiation and related vision of equity; and legal form —whether the 2015 agreement will be legally binding, and if yes, as is likely, which elements of the 2015 package will be in the legally binding instrument and which elements will be in non-binding complementary decisions. The Warsaw outcome will therefore be analysed with a view to providing insights into the likely architecture and legal form of as well as treatment of differentiation and equity in the 2015 agreement.

Keywords: architecture, climate change negotiations, differentiation, legal form, 2015 Climate Agreement.

I. INTRODUCTION

The UN climate negotiations in Warsaw, November 2013, held in the wake of the devastating Typhoon Haiyan in the Philippines, marked an important moment in the ongoing climate negotiations. A Philippine delegate, Yeb Sano, in a moving and tearful intervention in the opening session of the conference announced an indefinite hunger strike in solidarity with the victims of Typhoon Haiyan and in the hope of building pressure on nations to reach meaningful

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outcomes.[1] Yet the odds were stacked against a successful conclusion to the conference. Japan, in the wake of Fukushima and its zero-nuclear move, revised its greenhouse gas (GHG) targets from −25 per cent to +3 per cent from 1990 levels.[2] Australia is in the process of abolishing its carbon tax.[3] Developed countries have contributed a mere US$7.5 million to the Green Climate Fund.[4] They had agreed to mobilize US$100 billion per year by 2020.[5] The atmosphere seemingly tainted by broken promises was rife with discontent.

The Warsaw conference, however, marked the halfway point from the Durban conference, 2011, that launched negotiations towards a 2015 climate agreement and the Paris conference, 2015, slated as the deadline for these negotiations. As such, the Warsaw conference needed to register a step change in the process—from the airing of differences to negotiating them. It also needed to create the conditions necessary to reach agreement in 2015. This article analyses the outcome of the Warsaw negotiations with a view to determining the extent to which it paves the way for a 2015 climate agreement. In particular, this article explores the divisions over, prospects for and contours of a likely 2015 agreement. The 2015 agreement is likely to be shaped by the resolution Parties arrive at on three overarching issues. These are: architecture—whether the agreement will be 'top-down' (prescriptive) or 'bottom-up' (facilitative) or a hybrid version of the two; differentiation—the nature and extent of it, and in particular whether it will eschew or replicate the Kyoto model of differentiation and related vision of equity; and legal form—whether the 2015 agreement will be legally binding, and if yes, as is likely, which elements of the 2015 package will be in the legally binding instrument and which elements will be in non-binding complementary decisions. The Warsaw outcome will therefore be analysed with a view to providing insights into the likely architecture and legal form of as well as treatment of differentiation and equity in the 2015 agreement.

[1] M McGrath, 'Typhoon prompts ''fast'' by Philippines climate delegate' (BBC News Science and Environment, 11 November 2013) <http://www.bbc.com/news/science-environment-24899647>.

[2] E Lies and S Reklev, 'Japan Slashes CO_2 Emissions Targets at UN Climate Talks, Prompting Criticism' (Huffington Post, 15 November 2013) <http://www.huffingtonpost.com/2013/11/15/japan-co2-emissions-targets_n_4280593.html>; 'Japan slashes climate reduction target amid nuclear shutdown' (BBC News Asia, 15 November 2013) <http://www.bbc.com/news/world-asia-24952155>.

[3] 'Australia carbon tax: Abbott introduces repeal bill' (BBC News Asia, 13 November 2013) <http://www.bbc.com/news/world-asia-24923094>; J Smyth, 'Australia sets deadline to axe carbon tax' *Financial Times* (5 February 2014) <http://www.ft.com/cms/s/0/5032080c-8e28-11e3-98c6-00144feab7de.html#;axzz2ubwznGYa>.

[4] Green Climate Fund, 'Green Climate Fund Trust Fund Financial Report' (17 September 2013) GCF/B.05/Inf.04.

[5] UNFCCC, 'Decision 2/CP.15 Copenhagen Accord' (30 March 2010) FCCC/CP/2009/11/Add.1 (Copenhagen Accord) para 8; and UNFCCC, 'Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' (15 March 2011) FCCC/CP/2010/7/Add.1 (Cancun Agreements (LCA)) para 98.

II. LOCATING WARSAW: FROM DURBAN 2011 TO PARIS 2015

The international climate change regime comprises principally of the 1992 United Nations Framework Convention on Climate Change,[6] the 1997 Kyoto Protocol[7] and the decisions of Parties under these instruments. Although these instruments are important first steps towards addressing climate change and its impacts, they are widely regarded as inadequate and inadequately implemented. At the Durban conference, 2011, Parties launched a process to negotiate a climate agreement that will come into effect and be implemented from 2020.[8] This process, christened the Ad-Hoc Working Group on the Durban Platform for Enhanced Action (ADP), is intended to craft the agreement that will govern, regulate and incentivize the next generation of climate actions. The ADP is expected to conclude its work and yield agreement by 2015.[9] The international community has, since Durban, engaged in intense negotiations, both in the context of this process and in other complementary plurilateral and multilateral fora, to inform and design an agreement that builds on, complements and may even replace part of the existing climate change regime. To assist them in meeting the 2015 deadline and managing their negotiating time, Parties decided at the Doha conference, 2012, to erect milestones along the way. Parties agreed to consider 'elements for a draft negotiating text' no later than the Lima conference, 2014, 'with a view to making available a negotiating text before May 2015'.[10]

The Warsaw conference, 2013, marked the halfway point between the launch of the work of the ADP and its scheduled end. Parties had through 2012 and 2013 aired views and differences in 'workshop' and 'round table' formats which albeit useful for that purpose, were not conducive to active negotiation. In Warsaw, therefore, keeping in mind the interim deadline of producing elements of a draft negotiating text by Lima, 2014, the Chairs of the ADP process decided to shift gears and nudge Parties into negotiating mode.[11] To do so, they directed Parties' attention to delivering outcomes at Warsaw that could incentivize or create the conditions necessary for actions in 2014 that could pave

[6] United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (FCCC).

[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) FCCC/CP/1997/7/Add.1 (Kyoto Protocol).

[8] UNFCCC, 'Decision 1/CP.17 Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011' (15 March 2012) FCCC/CP/2011/9/Add.1 (Durban Platform). See for a detailed discussion of this decision, L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61(2) ICLQ 501; and see also, D Bodansky, *The Durban Platform Negotiations: Goals and Options* (Harvard Project on Climate Agreements, Massachusetts July 2012) 3 <http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf>.

[9] Durban Platform, para 4.

[10] UNFCCC, 'Decision 2/CP.18 Advancing the Durban Platform' (28 February 2013) FCCC/CP/2012/8/Add.1 (Doha ADP decision) para 9.

[11] UNFCCC, 'Scenario note on the third part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Note by Co-Chairs' (21 October 2013) ADP.2013.16.InformalNote, para 5.

the way to reaching agreement in 2015. Two issues raised by several Parties in this context assumed centre stage: first, the issue of domestic preparations across jurisdictions for the submission of national commitments to the 2015 agreement;[12] and, second, the issue of informational requirements that would accompany such commitments to the 2015 agreement.[13] There is general agreement that Parties need to engage in 2014 in the domestic preparations necessary to arrive at commitments that can be inscribed in the 2015 agreement or be part of the 2015 package.[14] This is necessary not just to arrive at realistic and realizable commitments but also to generate ownership of and responsibility for them. There is also general agreement that these commitments will need to be accompanied by information sufficient to generate clarity about the nature, type and stringency of the commitments. The Chairs also sought to initiate the process of distilling elements for a negotiating text, but this met with less success.[15]

III. THE RESULTS OF HUDDLE DIPLOMACY

After intense 'huddling' in various settings—the 'huddle' now being the preferred, ostensibly spontaneous mode of resolving final differences[16]—Parties arrived at the following language in relation to these two issues:

> [t]o Invite all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions, without prejudice to the legal

[12] See eg UNFCCC, 'Submission by Brazil, Views of Brazil on the Implementation of all the Elements of Decision 1/CP.17, (A) Matters Related To Paragraphs 2 to 6 (Workstream 1), on the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action' (12 September 2013) 1 <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_brazil_workstream_1_domestic_debates_20130912.pdf>.

[13] See eg UNFCCC, 'Submission by Lithuania and the European Commission on behalf of the European Union and its Member States: Further elaboration of elements of a step wise process for ambitious mitigation commitments in the 2015 agreement' (16 September 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_eu_workstream_1_mitigation_20130916.pdf>.

[14] There are proposals that contributions should be 'housed' elsewhere. See UNFCCC, 'Submission by the United States, U.S. Submission on Elements of the 2015 Agreement' (12 February 2014) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf>.

[15] The Chairs in early versions of the Warsaw ADP decision text had included an Annex that distilled elements of convergence and divergence that had emerged in focused discussions at Warsaw among Parties, but this did not survive in the final decision due to strong objections from the LMDCs, BASIC and Singapore.

[16] The huddle was used in Durban to good effect to resolve the final divergence between the EU and India. See J Tollefson, 'Durban maps path to climate treaty' (2011) 480(7377) Nature 299–300 <http://www.nature.com/news/durban-maps-path-to-climate-treaty-1.9635?referral=true>, for a picture of the famous huddle at Durban. Given the backlash unleashed against closed-door small-group negotiations at Copenhagen, and the suspicion thereof, the 'huddle' has since Durban emerged as a preferred mode of resolving final differences. Such huddles are convened spontaneously on the floor of the plenary. Key negotiators gather together to work on the contentious text. Although, in principle, anyone can join the huddle, only those in the inner few rings of the huddle play a decisive role. Participation in huddles demands physical strength and stature and there have been rumbles of discontent against this mode of resolving differences, which marginalizes many Parties.

> nature of the contributions, in the context of adopting a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties towards achieving the objective of the Convention as set out in its Article 2 and to communicate them well in advance of the twenty-first session of the Conference of the Parties (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the intended contributions, without prejudice to the legal nature of the contributions.[17]

This awkward, lengthy and open-textured formulation, containing two caveats in relation to legal form, leaves many options on the table. Parties also decided to request the ADP 'to identify … the information that Parties will provide when putting forward their contributions, without prejudice to the legal nature of the contributions'.[18] A close examination of these two seemingly prosaic paragraphs offers rich insights into the likely contours of the 2015 agreement.

IV. THE INCREASING SALIENCE OF HYBRID ARCHITECTURAL APPROACHES

The Copenhagen Accord, 2009[19] and the Cancun Agreements, 2010[20] initiated the climate regime's experiments with the 'bottom-up' approach. The commitments and actions required by the Copenhagen Accord, 2009, were communicated by Parties and enshrined in the climate regime through the Cancun Agreements, 2010.[21] The Cancun Agreements merely took note of commitments and actions by developed and developing countries respectively. They neither prescribed the nature, type and stringency of commitments or actions to be taken by countries nor imposed any informational requirements or rules in relation to these commitments and actions. In this, the Cancun Agreements adopted a truly 'bottom-up' approach that deferred to national autonomy in arriving at commitments/actions in the face of diverse national circumstances and constraints. This 'bottom-up' approach led to qualified and conditional pre-2020 GHG mitigation pledges[22] of breathtaking diversity, dubious rigour and limited climate impact.[23] There are processes under way

[17] UNFCCC, 'Decision 1/CP.19 Further Advancing the Durban Platform' (31 January 2014) FCCC/CP/2013/10/Add.1 (Warsaw ADP Decision) para 2(b).

[18] ibid, para 2(c).

[19] See generally L Rajamani, 'The Making and Unmaking of the Copenhagen Accord' (2010) 59(3) ICLQ 824.

[20] See generally, L Rajamani, 'The Cancun Climate Change Agreements: Reading the Text, Subtext and Tea Leaves' (2011) 60(2) ICLQ 499–519.

[21] The Copenhagen Accord, since it could not be adopted as a COP decision, has no formal legal status in the FCCC regime. See, UNFCCC, 'Notification to Parties: Clarification relating to the Notification of 18 January 2010' (25 January 2010) <https://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf>.

[22] UNFCCC, 'Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention' (7 June 2001) FCCC/SB/2011/INF.1/Rev.1; and UNFCCC, 'Compilation of Information on Nationally Appropriate Mitigation Actions to be Implemented by Parties not Included in Annex I to the Convention' (18 March 2011) FCCC/AWGLCA/2011/INF.1.

[23] UNEP, 'The Emissions Gap Report 2013: A UNEP Synthesis Report' (2013).

to understand 'the diversity of the nationally appropriate mitigation actions' submitted by developing countries,[24] and to 'clarify[ing] the quantified economy-wide emission reduction targets' submitted by developed countries.[25] It has rapidly become evident, however, that such a 'bottom-up' approach has its limits, at least, to the extent that the regime needs the 'bottom-up' to add up to what is required to reach the below 2 °C global temperature goal.[26] As a result of this experience, and ongoing difficulties associated with clarifying and understanding the current commitments and actions, in the negotiations for the 2015 agreement there is an effort to discipline or circumscribe the discretion available to countries. The Warsaw decision inviting Parties to initiate/intensify domestic preparations for 'nationally determined' contributions, firmly posits the 'bottom-up' approach as the starting point. Thus leaving the framing of contributions, at least in the first instance, solely to nations. This, given the overlapping interests of states in protecting autonomy, was a predictable and inevitable outcome.[27] Indeed, Singapore argues that the term 'nationally determined' excludes any possibility that the contributions could be 'internationally negotiated or multilaterally imposed'.[28] There is, however, an effort in the negotiations for the 2015 agreement to craft a hybrid approach where the 'top-down' meets the 'bottom-up'.[29]

There are at least two 'top-down' elements to the 2015 agreement under consideration in relation to countries' GHG contributions: informational requirements that accompany their contributions so as to enhance their clarity, transparency and understanding; and, an assessment/consultation/evaluation process (although the extent to which this will function in a 'top-down' or prescriptive manner is hotly contested) to review countries' GHG contributions.

The Warsaw ADP decision, in the paragraph excerpted above, merely mandated the ADP to develop informational requirements for Parties' contributions.[30] It neither provided any guidance on the type of information required from Parties nor posited any specific purpose to be served by this information. The previous paragraph of the decision inviting Parties to initiate/intensify domestic preparations for contributions required Parties to communicate these in a manner that facilitates 'clarity, transparency and understanding'

[24] UNFCCC, 'Decision 1/CP.18 Agreed outcome pursuant to the Bali Action Plan' (28 February 2013) FCCC/CP/2012/8/Add.1, paras 18 and 19. [25] ibid, para 8.

[26] Cancun Agreements (LCA), para 4; and UNEP, 'Bridging the Emissions Gap – A UNEP Synthesis Report' (2011). [27] Warsaw ADP Decision, para 2(c).

[28] Oral Intervention by Singapore, ADP 2.4, 10–14 March, Bonn, Germany (12 March 2014).

[29] UNFCCC, 'Note on Progress: Note by the Co-Chairs' (13 August 2013) 2 <http://unfccc.int/resource/docs/2013/adp2/eng/14infnot.pdf>; See eg UNFCCC, 'Submission by New Zealand, Submission to the Ad Hoc Working Group on the Durban Platform for Enhanced Action: Work Stream 1' (12 March 2014) 6 <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp2-4_submission_by_new_zealand_submission_20140312.pdf>.

[30] Warsaw ADP Decision, para 2(c).

but this is an invitation to Parties not a direction to the ADP in arriving at informational requirements to be placed on Parties. Many countries, across the developed–developing divide, argued in Warsaw for clear informational requirements to be laid out in relation to Parties' commitments.[31] Several Parties had in their submissions identified both the type of *ex ante* or upfront information to accompany mitigation commitments and the rationale for requiring such information. Suggestions for information to be provided by Parties included: target year and/or target period, sectors covered, gases covered, metrics used to calculate equivalence of greenhouse gases, expected contribution (if any) of international market based mechanisms,[32] assumptions underlying any parameters used for defining the mitigation commitment, accounting for the land sector, reasons for any deviation in accounting from IPCC sectors and gases, etc,[33] relevant domestic laws and policies.[34] A few Parties proposed templates for the submission of information by Parties.[35] Some Parties also lobbied for a process to develop accounting rules for the land use sector and the use of market mechanisms[36] At Warsaw, however, the negotiating dynamics did not permit Parties to reach this level of detail. The Like-Minded Developing Countries (LMDCs),[37] a recently formed coalition comprising, among others, China and India (but notably neither Brazil nor South Africa), resisted provision of such detailed information and argued that

[31] See eg Submission by Lithuania and the European Commission (16 September 2013) (n 13). See also, UNFCCC, 'Submission by South Africa: South African Submission on Mitigation under the Ad hoc Working Group on the Durban Platform for Enhanced Action' (30 September 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1__mitigation_20130930.pdf>.

[32] See eg Submission by Lithuania and the European Commission (16 September 2013) (n 13) 4; and see also, UNFCCC, 'Submission by Greece and the European Commission on behalf of the European Union and its Member States: The 2015 Agreement – Priorities for 2014' (3 March 2014) <http://unfccc.int/files/bodies/application/pdf/el-02-28-eu_adp_ws1_submission.pdf>.

[33] UNFCCC, 'Submission by Environmental Integrity Group (EIG), 2015 Agreement: Contours and Core Elements, Specific Views in the area of Mitigation, Adaptation and Means of Implementation, and Respective Deliverables in 2013, and Planning of Work 2014/2015, ADP 2.3, workstream 1' (23 September 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_eig_workstream_1_20130923.pdf>. The EIG comprises Liechtenstein, Mexico, Monaco, the Republic of Korea and Switzerland.

[34] UNFCCC, 'Submission by the United States: U.S. Submission on the 2015 Agreement' (17 October 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_usa_workstream_1_20131017.pdf>.

[35] ibid 9–10. See Submission by South Africa (30 September 2013) (n 31) 4. See also UNFCCC, 'Submission by New Zealand, Submission to the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work Stream 1' (15 October 2013), <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_new_zealand_workstream_1_20131015.pdf>.

[36] See eg Submission by the United States (17 October 2013) (n 34). See also Submission by South Africa (30 September 2013) (n 31).

[37] The LMDCs comprises Algeria, Argentina, Bolivia, Cuba, China, Democratic Republic of the Congo, Dominica, Ecuador, Egypt, El Salvador, India, Iran, Iraq, Kuwait, Libya, Malaysia, Mali, Nicaragua, Pakistan, Philippines, Qatar, Saudi Arabia, Sri Lanka, Sudan, Syria and Venezuela.

informational requirements as well as rules, if any, should be differentially applied to developed and developing countries.[38] Since differential application in the post-2020 period is anathema to the Umbrella Group, comprising Australia, Canada, Japan, Kazakhstan, New Zealand, Norway, Russia, Ukraine, and the US, these countries along with the majority of other developed countries brought the discussion to a halt.

On the related issue of the purposes to be served by this information, there is a range of views. The European Union (EU) believes such information is necessary to ensure that the commitments adhere to the criteria of 'transparency, quantification, comparability, verifiability and ambition'.[39] The Umbrella Group notes that the information elicited must ensure that the contributions are 'clear, transparent and quantifiable'.[40] The US notes that the 'clarifying information' is to be provided to ensure that Parties understand each other's commitments—'both to be able to analyze them in relation to their own commitments and to be able to look at the aggregate effort being put forward'.[41] The primary purpose of such information, in their view, is clarity. South Africa believes such information to be essential in assessing 'the adequacy of the aggregate effort and the fair distribution of relative efforts.'[42] The Africa Group's proposal for a principle-based reference framework is premised on information provided by Parties, and it is designed in its application to national contributions to address both considerations of adequacy (so as to reach the below 2 °C temperature goal) and equity (so as to ensure fair burden sharing).[43] The Africa Group's proposal for a principle-based reference framework, however, drew strong criticism from the LMDCs.

[38] See eg UNFCCC, 'Submission by China: China's Submission on the Work of the Ad Hoc Working Group on Durban Platform for Enhanced Action' (6 March 2014) 2 <http://unfccc.int/files/bodies/application/pdf/20140306-submission_on_adp_by_china__without_cover_page.pdf> (noting that submission of information must be differentiated in accordance with FCCC Article 12).

[39] Submission by Lithuania and the European Commission (16 September 2013) (n 13) 2.

[40] UNFCCC, 'Umbrella Group Opening Statement' (10 March 2014) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp2-4_umbrella_20140314.pdf>.

[41] Submission by the United States (17 October 2013) (n 34) 3.

[42] Submission by South Africa (30 September 2013) (n 31) 4.

[43] See UNFCCC, 'Submission by Swaziland on behalf of the African Group' (19 September 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_2_20130919.pdf>. This principle-based reference framework proposes to use a set of objective criteria in relation to historical responsibility, current capability and development needs to determine the required global effort as well as fair shares of Parties. Such a framework was first alluded to by BASIC Experts in Experts from BASIC countries, 'Equitable access to sustainable Development, Contribution to the Body of Scientific Knowledge – A Paper by Experts from BASIC Countries' (2011), and later fleshed out in X Ngwadla, 'Equitable Access to Sustainable Development: Relevance to Negotiations and Actions on Climate Change' (Mitigation Action Plans & Scenarios (MAPS) Research Paper Issue 10, Cape Town 2013) <http://www.mapsprogramme.org/wp-content/uploads/EASD-Relevance-to-negotiations_Paper.pdf>. See also X Ngwadla and L Rajamani, 'Operationalising an Equity Reference Framework in the Climate Change Regime: Legal and Technical Perspectives' (MAPS Research Paper, Cape Town forthcoming 2014).

In addition to their opposition to the prescription of detailed informational requirements and rules, the LMDCs opposed a multilateral assessment process for fear that in a regime 'applicable to all'[44] such a process will apply to their national contributions.

The Warsaw ADP decision therefore contained only the flimsiest of hooks for an assessment process. The decision invited Parties to initiate or intensify their preparations for their 'intended nationally-determined contributions'.[45] The use of the word 'intended' suggests that this contribution is provisional in that it may not be a Party's eventual contribution inscribed in the 2015 agreement. This creates two possibilities—that the intended contribution could be revised by the Party itself, or as a result of a multilateral assessment process. Some Parties have a clear preference for the former, as they do not envision a determinative role for a multilateral assessment process, if any.[46] In their view a multilateral assessment process, or a 'consultative process', as the US characterizes it, is intended to facilitate clarity and understanding of each other's commitments, and any decision to revise commitments upwards will 'ultimately be their [a Party's] choice'.[47] Others consider a multilateral assessment process, and one with a determinative role, as critical to any future international climate change agreement.[48] The Africa Group's proposal for a principle-based reference framework is premised on the creation of a multilateral assessment process that has a determinative role.[49] Indeed, it could be argued that a rigorous multilateral assessment process, such as the one proposed by the Africa Group, the Independent Association of Latin American and the Caribbean (AILAC)[50] and the EU[51] would provide a raison d'être for the international regime. Together these two elements— nationally determined contributions, accompanied by the required information, and a multilateral assessment/consultative/evaluation process applied to them—form the core of the 'hybrid approach' that is gaining ground as a likely architectural format for the 2015 agreement.

The nature of this assessment process, whether it will apply before 2015, after 2015, or at regular intervals; what critical mass of countries (and/or emissions coverage) will trigger the assessment process;[52] whether the assessment process will lead to a revisit of commitments; and, whether such a revisit will lead to a COP-mandated or requested revision of

[44] Durban Platform, para 2.
[45] Warsaw ADP Decision, para 2(b).
[46] See eg Submission by the United States (17 October 2013) (n 34).
[47] ibid.
[48] Submission by Lithuania and the European Commission (16 September 2013) (n 13). See also, UNFCCC, 'Submission by Swaziland on behalf of the Africa Group in respect of Workstream I: 2015 Agreement under the ADP' (30 April 2013) <http://unfccc.int/files/bodies/awg/application/pdf/adp_2_african_group_29042013.pdf>.
[49] Submission by Swaziland (19 September 2013) (n 43). See also, Ngwadla and Rajamani (n 43).
[50] AILAC comprises Chile, Colombia, Costa Rica, Guatemala, Panama and Peru.
[51] Submission by Lithuania and the European Commission (16 September 2013) (n 13).
[52] See Submission by New Zealand (12 March 2014) (n 29).

a Party's commitment or a self-correction by the Party concerned, are open questions that Parties will need to address. It is worth highlighting, however, that the timeline chosen by Parties at Warsaw for contributions to be submitted —well in advance of COP-21, Paris, 2015, and by the first quarter of 2015 by those Parties ready to do so—effectively deflects the application of an assessment process to national contributions before 2015. Despite the fact that the UN Secretary-General has scheduled a high-level event in the fall of 2014,[53] most contributions are only likely to be forthcoming in 2015. This is particularly so for developing country contributions as several developing countries are arguing that the elements of the 2015 agreement, in particular support arrangements, need to be fleshed out before they can define their contributions.[54] If contributions are only forthcoming in 2015, it is unlikely, given the paucity of time that a robust assessment even if an assessment process is agreed and adopted,[55] could be conducted and contributions revisited before the Paris conference. This could have the following consequence. Nationally determined contributions, at least by 2015, will likely be purely 'bottom-up' contributions, unprocessed internationally. This will lead to a justifiable reluctance to enshrine these contributions in a legally binding instrument. Some Parties, in any case, have indicated a preference for contributions to be 'housed' outside the legally binding agreement.[56] Delay in the submission of contributions will create a strong pull towards this option and/or to shifting some part of or the whole assessment process to after 2015. In such a case the contributions could be 'housed' outside the legally binding agreement until the completion of the assessment process, and then options for including it in the agreement could be explored.

V. THE INTERPLAY BETWEEN DIFFERENTIATION AND ARCHITECTURE

Parties need to perceive themselves as being treated fairly if they are to accept and comply with an international agreement. Yet, the issues of equity and differentiation have proven to be deeply contentious in the climate change negotiations. There is a range of views among Parties on equity and differentiation—from strict differentiation in line with the FCCC Annexes at one end of the spectrum to self-differentiation through self-selection effectively

[53] United Nations, 'Climate Summit 2014' <http://www.un.org/climatechange/summit2014/>.

[54] UNFCCC, 'Submission by LMDCs, Submission on Elements of the 2015 Agreed Outcome' (9 March 2014) <http://unfccc.int/bodies/awg/items/7398.php>; and Submission by China (6 March 2014) (n 38).

[55] An assessment process could be anchored under the Convention through a COP decision. For a discussion of further legal and architectural options for anchoring an assessment process see Ngwadla and Rajamani (n 43).

[56] See eg Submission by the United States (12 February 2014) (n 14); and, Submission by New Zealand (12 March 2014) (n 29) (noting that 'nationally determined commitments should sit in national schedules supplementary to, and outside the legally binding agreement').

bypassing the Annexes at the other end of the spectrum. The LMDCs,[57] at one end of the spectrum, advocate the following approach to equity and differentiation. The principles, provisions and structure (Annexes) of the FCCC are sacrosanct, and must not be reinterpreted, renegotiated or rewritten. These principles and provisions are premised on historical responsibility, respective capabilities and development imperatives. Thus these principles and provisions require leadership from developed countries and differentiation in central obligations (targets and timetables) in favour of developing countries. Such a balance of responsibilities between developed/Annex I and developing/non-Annex I countries must be reflected in the 2015 agreement. This approach to differentiation maps on to a prescriptive or 'top-down' architecture for the 2015 agreement in that commitments, including those that operationalize equity and differentiation, are negotiated and agreed rather than self-selected.

The Umbrella Group,[58] the Environmental Integrity Group[59] and Singapore[60] at the other end of the spectrum of views, advocate the following approach. They propose that nationally determined mitigation actions, taking into account national circumstances, form the building blocks of the 2015 mitigation agreement. In their view, self-selection of mitigation commitments results in self-differentiation.[61] In recognizing and privileging differentiation for *all* Parties (rather than just in favour of developing countries) this approach effectively bypasses (and renders irrelevant) the FCCC Annexes. This approach sits squarely within the bottom-up architectural approach in that nationally determined mitigation contributions or commitments—while they

[57] Submission by LMDCs (9 March 2014) (n 54). See also UNFCCC, 'Submission by India: Submission by India on the Work of the Ad-Hoc Working Group on the Durban Platform for Enhanced Action: Workstream I' (13 September 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_india_workstream_1_20130913.pdf>; and Submission by China (6 March 2014) (n 38).

[58] See eg UNFCCC, 'Submission by United States, ADP Workstream 1: 2015 Agreement' (12 March 2013) 3 <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_usa_workstream_1_20130312.pdf>; UNFCCC, 'Submission by Australia: Submission under the Durban Platform for Enhanced Action, The 2015 climate change agreement' (26 March 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_australia_workstream_1_20130326.pdf>; UNFCCC, 'Submission by Japan: Information, views and proposals on matters related to the work of Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP)' (10 September 2013) 2 <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_japan_workstream_1_and_2_20130910.pdf>; and UNFCCC, 'Submission by Canada: Views on advancing the work of the Durban Platform' (12 April 2013) 2 <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_canada_workstream_1_and_2_en_20130412.pdf>.

[59] Submission by EIG (23 September 2013) (n 33).

[60] UNFCCC, 'Submission by Singapore, Submission by Singapore to the Ad Hoc Working Group on the Durban Platform for Enhanced Action – Workstream 1' (2 September 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_singapore_workstream1_20130902.pdf>.

[61] Submission by the United States (12 March 2013) (n 58) 3 (noting that 'while there would be a common commitment to come forward with mitigation contributions, self-identification of measures would result in self-differentiation consistent with national circumstances, capabilities, etc.').

may be subject to a review[62] or evaluation and review[63] or consultative[64] phase—are not ultimately subject to international negotiation, benchmarking or adjustment. Countries may voluntarily[65] and unilaterally[66] revise their mitigation offers but this will ultimately be their choice.[67] The review or assessment phase in this approach is focused on 'adequacy' and fairness in terms of responsiveness in changes to countries' circumstances and capacities over time not on equity as interpreted by many developing countries. In this approach equity is conflated with self-differentiation.

In the middle of the spectrum are views by the EU,[68] and the AILAC.[69] In their view all Parties are required to take on ambitious mitigation commitments that will be differentiated based on the principles of the Convention applied in a 'dynamic' way. All Parties must participate in time in accordance with their evolving responsibilities and capabilities,[70] and changing national circumstances.[71] The Annexes are, implicitly, bypassed. This will result in a spectrum of commitments across countries varying in type, depth, and stringency, but not in legal form or nature of commitments, which will be identical for all. This approach seeks to combine the top-down and bottom-up architectural approaches in that it combines self-selection of commitments with a robust international assessment/adjustment[72] or review[73] process that is expected to lead to increased ambition. However, the assessment/adjustment/review process focuses on ensuring 'adequacy' or effectiveness in relation to the below 2 °C temperature goal but not in assessing compatibility with particular equity considerations.

[62] Submission by Australia (26 March 2013) (n 58) 4.

[63] Submission by Japan (10 September 2013) (n 58) 2.

[64] Submission by the United States (12 March 2013) (n 58) 2; and Submission by EIG (23 September 2013) (n 33) 3.

[65] Submission by Canada (12 April 2013) (n 58) 2 (noting that 'to encourage greater and broader ambition continually, a new climate change regime should provide countries with the flexibility to voluntarily modify and update their mitigation commitments, with a view to encouraging more aggressive action over time'.).

[66] Submission by EIG (23 September 2013) (n 33) 3 (noting the need to '[e]xplore options and ways for unilateral enhancement of mitigation commitments by a Party concerned under the 2015 Agreement').

[67] Submission by the United States (17 October 2013) (n 34) 4.

[68] Submission by Lithuania and the European Commission (16 September 2013) (n 13).

[69] UNFCCC, 'Submission by AILAC, ADP – Planning of Work in 2013' (1 March 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_ailac_workstream1_20130301.pdf>.

[70] Submission by Lithuania and the European Commission (16 September 2013) (n 13) 2 ('Those principles must be applied in a dynamic way such that all Parties participate over time in accordance with their evolving responsibilities and capabilities.').

[71] Submission by AILAC (1 March 2013) (n 69) 3 ('The Principles of the Convention should be applied in a contemporary context, evolving over time along with changing national circumstances.').

[72] Submission by Lithuania and the European Commission (16 September 2013) (n 13) 4.

[73] UNFCCC, Submission by AILAC, Submission on the Ad Hoc Working Group on the Durban Platform (ADP) (10 March 2014) 9 <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp2.4_submission_by_ailac_20140310.pdf>.

A more equity-friendly approach in the middle of the spectrum is the Africa Group approach. In the Africa Group's vision the FCCC Annexes are used nominally to assign broad categories of commitments/actions to Parties'—economy-wide emissions reductions for Annex I countries, and mitigation actions that support a deviation from business as usual for non-Annex I countries. All countries have legally binding commitments, undertaken in accordance with their national circumstances and common but differentiated responsibilities and respective capabilities. However, in so far as Parties self-select their commitments and actions, in accordance with the broad parameters of the Annexes, there is self-differentiation with respect to the specific commitments selected by Parties. The commitments by Parties are, however, subject to a 'principle-based reference framework' referred to earlier.[74] Parties' self-selected commitments are assessed for adequacy and fairness against this reference framework. This approach to equity and differentiation seeks to reconcile top-down and bottom-up architectural approaches to the 2015 agreement, in that it combines self-selected or nationally determined commitments with an international process for assessment, review and possible ratchet. This approach is prescriptive to the extent that it relies on metrics, criteria and/or indicators to assess equity, fairness and adequacy.

The issue of differentiation thus assumes particular relevance in the context of the 'top-down'/'bottom-up' architectural discussion. The 'top-down' approach is closely identified with the Kyoto Protocol. The Kyoto Protocol captures a 'top-down' approach in that GHG targets are prescribed in the international agreement (albeit once offered and negotiated by the countries concerned), as well as a strong form of differentiation in favour of developing countries, in that GHG targets and timetables are only for developed countries.[75] The 'bottom-up' approach is closely identified with the Copenhagen Accord, 2009, and Cancun Agreements, 2010. These instruments capture the 'bottom-up' approach discussed above, but also 'differentiation++', in that by deferring to national circumstances and permitting every nation to chart its own course and choose its own commitment or action, they recognize differentiation in favour of all countries (not just in favour of developing countries). 'Top-down' or prescriptive approaches are therefore conflated with strong forms of differentiation in favour of developing countries and 'bottom-up' or facilitative approaches with differentiation in favour of all countries through self-differentiation.

This interplay between the emerging architecture of the 2015 agreement and differentiation poses difficulties for some negotiating interests and coalitions. The LMDCs in particular find themselves in a bind. They espouse strong forms of differentiation in favour of developing countries, which suggests that they would advocate a 'top-down' or prescriptive approach in the 2015

[74] Submission by Swaziland (19 September 2013) (n 43).
[75] Kyoto Protocol, art 3 and annexes.

negotiations. However, since the 2015 agreement will be 'applicable to all'[76] the prescriptive approach, should one be adopted, would apply to developing countries as well.[77] This is problematic for them. Thus they advocate strong forms of differentiation in favour of developing countries yet endorse the 'bottom-up' approach that preserves their autonomy and discretion. This tension in the LMDCs' negotiating position explains their rejection, for instance, of the Africa Group's proposal for a principle-based reference framework.[78] A principle-based reference framework, however favourable the indicators used to assess countries' fair shares, will involve a top-down multilateral assessment, which this group rejects. Assuming the agreement will truly be 'applicable to all', one (strong form of differentiation in favour of developing countries) or the other (the 'bottom-up' approach) will give. And, it is likely to be the former, given the overwhelming tide across developed and developing countries towards using the 'bottom-up' approach as the starting point of the 2015 agreement.

As the 2015 agreement must be both equitable and effective for it to be broadly acceptable, Parties will need to determine how the 'top-down' might meet the 'bottom-up' to ensure the survival of some more prescriptive forms of differentiation in favour of developing countries. In particular Parties will need to determine how 'equity' can be mainstreamed into the climate regime as it evolves. The differentiation++ approach that respects self-differentiation by all countries subscribes to a certain vision of fairness—a vision that recognizes and respects diverse national circumstances, capabilities and constraints. This approach does not however address a vision of equity, held by many developing countries, that takes into account historical responsibility of developed countries and legitimate development needs and priorities of developing countries. If these are to be addressed they will need to be built into the top-down elements of the 2015 agreement. Both informational requirements as well as the assessment process, should one come to pass, could incorporate equity dimensions which would influence the extent of self-differentiation Parties permit themselves and that is recognized as legitimate. Parties could be asked to provide information, including objective criteria, justifying the fairness or equity of their contributions. Further, the assessment process could incorporate an evaluation, based on objective indicators relating *inter alia* to historical responsibility and development needs, of countries' fair

[76] Durban Platform, para 2.

[77] The term 'applicable to all' in the Durban Platform decision while legally inconsequential (as instruments can be applicable to all without being uniformly applicable to all) has been interpreted by many developed countries as signalling a shift away from the Kyoto-style differentiation and towards greater symmetry (in legal form, even if not in stringency) for all.

[78] UNFCCC, 'Submission by Swaziland on behalf of the African Group under Workstream I of the ADP' (8 October 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf>.

or equitable shares.[79] Needless to say, 'objective indicators' could be subjectively selected to reach differing and preferred conclusions, hence the objective indicators must be multilaterally chosen to ensure a fair and acceptable result.

VI. THE NATURE AND SCOPE OF NATIONALLY DETERMINED CONTRIBUTIONS

The centrepiece of the 2015 agreement, and indeed the Warsaw decision, is the 'nationally determined contributions' that Parties are expected to submit. The term 'contributions,' however, raises more questions than it answers. The term leaves the nature of contributions open. The Copenhagen Accord, 2009 and Cancun Agreements, 2010 required developed countries to take 'commitments' and developing countries to take actions.[80] At Warsaw, Parties had in open-ended consultations held before the final plenary agreed to the term 'commitments' in relation to all Parties. However, when the draft decision was taken up in the final plenary meeting of the ADP, the BASIC countries objected to the term commitments arguing that unless 'commitments' were firmly ensconced in the context of FCCC Article 4, they could not accept it. FCCC Article 4 contains general commitments for all, and specific commitments for developed countries including in relation to mitigation, finance and technology. The US, among others, opposed such a general reference to Article 4 as it would introduce an element of uncertainty, given the breadth of Article 4, to the commitments of Parties.[81] As no agreement could be reached on including a reference to Article 4, the final huddle substituted the term 'commitments' with the term 'contributions'. The term contributions, therefore, could crystallize in the 2015 agreement into commitments for all Parties, as some countries argue it should,[82] or into commitments for some and actions for others, as other countries argue it should.[83] The nature of nationally determined contributions is also unclear in another respect. It is unclear whether nationally determined contributions, whatever form they take, can be conditional. There is a divergence of views on this. Several developed countries believe these contributions should be unconditional, and based on what countries can commit to with their

[79] See Ngwadla and Rajamani (n 43). See eg Oral Intervention by South Africa, ADP 2.4, 10–14 March, Bonn, Germany (12 March 2014).

[80] Copenhagen Accord, paras 4 and 5; and Cancun Agreements (LCA), Section IIIA and Section IIIB.

[81] See Webcast of Plenary of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), resumed 6th meeting, 23 November 2013 <http://unfccc4.meta-fusion.com/kongresse/cop19/templ/play.php?id_kongresssession=7053&theme=unfccc> (starting at 56.30 minutes).

[82] See eg UNFCCC, 'Submission by Switzerland: Elements of the 2015 Agreement' (4 March 2014) <http://unfccc.int/files/bodies/application/pdf/elements_of_the_agreement_adp_ws1__switzerlands_views.pdf>.

[83] Submission by LMDCs (9 March 2014) (n 54) 4. Oral Intervention by Argentina, ADP 2.4, 10–14 March, Bonn, Germany (11 March 2014).

own resources.[84] Nationally determined, in Switzerland's words, suggests 'nationally owned'.[85] However, several developing countries are of the view that national contributions of developing countries, given the context of the Convention, will be conditional on the provision of adequate support.[86] If national contributions can be interpreted to be conditional in this way, aggregation of national efforts in order to determine conformity with particular mitigation pathways, and to assess the likelihood of achieving the chosen temperature goal will be difficult. This is yet another issue that waits further negotiation.

The term 'contributions' also leaves the scope of the contributions open. Since the term 'contributions' is not qualified by 'mitigation', contributions could take the form of adaptation, finance, technology transfer or capacity building contributions. Many developing countries favour this all-inclusive approach to contributions. This could in theory imply that Parties could offer adaptation contributions in lieu of mitigation under the 2015 agreement. The US, Japan and Canada argue that the context of the discussions thus far suggests that contributions refers to mitigation contributions. Among others, such as Switzerland, they believe that all countries must commit to nationally determined mitigation contributions, and that adaptation contributions cannot be offered in lieu of mitigation contributions. The US also argues that contributions to the 2015 agreement do not include financial contributions. The scope of nationally determined contributions will need to be determined soon as informational needs relating to different types of contributions and therefore informational requirements relating to different types of contributions will vary, and will need to be fleshed out accordingly.

Beyond the fundamental issues of nature and scope of the nationally determined contributions lie a range of further issues that Parties will need to discuss and agree to by 2015. Parties will need to agree on a process for communicating and inscribing contributions. They will need to identify information requirements for particular types of contributions, determine rules for accounting of contributions, and find a place to anchor or house them. Perhaps most importantly, Parties will need to determine what legal nature nationally determined contributions will assume.

VII. LEGAL FORM AND NATURE

The Warsaw decision leaves the legal form of the 2015 agreement and, explicitly, the legal nature of nationally determined contributions unresolved.[87]

[84] See eg Submission by the United States (12 February 2014) (n 14); and, Submission by Canada (12 April 2013) (n 58).

[85] Oral Intervention by Switzerland, ADP 2.4, 10–14 March, Bonn, Germany (12 March 2014). See also Submission by Switzerland (4 March 2014) (n 82).

[86] Submission by LMDCs (9 March 2014) (n 54) 4–5. See also, Submission by China (6 March 2014) (n 38) 2.

[87] Warsaw ADP Decision, para 2(b).

Indeed, the clause 'without prejudice to the legal nature of the contributions' occurs three times[88]—twice in one paragraph[89]—and was a product of the final huddle at Warsaw. These caveats suggest not just that the legal nature of the nationally determined contributions is unresolved, but also that the information Parties communicate or the manner of communicating it should not prejudge the legal nature of the contributions.

The Durban Platform decision, in the absence of agreement on the legal form of the outcome, agreed to launch work towards a 'protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'.[90] Given the substantive contents and contours of the 2015 agreement are still to be determined, Parties did not address this issue at Warsaw. Nevertheless, Parties do appear to be negotiating on the operational presumption that the 2015 package will contain a legally binding agreement.[91] It is unclear, however: what will be included in the agreement (and what will not); what the legal nature of contributions will be; whether the legal nature of contributions will be the same across different types of contributions (assuming contributions are not limited to mitigation contributions); and, whether the legal nature of contributions will be identical for all Parties or differentiated for developed and developing countries.

There are differing views among Parties on what should be included in the 2015 agreement. In particular, there is a divergence on whether national contributions should be contained in the 2015 agreement or not. There are several possibilities. National contributions could be inscribed in the 2015 agreement, as for instance in an Annex, Appendix, Attachment or Schedules. The EU,[92] Australia[93] and China,[94] among others, subscribe to this view. South Africa suggests the inscription of commitments in schedules to the 2015 agreement, but only by 2017.[95] National contributions could also be located elsewhere in documents (such as COP decisions,[96] information,[97] miscellaneous or other documents) or be held by the FCCC Secretariat.[98]

[88] ibid, para 2(b) and 2(c). [89] ibid, para 2(b). [90] Durban Platform, para 2.

[91] A formal account of 'bindingness' would suggest that the negotiated legal instrument in question would render a particular state conduct non-optional as well as judicially enforceable. See J Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 LJIL 1, 32.

[92] Submission by Lithuania and the European Commission (16 September 2013) (n 13) (the EU notes that mitigation commitments should be a part of the 2015 agreement).

[93] Submission by Australia (26 March 2013) (n 58) 4.

[94] Submission by China (6 March 2014) (n 38) 4–5.

[95] Submission by South Africa (30 September 2013) (n 31) 4.

[96] Submission by the United States (12 February 2014) (n 14) 4.

[97] The Cancun pledges are contained in information documents. See Compilations of economy-wide emission reduction targets and Compilation of Information on Nationally Appropriate Mitigation Actions (n 22).

[98] The FCCC Secretariat functions as a repository for information, as for instance, in relation to national communications from Parties.

Inscription in these cases could occur at any time—before, in or after 2015. Contributions could also be readily updated or changed than if these were inscribed in a legally binding agreement. The US notes that schedules containing contributions should be 'housed separately (for example, by the Secretariat), both because this will facilitate updating over time and because national schedules are not "approved" by other Parties in the same sense as either provisions of the agreement or decisions of the Parties'.[99] In a similar vein, New Zealand suggests national schedules containing contributions that are 'supplementary' to the legally binding instrument.[100] If contributions are housed elsewhere, their relationship to the 2015 agreement, if any, will need to be defined. Switzerland proposes that Parties' commitments for the period from 2020 are to be 'anchored under the 2015 agreement'.[101] Anchoring could take within its fold provisions in the 2015 agreement that commit countries to or otherwise refer to contributions.

The legal nature of nationally determined contributions will depend on where they are located, and how they are anchored in the 2015 agreement. If they are inscribed in an Annex/Appendix/Attachment to the 2015 agreement, they will be an integral part of the 2015 agreement, as Annexes are,[102] and if the 2015 agreement is legally binding, they will also be legally binding. If they are housed elsewhere, however, the contents of the 'anchoring' provision in the 2015 agreement that links these contributions to the agreement will determine the relationship of the 2015 agreement to national contributions. The anchoring provision could merely take note of the contributions, as the Cancun Agreements did of the targets and actions of developed and developing countries respectively. However, this would not be in keeping with the letter and the spirit of the Durban Platform decision. The anchoring provision could commit all Parties to finalizing contributions ie to translating intended contributions into commitments. The provision could go further and commit Parties to achieving their nationally determined contributions or commitments. It could commit Parties not to lower the level of ambition reflected in their contributions. The provision could also require Parties to demonstrate that their contributions or commitments have legal force in domestic law. The precise contours of the anchoring provision will therefore influence the nature and status of Parties' contributions. An anchoring provision alone, however, cannot render these contributions legally binding internationally—as the contributions here would not be housed in a negotiated legal instrument; indeed it is unclear that the nationally determined contributions would be internationally negotiated at all. Should the anchoring provision request Parties to ensure

[99] Submission by the United States (12 February 2014) (n 14) 4.
[100] Submission by New Zealand (12 March 2014) (n 29) 2.
[101] Submission by Switzerland, Elements of the 2015 Agreement (4 March 2014) (n 82). See also Submission by AILAC (10 March 2014) (n 73).
[102] See A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 383.

that these contributions are imbued with legal force domestically, however, these contributions, could form part of an 'agreed outcome with legal force' as required by the Durban Platform decision.[103]

This picture is further complicated by the fact that several developing countries are arguing not just that contributions can take different forms, and that developed countries must present financial contributions, but also that all contributions must have the same legal nature.[104] Thus, if mitigation contributions of developing countries are to be legally binding so must financial contributions from developed countries. As developed countries are unlikely to accept legally binding financial contributions, this position will create a pull towards housing the contributions outside a legally binding 2015 agreement. It is also worth noting the long-standing arguments of some developing countries that the legal nature of contributions should be different for developed and developing countries—voluntary for developing countries and binding for developed countries.[105] While this position has not been asserted forcefully in recent times, given that the legal nature of contributions is completely open, it could resurface at any time.

VIII. CONCLUSION

The Warsaw climate conference marked an important milestone on the road to the 2015 climate agreement. Parties transitioned at Warsaw from exchanging information and views to drawing the battle lines for the final negotiations in Paris. There is emerging common ground amongst Parties that a hybrid architecture combining nationally determined contributions or commitments with top-down elements such as rules on transparency and accounting, as well as an assessment/consultative process will likely be the architecture of the 2015 agreement. Battle lines have emerged, however, on how prescriptive the top-down elements should be. There is also emerging common ground that a legally binding instrument will be part of the 2015 Paris package, but less common ground on what the contents of that agreement will be, and in particular whether national commitments will be inscribed in the agreement, and be legally binding. There is least common ground amongst Parties on the cross-cutting issues of differentiation and equity. Strict differentiation along the lines of the FCCC Annexes that some hold sacred is incompatible with

[103] Rajamani (n 8) 507.

[104] Submission by China (6 March 2014) (n 38) 2. See also Submission by LMDCs (9 March 2014) (n 54) 3 (noting that '[a]ll elements of the 2015 agreed outcome should have the same legal nature, consistent with any other related legal instruments that the COP has adopted, and may adopt under the Convention').

[105] See eg UNFCCC, 'Submission by India, in Views on a workplan for the Ad Hoc Working Group on the Durban Platform for Enhanced Action' (30 April 2012) FCCC/ADP/2012/MISC.3, 33, 36.

self-differentiation that bypasses the Annexes that others insist is the only way forward given the demands of national autonomy and changing economic realities. The issue of differentiation will no doubt be the last to be resolved at Paris, and will demand all the ingenuity and diplomatic skills that Parties can muster.

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