

Strengthening Accountability under the 2015 Climate Change Agreement

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Summary and policy recommendations

Beyond the emissions pledges made by different countries, a cornerstone for ensuring the effectiveness of the 2015 international climate change agreement will be the mechanisms in place to hold states to account for how they live up to their commitments. While legal form has been viewed as an important indicator of the strength of the agreement, we highlight how accountability mechanisms at both the international as well as domestic levels can be strengthened irrespective of the international legal form chosen for the agreement.

This policy brief suggests that several actions can be taken by governments and other actors to strengthen the effectiveness of the 2015 agreement. It emphasizes that it requires a mix of steps at the domestic and international level that are aimed to strengthen accountability.

At the international level, the following steps are suggested:

- improving the current system for measurement, reporting and verification (MRV), and thereby increasing transparency;
- establishing an independent body for implementation review focused on facilitation;
- opening the MRV processes to non-state actors; and
- anchoring an accountability mechanism in the core (legally binding) agreement (e.g. through a provision providing a strong mandate for the development of further modalities and procedures).

At the domestic level, the following actions can be taken:

- clearly assigning responsibilities for implementation among governmental actors;
- collecting data and developing indicators across the various spheres of commitment, not only limited to mitigation;
- mandating national audit institutions to conduct regular audits of the activities of governments in relation to commitments;
- strengthening capacity of parliamentarians to provide oversight; and
- investing in climate change education of the public and the capacity of civil society.

Authors:

Sylvia Karlsson-Vinkhuyzen, Assistant Professor, Public Administration and Policy Group, Wageningen University; Member of Climate Strategies
Harro van Asselt, Senior Research Fellow, Stockholm Environment Institute; Member of Climate Strategies

Editor of the series: Charlotte Streck



Introduction

To date, most efforts by Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in the context of the Ad Hoc Working Group on the Durban Platform on Enhanced Action (ADP) have focused on reaching agreement on a range of substantive issues. By contrast, the legal form of the 2015 climate change agreement will likely be addressed only once agreement on other matters is within reach. Yet legal form is an issue that strongly engages many Parties, civil society and other observers, who are likely to use it as a benchmark for the success of the Paris summit. A legally binding agreement (i.e. a treaty) is associated with higher expectations of effectiveness compared to a non-legally binding agreement. A legal agreement is expected to have greater influence on states' behaviour, and presents better opportunities to hold states to account for a lack of action. In this policy brief we take a closer look at these two expectations.

Options for the legal form of the 2015 agreement

The purposefully vague mandate of the ADP to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” outlines the main options for the legal form of a new agreement. Each of these forms can be associated with advantages and drawbacks (Table 1). In terms of accountability, a “strong” legal form such as a treaty will mean that the agreed outcome is part of international law. This means, in turn, that in theory, it can be subject to legal enforcement before international and domestic adjudicatory bodies. Moreover, it has long been assumed that treaties and other types of formal law making are associated with greater legitimacy and accountability. However, these assumptions about the benefits of formal law making do not necessarily hold true in practice.¹

As long as the ADP's mandate is fulfilled, the chosen legal form may be accompanied by other documents, such as political declarations and informal documents, which may, for instance, list Parties' contributions.²

Table 1: Main options for legal form of the 2015 agreement

	Options	Legal basis in UNFCCC	Advantages	Drawbacks
Protocol	<i>Protocol</i>	Art. 17	<ul style="list-style-type: none"> Predictability and durability Incorporation of obligations into national law (ratification) 	<ul style="list-style-type: none"> Some countries wish to avoid use of term “protocol” (because of association with Kyoto) Ratification and entry into force may take time and is uncertain
Another legal instrument	<i>Amendment of the UNFCCC</i>	Art. 15	<ul style="list-style-type: none"> Predictability and durability Can be adopted by 3/4 majority Incorporation of obligations into national law (ratification) 	<ul style="list-style-type: none"> Ratification and entry into force may take time and is uncertain
	<i>Addition or amendment of Annexes</i>	Art. 16	<ul style="list-style-type: none"> Predictability and durability Can be adopted by 3/4 majority Easier entry into force Incorporation of obligations into national law (ratification) 	<ul style="list-style-type: none"> Restricted to “lists, forms, and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character”
	<i>Legal instrument not termed “protocol”</i>	Implicit/Art. 17	<ul style="list-style-type: none"> Predictability and durability Avoids use of term ‘protocol’ Incorporation of obligations into national law (ratification) 	<ul style="list-style-type: none"> Ratification and entry into force may take time and is uncertain
Agreed outcome with legal force	<i>Decision(s) by Conference of the Parties (COP)</i>	Art. 7(2)	<ul style="list-style-type: none"> Immediately applicable Easier to update 	<ul style="list-style-type: none"> May not fulfil ADP mandate Legal effects unclear Cannot create new legal obligations Lower predictability and durability

The likeliest outcome in Paris seems to be a mix of a “core” agreement (i.e. a protocol or another legal instrument), which contains the main provisions of the agreement and which would be considered a “treaty” under the relevant rules of international law (the Vienna Convention on the Law of Treaties), complemented by a set of COP decisions. The latter could elaborate upon the core agreement, and may include details that some Parties would rather not like to see in an explicitly legally binding agreement. This view was reinforced by the Co-Chairs’ note released in July 2015, which separates the negotiating text into several parts, with one part relating to the core of an agreement and another containing text proposals that could find their way into COP decisions.³

Notwithstanding these indications about the 2015 agreement’s legal form, a more fundamental question remains unanswered: why does the agreement’s legal form matter in the first place?

What makes an agreement work?

International agreements can influence the behaviour of states by: (1) changing incentives, (2) changing identities and preferences, and (3) increasing the capacity for action. Each route in turn comprises several mechanisms of influence (Table 2).

Although there may be links between these mechanisms and the legal form (e.g. many countries consider treaties to be more legitimate), most mechanisms of influence are not tied to a specific legal form. There are many examples of so-called “soft law” that is influential, through mechanisms such as legitimacy, dialogue and learning, increasing domestic leverage for action, capacity building and soft (reputational) sanctions, such as the COP decisions forming the Marrakesh Accords or the

Millennium Development Goals. Conversely, there are examples of “hard law” with limited influence on state behaviour, such as the Convention on Biological Diversity. Much work remains to be done to compare these mechanisms and verify the extent to which their influence varies between different options for legal form, issue areas and countries. However, it is clear that what makes an agreement effective is affected by factors at the international and domestic levels that go beyond legal form.

Legal form and accountability mechanisms at different levels

In domestic contexts, there is a general expectation that actors that do not follow the law or keep their publicly made promises will be held to account, having to justify their actions and facing sanctions in judicial, political and/or public arenas. Similarly, we expect that the prospects of actors for having to answer for their actions will encourage law-abiding behaviour. The opportunity to hold states to account in relation to commitments made under international agreements can be a prerequisite for the mechanism of sanctions; (see Table 2), but it can also allow for dialogue, learning and capacity-building. In this section, we briefly discuss how diverse accountability mechanisms can be strengthened at both international and domestic level, irrespective of the choice of legal form of the 2015 agreement.

The international level

A contributing factor for the mixed pattern of compliance with multilateral environmental agreements by states is that, in comparison of other areas of international affairs (e.g. international trade), accountability mechanisms tend to be weak. The UNFCCC is a case in point.

Table 2: Mechanisms of how international norms can influence state behaviour¹

Route	Mechanism
Influencing the motivation to comply	
<i>Changing incentives</i>	<ul style="list-style-type: none"> • Material (hard) sanctions (such as trade sanctions) • Immaterial (soft) sanctions (such as reputational damage) • Material reward systems (such as finance) • Immaterial reward systems (such as praise)
<i>Changing identities or preferences</i>	<ul style="list-style-type: none"> • Dialogue and learning • Feeling obliged to comply with norms as it is ‘the right thing to do’ (legitimacy)
Influencing the ability to comply	
<i>Increasing the capacity for action</i>	<ul style="list-style-type: none"> • Technical and human capacity building • Increasing domestic political leverage for action

States have thus far been reluctant to create a strong mechanism that would enable them to hold each other to account for a lack of compliance with climate commitments. The “multilateral consultative process” foreseen in the UNFCCC to help resolve questions of implementation never came into being. While a compliance mechanism was put in place for the Kyoto Protocol, and the protocol’s Compliance Committee successfully dealt with several cases of non-compliance (mainly related to methodological issues and reporting), the mechanism had important weaknesses. First, even though the Compliance Committee could also address non-compliance by developing countries, in practice it dealt with developed countries only. Second, compliance with the treaty’s core commitments (i.e. emissions targets) is only assessed several years after the end of a commitment period, following the negotiation of a new round of targets. This means that Parties could delay emission reductions, and take the non-compliance into account in new negotiations.⁴ Finally, in practice, the mechanism did not properly serve an “early warning” function to signal future non-compliance.⁵ And as there are no consequences for withdrawal, it is possible for a non-complying state to simply pull out of the treaty. This notoriously happened in the case of Canada.

The one system applying to all countries and all commitments are the Convention’s extensive measurement, reporting and verification (MRV) processes, which includes regular country reporting on emissions trends and policies put in place, usually followed by an expert review.⁶ Through the existing MRV processes, the UNFCCC has already helped to enhance the transparency of how countries are performing. Such processes have gathered a wealth of information on countries’ emissions and policies. Moreover, they offer an opportunity for a political dialogue that can help to build trust and encourage mutual learning. This could be witnessed, for instance, in the recently started multilateral assessment process as part of the international assessment and review (IAR) for developed country Parties, which offered an opportunity for a series of questions-and-answer sessions between different Parties.

But is this sufficient to hold countries to account? The MRV processes are not linked to any concrete outcome directed at the Party in question, be it sanctions or facilitative measures such as advice or financial assistance. Moreover, the processes are heavily politicized, notwithstanding the use of teams of independent technical experts that are supposed to function in their personal capacity.⁷ And perhaps most fundamentally, by excluding any role for non-

state actors the processes are limited to state-to-state accountability.

There are several ways in which these weaknesses can be remedied in the 2015 agreement. Although establishing a new compliance body akin to the Kyoto Protocol’s Compliance Committee is unlikely, the new agreement can seek to improve existing MRV processes and make them more meaningful for improving implementation in individual countries.⁸ This may happen, for example, through the establishment of a politically independent body for implementation review, with a focus on facilitation. Doing so would mean that the system is less dependent on Parties to raise issues of non-compliance. Further, opening up the MRV processes to non-state actors such as civil society organizations or parliamentarians (e.g. by allowing them to provide input into the reviews or to ask questions of Parties) would strengthen the accountability vis-à-vis these stakeholders.⁹

A stronger legal form (i.e. a treaty as opposed to a set of COP decisions) may help strengthen accountability mechanisms in the 2015 agreement. For example, a legally binding agreement that includes Parties’ contributions in the “core” agreement would increase the reputational costs in case Parties’ compliance is found wanting by the independent review body or non-state actors.¹⁰ However, the details of any mechanism to hold countries to account can be agreed through a series of COP decisions, showing that such accountability mechanisms are not entirely dependent on the legal form of an agreement – even though they would likely benefit from a strong mandate in the underlying agreement.

The domestic level

The interim conclusion that strengthening accountability among states in the climate regime requires a number of improvements to become really meaningful suggests it is important to look at domestic accountability relationships. The strength and form of domestic accountability mechanisms for commitments made in relation to the 2015 agreement will naturally vary according to a country’s political and legal system. However, they often provide better opportunities for holding governments to account than the international mechanisms, as national sovereignty concerns can make states reluctant to accept accountability relationships outside the domestic sphere. Domestic accountability mechanisms have higher potential to be strong if commitments become incorporated into domestic law, as this usually enables a number of judicial, political and administrative procedures and

mechanisms for ensuring continued efforts to achieve compliance over time (and over government transitions). The process of ratification of a treaty would ensure internalization into domestic law. And even if the nationally-determined contributions are not included in the “core” of the agreement (as most observers expect), countries can still opt to formalize their contributions into domestic law. For instance, through various legislative measures the European Union (EU) intends to enshrine its binding target to reduce emissions by 40% domestically by 2030 in EU law.¹¹

Domestic accountability mechanisms could also be strengthened irrespective of whether international commitments are transposed into domestic law.¹² For example, governments can through dialogues between relevant ministries, government agencies and provincial and local authorities or through other processes assign clear responsibilities for implementation to each governmental actor. Clearly assigning responsibilities should make it easier to hold governmental actors to account – for other governmental actors, as well as civil society organizations, the media and the public. The UK Climate Change Act sets a target of 80 percent emission reductions by 2050, which are linked to five-year carbon budgets for the shorter term. These carbon budgets are allocated to different government departments in line with their own share of emissions from the public sector as well as the economic sectors they seek to influence. Each department needs to publish plans for how to achieve these reductions, and monitor and report on progress to the public.¹³

Regular reporting on implementation and evaluation of progress reports can further strengthen the foundation for accountability, but more remains to be done to collect data and develop indicators. For mitigation-related actions there are reporting requirements with established methodologies for greenhouse gas inventories under the UNFCCC. For other climate actions (e.g. adaptation), information and indicators still need to be developed further, and data systematically gathered. However, some countries have started to make progress in this area. For instance, ten European countries are developing or implementing indicators on adaptation actions.¹⁴

National audit institutions can play an important role in ensuring accountability by conducting independent audits of the activities of governments in relation to its domestic and international commitments on climate change. For example, the Swedish National Audit Office, in its most recent audit of the government’s climate goals and their cost-effectiveness, concluded that Sweden would

likely meet its 2020 target. It also concluded, however, that there is still a big gap between the domestic vision of close-to-zero emissions by 2050 and expected emissions according to current scenarios. Furthermore, the steering and reporting to the parliament that the government would need to do is insufficient.¹⁵

Parliaments can also play an important role in ensuring that domestic and international climate commitments are complied with. Proactive parliamentarians can use both established formal procedures (e.g. hearings, ministerial questions) and informal means of engaging with government officials to provide oversight, whether incorporated in domestic laws or not. Such actions can be enabled by capacity building, such as the International Institute for Environment and Development’s climate-related capacity-building programmes for parliamentarians and the parliamentary support staff in Africa.¹⁶

Ultimately, however, the strength of domestic accountability for implementing domestic and international climate commitments will often depend on the engagement and support of the broader public. If addressing climate change is important for the public, it can help motivate other actors, such as parliaments, to take action. The public at large can also take concrete action, empowered by international agreements: for example, the Dutch nongovernmental organization Urgenda, together with 900 citizens, sued the Dutch government, leading to a court ruling that government policies were insufficient, and that further action was needed.¹⁷ An international agreement, particularly if it is universal and with a high degree of transparency, can also empower domestic constituencies and reduce the plausibility of the free-riding argument (‘why should we act when others do not’).

If a proactive government wants its ambitious climate policies to be long-lasting, it may therefore consider investing in education about climate change and supporting civil society organizations.

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Endnotes

- ¹ Joost Pauwelyn, “Is It International Law or Not, and Does It Even Matter?”, in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012), 125-161.
- ² Lavanya Rajamani, “Negotiating the 2015 Climate Agreement: Issues relating to Legal Form and Nature” (MAPS, 2015).
- ³ <http://unfccc.int/resource/docs/2015/adp2/eng/4infnot.pdf>
- ⁴ Scott Barrett, *Environment & Statecraft: The Strategy of Environmental Treaty-Making* (Oxford University Press, 2003), 385-386.
- ⁵ Sebastian Oberthür, “Options for a Compliance Mechanism in a 2015 Climate Agreement” (WRI, 2015)
- ⁶ It is beyond the scope of this policy brief to discuss the various MRV processes in detail. Developed countries need to submit emissions inventories (annually), National Communications (every 4 years) and Biennial Reports (every 2 years), all of which are subject to expert review. Developing countries also need to submit inventories and National Communications, as well as Biennial Update Reports, but the requirements are in general more lenient.
- ⁷ Anna Huggins, “The Desirability of Depoliticization: Compliance in the International Climate Regime” 4 *Transnational Environmental Law* (2015), 101-124.
- ⁸ See also Harro van Asselt, Håkon Sælen and Pieter Pauw, “Assessment and Review under a 2015 International Climate Change Agreement” (Nordic Council of Ministers, 2015).
- ⁹ See Sébastien Duyck, “MRV in the 2015 Climate Agreement: Promoting Compliance through Transparency and the Participation of NGOs” 8 *Carbon & Climate Law Review* (2014), 175-187 for more elaborate proposals of how to include civil society in MRV processes.
- ¹⁰ Sébastien Duyck, “MRV in the 2015 Climate Agreement: Promoting Compliance through Transparency and the Participation of NGOs” 8 *Carbon & Climate Law Review* (2014), 175-187.
- ¹¹ Further legislation is still needed for the post-2020 period to give this “binding” target the necessary teeth, notably a new “effort-sharing” decision, including provisions on the consequences of non-compliance.
- ¹² See also Sylvia Karlsson-Vinkhuyzen, “Paris and then? Holding States to Account”, in the report of the Global Climate Policy Conference, New Delhi 30 April – 1 May: New Research for Effective Action at Paris and Beyond: Strengthening Research-Policy Interface in International Climate Negotiations (Stanley Foundation and Climate Strategies 2015) Muscatine, IA.
- ¹³ Aileen McHarg, “Climate Change Constitutionalism? Lessons from the United Kingdom” 2 *Climate Law* (2011), 469-484.
- ¹⁴ European Environment Agency (EEA), National Adaptation Policy Processes in European Countries – 2014 (EEA, 2014).
- ¹⁵ Riksrevisionen, *Klimat för pengarna? Granskningar inom klimatområdet 2009-2013*. Stockholm Riksrevisionen (Swedish National Audit Office, 2013).
- ¹⁶ See <http://www.iied.org/helping-parliamentarians-drive-national-climate-change-policy>
- ¹⁷ See <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>. The verdict is being appealed by the Dutch government.

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Climate Strategies
40 Bermondsey Street
London SE1 3UD
United Kingdom
info@climatestrategies.org

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