

## SCELG Dialogue

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### Is the Paris Agreement *really* legally binding?

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In the weeks ahead the Paris COP21 summit a lot of attention was given to the fact that the outcome of Paris had to be legally binding, almost as if the “legal” accolade would make climate change disappear without any further effort. At the closure of COP21 the French Presidency declared victory stating that the Paris Agreement is ambitious, fair and “legally binding”. So, is it really?

It depends on what is meant by the question itself: what do mean by legally binding? If by legally binding we have in mind the framework of most domestic legal systems where there is a clear sanction if somebody breaches a rule, then it is difficult to see the Paris Agreement as legally binding. Again, if we consider a legal instrument to be legally binding only if there is an independent body capable of monitoring and auditing the activities of those under the law, the Paris Agreement has little of that. However, if we acknowledge (and we all should) that the Agreement is a matter of Public International Law, the contour of what is legally binding changes ever so slightly.

Two observations can be made from the start: 1) formally, a legal instrument in international law is legally binding upon States if the latter consent to it through “ratification, acceptance, approval or accession”. This is the language of article 21 of the Paris Agreement. This would mean that the Paris Agreement is, at least formally, legally binding under international law; 2) Assuming that, formally, the Paris Agreement is legally binding, whether the Agreement is legally binding in substance (really legally binding) depends on: a) whether there is a “clear conduct” that Parties are required to undertake or whether there is a “clear outcome” that Parties need to achieve; and b) whether there is a “strong” system/framework/mechanism to check/control that such a conduct or outcome is undertaken and achieved.

Does the Paris Agreement provide for a “clear outcome” and is there a system that makes countries accountable for it? The answer is no. The Paris Agreement calls for countries to “hold the increase in the global average temperature to well

well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C". However, there is no clear quantitative emission greenhouse gas restrictions imposed upon Parties. There is not an overall carbon budget, as some countries were advocating for. The lack of a clear legally binding target is, amongst other factors, one of the aspects that may enable the United States of America to not require Congressional approval to ratify the Paris Agreement. See this piece from [Daniel Bodansky](#) explaining in detail the relationship between the legal nature of the obligations in the Paris Agreement and US domestic politics. Furthermore, the 2 °C goal does not have a clear deadline. The Paris Agreement refers to peaking of emissions ASAP (yes, as soon as possible...), followed by "rapid" reductions in order to achieve the Agreement's goal in the second half of the century.

If the Paris Agreement does not provide for a clear outcome, does it, at least, set a "clear conduct" that Parties must pursue, and is there a system that makes countries accountable for it? This is where the Paris Agreement does start to appear slightly more legally binding. For example, in relation to mitigation Parties to the Paris Agreement will have to:

"prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

This is an obligation of conduct (a procedural obligation) that the Paris Agreement lays out for Parties. For a country to comply with this provision of the Paris Agreement it will need to do what 185 countries have done before COP21 without it being, one could argue, legally binding: prepare and communicate an Intended Nationally Determined Contribution (INDC) ... It will be for the COP acting as the meeting of the Parties to the Paris Agreement in the next few years to develop stricter and clearer guidelines on how future NDCs should look like. Crucially, Parties have a legally binding obligation to repeat this exercise (prepare, communicate and maintain successive NDCs) every five years and for each NDCs to be more ambitious than the previous one.

Having clarified the legally binding obligation of article 4.2 of the Paris Agreement, to what extent can we say that there is a system/framework/mechanism that makes countries accountable for it? It is important, once more, to not fall in the trap of thinking of effectiveness, accountability and enforcement under national law lens. The Paris Agreement is an "international" legal instrument, and, as such, it would be almost unheard of for there to be an independent quasi-judicial body set up to make countries accountable for their obligations (having said that, other international legal instruments (very few) have such mechanisms – see the United Nations Economic Commission for Europe Water Protocol). As it stands art. 4.13 maintains that "Parties shall account for their NDCs" and articles 13 and 15 develop a combination of transparency and compliance frameworks and mechanisms that will need to be further developed to gauge its effectiveness. The transparency framework requires all parties, except Least Developed Countries and Small Island Developing States, to report back on the implementation of their NDC every two years. The way this information will be scrutinised and by whom is yet to be fully decided, but it will "build on experience from the arrangements related to transparency under the Convention". In other words it will be a combination of already existing patterns of Monitoring, Reporting and Verification (MRV) and of new modalities and procedures developed by the COP in the coming years. The effectiveness of the Paris Agreement will, ultimately, be determined by the extent to which this MRV system will make countries truly accountable for their NDCs.



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To conclude, as Joost Pauwelyn also commented in his Pre Paris [post](#), the question is not really whether the Paris Agreement is formally legally binding or not under international law (it is formally), but whether in substance the provisions of the Agreement are clear enough to determine an outcome (we have seen that does not seem to be the case), or at least a conduct (this seems to be more promising) for Parties. In the debate over whether the Paris Agreement is legally binding or not transparency will ultimately determine the long term success of the international climate change regime. This is why article 13 of the Paris Agreement is so important, and why its operationalization will be one of the key aspects of the international climate change negotiations in the years to come.

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### Past SCELG Dialogues:

1. C Murdoch, Rights Based Approach to Conservation: Can legal trade provide the protection endangered species require? SCELG Dialogue, No 1/2015
2. M Orme, F Sindico, Z Cuthbert, J Gibson, R Bostic, Good Transboundary Water Governance and the 2015 Sustainable Development Goals, SCELG Dialogue, No 2/2015
3. F Sindico, Is the Paris Agreement really legally binding?, SCELG Dialogue, No 3/2015