11 Legally binding versus non-legally binding instruments

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Although it now appears settled that the Paris agreement will be a treaty within the definition of the Vienna Convention on the Law of Treaties, debate continues over which provisions of the agreement should be legally binding. The legal character of the Paris agreement and its constituent parts may matter for several reasons, even in the absence of any enforcement mechanisms. Formulating an agreement in legally binding terms signals stronger commitment, both by the executive that accepts the agreement and by the wider body politic, particularly if domestic acceptance requires legislative approval. It can have domestic legal ramifications, to the extent that treaties prompt legislative implementation or can be applied by national courts. And it can serve as a stronger basis for domestic and international mobilisation. But, despite much empirical work over the past two decades, it has proved difficult to assess the strength of these factors in promoting effectiveness, both absolutely and relative to other elements of treaty design, such as an agreement's precision and its mechanisms for transparency and accountability. On the one hand, states exhibit a strong belief that the legal character of an agreement matters. On the other hand, some political agreements, such as the 1975 Helsinki Accords, arguably have had a greater influence on state behaviour than their legal counterparts. As a result, confident assertions, one way or the other, on the degree to which the legally binding nature of the Paris agreement does or does not matter seem unwarranted.

Discussions of the legally binding character of the Paris outcome often mix together five related but distinct issues: (1) the legal form of the Paris agreement; (2) the legally obligatory character of its particular elements; (3) whether its provisions are sufficiently precise as to constrain states; (4) whether it can be applied judicially; and (5) whether it can be enforced. It now appears likely that the Paris agreement will take the form of a treaty. But it remains uncertain which provisions of the agreement will create legal obligations, how precise the agreement will be, and what mechanisms it will establish to promote accountability and compliance.

The 2013 Warsaw decision suggests that states' nationally determined contributions (NDCs) on mitigation will be a central element of the Paris outcome, but was expressly without prejudice to the legal character of these contributions. Will states have a legal obligation to implement and/or achieve their NDCs, or will NDCs represent non-legally binding aims or intentions, rather than obligations? Similarly, will the Paris agreement establish new financial obligations? And how much does the legally binding character of these provisions matter? These are among the central issues in the Paris negotiations.

1 Legal form of the Paris agreement

The 2011 Durban Platform for Enhanced Action calls for the development of 'a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all parties'. Although this formulation was deliberately vague, the negotiations reflect growing agreement that 'an agreed outcome with legal force' means a legally binding instrument under international law – that is, a treaty.

The Vienna Convention on the Law of Treaties (VCLT) defines a treaty as 'an international agreement concluded between states in written form and governed by international law'

(VCLT article 2(a)).[1] Treaties can be referred to by many terms, including 'agreements', 'conventions', 'protocols', 'charters', 'accords', and 'amendments'. According to the VCLT, whether an agreement constitutes a treaty does not depend on its title, but on whether the parties intended the instrument to be governed by international law (Aust 2007). Although in some cases this may be ambiguous, treaties can usually be distinguished from non-legally binding instruments by the inclusion of 'final clauses', addressing issues such as how states express their consent to be bound (for example, through ratification or accession) and the requirements for entry into force – provisions that would not make sense in an instrument not intended to be legal in character.[2]

Could a decision by the Conference of the Parties (COP) satisfy the Durban Mandate? Arguably not. In general, decisions by international institutions such as the COP are not legally binding unless their governing instrument so provides.[3] The UN Charter provides a simple example. Article 25 of the Charter provides that member states *shall* carry out decisions of the Security Council, so this provision makes Security Council decisions legally binding. But otherwise, decisions by UN organs are not binding on the member states. Similarly, a COP decision could be legally binding if there is a 'hook' in the UNFCCC that gives it legal force. For example, Article 4.1 of the UNFCCC requires parties to use for their greenhouse gas inventories 'comparable methodologies to be agreed upon by the COP'. But, otherwise, COP decisions are not legally binding, so a COP decision, by itself, would not satisfy the Durban Platform's mandate that the Paris outcome have legal force (Bodansky and Rajamani 2015), and any element of the

1 In contrast, 'treaty' has a narrower meaning in US domestic law, referring to international agreements adopted with the advice and consent of the Senate, pursuant to Article II of the Constitution. As a result, only a subset of 'treaties' in the international sense are 'treaties' within the meaning of the US Constitution. Whether the Paris agreement would require advice and consent by the US Senate in order for the US to participate is uncertain and will depend, in part, on what the agreement provides. To the extent that it is procedural in character, could be implemented on the basis of existing US law, and is aimed at implementing or elaborating the provisions of the UN Framework Convention on Climate Change, then arguably the president could join the Paris agreement based on his existing legal authority (see generally Bodansky 2015).

2 For non-legally binding agreements, the functional equivalent of an entry-into-force provision is a provision specifying when the agreement 'comes into effect'.

3 Brunnée reaches a different conclusion, namely, that a larger set of COP decisions should be considered binding, because she adopts a broader definition of 'bindingness' than suggested here (Brunnée 2002).

Paris outcome that is intended to be legally binding would need to be either contained in, or provided for by, the Paris agreement.

2 Mandatory character of particular provisions

Under the principle of *pacta sunt servanda* ('agreements must be kept'), treaties are binding on the parties and must be performed by them in good faith (VCLT article 26). But this does not mean that every provision of a treaty creates a legal obligation, the breach of which entails non-compliance. Although they are sometimes confused, the issue of an instrument's legal form is distinct from the issue of whether particular provisions create legal obligations. The former requires examining the instrument as a whole, and depends on whether the instrument is in writing and is intended to be governed by international law, while the latter depends on the language of the particular provision in question – for example, whether it is phrased as a 'shall' or a 'should'.

Treaties often contain a mix of mandatory and non-mandatory elements. For example, Article 4.1 of the UNFCCC establishes legal obligations, because it specifies what parties 'shall' do to address climate change. By contrast, Article 4.2 formulates the target for Annex I parties to return emissions to 1990 levels by the year 2000 as a non-binding 'aim', rather than as a legal commitment.

Similarly, the Paris agreement might contain a mix of mandatory and hortatory provisions relating to parties' nationally determined contributions and other issues. For example, it might include commitments that parties maintain, report on, and update their NDCs throughout the lifetime of the agreement, but make the achievement of NDCs only hortatory. The choice regarding NDC-related obligations is therefore not simply whether to have legally binding NDCs or not. Rather, the question is what specific obligations, if any, parties will have with respect to their NDCs – and, in particular, whether these obligations will be purely procedural or also substantive in character.

3 Distinguishing the concept of legally binding from other dimensions of bindingness

What is the import of saying that the Paris agreement is a legal instrument or that one of its provisions is legally binding? It is difficult, if not impossible, to answer this question in a non-circular way. Ultimately, legal bindingness reflects a state of mind – most importantly of officials who apply and interpret the law (judges, executive branch officials, and so forth), but also to some degree of the larger community that the law purports to govern. It depends on what the British philosopher HLA Hart referred to as their 'internal point of view', a sense that a rule constitutes a legal obligation and that compliance is therefore required rather than merely optional (Hart 1994).

The concept of 'legally binding' is distinct from several other dimensions of 'bindingness' (Goldstein et al. 2001, Bodansky 2009, Stavins et al. 2014). First, it differs from whether an instrument is *justiciable* – that is, whether the instrument can be applied by courts or other tribunals. In general, courts can apply only legal instruments, so justiciability depends on legal form. But the converse is not the case – the legally binding character of an instrument does not depend on whether there is any court or tribunal with jurisdiction to apply it.

Second, the concept of 'legally binding' is distinct from that of *enforcement*. Enforcement typically involves the application of sanctions to induce compliance. As with justiciability, enforcement is not a necessary condition for an instrument to be legally binding. If an instrument is created through a recognised lawmaking process, then it is legally binding, whether or not there are any specific sanctions for violations. Conversely, enforcement does not depend on legal form, since non-legal norms can also be enforced through the application of sanctions.[4]

Third, the legal form of an agreement is distinct from its *precision*. Of course, the more precise a norm, the more it constrains behaviour. But legally binding instruments can be

4 For example, US law provides for the imposition of trade sanctions against states that 'diminish the effectiveness' of an international conservation program, whether or not a state has committed any legal violation (Pelly Amendment, 22 USC 1978).

very vague, while non-legal instruments can be quite precise. So the constraining force of precision is different from that of law.

In domestic legal systems, the elements of legal form, judicial application, and enforcement often go together. But this is much less common internationally. Many, if not most, international legal agreements provide no mechanisms for judicial application and little enforcement. So it is important to distinguish the different dimensions of bindingness.

Although the issue of legal form is binary – the Paris agreement either will or will not be a legal instrument, and its particular provisions either will or will not be legally binding (Raustiala 2005) – the Paris agreement could be more or less binding along other dimensions. For example, it could be more or less precise, and establish weaker or stronger mechanisms to promote accountability and compliance.

4 Does the legally binding character of a rule matter and, if so, how?

Will the Paris agreement be more effective in addressing climate change if it is a legal rather than a political instrument, and if parties' NDCs are legally binding obligations rather than non-binding aims? How much does the legal form of the Paris outcome matter? Opinions on these questions differ widely.[5]

The effectiveness of an international regime is a function of three factors: (1) the ambition of its provisions; (2) the level of participation by states; and (3) the degree to which states comply (Barrett 2003). Those who argue for the importance of a legally binding outcome in Paris focus primarily on compliance. But the legally binding character of the Paris agreement and its constituent elements could also affect ambition and participation, potentially in negative ways. So even if legal bindingness promotes compliance, as proponents argue, it may not increase effectiveness if its positive effects on compliance are outweighed by negative effects on participation and/or ambition.

5 On the effectiveness of international law, compare Downs et al. (1996) with Simmons (2009).

In theory, the legal character of a norm might promote compliance in a number of ways, even in the absence of judicial application or enforcement (Abbott and Snidal 2002). First, treaties must be formally ratified by states, usually with the approval of the legislature. So acceptance of a treaty generally signals greater domestic buy-in and commitment than acceptance of a political agreement, which typically can be done by the executive acting alone.

Second, the internal sense of legal obligation discussed earlier, if sincerely felt, means that legal commitments exert a greater 'compliance pull' than political commitments, independent of any enforcement.

Third, to the extent that states take legal commitments more seriously than political commitments, this not only makes them more likely to self-comply; it causes them to judge non-compliance by other states more harshly. As a result, states risk greater costs to their reputation and to their relations with other states if they violate a treaty commitment than a political commitment, making non-compliance less attractive.

Fourth, legally binding agreements tend to have greater effects on domestic politics than political agreements, through their influence on bureaucratic routines and by helping to mobilize and empower domestic advocates.

Finally, legal obligations are at least capable of being applied by courts. So if legalised dispute settlement is available, either in an international tribunal or a state's domestic courts, then the legal character of a norm would be a necessary condition of using these procedures.

Perhaps the best evidence that states take legal commitments more seriously than political commitments is that they are more careful in negotiating and accepting them – and, in many states, acceptance of treaties requires special procedures, such as legislative approval. This caution would be irrational if legal bindingness didn't matter. The fact that treaties are more difficult to negotiate and to approve than non-legal instruments suggests that states view them as imposing a greater constraint on their behaviour.

But while there are good reasons to believe that legal form enhances compliance, other factors are also important. As elaborated by Wiener (2015) in his contribution

to this eBook, transparency and accountability mechanisms make it more likely that poor performance will be detected and criticised, thereby raising the reputational costs for the state concerned, regardless of whether a norm is legally binding. Like legal commitment, transparency and accountability mechanisms can also help mobilise and empower domestic supporters of an agreement. In addition, the precision of an instrument can enhance effectiveness, both because precise norms exert greater normative guidance and because violations are more apparent.

As a result of these factors, non-legal instruments can significantly affect behavior (Victor et al. 1998, Shelton 2000). Indeed, the 1975 Helsinki Declaration[6] has been one of the most successful human rights instruments, despite its explicitly non-legal nature, because of its regular review conferences, which provided domestic advocates with a basis for mobilisation and which focused international scrutiny on the Soviet bloc's human rights performance.

Similarly, with respect to ambition, the legal character of an agreement can cut both ways. On the one hand, it may make states willing to assume more ambitious commitments, by giving them greater confidence that their actions will be reciprocated by others. On the other hand, it may also have a negative effect on ambition, if states are more concerned about locking themselves into potentially costly commitments than about non-compliance by other states.

Finally, since states are cautious about entering into legal agreements (or have special requirements for ratification that raise additional hurdles), making an instrument legally binding may reduce participation. The US declined to participate in the Kyoto Protocol, in part, because of the legally binding nature of Kyoto's emission targets and the impossibility of getting Senate consent to ratification. Similarly, far fewer countries, arguably, would have participated in the Copenhagen Accord, by putting forward emissions pledges, if the Accord had been a legally binding instrument that made countries' pledges legally binding.

6 Conference on Security and Cooperation in Europe, Final Act (1 August 1975), Article 10 in *International Legal Materials* 14: 1292.

How do these countervailing factors play out? Thus far, it has been next to impossible to answer this question empirically. To do so, one would need to hold all other factors constant, and vary only the legal form of an agreement. Despite significant efforts over the last two decades to determine the significance of legal bindingness internationally, we still do not have any definitive answers (Stavins et al. 2014).

5 Conclusion

To satisfy the Durban Platform's requirement that the Paris outcome have legal force, the Paris agreement must constitute a treaty within the definition of the Vienna Convention on the Law of Treaties; a COP decision would not suffice. But this does not mean that every provision of the Paris agreement must create a legal obligation or that parties' NDCs in particular must be legally binding. The Paris agreement could contain a mix of mandatory and non-mandatory provisions relating to parties' mitigation contributions, as well as to the other elements of the Durban Platform, including adaptation and finance.

One cannot definitively say how much the legally binding character of the Paris agreement matters. Making the agreement legally binding may provide a greater signal of commitment and greater assurance of compliance. But transparency, accountability, and precision can also make a significant difference, and legal bindingness can be a double-edged sword if it leads states not to participate or to make less ambitious commitments. Thus, the issue of legal form, though important, should not be fetishised as a goal of the Paris conference.

References

Abbott, K. and D. Snidal (2000), "Hard and Soft Law in International Governance", International Organization 54(3): 421-456.

Aust, A. (2007), *Modern Treaty Law and Practice*, 2nd edition, Oxford: Oxford University Press.

Barrett, S. (2003*), Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Oxford: Oxford University Press.

Bodansky, D. (2009), *The Art and Craft of International Environmental Law*, Cambridge: Harvard University Press.

Bodansky, D. (2015), *Legal Options for U.S. Acceptance of a New Climate Change Agreement*, Arlington, VA: Center for Climate and Energy Solutions.

Bodansky, D. and L. Rajamani (2015), *Key Legal Issues in the 2015 Climate Negotiations*, Arlington, VA: Center for Climate and Energy Solutions.

Brunnée, J. (2002), "COPing with Consent: Law-Making under Multilateral Environmental Agreements", *Leiden Journal of International Law* 15(1): 1-52.

Downs, G., D. Rocke and P. Barsoom (1996), "Is the Good News about Compliance Good News about Cooperation?", *International Organization* 50(3): 379-406.

Goldstein, J., M. Kahler, R. Keohane and A.-M. Slaughter (eds) (2001), *Legalization and World Politics*, Cambridge, MA: MIT Press.

Hart, H. L. A. (1994), *The Concept of Law*, 2nd edition, Oxford: Oxford University Press.

Raustiala, K. (2005), "Form and Substance in International Agreements", *American Journal of International Law* 99: 581-614.

Shelton, D. (ed.) (2000), *Commitment and Compliance; The Role of Non-Binding Norms in International Law*, Oxford: Oxford University Press.

Simmons, B. (2009), *Mobilizing for Human Rights: International Law in Domestic Politics*, New York: Cambridge University Press.

Stavins, R., J. Zou et al. (2014), International Cooperation: Agreements and Instruments, in *Climate Change 2014: Mitigation of Climate Change* (see IPCC 2014b) in the introduction to this volume for the reports complete reference).

Victor, D., K. Raustiala and E. Skolnikoff (eds) (1998), *The Implementation and Effectiveness of International Environmental Law*, Cambridge, MA: MIT Press.

Wiener, J. (2015), "Towards an effective system of monitoring, reporting and verification", Chapter 13 in this volume.

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