



# The ‘bottom-up pledge and review’ approach of nationally determined contributions (NDCs) in the Paris Agreement: A Historical Breakthrough or a setback in new climate governance?

by Sharaban Tahura Zaman

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## I. Introduction

The Paris Agreement, 2015 is considered ‘historic’ in the global climate regulatory regime as it set-forth an internationally coordinated, but nationally driven, long-term comprehensive action plan<sup>1</sup> to limit global temperature increase to ‘*well below 2°C* (along with strong persuasion to limit it to 1.5°C)<sup>2</sup> and guide the post-2020 climate regime. The mitigation path adopted by the Paris Agreement is divergent compared to the Kyoto Protocol’s top-down, differentiated, rigid approach and represents a progressive, flexible bottom-up pledge and review approach. This bottom-up architecture relies on Parties’ unilateral discretion to determine their own mitigation pledges and is subject to an international review process<sup>3</sup>. The Paris Agreement inscribed this new pragmatic regulatory framework through Nationally Determined Contributions (hereinafter referred to as NDCs) - one of the main building blocks of the Paris Agreement for mitigation actions. With the bottom-up pledge and review approach of NDCs, the Paris Agreement intends to catalyze adequate mitigation actions and ratchet them up over time so that by the second half of the century carbon neutrality can be achieved.

However, it is far from clear whether this new approach can truly fix the urgent need to decarbonize the global economy<sup>4</sup>. Therefore, the aim of this article is to explore the nature of the ‘bottom-up pledge and review’ approach of NDCs. The article assesses the ‘bottom-up pledge and review’ approach of NDCs through the lens of international environmental law and seeks to focus on identifying key normative strengths and weaknesses of NDCs’ bottom-up pledge and review approach to guide or influence individual states behavior in mitigation actions. By exploring the legal nature of the ‘bottom-up pledge and review’ approach of NDCs and by identifying its key strengths and weaknesses, the article also endeavours to assess whether this new approach can function as a historic breakthrough in the international climate regulatory regime that governs states’ behaviour and secures effective action towards climate mitigation issues, or if it contrarily turns out to be a setback to the climate governance regime.

The discussion in the article develops under three broad themes. The first part briefly dwells upon the changing context of the climate governance regime from the top-down to the bottom-up approaches. Then, the second part examines the legal character of the ‘bottom-up pledge and review’ approach of NDCs through the lens of international law. The third part identifies the key strengths and

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<sup>1</sup> Sharaban Zaman, ‘*The Paris Agreement and the Challenges for Climate Change Policy Regime*’ <<http://www.dhakatribune.com/climate-change/2016/11/05/paris-agreement-challenges-climate-change-policy-regime/>> accessed 16 August 2017.

<sup>2</sup> The Paris Agreement, Dec. 1/CP.21, Annex, UN Doc. FCCC/CP/2015/10/Add.1, at 21 (Jan. 29, 2016), art 2.1

<sup>3</sup> Annalisa Savaresi, ‘*A Glimpse into the Future of the Climate Regime: Lessons from the REDD+ Architecture*’ (2016) 25 *Review of European, Comparative & International Environmental Law* 186, 1 <<http://onlinelibrary.wiley.com/doi/10.1111/reel.12164/abstract>> accessed 16 August 2017.

<sup>4</sup> Robert Falkner, ‘*The Paris Agreement and the New Logic of International Climate Politics*’ (2016) 92 *International Affairs* 1107 <<http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.12708/abstract>> accessed 15 August 2017.

weaknesses of NDCs' 'bottom-up pledge and review' approach to effectively address mitigation issues.

The legal analysis provided in the paper leads to the conclusion that the Paris Agreement architect NDCs in a flexible, political approach which limits the role of international law to shape each state's behaviour. NDCs substantive obligations are non-binding, unenforceable and subject to states' discretionary power depending on the state's respective capacity and national priorities. It does not rectify past breaches of mitigation actions with sanctions and triggers the binding procedural obligation in a non-adversarial manner with peer pressure and global naming and shaming. As a result the overall framework of NDCs' 'bottom-up pledge and review' approach, its identified strengths and weaknesses, and past and current experiences don't justify any hope that states will progressively continue to adopt adequate, enhanced mitigation pledges and implement costly mitigation policies for the sake of moral compulsion, reputation, global leadership and international momentum. Therefore, the bottom-up approach of NDCs needs to be carefully balanced with the top-down, rigorous oversight mechanism and if the future climate negotiations can successfully make it by giving teeth to its review, enforcement and implementation processes, then it can be considered a historic breakthrough. Otherwise this high stake experiment will result in being a setback and there will be not much time left for another change.

## II. The International climate regulatory regime: the Shift from a top-down towards a bottom-up approach

The Paris Agreement represents the third phase<sup>5</sup> of the global climate regulatory regime<sup>6</sup>. The Agreement is an ancillary treaty to the UNFCCC,<sup>7</sup> building on its principles<sup>8</sup> and institutional arrangements<sup>9</sup>, and is explicitly meant to enhance the implementation<sup>10</sup> of the Convention<sup>11</sup>. In framing a new regulatory approach, the Agreement embodies a significant departure from the Kyoto Protocol, 1997<sup>12</sup>. The new approach introduces a stark contrast to the Kyoto Protocol's top-down approach which is embodied by the legally binding mitigation targets and timeline for developed countries. Instead of self-determination by the state Parties, the mitigation targets and timelines are imposed by the Protocol itself based on historic contribution in greenhouse gas emission (hereinafter referred to as GHG) along with reporting obligation and sanction for non-compliance. Therefore this part of the paper aims at discussing how the shift from the top-down to the bottom-up approach took place in the climate regulatory regime, by focusing on the challenges embedded within the Kyoto protocol's top-down approach and explaining how the concept of NDCs evolved in the climate regulatory regime.

In 1994, the United Nations Framework Convention on Climate Change (hereinafter referred to as UNFCCC) entered into force with the ultimate goal of preventing dangerous human interference with the climate system<sup>13</sup>. With the aim of mitigation action, the UNFCCC outlines core principles and general commitments for its Parties and achieved almost universal membership. However, the convention is an umbrella or a 'constitutional' treaty, and as such by its very nature includes limited technical detail. The convention of 1994 framed no strategies for implementation and prescribed no precise solutions to be introduced through policy. To address these, in 1997 the Kyoto Protocol was adopted under the UNFCCC framework as a legally binding agreement to reduce GHG emissions.

<sup>5</sup> Zaman, *supra* note 1.

<sup>6</sup> The first phase was signalled with the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 and the second phase with the adoption of the Kyoto Protocol in 1997, which entered into force in 2005.

<sup>7</sup> Annalisa Savaresi, 'The Paris Agreement: Reflections on an International Law Odyssey' (Social Science Research Network 2017) SSRN Scholarly Paper ID 2912001 8 <<https://papers.ssrn.com/abstract=2912001>> accessed 22 March 2017 at 3.

<sup>8</sup> The Paris Agreement, *supra* note 2, Preamble and art 2.

<sup>9</sup> *Ibid* art 16-18.

<sup>10</sup> Savaresi, *supra* note 7, at 3.

<sup>11</sup> The Paris Agreement, *supra* note 2, art 2.1.

<sup>12</sup> 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC), 2303 UNTS 148 / [2008] ATS 2 / 37 ILM 22 (1998)

<sup>13</sup> United Nations Framework Convention on Climate Change, Article 2, May 29, 1992, U.N. Doc. A/AC.237/18 (1992)

The regulatory framework of the Kyoto Protocol was founded on the principle of equitable burden-sharing<sup>14</sup>. According to this principle, country-specific quantified emission reduction targets and time-tables were set forth for Annex I countries (countries that have historic contribution to the climate change problem<sup>15</sup>), with a legally binding obligation to achieve the targets<sup>16</sup>. The country specific targets and time tables of the Kyoto Protocol were not nationally driven but multilaterally negotiated in a process of political bargaining<sup>17</sup>. The Protocol also incorporated implementation strategies with rigid compliance mechanisms and sanctions for non-compliance.

However, the Protocol failed to bring about significant GHG emission reductions at the global level due to a lack of comprehensive and effective participation of all major GHG emitter countries. The lack of participation is considered the by-product of various factors attributed with the top-down rigid approach of the Kyoto Protocol. Among others, the two pressing factors are: (1) a predetermined legally-binding rigid set of GHG emission reduction targets that made major GHG emitter countries reluctant to participate in the Kyoto framework<sup>18</sup>; and (2) the distribution of burden-sharing solely on the basis of historic contribution that let some major GHG emitters countries (with no historic contributions<sup>19</sup>) get away with taking up mitigation as an obligation. The architecture of the Kyoto Protocol also left no room to broaden the group of Parties to include those that contribute most to the climate change. Moreover, the top-down approach of the Kyoto Protocol failed to induce state Parties' national climate policies to adopt an effective emissions reduction path for achieving the mitigation targets<sup>20</sup>.

The difficulties in implementing the top-down approach of the Kyoto Protocol became more glaring in 2005, when further commitments for the post-2012 period had to be negotiated. Ultimately, the negotiation to extend the legally binding commitments and targets for subsequent periods proved to be nearly impossible as many Annex I countries did not want to be legally bound by new targets while other large emitter countries like the US, India, China were not<sup>21</sup>. Instead of a top-down legally binding approach, Annex I countries were looking for a more flexible, nationally driven global approach which will be applicable to all countries irrespective of their historic contributions to pollution. On the other hand the European Union and all non-Annex state-Parties<sup>22</sup> were advocating for the continuation of the top-down legally binding Kyoto approach. The situation ultimately led towards a dual-track negotiation<sup>23</sup> (held under the umbrella of UN Framework Convention of Climate Change) process that was meant to be concluded in 2009 at the Copenhagen Climate Change conference<sup>24</sup>.

Although the Copenhagen Climate Change Conference, 2009 ended with acrimony and disappointment<sup>25</sup>, the Copenhagen Agreement, 2009 (adopted in the Copenhagen Climate Change Conference) set forth a new architecture with a flexible bottom-up approach, whereby Parties have discretion to define and design their own domestic targets and mitigation paths<sup>26</sup>. By adopting a more global approach the Agreement also eliminated the sharp differentiation between Annex and non-Annex country Parties<sup>27</sup>. Under the Agreement, for the first time 28 major GHG emitter countries

<sup>14</sup> Widely known as common but differentiated responsibilities (CBDR) principle.

<sup>15</sup> [Annex I](#) Parties include the industrialized countries that were members of the OECD (Organization for Economic Co-operation and Development) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States, and several Central and Eastern European States.

<sup>16</sup> Kyoto Protocol 1997, *supra* note 7, art 3.1 and Annex B.

<sup>17</sup> Savaresi, *supra* note 7, at 5.

<sup>18</sup> This was the key factor from the United States decision not to become Party of the Kyoto Protocol.

<sup>19</sup> Like China, India, Brazil, South Africa.

<sup>20</sup> The situation was evident especially in the country context of Australia, Canada, Russia and Japan.

<sup>21</sup> Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' 5 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2773895](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773895)> accessed 2 August 2017.

<sup>22</sup> **Non-Annex** Parties are mostly developing and least developed countries.

<sup>23</sup> In dual track negotiation, 'Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol' (AWG-KP) focused to negotiate on national targets and time table for the Kyoto Protocol's second commitment period and the other, named 'Ad Hoc Working Group on Long -Term Cooperative Action Under the Convention' (AWG-LCA) focused to negotiate on long-term cooperative action.

<sup>24</sup> Bodansky, *Supra* note 21, at 6.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

(including the United States, Brazil, South Africa, China and India) submitted their national emission limitation pledges<sup>28</sup>. Later, in 2010 through the Cancun Agreement (adopted in the Cancun Climate Change Conference, 2010) the emission reduction targets and actions introduced in the Copenhagen Agreement were formally incorporated into the UNFCCC regime<sup>29</sup>. Therefore the Copenhagen Climate Change Conference can be considered the turning point from where the global climate regime shifted towards a more bottom-up flexible global approach from a rigidly differentiated top-down approach.

In 2011, under the *Decision 1/CP.17*, the Durban climate change conference established the 'Ad Hoc Working Group on Durban Platform' (ADP) to launch a new negotiation path in order to adopt a new legally binding instrument which will regulate, govern and incentivize post-2020 climate actions<sup>30</sup>. In the Warsaw climate change conference in 2013 under the ADP negotiation track, *Decision 1/CP.19* articulated for the first time the basic structure of a new agreement which was mostly analogous to the Copenhagen Agreement's bottom-up approach. The Decision also called on countries to submit their 'intended nationally determined contributions' (INDCs) well in advance of the Paris climate change conference, which was planned to be held in 2015<sup>31</sup>. It is worth noting that *Decision 3/CP.19* referred to the nationally determined actions as 'contribution(s)' instead of 'commitment(s)' and left the legal nature of INDC undetermined, the intention being that as a contentious issue it would be debated until the very end of the ADP negotiation. In the Lima climate change conference in 2014, the Parties agreed on the content of INDCs and decided that 'towards achieving the objective of the UN Framework Convention on Climate Change, INDCs should represent a progression beyond current mitigation efforts'<sup>32</sup>. After the Lima climate change conference, Parties started negotiations on the articulation of INDCs within the framework of the draft text of the Paris Agreement, which was later adopted in 2015 at the Paris climate change conference.

With the adoption of the Paris Agreement, the global community officially has abandoned the Kyoto Protocol's top-down approach and demonstrated a consensus on a flexible, nationally driven approach to mitigating emissions, which would be institutionalized through 'nationally determined contributions'. It is expected that this flexible bottom-up pledge and review approach will ensure wider participation along with states' effective commitments and actions to address the climate change problem.

Nevertheless, the negotiation for and, ultimately, the adoption of the bottom-up approach sidelined the equitable burden sharing principle, leaving Annex I countries off the hook from their historic responsibility in spite of channeling massive quantities of CO<sub>2</sub> to the atmosphere. Now, the global approach of the Paris Agreement directing all developed and developing countries including major GHG emitters, poor and vulnerable countries to undertake commitments, targets to limit their future emissions even though many developing and least developed countries have no historic contribution and some of them are even exposed with the severe threat of global warming. Following this background, the next two parts of the paper critically assess the legal nature of the bottom-up pledge and review approach of NDCs and endeavours to identify its key strengths and weaknesses in order to demonstrate whether this new approach is capable of performing as a historic breakthrough in the climate regulatory regime or if it is doomed to be a setback.

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at 7.; See also Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Dec. 1/CP.16 (Dec. 10-11, 2010), UN Doc. FCCC/CP/2010/7/Add.1 (March 11, 2011).

<sup>30</sup> Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *International & Comparative Law Quarterly* 493, 3  
<<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/ambition-and-differentiation-in-the-2015-paris-agreement-interpretative-possibilities-and-underlying-politics/CD4237FABBA8B88854F093BC02453960>>  
accessed 11 August 2017.

<sup>31</sup> Bodansky, *Supra* note 21, at 7.

<sup>32</sup> 'Lima call for climate action', *Decision 1/CP.20* (Dec. 14, 2014), UN Doc. FCCC/CP/2014/10/Add.1, at 3 (Feb. 2, 2015).



### III. Assessing the nature of the 'bottom-up pledge and review approach' of NDCs

The Paris Agreement is a legally-binding treaty as a matter of international law and in accordance with the Vienna Convention on the Law of Treaties (VCLT)<sup>33</sup>, once the Agreement enters into force, its terms and conditions shall be legally binding on the ratified countries. Under Article 27 of the Agreement there is no room for reservation and once Parties ratify the Agreement they shall be remained bound by it unless they withdraw from it under Article 28.

The Paris Agreement contains a number of goals<sup>34</sup>; to achieve them the Agreement institutionalized a paradigm shift through NDCs that Parties are required to 'prepare, communicate<sup>35</sup>, maintain and scale up over time'<sup>36</sup>. The annex and non-annex based differentiation among State-Parties is not referred to in the Paris Agreement and the NDCs' mechanism is equally applicable to all countries. Ultimately the 'firewall' between developed and developing countries was torn down, continuing from the Berlin Mandate, adopted in 1995<sup>37</sup> at the Berlin climate change conference.

Now, through the lens of international law the following discussion critically assesses the legal character of the 'bottom-up pledge and review approach' of NDCs to address the GHG mitigation related challenges.

#### a. NDCs as a Notion of 'bottom-up pledge and review'

According to Article 2, the ultimate long term goal of the Paris Agreement is to hold '*the increase of the global average temperature to well below 2°C, above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 °C*'. Under Article 3 '*to achieve the purpose of this Agreement*' through NDC each party is required to '*undertake and communicate ambitious efforts*' to contribute '*global response to climate change*'. Therefore, the key objective of the NDCs is to steer state Parties' national efforts to foster and facilitate the achievement of long term temperature goals as set out in Article 2 of the Paris Agreement.

The NDCs are structured as a bottom-up process, leaving many details to be determined by the states. The NDC-related provisions in the Paris Agreement, i.e. Decision 1/CP. 21 and Decision 1/CP.20, gave countries control over their own mitigation commitments by letting them set their own NDCs target, features and time frame<sup>38</sup>. Moreover to undertake domestic mitigation pledges and targets, countries can self-differentiate and contextualize their contributions based on their national circumstances and priorities<sup>39</sup> in the light of the principle of 'common but differentiated responsibility and respective capabilities' (CBDR-RC). So, in NDCs it is states themselves that decide domestically how much and in what ways they will contribute towards the common endeavour to meet global climate goals<sup>40</sup>.

<sup>33</sup> Bodansky, *supra note 21*, at 7.

<sup>34</sup> Rajamani, *supra note 31*, at 2.

<sup>35</sup> According to the para 22 of the Paris Agreement Decision 1/CP 21, Parties, are legally bound to communicate their first intended nationally determined contributions at the time of submitting their ratification instrument of the Paris Agreement or prior to it.

<sup>36</sup> The Paris Agreement: Key Points and Future Prospects < Blog Carlo Carraro ICCG' <<http://www.carlocarraro.org/en/topics/climate-policy/paris-agreement-key-points-and-future-prospects/>> accessed 3 June 2016.

<sup>37</sup> In Berlin Climate Change Conference, under the Decision 1/CP.1 'Berlin Mandate' was adopted which eventually led climate regime toward the adoption of Kyoto Protocol. The Mandate first ever brought the concept of firewall between Annex and Non Annex country by stating that "for developed country/other Parties included in Annex I, both to elaborate policies and measures, as well as to set quantified limitation and reduction objectives within specified time-frames ..... for their anthropogenic emissions .....and not introduce any new commitments for Parties not included in Annex I".

<sup>38</sup> Robert N. Stavins and Robert C. Stowe, '*The Paris Agreement and Beyond: International Climate Change Policy Post-2020*' Cambridge, Mass.: Harvard Project on Climate Agreements, October 2016' 13 <<https://www.belfercenter.org/publication/paris-agreement-and-beyond-international-climate-change-policy-post-2020>> accessed 22 February 2017.

<sup>39</sup> Deutsches Institut für Entwicklungspolitik, 'Self-Differentiation of Countries' Responsibilities: Addressing Climate Change through Intended Nationally Determined Contributions' 4 <<http://www.die-gdi.de/en/discussion-paper/article/self-differentiation-of-countries-responsibilities-addressing-climate-change-through-intended-nationally-determined-contributions/>> accessed 7 August 2017.

<sup>40</sup> Savaresi, *supra note 7*.

The NDCs of each country will primarily reflect the country's mitigation paths, action plans and commitments to limit GHG emissions; however the scope and content of NDCs can vary, depending on the state's domestic economic conditions, capabilities, priorities and other circumstances. Article 4.8 of the Agreement requires Parties to provide necessary information at the time of communicating NDCs for 'clarity, transparency and understanding' and Para 27 of Decision 1/CP.21 specifies a list of upfront information which state-Parties can refer to in their NDCs. However the list is non-binding and gives Parties the discretion to satisfy the obligation<sup>41</sup> under Article 4.8<sup>42</sup>. It is also worth noting that, although Article 4.2 firmly affirms that NDCs are an integral part of the Paris Agreement, they are not housed within the body of the Agreement NDCs will be recorded in the Secretariat-maintained public registry<sup>43</sup>. The housing of NDCs outside of the Agreement gives leeway to the Parties to amend/adjust their (i.e., party's) recorded NDCs unilaterally to enhance the level of ambition<sup>44</sup> and to carry out this amendment, there are no procedural rules to comply with by the state Parties. Hence, while the submission of NDCs is mandatory for a state to become a Party to the Paris Agreement, the foundation of NDCs is based on a nationally driven bottom-up approach where mitigation targets and time frames are formulated by the state itself instead of being imposed by a regulation or the Paris Agreement. Moreover, the state's respective capacity, discretion and flexibility are key drivers here to decide the state's respective targets and timeframe.

However, the bottom-up pledges along with substantial discretion of states in crafting their mitigation targets and commitments<sup>45</sup> essentially creates the demand for the establishment of a review and compliance mechanism that scrutinizes the substantial content of the pledges and monitors their implementation. In this regard, the Paris Agreement can be considered unique as it introduces a hybrid approach by setting forth a top-down review mechanism to oversee the bottom-up pledges. The review framework comprises of three mechanisms: first, to review and assess the implementation of the bottom-up pledge there is a transparency framework in place; second, to assess the collective progress of NDCs' implementation there is a global-stocktake which takes place every five years; and third, to review compliance, an implementation and compliance mechanism is set forth which functions in a non-adversarial and non-punitive nature. Alongside the aforementioned mechanisms, a set time-frame to achieve net GHG emission neutrality, such as the second half of the century, helps to steer-up the implementation process.

So, the bottom-up pledges of NDCs are not standalone mechanisms but are complemented with a top-down review approach. It is expected that this combination can secure transparency and accountability, prevent backsliding and prod States to ramp up their efforts<sup>46</sup>.

## b. The Legal Character of NDCs

The legal character of a 'norm'<sup>47</sup> indicates- what rights and obligations are created for the Parties, what is the extent/depth of such rights and obligations, what behavioural standards are set to assess their compliance and non-compliance and in the latter case what the consequences are for non-compliance<sup>48</sup>. Therefore, assessing the legal character of a norm is essential to determine how

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<sup>41</sup> Stavins, Robert N., and Stowe, Robert C, *supra* note 45.

<sup>42</sup> *Ibid*.

<sup>43</sup> The Paris Agreement, *supra* note 2, art 4.12.

<sup>44</sup> *Ibid* art 4.11.

<sup>45</sup> Joseph E Aldy, 'Evaluating Mitigation Effort: Tools and Institutions for Assessing Nationally Determined Contributions | Belfer Center for Science and International Affairs' 1 <<http://www.belfercenter.org/publication/evaluating-mitigation-effort-tools-and-institutions-assessing-nationally-determined-0>> accessed 7 August 2017.

<sup>46</sup> Bodansky, *supra* note 21, at 2.

<sup>47</sup> The term 'norm' largely denotes two distinct meaning, one is descriptive and other is prescriptive. For this Article the term 'norm' is used in prescriptive sense, that means 'a regulatory standard that aims to guide or influence behavior.....by providing a model of appropriate action or in actions' [Daniel Bodansky, Art and Craft of International Environmental Law (2011) at 87]

<sup>48</sup> Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 Journal of Environmental Law 337, 342 <<https://academic.oup.com/jel/article/28/2/337/2404195/The-2015-Paris-Agreement-Interplay-Between-Hard>> accessed 7 August 2017.

effective the norm would be to induce the desired behavioural change on behalf of states to meet the objectives of the agreement<sup>49</sup>. NDCs relate provisions in the Paris Agreement as a norm<sup>50</sup> endeavour to guide/influence the states' behaviour for climate mitigation actions through a bottom-up pledge and review approach by setting forth a model of appropriate action or inaction<sup>51</sup>. Therefore a detailed discussion about the legal character of NDCs is important here to draw a conclusion about their potential to bring about changes in the states' behaviour.

In the Paris Agreement the key NDC-related provisions are Articles 3, 4, 13, 14 and 15. Decision 1/CP.21 is also important to assess the legal character of NDCs. INDCs, in the text of the Paris Agreement, are incorporated as 'nationally determined contributions' (NDCs)<sup>52</sup>.

#### i. The Normative Content of NDC Related Provisions in the Paris Agreement

As mentioned before, in international environmental law a norm sets standards, provides models of appropriate action or inaction and creates rights and obligations for states with the aim to guide or influence their behaviour<sup>53</sup>. So assessment of the normative content of the provisions that constitute a norm can be helpful to identify the nature and extent of their legal bindingness. For example it can help to identify whether the norms are binding or non-binding, or whether the norm constitutes hard law or soft law, or whether the implementation of such norms are required to follow any mandatory standard, direction and obligation. Therefore, this part of the paper aims to explore –

- How the normative content of the NDC-related provisions are structured in the Paris Agreement?
- And have these provisions created any legally binding obligations to comply with or not?

The legal character of a particular provision typically depends on the choice of verb<sup>54</sup>. If in a treaty provision, the verb 'shall' is inscribed, it generally<sup>55</sup> denotes imperative rights and obligations for Parties<sup>56</sup>. Using verbs like 'should', 'encourage' refers to recommendations; the verb 'may' creates permission and 'will', 'acknowledge', 'recognize' imply expectations, a promise, goals or values<sup>57</sup>. In assessing the normative content of a treaty provision it is also important to examine who it identifies as actors or to whom the provision is addressed<sup>58</sup>. If the provision uses the words 'each Party' or 'all Parties', it signals specific individual obligations<sup>59</sup>. On the other hand if it incorporates the words 'Parties', it denotes collective or cooperative obligations<sup>60</sup>. The provision can also use a passive voice with no subject, which may implicate expectations on behalf of Parties or a governing regime<sup>61</sup>.

In the Paris Agreement, the legal character and normative content of NDC-related provisions vary and typically comprise of a combination of hard and soft obligations. Hard obligation can be

<sup>49</sup> Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421, 421–26 <<http://www.jstor.org/stable/2601340>> accessed 7 August 2017; Rajamani, *supra note* 55, at 342.

<sup>50</sup> In this Article by referring the words 'NDCs as a norm' intendeds to indicate the concept of NDCs as a whole as framed throughout the provisions of the Paris Agreement, Decision 1/CP.21 and Decision 1/CP.20. The paper by referring the word 'NDCs as a norm' not necessarily indicate each party's submitted NDCs document which is kind of an action plan designed and framed based on aforesaid instruments.

<sup>51</sup> 'The Art and Craft of International Environmental Law — Daniel Bodansky | Harvard University Press' 87 <<http://www.hup.harvard.edu/catalog.php?isbn=9780674061798>> accessed 8 August 2017.

<sup>52</sup> The word 'intended' is dropped in the text of the Paris Agreement because, after communicating state's 'intended' national contribution to the secretariat, when the country formally join the Agreement by depositing ratification instrument, the intended national contribution is no longer considered as 'intended' but final that party need to implement by adopting effective action plan. So the conversion from INDCs to NDCs takes place when the countries deposit their instrument of ratification to join the Paris Agreement and from than onwards the national pledge is considered final not 'intended'.

<sup>53</sup> Bodansky, *supra note* 58, at 87–88.

<sup>54</sup> Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European, Comparative and International Environmental Law 142, 8 <<https://asu.pure.elsevier.com/en/publications/the-legal-character-of-the-paris-agreement>> accessed 9 August 2017.

<sup>55</sup> If the verb 'shall' is incorporated in a non-binding instrument provisions for example in the Copenhagen Agreement, it does not create/refer any legally binding obligation.

<sup>56</sup> Bodansky, *supra note* 61, at 8.

<sup>57</sup> *ibid*; Rajamani, *supra note* 55, at 343.

<sup>58</sup> Rajamani, *supra note* 55, at 343.

<sup>59</sup> Bodansky, *supra note* 61, at 8.

<sup>60</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013).

<sup>61</sup> *Ibid* at 23.

characterized as an obligation that addresses each Party (individual obligation), is structured in mandatory terms ('shall') with clear normative content and no qualifying or discretionary elements<sup>62</sup>. Article 4.2 of the Paris Agreement represents hard obligations as it requires each party with the mandatory term 'shall', to '*prepare, communicate and maintain successive*' NDCs that 'it intends to achieve'. This is a mandatory obligation for Parties with no discretionary and qualified clause. Article 4.8 and 4.9 also represent individual hard obligations as they require all Parties to communicate their NDCs with the necessary information for '*clarity, transparency and understanding*' every five years and '*be informed by the outcomes of the global stocktake*'. Under Article 13.7.b each party is mandatorily required to provide necessary information '*to track progress made in implementing and achieving its NDCs under Article 4*'. Each Party's submitted information on NDCs shall be subject to mandatory review under a technical expert team<sup>63</sup>.

Besides these individual legally binding hard obligations, NDC-related provisions also set forth some collective or cooperative obligations for Parties again under the mandatory term 'shall'. Those are as follows:

- '*Parties shall account for their NDCs*'.<sup>64</sup>
- '*Parties shall take into consideration in implementing this Agreement the concerns of countries most affected by the impact of response measure*'<sup>65</sup>.

Besides hard obligations, the provisions of NDCs also lay out a number of soft obligations that set standards for Parties with the recommendatory terms 'should'/'encourage'/'will' along with discretionary and qualifying clauses<sup>66</sup>. These provisions generate no new obligations but introduce a strong normative expectation from Parties to implement the standard by exercising their own particular choice<sup>67</sup>. For instance, Article 4.3 by using the verb 'will' creates a strong normative expectation (but no mandatory obligation) that "*each party's successive NDCs will represent a progression beyond the party's then current NDCs and reflect its highest possible ambition*". Similarly Article 4.4 encourages developed countries to take the lead in adopting '*economy-wide absolute emission reduction targets*' and recommends developing countries to '*continue to enhance their mitigation efforts*' and '*move over time towards economy-wide emission reduction targets*', taking into account their respective national circumstances. Article 4.14 also recommends Parties to consider the appropriate method under the UNFCCC to recognize and implement mitigation actions under their respective NDCs. Article 4.1 instead of generating recommendations or expectations sets an aspiration to reach global peaking of GHGs as soon as possible.

The above discussion is illustrative of the fact that the normative content of NDC-related provisions is characterized by a dynamic interplay between soft and hard obligations. In its majority, however, the Agreement provides more for soft obligations rather than hard ones. In this respect it doesn't generate strict normative rules like the Kyoto Protocol for instance, and gives Parties sufficient discretionary power in translating international obligations at the national level. It remains to be seen whether this mixed set of obligations can deliver promising results in addressing the GHG mitigation problem. However, it is fairly obvious that the approach taken here eventually narrows down the role of law in regulating the state's behaviour.

## ii. The Nature of the Obligation

The foregoing analysis demonstrates that NDC-related provisions create few legally binding obligations on states. The key question to be answered now is: what is the legal nature of these obligations? An obligation may refer to a commitment to bring about a specific result or it may signify

<sup>62</sup> Dinah Shelton, 'Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System - Oxford Scholarship' (9 October 2003) <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199270989.001.0001/acprof-9780199270989>> accessed 9 August 2017; Rajamani, *supra* note 55, at 352.

<sup>63</sup> The Paris Agreement, *supra* note 2, art 13.11.

<sup>64</sup> *Ibid* art 4.13.

<sup>65</sup> *Ibid* art 4.15.

<sup>66</sup> Rajamani, *supra* note 55, at 352.

<sup>67</sup> *Ibid* 355.



a commitment to a particular action or conduct at the international or domestic level<sup>68</sup>. The incorporation of both kinds of commitments in one treaty is considered efficacious to architect a strongest or most effective legal framework<sup>69</sup>.

However, determining the legal nature of the NDCs' obligation was not a simple issue in the negotiation that led up to the Paris Agreement. On the contrary, the matter was the backbone of contention. Many Parties, including the European Union and small island countries were advocating for an 'obligation of result' to secure the implementation and achievement of NDCs' targets. Conversely, other countries like India, China and the United States strongly opposed the proposition as they didn't want to be subject to a legally binding obligation of result<sup>70</sup>. As a compromise, the Paris Agreement incorporates NDCs as an obligation of conduct where Parties are required to implement NDCs, instead of an obligation of result where they would have been required to achieve NDCs' targets. Indeed, the procedural obligation imposed on state-Parties to 'prepare, communicate and maintain successive' NDCs 'every five years' with necessary information for 'clarity, transparency and understanding' and under the transparency framework report regularly on progress in implementing and achieving their NDCs, constitute obligations of conduct.<sup>71</sup>

However, it is worth noting that Article 4.2 not only sets forth a legally binding obligation of conduct on Parties but also refers to the expectation of results deriving from good faith<sup>72</sup>. Under the said Article, besides preparing, communicating and maintaining successive NDCs, Parties are required to '*pursue domestic mitigation measures, with the aim of achieving the objectives of NDCs*<sup>73</sup>'. The provision carefully connects the obligation of conduct at the international level (communicate and maintain) with the obligation of conduct at the national level (prepare NDCs and pursue domestic mitigation measures). What is more, by using the word 'pursue' in relation to domestic measures, it creates no standalone obligation for Parties to actually achieve the NDCs' substantive content<sup>74</sup> but underlines an expectation of result in good faith to achieve NDCs' objectives. It is worth noting that even in its expectation from Parties, the Article refers to 'achieving the objectives' of the NDCs and not to achieving the specific content or pledges of their respective NDCs. Moreover the soft obligation to pursue domestic measures is not an individual but collective obligation as it will be applicable on 'Parties' rather than 'each Party'<sup>75</sup>. NDC-related Articles also contain substantive provisions in relation to mitigation but those are formulated as recommendations, expectations or aspirations as discussed in the last part of the paper.

Thus, the NDCs' core binding obligations are obligations of conduct in nature that requires Parties to comply with a certain procedural behaviour instead of focusing their attention on achieving the targeted results. However, as mentioned earlier, at the time of formulating their NDCs, a state-Party can reflect the principle of Common But Differentiated Responsibility-Respective Capacity (hereinafter referred to as CBDR-RC) in them, but the fundamental NDC-related procedural obligations are binding to all Parties with no differentiation. It is worth noting that, besides limiting temperature increase below 2°C with a strong aspiration to limit it to 1.5°C, the Paris Agreement has emission reduction goals, which is to achieve global peaking as soon as possible and reach net GHG emission neutrality by the second half of the century<sup>76</sup>. However, by solely regulating some procedural conduct it might be challenging for the global community to steer mitigation actions to reach these time-referred mitigation goals in time.

<sup>68</sup> Sebastian Oberthür and Ralph Bodle, 'Legal Form and Nature of the Paris Outcome' (2016) 6 *Climate Law* 40, 51 <<http://booksandjournals.brillonline.com/content/journals/10.1163/18786561-00601003>> accessed 9 August 2017.

<sup>69</sup> *Ibid* at 52; Nathalie Boucquey, Birgit Lode and Milan Dehnen, 'Passing and Implementing Domestic Climate Legislation under the 2015 Agreement' (2014) 8 *Carbon & Climate Law Review* 156 <<http://www.jstor.org/stable/24324309>> accessed 9 August 2017.

<sup>70</sup> Rajamani, *supra note* 55, at 354.

<sup>71</sup> The Paris Agreement, art 13b(7).

<sup>72</sup> *Ibid*; Bodansky, *supra note* 61, at 10.

<sup>73</sup> The Paris Agreement, art 4(2).

<sup>74</sup> Bodansky, *supra note* 61, at 10.

<sup>75</sup> *Ibid* at 11.

<sup>76</sup> The Paris Agreement, *supra note* 2, art 4.1.

### iii. Precision in Wording

Under international law, precision in wording is another essential dimension to consider in order to assess the legal character and effectiveness of provisions. The more precise the provision, the more likely it is that it will impose constraints on states' behaviour<sup>77</sup>, because the constraining force of precision in wording is different from the constraining force of law<sup>78</sup>. A precise provision specifically sets standards, spells out permissible actions, inactions, obligatory conducts and lends itself to the assessments of compliance/non-compliance<sup>79</sup>. By doing so, it ultimately contributes to the determination of the specific rights and obligations that Parties have and the standards of conduct they are required to maintain. Conversely, if the provision is less prescriptive it leaves room for self-serving interpretations by Parties and hinders its consistent application<sup>80</sup>. Similarly if the provision sets goals or prescribes actions but is vague or does not prescribe how those goals are to be met or the actions carried out, it may not enable compliance<sup>81</sup>. A legally binding provision can be vague and ambiguous for lack of precision which can eventually make the provision ineffective. By contrast, a non-legally binding precise and concrete provision can increase accountability and compliance. Now the question is: are the NDC-related provisions precise enough to constrain states' behaviour for effective mitigation actions?

Some NDC-related provisions are precise enough as they define the obligation well by identifying its specific addressee (who), its substance (what) and the time-frame (by when)<sup>82</sup>. For instance each Party has an obligation to prepare, communicate and maintain successive NDCs every five years (specific timeline is further mentioned in Decision1/CP.21), giving the necessary information for clarity, transparency and understanding. Similarly, the Parties' obligations with regards to accountability are precisely defined under Article 4.13 and detailed out further in paras 31 and 32 of Decision 1/CP.21. To track progress, each Party's reporting obligation is specifically defined under Article 13.7.b, 13.11 and para 90 of Decision 1/CP.21. The reporting obligation is time bound and on a biennial basis<sup>83</sup> states are required to submit reports about implementing and achieving their respective NDCs' targets.

By contrast, there are also a number of NDC-related provisions that are not well defined, are less prescriptive, and vague. For instance, Article 4.1 which refers to the time-frame for the achievement of the two emission goals<sup>84</sup> is expressed vaguely with qualitative terms such as 'as soon as possible', 'rapid reduction', 'second half of the century' as indications of the chronicle benchmark for the goals' achievement. Plausibly, quantified midterm emission-reduction goals such as 'a 50% reduction by mid-century', which give a clearer guidance for designing emission reduction paths and targets, could have been used. The absence of such a specific time-frame for global peaking of GHG emissions and decarbonization will make the effort difficult to bridge the mitigation gap<sup>85</sup>. Along the same lines, Article 4.2 requires Parties to prepare and communicate their NDCs but what the specific content of the NDCs or what the standard quality of the information should be is not precisely referred to therein. Paras 27 of Decision1/CP.21 and 14 of Decision1/CP.20 specify some information which states can refer to when designing their NDCs, but the list is inclusive rather than exclusive. Furthermore, Article 4.2 of the Agreement requires Parties to 'pursue' domestic mitigation measures to achieve their NDCs' objectives. However the words 'pursue' and 'domestic measures' are generic terms and without further prescriptive guidelines the provision cannot be applied consistently. How a party will comply with its obligation of progression in successive NDCs is also not precisely defined.

<sup>77</sup> Bodansky, *supra* note 58, at 105; Bodansky, *supra* note 61, at 4.

<sup>78</sup> Bodansky, *supra* note 61, at 4.

<sup>79</sup> Rajamani, *supra* note 55, at 343; Aust, *supra* note 67.

<sup>80</sup> Rajamani, *supra* note 55, at 343; Oberthür and Bodle, *supra* note 75, at 49.

<sup>81</sup> Rajamani, *supra* note 55, at 343.

<sup>82</sup> Oberthür and Bodle, *supra* note 75, at 49.

<sup>83</sup> However, the time limit (biennial) of the report submission is not applicable on the least developed country Parties and Small Island developing States and they may submit information at their discretion. [para 90, Decision1/CP.21]

<sup>84</sup> First emission goal is to reaching global peaking goal, as soon as possible, with rapid reductions thereafter; and the second goal is to achieve net GHG emission neutrality by second half of the century.

<sup>85</sup> Meinhard Doelle, 'The Paris Climate Agreement – Assessment of Strengths and Weaknesses' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2851424 <<https://papers.ssrn.com/abstract=2851424>> accessed 16 August 2017.

There is no further direction as to whether successive NDCs will be a strict numerical commitment to the same target<sup>86</sup> or an increase in absolute reductions over an earlier target<sup>87</sup>. There is also no clear reference about how the progression will be judged since no minimum standards or requirements are set and it is left to the discretion of Parties to decide based on the principle of CBDR-RC. To secure efforts in the implementation and achievements of NDCs, each party is obliged to participate in a 'facilitative, multilateral consideration of progresses'<sup>88</sup>. Again the words 'facilitative', 'multilateral consideration' are generic, less precise, and vague. Under Article 4.5 though a well-defined and precise obligation is set, to provide support to the developing countries that are Parties to the Agreement, nevertheless, the provision loses its force as it is framed in a passive voice and no subject (actor) is identified here<sup>89</sup> to be responsible for providing such support<sup>90</sup>. Consequently, due to this vagueness the provision can be considered as an expectation (instead of obligation) from the whole regulatory regime.

To conclude, the NDC-related provisions in the Paris Agreement are less precise and more flexible in regulating state behaviour. However, less precise and prescriptive provisions may have some technical benefits as they preserve flexibility, can be modified to reflect different circumstances, can be developed further over time and are easy to negotiate. On the other hand, a provision by defining the precise contribution of each state can effectively address universal problems like climate change, the solution to which depends on reciprocity<sup>91</sup>. It can also enhance compliance by making its violation more glaring by increasing the reputational cost for states through sanctions<sup>92</sup>. All things considered though, NDC-related provisions should be more precise in order to constrain states' behaviour and to enhance accountability, transparency and compliance in climate mitigation action.

### c. Oversight

Structure and framing of international oversight mechanisms do matter in order to secure effective implementation and strict compliance. The more rigorous the oversight mechanism<sup>93</sup>, the more likely it is that states will comply with their commitments and be in a position to demand compliance from others<sup>94</sup>. The NDCs of the Paris Agreement are built on a flexible bottom-up approach, by which Parties' pledges are regulated by hard and soft laws with no obligation of result. Therefore, a balanced and well-structured oversight regime is needed here to secure that the pledges are adequate and eventually realized<sup>95</sup> to reach the ultimate goal of the Agreement. Moreover, the oversight mechanism can enhance transparency, accountability, trust and reciprocal action among state Parties by further developing shared understanding of each Party's targets, contributions and implementation efforts<sup>96</sup> and by providing scope for feedback on proposed approaches to the issue<sup>97</sup>. As mentioned before, the Paris Agreement structures its oversight regime with three institutional mechanisms. This part of the paper aims to assess each one of these mechanisms structured under the Paris Agreement and explore whether NDC-related provisions of the agreement are enforceable and applied by courts or not.

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<sup>86</sup> Rajamani, *supra* note 31, at 10.

<sup>87</sup> *Ibid.*

<sup>88</sup> The Paris Agreement, *supra* note 2, art 13.11.

<sup>89</sup> Oberthür and Bodle, *supra* note 75, at 49.

<sup>90</sup> Rajamani, *supra* note 55, at 353.

<sup>91</sup> Daniel Bodansky, 'Rules vs. Standards in International Environmental Law' (2004) 98 Proceedings of the ASIL Annual Meeting 275 <<https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/div-classtitlerules-vs-standards-in-international-environmental-lawdiv/13A7F93CB324BB7FC7556FDFB8040B67>> accessed 11 August 2017; Bodansky, *supra* note 58, at 106.

<sup>92</sup> Bodansky, *supra* note 98.

<sup>93</sup> Rajamani, *supra* note 55, at 343.

<sup>94</sup> *ibid*; Bodansky, *supra* note 58, at 106; Stavins, Robert N., and Stowe, Robert C, *supra* note 45.

<sup>95</sup> Harro van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement' (2016) 6 Climate Law 91, 92 <<http://booksandjournals.brillonline.com/content/journals/10.1163/18786561-00601006>> accessed 12 August 2017.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

### i. Enhanced Transparency Framework and Compliance Mechanism

An 'enhanced transparency framework' is established under Article 13 of the Paris Agreement with the purpose to provide '*clear understanding on climate change action*' and to promote '*effective implementation*' through '*clarity and tracking the progress of Parties in achieving their individual NDCs*'. Since the substantive commitments of NDCs are non-binding and regulated by soft laws, the transparency framework is considered the main tool to hold the Parties accountable for fulfilling their promises<sup>98</sup>. The transparency framework features a built-in flexible system, where a Party's respective capacity will be duly taken into account while assessing the state's actions related to the implementation of the NDCs. The framework shall be implemented '*in a facilitative, non-intrusive, non-punitive manner, respectful to national sovereignty with no undue burden on Parties*'<sup>99</sup>. The framework establishes a common, mandatory system for mitigation. Each Party is required to submit its report on GHG inventories annually. To track progress in implementing and achieving NDCs, each Party is also obliged to submit a report biennially. Both submitted reports shall be subject to review by technical experts in line with Article 13.11 and 13.12, who shall assess each Party's progress in '*implementing and achieving their NDCs*', will '*identify areas of improvement*' and evaluate the '*consistency of the information [given]*' with the reporting '*modalities, procedures and guidelines*' developed by the CMA (The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement).

To supplement the enhanced transparency framework, an 'implementation and compliance mechanism' is established under Article 15 of the Paris Agreement. The detailed rules of the 'implementation and compliance mechanism' are not developed in the Paris Agreement and left up to the CMA to be framed. The compliance mechanism aims to '*facilitate implementation and promote compliance in a manner that is transparent, non-adversarial and non-punitive*'. The mechanism will be comprised of an experts' committee which will report annually to the CMA. The compliance mechanism functions in a facilitative nature and this new mechanism specifies no enforcement mechanism to address the consequences of non-compliance. Therefore it is very unlikely that the NDC-related legal provisions can be enforced. The NDC-related provisions are also unlikely to be applied by courts at a national or international level as no traditional dispute settlement mechanisms are incorporated into the Agreement. Given that, NDC-related provisions are not enforceable and cannot be applied by courts. Ultimately, this gives rise to the question: what would the consequences of non-compliance be then? If a country doesn't submit reports biennially or does not communicate or maintain NDCs every five years, what consequences will it face for non-compliance? The Agreement provides no clear or minimum guidance and the matter will be decided by the CMA after further negotiations with the state Parties.

Thus, the oversight mechanisms of NDCs are facilitative, non-punitive and non-adversarial in nature, rendering the NDCs' provisions unenforceable by international review, compliance mechanisms or any traditional dispute settlement mechanism. However, through international review each state's performance on mitigation actions will be showcased publicly and it will eventually create public naming and shaming and peer pressure if states fall short in their performance. It is expected that the public naming-shaming and peer pressure will be as effective as legal obligation in steering state behaviour<sup>100</sup>. Moreover, the Agreement is silent about the linkage between the transparency framework's output and the compliance mechanism's functioning<sup>101</sup>. A direct linkage between the compliance committee and the expert reviewers' comments and findings on the national reports could give teeth to these oversight mechanisms. Here, actions under the compliance mechanism could be

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<sup>98</sup> Harro van Asselt, Pieter Pauw and Håkon Sælen, *Assessment and Review under a 2015 Climate Change Agreement* (Organisation for Economic Co-operation and Development 2015) <<http://www.oecd-ilibrary.org/content/book/tn2015-530>> accessed 13 August 2017; Bodansky, *Supra note 21*, at 33.

<sup>99</sup> The Paris Agreement, *supra note 2*, art 13.3.

<sup>100</sup> Van Asselt, Pauw and Sælen, *supra note 105*; Rajamani, *supra note 55*; Bodansky, *supra note 61*.

<sup>101</sup> Van Asselt and others, 'Transparency of Action and Support under the Paris Agreement' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2859151 <<https://papers.ssrn.com/abstract=2859151>> accessed 12 August 2017; Bodansky, *supra note 61*.



based on the comments and findings of the transparency framework, which would pinpoint the states' inactions.

The review of national reports under the transparency framework is a challenging exercise for the fact that the NDCs are designed in diverse ways due to the significant leeway given to countries under para 27 of Decision 1/CP.21 and the lack of standardized guidance on NDCs' features and the NDCs' accompanying information<sup>102</sup>. This is a gross loophole and unless further detailed guidelines on NDCs' features and accompanying information are developed, tracking progress towards implementing and achieving NDCs as well as reviewing progress will remain a very perplexing process<sup>103</sup>. However, under para 28 of the Decision 1/CP.21, the APA (Ad Hoc Working Group on the Paris Agreement) has the mandate to develop further guidance on the features and accompanying information of NDCs. In this regard the APA can keep the guidance specific and unified to facilitate the tracking of states' progress on NDCs. Further guidance is also needed to sufficiently define the terms 'built in flexibility' and 'respective capacity', and determine how these two terms will be translated into practice, in order to address the reporting and reviewing requirements of least developing countries (LDCs) and small island countries (SIDs) (as their mitigation actions depend on the finances and technology transferred to them by the developed countries).

However, regarding the functionality of the transparency mechanism, there is a growing concern that the existing reporting and review process under the transparency framework will ultimately place a significant burden on Parties<sup>104</sup> (especially Parties with low GHG emission level and low incomes), expert reviewers and the UNFCCC Secretariat<sup>105</sup>. The process will also be time-consuming and will involve huge finances, human resources and other logistics to track the accuracy of the national reports to showcase each country's effort to achieve their NDCs' targets.

## ii. Global Stocktake

Besides the transparency framework and compliance mechanism, the Paris Agreement establishes another oversight mechanism named *global stocktake* to review the progress and effectiveness of the global collective efforts as opposed to individual efforts. According to Article 14, the global stocktake shall take place every five years (first one will be in 2023) and again having a facilitative and comprehensive manner, it will 'assess the collective progress towards achieving the purpose of the Agreement and its long-term goals' by considering 'mitigation actions, adaptation, means of implementation and support'. To assess the collective progress towards achieving long term goals of the Agreement, the global stocktake will take input from the information on 'overall effect of the NDCs communicated by Parties'<sup>106</sup>, adaptation efforts, mobilization of support<sup>107</sup> and the information generated through the transparency framework<sup>108</sup>.

As an oversight mechanism, the global stocktake is considered crucial not only to measure the adequacy of global efforts to limit temperature increase to 2°C but also to assess the adequacy of states' contribution based on their respective capabilities and given responsibilities<sup>109</sup>. Moreover, the outcome of the global stocktake shall be communicated to the Parties so that 'in a nationally determined manner'<sup>110</sup> they can update and enhance their mitigation actions as well as support in response to climate problems. It is worth noting that, the global stocktake will function under the principle of equity and best available science in order to ratchet up strong NDCs' targets over time, though it is yet to be clear how the equity principle will be defined and incorporated in the global

<sup>102</sup> Asselt and others, *supra* note 109, at 12.

<sup>103</sup> *Ibid* at 19.

<sup>104</sup> Asselt and others, *supra* note 109, at 8.

<sup>105</sup> Gregory Briner and Sara Moarif, 'Unpacking Provisions Related to Transparency of Mitigation and Support in the Paris Agreement' (Organisation for Economic Co-operation and Development 2016) OECD/IEA Climate Change Expert Group Papers <<http://www.oecd-ilibrary.org/content/workingpaper/5j1ww004n6nq-en>> accessed 13 August 2017.

<sup>106</sup> Decision 1/CP 21, *supra* note 37, Para 99

<sup>107</sup> *Ibid*.

<sup>108</sup> The Paris Agreement, *supra* note 2, art 13.5-6.

<sup>109</sup> Rajamani, *supra* note 31, at 13.

<sup>110</sup> *The Paris Agreement*, art 14.3.

stocktake process of the Paris Agreement<sup>111</sup>. However, the incorporation of the equity principle in the global stocktake process might give scope to discuss the application of equitable burden sharing in the Paris Agreement regime<sup>112</sup>.

The global stocktake mechanism also sets a specific timeline through Decision 1/CP.21 to steer the global action for mitigation. For instance, in 2018 a 'facilitative dialogue' among the Parties will take place to take stock of the global collective progress in achieving the emission targets set forth in Article 4.1<sup>113</sup>. In 2025 each Party is required to submit their 'successive NDCs, at least 9 to 12 months in advance of the CMA and shall be informed by the outcomes of the global stocktake'<sup>114</sup>.

Thus, in a comprehensive manner the periodic global stocktake will globally showcase collective progress in mitigation actions, will capture the adequacy of state Parties' efforts based on capabilities and given responsibilities and will solicit international cooperation and political commitment for enhanced climate actions. By bridging the global stocktake's outcome with the updating and enhancement of Parties' NDCs, it will also create a strong expectation from state Parties' that successive NDCs will reflect progression in line with the findings of the global stocktake<sup>115</sup>. The expectation and connection can have a positive impact by ratcheting up Parties' mitigation actions and to prevent autonomy in determining individual states' contributions towards mitigation actions. Though ratcheting up of mitigation action and support as a result of the global stocktake will be left solely to the discretion of a state's national determination. But undeniably the global naming and shaming's showcase under the global stocktake mechanism is the sole avenue in the Paris Agreement's oversight mechanism which can put some pressure on the states, if the Party, instead of pursuing progression and highest possible ambition, keep their NDCs' pledges steady.

#### IV. Identifying the key strengths and weaknesses of the 'bottom-up pledge and review' approach of NDCs

From an international law perspective, the preceding evaluation on the NDCs made it evident that the Paris Agreement takes a flexible, political approach towards NDCs instead of a legalistic one. The NDCs' substantive obligations are non-binding, unenforceable and subject to a state's discretionary power, depending on their capacity and national priorities. It does not rectify past breaches with sanctions and triggers, binding procedural obligations in a non-adversarial manner through peer pressure and global naming and shaming. Hence the flexible bottom-up pledge and non-adversarial review approach of NDCs erodes the NDCs' status in law that can contribute to the shaping of the international social order<sup>116</sup>. However, there is a general belief that mandatory norms signal greater commitments and offer greater assurance of compliance to achieve the expected behavioral change,<sup>117</sup> which ultimately gives rise to the question of whether this flexible, political approach to NDCs would be able to function 'effectively' to address climate change problems.

In international law the word 'effectiveness' signifies different connotations. Depending on the regulatory architecture of the respective norm, the term can refer to legal effectiveness, focusing on the issue of compliance; behavioral effectiveness, intending to modify states' and individuals' behavior towards the right direction; or problem-solving effectiveness, which in the case of environmental law would mean to solve the environmental problems<sup>118</sup>. It's worth noting that behavioral effectiveness is a necessary precondition for the problem-solving effectiveness<sup>119</sup>. However, the flexible bottom-up pledges and the review-based regulatory architecture of NDCs in the Paris Agreement tend to focus

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<sup>111</sup> Rajamani, *supra* note 31, at 13.

<sup>112</sup> *Ibid.*

<sup>113</sup> Decision 1/CP 21, *supra* note 37, Para 20.

<sup>114</sup> *Ibid.*, Para 25 and 9.

<sup>115</sup> Rajamani, *supra* note 31, at 14.

<sup>116</sup> Bodansky, *supra* note 58, at 250.

<sup>117</sup> *Ibid.*, 102.

<sup>118</sup> *Ibid.*, at 253.

<sup>119</sup> *Ibid.*, at 256.

more on behavioral effectiveness than legal effectiveness. Whether NDCs with their unique character will be behaviourally effective or not can be assessed by identifying its key strengths or weaknesses. A detailed discussion on NDCs' key strengths and weaknesses is discussed below.

The key strength of NDCs lies in their flexibility which ultimately reflects a realistic approach to align international climate change *policy* with the realities of international climate change *politics*<sup>120</sup>. The flexible approach fulfils the long standing demand of developed countries to be not bound by legally binding rules and also creates a favourable platform where all countries can join with their respective capacities to address the reduction of GHG emission. The positive aspects of flexibility is glaring as it has already helped to achieve greater political consensus to pursue the ambitious temperature limit goal of 1.5°C and broaden the participation of major GHG emitter countries in this effort<sup>121</sup>. Moreover, by giving countries control over their decisions about their own commitments and targets for mitigation, it eventually puts pressure on Parties to do what they had promised to do.

Another strength of the NDCs is its bottom-up approach that allows successfully the translation of the international commitments at the domestic level, making climate change policy an integral part of national public policy. Most of the countries (including major emitters) have laws, regulations, policies and action plans to address the problem of climate change<sup>122</sup>. Thus, climate change is no longer solely an international issue but has become a national mandate. The flexible bottom-up approach of NDCs also prevents backsliding (in order to demonstrate progress, successive NDCs' targets have to be driven upwards not backwards) and provides a carefully balanced mechanism that can enhance mitigation targets over time.

However, it is clear that this flexible bottom-up approach has undeniable consequences as well. The fact that national circumstances and priorities are taken into consideration when states propose their NDCs may not necessarily mean that the latter are fair and ambitious to address global goals<sup>123</sup>. Moreover, the NDC-related provisions provide no method for determining appropriate NDCs for each individual Party<sup>124</sup>. These parameters ultimately give leeway to state-Parties to adopt a minimum mitigation target corresponding to their respective capacity. Furthermore, there is no mechanism to assess further respective NDCs' adequacy in the effort to mitigate environmental harm. This implies that once NDCs are submitted, they become final. This is undoubtedly a major drawback of NDCs that eventually challenges their effectiveness to address the GHG mitigation problem. For instance, the USA in their submitted NDCs, pledged to reduce 26%-28% of net GHG emission from 2005's level by 2025<sup>125</sup>. It is worth noting that, due to the discretion and flexibility given in the framing of NDCs, the USA took 2005 as their base year though under Article 4.2.b of the UNFCCC, the base year should be 1990. So, the USA will mainly reduce 16% GHG emission comparing with 1990's level which is very little given its actual capacity<sup>126</sup> and critically insufficient to meet the Paris Agreement's 2°C target. Correspondingly, Japan has pledged to reduce 26% by 2030 compared to the country's 2013 level<sup>127</sup>. Choosing 2013 as a base year is far from adequate for a country like Japan<sup>128</sup>, who is the fifth highest GHG emitter country with a historic responsibility of GHG emissions. Compared to the 1990 level, Japan will reduce only 18% of GHG emissions which is considered highly insufficient<sup>129</sup>. Similarly, Canada, Australia, Russia, Saudi Arabia, Indonesia and South Africa have also adopted

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<sup>120</sup> Falkner, *supra note 4*.

<sup>121</sup> Till today 159 developed and developing countries including USA, China, India, Brazil, Canada submitted their NDCs and ratified the Paris Agreement.

<sup>122</sup> Falkner, *supra note 4*.

<sup>123</sup> Entwicklungspolitik, *supra note 39*, at 4.

<sup>124</sup> Doelle, *supra note 92*.

<sup>125</sup> Raymond Cléménçon, 'The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?' (2016) 25 *The Journal of Environment & Development* 3, 15 <<http://journals.sagepub.com/doi/10.1177/1070496516631362>> accessed 15 August 2017.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* at 16.

<sup>128</sup> Cléménçon, *supra note 134*, at 15. See also Climate Action Tracker report available at <http://climateactiontracker.org/countries/japan.html>.

<sup>129</sup> *Ibid*, 16.

inadequate mitigation targets compared to their level of GHG emissions<sup>130</sup> which is not fair and sufficient to address the 2°C global temperature goal with strong persuasion to limit temperature increase by 1.5°C. As a consequence, it is projected that, even if the current NDCs pledges are fully implemented, it will still increase the global temperature by up to 2.7°C to 3°C in 90 years<sup>131</sup>. This scenario ultimately outlined that, in the first round of NDCs the strong good faith normative expectation didn't function well and resulted in highly uneven NDC targets. It is worth noting that para 17 of the Decision 1/CP.21 acknowledges the shortage of the current mitigation effort to achieve the 2°C goals, but it offers no guidelines to bridge the mitigation gap<sup>132</sup>.

Improving the quality of the NDCs' targets is a *sine qua non* here and all major GHG emitter countries need to adopt adequate and enhanced NDCs' targets well before 2030 in order to be aligned with the long term temperature reduction goal of the Paris Agreement<sup>133</sup>. Nevertheless, the competency of the NDCs' approach to secure adoption of adequate periodic targets and enhanced mitigation ambitions is again questioned. Because by law it is not possible to pressurize Parties for adopting progressive and adequate mitigation targets in aligning with the 2°/1.5°C goals of limiting temperature increase since successive progression and adoption of the highest possible ambition are just an expectation from the Parties. In fact, inducing states to adopt adequate and enhanced mitigation targets is challenging because obtaining reliable information on the respective country's capabilities and priorities is not very clear-cut and creating peer pressure for pursuing appropriate and adequate mitigation targets is time-consuming. Hence, this lengthy process to prod states for enhanced mitigation action questions NDCs' problem-solving effectiveness to decisively resolve the dire climate change crisis where immediate adequate action is much needed.

Since NDC-related provisions are applicable to all countries, the engagement of all countries is also a strength of NDCs for securing collective mitigation efforts. Now emerging economies can no longer hide behind their status as developing countries<sup>134</sup> and have to prepare to communicate and maintain NDCs. However, solely complying with the procedural obligations of NDCs won't solve the problem much, unless developing economies, as well as major GHG emitting economies,<sup>135</sup> effectively initiate adequate, progressive action to implement the substantive content of NDCs.

In order to address non-compliance related issues, the oversight regime of NDCs, instead of relying on legal enforcement, puts much emphasis on the review mechanism and on negotiated solutions<sup>136</sup>. In this case, the strength of NDCs lies in its two-tier review mechanism which is unique and not seen in other multilateral environmental agreements. Under the Agreement, the Parties' NDCs' implementation efforts will be periodically reviewed both at the individual and at the aggregated level<sup>137</sup>. Individual review under the transparency framework will identify the gap between states' mitigation pledges and actual domestic application. Review at the aggregated level will identify gaps between the total sum of national measures and the required level of ambition<sup>138</sup>. Identification of such gaps will help to put forward a more realistic way for enhancing mitigation actions. Implementation of the NDCs' commitments will be further assisted by an expert-based compliance mechanism which will function in a facilitative, non-adversarial and non-punitive manner<sup>139</sup>. So, the oversight mechanisms of NDCs adopt no coercive enforcement mechanism and incorporate peer pressure and public naming and shaming as fallback mechanisms.

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<sup>130</sup> MJ Mace, 'Mitigation Commitments Under the Paris Agreement and the Way Forward' (2016) 6 *Climate Law* 21, 32 <<http://booksandjournals.brillonline.com/content/journals/10.1163/18786561-00601002>> accessed 15 August 2017.

<sup>131</sup> Climate Action Tracker, Effect of Current Pledges and Policies on Global Temperature, available at <[http://climateactiontracker.org/assets/publications/briefing\\_papers/CAT\\_Temp\\_Update\\_COP21.pdf](http://climateactiontracker.org/assets/publications/briefing_papers/CAT_Temp_Update_COP21.pdf)>.

<sup>132</sup> Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2708148 5 <<https://papers.ssrn.com/abstract=2708148>> accessed 15 August 2017.

<sup>133</sup> Mace, *supra* note 139, at 32.

<sup>134</sup> Falkner, *supra* note 4.

<sup>135</sup> Mace *supra* note 139.

<sup>136</sup> Bodansky, *supra* note 58, at 251.

<sup>137</sup> Savaresi, *supra* note 7, at 10.

<sup>138</sup> Falkner, *supra* note 4.

<sup>139</sup> Savaresi, *supra* note 28, at 10.



Undoubtedly the approach is unique and persuasive but not free from drawbacks. As there is no rigorous consequence of non-compliance, it gives countries leeway to bypass the adoption and establishment of costly mitigation policies that involve technological and economic transformation towards low carbon development. Moreover, the past experiences of international climate change politics gives little hope on the functionality of peer pressure and naming and shaming to prevent non-compliance. By way of example, the USA's refusal to join and Canada's withdrawal from the Kyoto Protocol's regime clearly proves that the major GHG emitter countries are willing to accept reputational costs when it comes to choosing national priorities over international concerns<sup>140</sup>. Although NDCs, through their flexible bottom-up approach, achieved global consensus and increased countries' awareness towards normative commitments and their international responsibility<sup>141</sup>, it is very unlikely that this alone will outweigh countries' conflicting national interests<sup>142</sup>.

## V. Conclusion: Can the 'bottom-up pledge and review' approach of NDCs be considered a historic breakthrough?

The foregoing discussion made it evident that the 'bottom-up pledge and review' approach of NDCs as a mode of delineating social order limits the role of international law<sup>143</sup> and the regulation of states' behaviour, much depends on the 'good will' of each state's ruling government, the international momentum on climate change, international climate change politics and moral compulsion. The approach can be considered as a pragmatic gamble to overcome the failure of the top-down approach of the Kyoto Protocol and to bring the major GHG emitters on board. However, the overall framework of the NDCs' 'bottom-up pledge and review' approach with its identified strengths and weaknesses does not allow for much hope that this new logic of NDCs will function as a historic breakthrough in the climate regulatory regime with regards to shaping states' behavior and ensuring effective action towards climate mitigation. Because for effective behavioral change, substantive mitigation obligations need to be implemented. But in the current context of NDCs, where substantive pledges are flexible, non-binding and unenforceable, it is very unlikely that states will progressively continue to adopt adequate, enhanced mitigation pledges and implement costly mitigation policies for the sake of moral compulsion, reputation, global leadership and international momentum. On the other hand, undeniably this new logic of NDCs provides a supportive and realistic framework under which countries have agreed on and are willing to take domestic mitigation measures based on their national circumstances.

However, it's worth noting that the role of an international regulatory regime is not to define what each country must do, but rather help to generate greater political will<sup>144</sup> by ensuring reciprocal actions of all major emitter countries and by providing greater legal transparency frameworks. The Paris Agreement already encapsulates the former and sets mechanisms for the latter. To make this unique approach successful, the global community needs to carefully balance the flexibility of NDCs with the rigorous oversight mechanism by giving teeth to its enforcement and implementation process and by limiting the discretionary power of the states. NDCs' detailed framework is yet to be developed. By developing further modalities, procedures and guidelines, if a robust oversight mechanism is developed along with the strict, precise rules on reporting, reviewing, verification and non-compliance consequences, only then can the 'bottom-up pledge and review' approach of NDCs function truly as a historic breakthrough to induce the desired behavioural change of the states and its citizens.

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<sup>140</sup> Falkner, *supra* note 4.

<sup>141</sup> Bodansky, *supra* note 58, at 251.

<sup>142</sup> Falkner, *supra* note 4.

<sup>143</sup> Bodansky, *supra* note 58; Falkner, *supra* note 4; Doelle, *supra* note 92; Cléménçon, *supra* note 134.

<sup>144</sup> Hans-Joachim Koch and others, *Climate Change and Environmental Hazards Related to Shipping: An International Legal Framework: Proceedings of the Hamburg International Environmental Law Conference 2011* (Martinus Nijhoff Publishers 2012) at 49.

To summarise, the success of the 'bottom-up pledge and review approach' of NDCs and progress in mitigation action will depend on three key areas. First, the need to adopt a detailed, robust and efficient rule book for national pledging and its implementation, which can precisely guide state-Parties through the process of the adoption of NDCs and their implementation. Second, by developing modalities, procedures and guidelines for a transparency framework, compliance mechanism and global stocktake, rigorous, strict and homogenous accountability and transparency rules need to be developed to limit the excessive discretionary power of the Parties<sup>145</sup>, constrain state behavior and make states accountable at the international level. The detailed rules should be applicable to all Parties<sup>146</sup>. Finally, the global consensus needs to be preserved to mobilize adequate and effective actions at the national, sub-national, regional and international levels. To put it differently, the bottom-up approach of NDCs needs to be carefully balanced with the top-down review, and if future negotiations on climate issues can successfully achieve this combination, only then can the current framework be considered a historic breakthrough. Otherwise, this high stake experiment<sup>147</sup> will turn out to be a setback, and there is not much time left for another change.

**Sharaban Tahura Zaman**

*(The author is a lecturer at North South University, research associate at Centre For Climate Justice-Bangladesh (CCJ-B) and involved in the climate change negotiation to support Least Developed Country (LDC)*

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<sup>145</sup>Bodansky, *supra note* 58, at 253; Savaresi, *supra note* 28, at 11.

<sup>146</sup>Savaresi, *supra note* 7, at 11.

<sup>147</sup>Doelle, *supra note* 92.