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The Paris Agreement: Reflections on an International Law Odyssey

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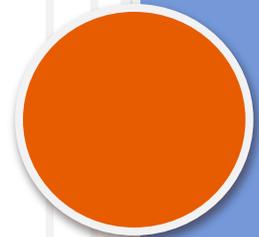
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The Paris Agreement and the Future of the Climate Regime: Reflections on an International Law Odyssey

ANNALISA SAVARESI

ABSTRACT:

This paper discusses how international law has responded to climate change, focussing on the challenges that have faced the implementation of existing climate treaties, and on the suitability of the Paris Agreement to address these. It specifically reflects on international law-making and on the approach to climate change governance embedded in the Paris Agreement, drawing inferences from the past, to make predictions on what the future may hold for international climate change law.

Keywords: climate change; international law; Paris Agreement; law-making; climate governance.

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Table of Contents

1. Introduction.....	2
2. International climate change law-making.....	4
3. International climate change governance.....	8
4. Conclusion: what the past tells us about the future.....	11

1 Introduction

Climate change has been described as a risk ‘multiplier’ exacerbating virtually all crises facing humanity in the 21st century,¹ and thus requiring unprecedented levels of international cooperation.² International cooperation on climate change has a short, but rather eventful history. On other environmental matters – such as protected areas or freshwater – multilateral cooperation is only a relatively recent addition to well-established regulatory and governance³ arrangements at the national and regional level.⁴ Conversely, climate change efforts started at the international level, and only subsequently trickled down to the national and regional level. This peculiarity can be explained by the global nature of climate change and by the relatively recent scientific awareness of the problem. By comparison with other international regimes, therefore, the climate change regime is still a relatively new addition to the international law family, and an especially troubled one. Indeed, the history of international climate change law thus far may be likened to an odyssey.

Since 1992 States have struggled to stabilize greenhouse gas concentrations in the atmosphere ‘at a level that would prevent dangerous anthropogenic interference with the climate system.’⁵ The treaty laying the foundations of international climate change governance – the 1992 United Nations Framework Convention on Climate Change (UNFCCC)⁶ – does not contain much detail on action that Parties should undertake to achieve this objective. Instead the UNFCCC rather typically performs a ‘constitutional’ role,⁷

¹ ‘Global Risks 2014’ (World Economic Forum), part 1 <<http://wef.ch/GJkRdk>> accessed 11 May 2017.

² David Archer and Stefan Rahmstorf, *The Climate Crisis: An Introductory Guide to Climate Change* (Cambridge University Press 2009) 230.

³ Drawing on Laurence E Lynn Jr, ‘The Many Faces of Governance: Adaptation? Transformation? Both? Neither?’ in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2012), the term governance is used in this paper to refer to the act of ‘directing, guiding, or regulating’ states’ conduct or actions, including through the design of international processes and institutions. *Ibid.*, 49.

⁴ In relation to protected areas, see e.g. Alexander Gillespie, *Protected Areas and International Environmental Law* (Brill 2007) 7–26. In relation to watercourses, see e.g. Ariel Dinar and others, *Bridges Over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation* (World Scientific Publishing Company 2013) 58–74.

⁵ UNFCCC, Article 2.

⁶ United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994) (‘UNFCCC’).

⁷ For this use of terminology, see P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edition, Oxford University Press 2009) 9.

sketching out a series of principles guiding Parties' action, and an institutional framework for inter-state cooperation.⁸ The main components of this architecture are a set of substantive obligations concerning the achievement of the objective of the Convention (i.e. the mitigation of climate change and adaptation to the adverse consequences thereof), and procedural obligations to enable the review of implementation of substantive obligations. Furthermore, the UNFCCC sketches a framework to enable international cooperation through the provision of finance, capacity-building and the exchange of information. The Convention only performs a limited 'regulatory' role,⁹ envisioning the progressive development of a regulatory architecture through the adoption of protocols and the rule-making activities of treaty bodies.¹⁰ This approach is far from unusual, and may be rather regarded as established practice under Multilateral Environmental Agreements (MEAs).¹¹

Only one protocol to the Convention has been adopted – namely, the 1997 Kyoto Protocol to the UNFCCC.¹² The protocol was meant to phase out greenhouse gas emissions progressively, pursuant to a 'targets and timetables' approach¹³ similar to that embedded in the Montreal Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer.¹⁴ The Kyoto Protocol, however, has not enjoyed the same success as its model treaty¹⁵ and largely failed to deliver the hoped for results. Its bifurcated approach to the differentiation between Parties' obligations and almost exclusive reliance on developed countries efforts¹⁶ have been superseded by circumstances – most saliently, the dramatic increase of emissions in developing countries.

As Parties squabbled over the means to either reform or replace the Kyoto Protocol's architecture, international climate governance has progressively become a highly fragmented affair.¹⁷ This is exemplified by the

⁸ UNFCCC, Articles 3 and 7-11, respectively.

⁹ For this use of terminology, see Birnie, Boyle and Redgwell (n 7) 9.

¹⁰ UNFCCC, Articles 7.1 and 17.

¹¹ Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *The American Journal of International Law* 623.

¹² Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005) ('Kyoto Protocol').

¹³ The conceptualization of a targets and timetables, as opposed to a pledge and review, approach to climate governance is operated in the works of Daniel Bodansky, starting with Daniel Bodansky, 'The Emerging Climate Change Regime' (1995) 20 *Annual Review of Energy and the Environment* 425.

¹⁴ Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987, in force 1 January 1989).

¹⁵ As noted most famously in Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (1st edn, Oxford University Press 2007) 94–95.

¹⁶ Kyoto Protocol, Article 3 and Annex B.

¹⁷ The literature on this issue is vast. See for example: OR Young, *The Institutional Dimensions of Environmental Change: Fit, Interplay, and Scale* (MIT Press 2002); Frank Biermann and others, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis' (2009) 9 *Global Environmental Politics* 14; Cinnamon P Carlarne, 'Good Climate Governance: Only a Fragmented System of International Law Away?' (2008) 30 *Law & Policy* 450; Harro van Asselt, Francesco Sindico and Michael Mehling, 'Global Climate Change and the Fragmentation of International Law' (2008) 30 *Law & Policy* 423; Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar Publishing 2014).

emergence of a multitude of law-making and governance processes outwith those designed by international climate change treaties.¹⁸ International climate change governance has in this connection been likened to the Cambrian explosion, whereby ‘a wide array of diverse institutional forms emerges, and through selection and accident a few are chosen’, and where the architecture designed under the UNFCCC and the Kyoto Protocol is ‘particularly important’ but ‘not unrivalled’.¹⁹

The implementation of climate change treaties has produced important results, when one considers the high level of compliance with Parties’ reporting obligations, and with the targets embedded in the Kyoto Protocol.²⁰ Yet the action undertaken to date has doubtlessly been inadequate to tackle climate change, raising concerns about the adequacy of existing governance arrangements.

After much tribulation, and the near collapse of the regime in 2009, the quest for better international cooperation on climate change resulted in the adoption of the 2015 Paris Agreement. Expectations of this new treaty could scarcely be greater: the Paris Agreement is meant to provide a framework to improve international cooperation on climate change, and to keep the world within the global mean temperature change goal identified by scientists as safe.²¹ Yet, whether and how this important objective will be reached largely depends, on the one hand, on the supporting political will and, on the other, on the re-design of the international architecture for climate governance. These rather thorny matters hang in the balance of ongoing negotiations on the so-called rule-book of the Paris Agreement, which are meant to conclude by the end of 2018.²²

This paper reflects on this ongoing process, in light on the evolution of international climate change law-making and governance to date, focussing on challenges that have faced the implementation of existing arrangements, and on the suitability of the Paris Agreement to address these. The paper follows a two-pronged approach. The first part reflects on international climate change law-making, and on practice since the adoption of the Paris Agreement. The second part considers the shift in international climate change governance, from a ‘targets and timetables’ to a ‘pledge and review’ approach. Whilst the suitability of the latter approach to deliver the solution to climate change remains to be tested, this paper looks at the past of the climate regime, to gauge where the implementation of the Paris Agreement may lead, as well as to identify potential pitfalls lying ahead.

¹⁸ On the informalization of the climate regime, see Harro van Asselt, Michael Mehling and Clarisse Siebert, ‘The Changing Architecture of International Climate Change Law’ in Geert van Calster, Wim Vanderberghe and Leonie Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar Publishing 2015) 5; and Duncan French and Lavanya Rajamani, ‘Climate Change and International Environmental Law: Musings on a Journey to Somewhere’ (2013) 25 *Journal of Environmental Law* 437, 446.

¹⁹ Robert O Keohane and David G Victor, ‘The Regime Complex for Climate Change’ (2011) 9 *Perspectives on Politics* 7, 12.

²⁰ See Michael Grubb, ‘Full Legal Compliance with the Kyoto Protocol’s First Commitment Period – Some Lessons’ (2016) *Climate Policy* 1.

²¹ Paris Agreement, Article 2.1(a).

²² Decision 1/CMA.1 Matters relating to the implementation of the Paris Agreement, (UN Doc. FCCC/PA/CMA/2016/3/Add.1, 31 January 2017), 5.

2 International climate law-making and its complexities

The Paris Agreement was adopted by consensus at the twenty-first conference of the Parties (COP) to the UNFCCC.²³ The agreement was from the outset meant to be ‘a protocol, another legal instrument or an agreed outcome with legal force’ under the UNFCCC.²⁴ The issue of legal form, nevertheless, was an elephant in the room during much of the lengthy negotiation that led to the adoption of the new agreement.²⁵

At one end of the spectrum, some Parties favoured a protocol. This is in-keeping with the practice of seeking to perfect and further substantiate Parties’ obligations under framework conventions, such as the UNFCCC, by adopting ancillary treaties, commonly referred to as protocols.²⁶ On the other end of the spectrum, other Parties were uneasy about the legal form of the Paris Agreement. The US had domestic political reasons to ask that the agreement’s legal form be left undetermined, so as to enable presidential ratification without Senate approval.²⁷ Other Parties too, however, were wary of the legal implications attached to encapsulating the new architecture enshrined in the Paris Agreement in a treaty.

In spite of some initial confusion at the time of its adoption,²⁸ the Paris Agreement is, without doubt, an international treaty. This conclusion is compelled by the fact that the agreement is endowed with typical features of a treaty. For example, the agreement is structured in articles and it includes standard treaty provisions concerning ratification, the depositary, and so on.²⁹ Most conclusively, the Paris Agreement has been treated as a treaty by its now 174 Parties, which brought about its entry in force much earlier than anticipated, following a record-breaking ratification process.³⁰

²³ Decision 1/CP.21, Adoption of the Paris Agreement, (UN Doc. FCCC/CP/2015/10, Add.1, 29 January 2016).

²⁴ Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (UN Doc FCCC/CP/2011/9/Add, 15 March 2012), 2.

²⁵ Annalisa Savaresi, ‘UN Climate Change Negotiations: Last Tango in Paris?’ <<http://www.ejiltalk.org/un-climate-change-negotiations-last-tango-in-paris/>> accessed 15 December 2015.

²⁶ Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011) 151–152.

²⁷ As noted, for example, in a hearing before the Environment and Public Works Committee of the United States Senate, Testimony of Julian Ku, Maurice A Deane Distinguished Professor of Constitutional Law, Hofstra University School of Law “Examining the International Climate Negotiations” November 18, 2015, available at:

<https://www.epw.senate.gov/public/_cache/files/29525f03-9fc4-4112-9488-701f3dc1e8d1/ku-testimony.pdf> accessed 2 March 2018.

²⁸ As noted, for example, in Joust Pauwelyn and Lilliana Andonova, ‘A “Legally Binding Treaty” or Not? The Wrong Question for Paris Climate Summit’ <<https://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit/>> accessed 11 May 2017; and Daniel Bodansky, ‘The Legal Character of the Paris Agreement: A Primer’ <<http://opiniojuris.org/2015/12/02/the-legal-character-of-the-paris-agreement-a-primer/>> accessed 14 December 2015.

²⁹ Paris Agreement, Articles 20 and 27, respectively. See also reflections in Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *Review of European, Comparative & International Environmental Law* 142.

³⁰ Christina Voigt, ‘On the Paris Agreement’s Imminent Entry Into Force’ <<http://www.ejiltalk.org/on-the-paris-agreements-imminent-entry-into-force/>> accessed 11 October 2016.

In substance, the Paris Agreement is as an ancillary treaty to the UNFCCC – and possibly a protocol in anything but name.³¹ It hinges on the principles³² and institutional arrangements established by the convention,³³ the implementation of which it is mandated to enhance.³⁴ As such, the agreement is not expected to dismantle the pre-existing international climate change governance architecture, but rather to build upon it.³⁵ While the core ingredients of the regulatory framework have remained the same – i.e. substantive obligations concerning mitigation and adaptation as well as procedural obligations to enable the review of implementation of these) – much of the normative content of the Paris Agreement is incompatible with the continued existence of the governance architecture established by the Kyoto Protocol. The agreement is nevertheless silent on the fate of the protocol and of the complex governance arrangements and obligations it established, which therefore hang in the balance.

Another matter that engendered animated debate after the adoption of the Paris Agreement is whether or not it is ‘legally binding’.³⁶ Again, there is scarcely any doubt that, as any other treaty, the Paris Agreement is formally binding upon its Parties. As with any other treaty, however, the scope of Parties’ obligations clearly depends on the language in each provision. Some provisions establish categorical obligations, such as, for example, the obligation to pursue domestic mitigation measures, or to submit ‘Nationally Determined Contributions’ (NDCs).³⁷ Others, instead, are expressed in non-categorical terms, like that concerning the move by developing countries towards emission reduction targets.³⁸ Others again have a merely enabling character, and aim to facilitate internationally coordinated action, rather than prescribe it – such as, for example, the provisions on the joint implementation of Parties’ mitigation obligations.³⁹ The contours of States’ obligations under the Paris Agreement do not however only depend only on the terms used in each provision. Parties’ interpretation of these provisions in the practice of implementation may turn what sound like hortatory provisions into a sophisticated web of reciprocal State obligations. Conversely, the practice of implementation may turn into dead letter what were seemingly construed as categorical obligations.

The climate regime provides eloquent examples of both. One example of the first type of practice concerns the body of rules concerning REDD+.⁴⁰

³¹ As argued also in Annalisa Savaresi, ‘The Paris Agreement: A New Beginning?’ (2016) 34 *Journal of Energy & Natural Resources Law* 16, 20.

³² Paris Agreement, Preamble and Article 2.

³³ *Ibid*, Articles 16-18.

³⁴ *Ibid*, Article 2.1.

³⁵ See e.g. Paris Agreement, Article 13.13 and Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1, 29 January 2016, 98.

³⁶ As noted, for example, in Bodansky, ‘The Legal Character of the Paris Agreement’ (n 29).

³⁷ Paris Agreement, Article 4.2.

³⁸ *Ibid*, Article 4.4.

³⁹ *Ibid*, Article 6.

⁴⁰ The acronym stands for Reducing Emissions from Deforestation and forest Degradation in developing countries, and the scope of activities covered was progressively expanded to cover also the role of conservation, sustainable management of forests, and enhancement of forest carbon stocks in developing countries (hence the ‘+’). See Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on

These rules have emerged in a tumultuous fashion, from a long string of decisions adopted by the UNFCCC COP,⁴¹ which are *ex se* non-legally binding.⁴² These rules nevertheless detail a set of obligations, which are now understood to encumber Parties wishing to carry out REDD+ activities.⁴³

The Kyoto Protocol, conversely, features several examples of categorically formulated obligations that have progressively descended into irrelevance. The protocol targets and timelines for the progressive reduction of emissions in developed countries were multilaterally negotiated in a process of political bargaining, which was enshrined in treaty form.⁴⁴ But even though the protocol unequivocally requires all developed country Parties to adopt successive targets over time,⁴⁵ faltering political will has made it impossible to continue with this approach. The Doha Amendment to the Kyoto Protocol has never entered into force, which means that the targets enshrined in it are not formally legally binding on Parties.⁴⁶

Far from being unique to the climate regime, this fuzziness in sources and in the related normative content is a typical feature of MEAs. So-called 'autonomous institutional arrangements'⁴⁷ have rendered MEAs living instruments into which, in Brown Weiss's words, Parties 'continuously breathe life and to which they give new directions by acting as informal legislatures.'⁴⁸ MEAs treaty bodies regularly perform a variety of law-making functions. At times these functions are an emanation of specific delegated rule-making powers.⁴⁹ The rationale for entrusting treaty bodies to adopt such rules is to enable the periodical adjustment and review of technical details that would scarcely be suited to be embedded in treaty text.⁵⁰ At other times, decisions by treaty bodies may be regarded as authoritative interpretation of the terms of the treaties, and the practice of implementation may render these decisions

Long-term Cooperative Action under the Convention (UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011), 70.

⁴¹ These decisions are recalled in Paris Agreement, Article 5.2.

⁴² As noted for example in Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1.

⁴³ As argued in Christina Voigt and Felipe Ferreira, 'The Warsaw Framework for REDD: Implications for National Implementation and Access to Results-Based Finance' (2015) 9 *Carbon & Climate Law Review* 113; Christina Voigt, 'Introduction: The Kaleidoscopic World of REDD' in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Edward Elgar Publishing 2016); and Annalisa Savaresi, 'The Legal Status and Role of Safeguards' in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Edward Elgar Publishing 2016).

⁴⁴ Kyoto Protocol, Article 3.1 and Annex B.

⁴⁵ *Ibid*, Article 3.9.

⁴⁶ Doha Amendment to the Kyoto Protocol, Doha, 8 December 2012, not in force.

⁴⁷ See G Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *The American Journal of International Law* 623.

⁴⁸ Edith Brown Weiss, 'The Rise or the Fall of International Law' (2000) 69 *Fordham Law Review* 345, 352.

⁴⁹ See for example, Kyoto Protocol, Article 6.2. Compare also Churchill and Ulfstein (n 29), 639.

⁵⁰ As noted in AE Boyle and CM Chinkin, *The Making of International Law* (Oxford University Press 2007) 216; CC Shaffer and MA Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2009) 94 *Minnesota Law Review* 706, 719.

obligatory.⁵¹ Establishing whether or not the decisions of treaty bodies impose obligations on Parties, therefore, requires context-specific assessment.⁵²

Even by the standards of MEAs, international climate change law is remarkable for its latitude. The UNFCCC COP, its subsidiary bodies⁵³ and their homologues under the Kyoto Protocol⁵⁴ have been extremely prolific international law-making machines. They have adopted hundreds of decisions and established dozens of institutions, which together constitute one of the largest international environmental bureaucracies in existence. The treaty bodies of the climate regime have thus typically ‘amplified’ the terms of climate treaties, filling in their ‘open-textured’⁵⁵ provisions with content. This has been done by adopting both hard rules that Parties are expected to uphold,⁵⁶ as well as soft guidance. The latter may be regarded as ‘subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation,’ pursuant to Article 31(3)(b) Vienna Convention on the Law of Treaties.⁵⁷ The UNFCCC and the Kyoto Protocol are therefore conspicuous examples of living international law instruments, and the negotiated expression of Parties’ consensus, enshrined in guidance adopted by treaty bodies, has become the backbone of the climate regime.⁵⁸

The adoption of the Paris Agreement marked the beginning of a new rule-making process, whereby Parties are expected to fill with content the open-textured provisions in the treaty, through the adoption of its so-called rule-book. The total or partial shelving of the architecture built with the Kyoto Protocol and the building of the institutional and regulatory architecture envisioned in the Paris Agreement requires considerable adjustment in international climate change governance. This gargantuan reform process was always expected to take time and is no mean undertaking for bodies operating on the basis of consensus, in a process with almost 200 Parties, where institutional viscosity and ‘lowest common denominator outcomes’⁵⁹ are the norm.

Prolonged rule-making processes are standard practice after the adoption of constitutional treaties,⁶⁰ such as the Paris Agreement. Nevertheless, thus far, the process for the making of the Paris Agreement’s rule-book has been marked by much complexity and by a high level of

⁵¹ As suggested also in Boyle and Chinkin (n 50) 151–152.

⁵² As pointed out also in van Asselt, Sindico and Mehling (n 17) 430.

⁵³ UNFCCC, Article 7.2(i).

⁵⁴ Kyoto Protocol, Article 13.4.

⁵⁵ This use of terminology is borrowed from Alan E Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *The International and Comparative Law Quarterly* 901.

⁵⁶ Building upon specific mandates conferred upon them by the treaties, e.g. Kyoto Protocol, Articles 3.4 and 12.7.

⁵⁷ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) 115 UNTS 331. On the legal status of treaty bodies decisions, see Boyle (n 25), at 905 and 903, respectively.

⁵⁸ As noted also in Duncan French and Lavanya Rajamani, ‘Climate Change and International Environmental Law: Musings on a Journey to Somewhere’ (2013) 25 *Journal of Environmental Law* 437, 445.

⁵⁹ As suggested also in Boyle and Chinkin (n 50) 159.

⁶⁰ On the notion of constitutional treaties, see Birnie et al (n 7) 9-10.

controversy.⁶¹ The remarkable institutional complexity of the climate regime has nevertheless meant that even the matter of which subsidiary body does what in the drafting of the rule-book had to be painstakingly negotiated.⁶² The early entry into force of the Paris Agreement complicated matters further, forcing Parties to decide which tasks ought to be reserved to the treaty bodies of the agreement, and which could be overseen by UNFCCC treaty bodies.⁶³ So, even though Parties gave themselves until the end of 2018 to agree on the Paris Agreement rule-book, the delivery of this crucial piece of the climate regime is proving difficult, and time is running short already.

2.1 The role of non-state actors

The Paris Agreement has conferred an enhanced role upon non-state actors in international climate governance.⁶⁴ As with many other MEAs, non-state actors may attend meetings of the Parties, and although they cannot formally participate in international law-making, they may make submissions on matters under consideration by Parties.⁶⁵ Over the years an increasingly large number of civil society organisations has made ample use of this prerogative.⁶⁶

In the lead-up to the adoption of the Paris Agreement, however, much emphasis was placed on voluntary emission reductions by non-state actors, such as companies and subnational governments, as well as on their contribution to the provision of climate finance.⁶⁷ This is understandable, given the prominent role of corporate actors in engendering the climate problem and in being part of the solution.

Rather belatedly, therefore, the preamble of the Paris Agreement acknowledges for the first time in a climate treaty the importance to engage 'all

⁶¹ As noted also in Jennifer Allan, Katherine Browne, Aaron Cosbey, Dina Hestad, Mari Luomi, 'Earth Negotiations Bulletin: Summary of the Fiji / Bonn Climate Change Conference' (IISD 2017) <<http://enb.iisd.org/vol12/enb12714e.html>> accessed 25 February 2018.

⁶² Decision 1/CP.21 entrusts some issues to the COP serving as the meeting of the Parties to the Paris Agreement and the UNFCCC subsidiary bodies; others are entrusted to the body charged to prepare for its entry into force, the Ad Hoc Working Group on the Paris Agreement (APA); and others again to the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice.

⁶³ As reported for example in Anna Schulz et al., 'Summary of the Marrakech Climate Change Conference, 7-18 November 2016, Marrakech, Morocco' 12 Earth Negotiations Bulletin 689, 21 November 2016.

⁶⁴ Paris Agreement, Preamble and Decision 1/CP.21, Adoption of the Paris Agreement, paras 133-135. For an early reflection, see Harro van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement' (2016) 6 Climate Law 91.

⁶⁵ UNFCCC, Article 7.6 and, Kyoto Protocol, Article 13.8. for an early analysis, see B Arts, *The Political Influence of Global Ngos: Case Studies on the Climate and Biodiversity Conventions* (International Books 1998).

⁶⁶ These submissions may be found at: <http://unfccc.int/documentation/submissions_from_non-party_stakeholders/items/7478.php> accessed 11 May 2017.

⁶⁷ See Lima-Paris Action Agenda and the Non-state Actor Zone for Climate Action (NAZCA) platform launched in 2014. For an analysis, see Sander Chan et al., 'Reinvigorating International Climate Policy: A Comprehensive Framework for Effective Non-state Action' (2015) 6:4 Global Policy 466; and Sander Chan et al., 'Strengthening Non-state Climate Action: A Progress Assessment of Commitments Launched at the 2014 UN Climate Summit' (London School of Economics, 2015).

levels of government' and 'various actors' in addressing climate change.⁶⁸ Furthermore, while the UNFCCC already made generic reference to public participation in addressing climate change and its effects, and developing adequate responses,⁶⁹ the Paris Agreement specifically emphasizes the importance of enhanced public and private sector participation in the implementation of NDCs.⁷⁰ These developments largely focus on non-state actors' engagement in the making and implementation of climate change action at the national, rather than at the international level. Yet, developments at recent Party meetings clearly show that momentum is building for finding ways to expand the visibility and active involvement of non-state actors in international climate change governance.⁷¹

An eloquent sign of this paradigm shift was the establishment of a dedicated local communities and indigenous peoples' platform in 2016.⁷² The platform has been tasked with strengthening the knowledge, technologies, practices and efforts of local communities and indigenous peoples; facilitating the exchange of experience and the sharing of best practices and lessons learned; and enhancing the engagement of local communities and indigenous peoples in the UNFCCC process.⁷³ Work towards the operationalization of the platform is still ongoing at the time of writing, yet the platform has opened up an unprecedented avenue for the formal involvement of non-state actors in the climate regime, which is reminiscent of similar developments which occurred in the context of the 1992 Convention on Biological Diversity (CBD).⁷⁴ The CBD is unique amongst MEAs for having attributed a formal role to indigenous peoples and local communities.⁷⁵ While it is too early to tell whether developments in the climate regime will take a turn similar to that observed under the CBD, this is a development which is potentially gravid with momentous consequences for law-making under the climate regime.

2.2 Regime interplay and institutional cooperation

Because of the breadth of its subject matter, the climate regime is especially prone to overlaps with other international regimes.⁷⁶ Parties to the climate regime have nevertheless historically been reluctant to engage in institutional

⁶⁸ Paris Agreement, Preamble.

⁶⁹ UNFCCC, Article 6

⁷⁰ Paris Agreement, Article 6.8.

⁷¹ As noted in Jennifer Allan, Katherine Browne, Aaron Cosbey, Dina Hestad, Mari Luomi (n 61).

⁷² Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1 (2015), 135-136; and Report of the Conference of the Parties on its twenty-second session, held in Marrakech from 7 to 18 November 2016, FCCC/CP/2016/10 (2016), 163-167.

⁷³ Decision 2/CP.23, Local Communities and Indigenous Peoples Platform, FCCC/CP/2017/11/Add.1 (2018), para 5.

⁷⁴ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) 1760 UNTS 79. This argument is reproduced in Annalisa Savaresi, 'Traditional Knowledge and Climate Change: A New Legal Frontier?' (2018) 9 *Journal of Human Rights and the Environment* 32.

⁷⁵ Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2011) 21 *Yearbook of International Environmental Law* 3.

⁷⁶ The literature on this matter is vast. See e.g.: Carlarne (n 17); Biermann and others (n 17); Margaret Young, 'Climate Change and Regime Interaction' (2011) 5 *Carbon and Climate Law Review* 147; van Asselt, *The Fragmentation of Global Climate Governance* (n 17).

cooperation. Even when they have done so, as, for example in the context of the Joint Liaison Group to enhance coordination between the UNFCCC, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification, very limited results have been obtained, based on the argument that the Rio Conventions have a 'distinct legal character, mandate and membership'.⁷⁷

The Paris Agreement seems to have opened the way to greater institutional cooperation with other international bodies and processes which have a mandate relating to climate change. The COP decision adopting the agreement acknowledges the importance of liaising with international processes which deal with matters such as climate finance⁷⁸ and human displacement.⁷⁹

Furthermore, the Paris Agreement's preamble has broken new ground by tracing explicit links between climate change and human rights law. The climate regime has thus become the only body of international environmental law to include a specific reference to Parties' existing human rights obligations.⁸⁰ While such a reference does not impose new human rights obligations on States, it draws attention to the need to comply with existing ones. Although timid, this reference may have significant implications for the interpretation and further refinement of Parties' obligations under the climate regime.⁸¹

Indeed, after having unprecedentedly engaged in the negotiations for the Paris Agreement, human rights bodies have actively sought to influence the making of its rule-book.⁸² After a string of the Human Rights Council's (HRC) resolutions emphasised the potential for human rights to 'inform and strengthen' climate change law- and policy-making, by 'promoting policy coherence, legitimacy and sustainable outcomes',⁸³ the Office of High Commissioner for Human Rights (OHCHR) has made a series of submissions on matters under consideration by the Parties to the climate regime, including gender, finance, the sustainable development mechanism and capacity

⁷⁷ See, for example, the position by the US in Views on the Paper on Options for Enhanced Cooperation Among the Three Rio Conventions, Submissions from Parties, (UN Doc. FCCC/SBSTA/2006/MISC.4, 23 March 2006), 16. The same point was made by Australia, *ibid*, 5, as observed also in Harro van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes' (2012) 44 *New York University Journal of International Law and Politics* 1205, 1266-67.

⁷⁸ Decision 1/CP.21, 44.

⁷⁹ *Ibid*, 50.

⁸⁰ Paris Agreement, Preamble.

⁸¹ Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018).

⁸² As noted also in *ibid*; Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 228.

⁸³ HRC, Human Rights and Climate Change, UN Doc A/HRC/7/78, 29 March 2008; HRC, Human Rights and Climate Change, UN Doc A/HRC/RES/10/4, 25 March 2009, at preamble; HRC, Human Rights and Climate Change, UN Doc A/HRC/RES/18/22, 17 October 2011, at preamble; and HRC, Human Rights and Climate Change, UN Doc A/HRC/RES/26/27, 15 July 2014, at preamble.

building.⁸⁴ The OHCHR has furthermore facilitated the compilation of expert recommendations on climate change and human rights,⁸⁵ and human rights bodies have started to work as institutionalized pathways to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures.⁸⁶

3 Turning international climate change governance on its head

The Paris Agreement enshrines in treaty form the ‘bottom-up’ ‘pledge-and-review’ approach to international climate governance which first emerged with the Copenhagen Accord.⁸⁷ Ever since the ill-fated 2009 Copenhagen Climate Change Conference, the climate regime has progressively moved away from the ‘top-down’ ‘targets and timetable’ model embedded in the Kyoto Protocol.⁸⁸ The new approach requires that Parties unilaterally declare the action they are willing to undertake, with international climate bureaucracy working as a notary collecting, and eventually enabling, the review of Parties’ pledged action. This ‘hybrid’ architecture⁸⁹ hinges on Parties’ NDCs, rather than on a set of targets enshrined in a treaty.

The legal character of NDCs was the subject of much speculation during and after the negotiations of the Paris Agreement.⁹⁰ Contrary to what some suggested at the time,⁹¹ NDCs can scarcely be regarded as binding unilateral acts, as they miss the ‘intention’⁹² or ‘will to be bound’.⁹³ Equally, given their unilateral nature, it seems unlikely that NDCs might qualify as subsequent

⁸⁴ All submissions are available at: <<http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/UNFCCC.aspx>> accessed 11 May 2017.

⁸⁵ The OHCHR hosted an expert meeting on climate change and human rights on 6 - 7 October 2016 in Geneva. The Draft Recommendations elaborated at the meeting are available online at: <<http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/ClimateChange.aspx>> accessed 2 March 2018.

⁸⁶ CIEL, ‘States’ Human Rights Obligations in the Context of Climate Change’ (CIEL 2018) <<http://www.ciel.org/wp-content/uploads/2018/01/HRTBS-synthesis-report.pdf>> accessed 2 March 2018.

⁸⁷ Decision 2/CP.15, Copenhagen Accord, UN Doc. FCCC/CP/2009/11/Add.1, 30 March 2010. For this use of terminology, see Bodansky n 13.

⁸⁸ Savaresi, ‘The Paris Agreement’ (n 31) 6.

⁸⁹ This terminology is used in Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani (n 82) 214.

⁹⁰ See for example Daniel Bodansky and Lavanya Rajamani, ‘Key Legal Issues in the 2015 Climate Negotiations’ (Centre for Climate and Energy Solutions 2015) <<https://www.c2es.org/docUploads/legal-issues-brief-06-2015.pdf>> accessed 11 May 2017; Jorge Viñuales, ‘The Paris Climate Agreement: An Initial Examination’ <<https://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-i-of-ii/>> accessed 11 May 2017.

⁹¹ Vinuales (n 90).

⁹² International Court of Justice, *Nuclear Tests Case [Australia v France]* ICJ Reports 1974 253, para. 43.

⁹³ As argued also in Annalisa Savaresi, ‘The Paris Agreement: A Rejoinder’ <<http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>> accessed 20 April 2016. For this use of terminology see: International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, 2006, 1.

agreements between the Parties ‘regarding the interpretation of the treaty or the application of its provisions’ pursuant to Article 31(3)(a) of the Vienna Convention on the Law of Treaties.⁹⁴ Whilst Parties’ interpretation of the legal character of NDCs will only become clearer with the implementation of the Paris Agreement, the provisions anchoring NDCs in the treaty provide some useful clues in this connection. Article 4.2 of the Paris Agreement says:

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

This provision clearly imposes obligations of conduct upon all Parties,⁹⁵ which are required to submit NDCs detailing action on how they plan to reduce their emissions, and by how much.⁹⁶ This obligation of conduct⁹⁷ is procedural in nature.⁹⁸ Whilst no format for (intended) NDCs could be agreed ahead of the adoption of the Paris Agreement, the conference of the Parties, serving as the meeting of the Parties, is expected to adopt specific guidance on this issue.⁹⁹

Quite crucially, therefore, the Paris Agreement does not impose obligations of results, as the Kyoto Protocol did, to achieve specific emission reductions over a certain timeframe.¹⁰⁰ Yet all Parties must contribute to the achievement of the global temperature goal envisioned in the Paris Agreement,¹⁰¹ and NDCs will be the term of reference to assess their contribution to such a goal. The Paris Agreement does not entirely do away with a differentiated approach to Parties’ obligations, but it moves away from the static distinction between developed and developing countries drawn in the UNFCCC, replacing it with a rather more flexible ‘self-differentiation’ approach.¹⁰²

In many ways, the governance architecture envisioned in the Paris Agreement is very much akin to that embedded in other MEAs, like the 1992 Convention on Biological Diversity and its so-called Aichi Targets,¹⁰³ or indeed

⁹⁴ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) 115 UNTS 331.

⁹⁵ For a reflection on the differences between obligations of conduct and obligations of result, see: Rüdiger Wolfrum, ‘Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations’ in Mahnouch H Arsanjani and Jacob Cogan (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010); and Pierre-Marie Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 *European Journal of International Law* 371.

⁹⁶ See e.g. Bodansky, ‘The Legal Character of the Paris Agreement’ (n 29) 146; Savaresi, ‘The Paris Agreement’ (n 93).

⁹⁷ Paris Agreement, Article 4.2.

⁹⁸ As argued also in Bodansky, ‘The Legal Character of the Paris Agreement’ (n 29); Savaresi, ‘The Paris Agreement’ (n 93).

⁹⁹ Paris Agreement, Article 4.13; and Decision 1/CP.21, 31.

¹⁰⁰ Kyoto Protocol, Article 3.1 and Annex B.

¹⁰¹ Paris Agreement, Article 2.1(a).

¹⁰² For this use of terminology, see Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani (n 82) 223.

¹⁰³ Decision X/2. Strategic Plan for Biodiversity 2011-2020, UN Doc UNEP/CBD/COP/DEC/X/2, 29 October 2010, Annex.

in the Sustainable Development Goals.¹⁰⁴ While the pursuit of these collective targets/goals is not the subject of enforceable obligations, the expectation is that the process of reporting on progress in achieving these targets/goals will engender a virtuous peer pressure circle, leading Parties to deliver the desired outcomes.¹⁰⁵

Generally, the provision of information is a crucial ingredient of MEAs, both to ensure the monitoring of the problems that Parties seek to tackle (in the case of the climate regime, the emissions of greenhouse gases), as well as to review Parties' adherence to the substantive obligations they have undertaken. When compared with the other climate treaties, the Paris Agreement attempts to devise a more comprehensive system to review the effectiveness, implementation and compliance with Parties' obligations.¹⁰⁶

Before the adoption of the Paris Agreement, in fact, differentiation in the climate regime did not only apply to Parties' substantive obligations concerning emission reductions, but also affected procedural obligations associated with the review of implementation and compliance. Furthermore, the Kyoto Protocol's sophisticated review mechanisms did not encompass the review of effectiveness of action. This in turn means that the Kyoto Protocol lacked the means to 'ratchet up' ambition over time, and align with recommendations received from scientists.

Conversely, the UNFCCC includes only skeletal references to the review of implementation of Parties' obligations. Since the Copenhagen debacle, however, decisions adopted by UNFCCC treaty bodies have progressively both increased Parties' reporting obligations in frequency and expanded their scope, incorporating new elements, such as, for example, the provision of information concerning assistance to developing countries.¹⁰⁷ The review of implementation, however, has remained differentiated for developed and developing countries.¹⁰⁸ The implementation of these arrangements has evidenced some obvious shortcomings.¹⁰⁹ First, the lack of a standard template to report pledged mitigation action hindered comparison between Parties' efforts.¹¹⁰ Second, developing countries struggled to comply with their increased reporting obligations under the UNFCCC,¹¹¹ thus drawing attention to the need for dedicated assistance and capacity building. The review of effectiveness of action was unsuccessfully attempted with the so-called 2013-

¹⁰⁴ Transforming Our World: the 2030 Agenda for Sustainable Development,' UNGA Res 70/1 (2015).

¹⁰⁵ See Norichika Kanie and Frank Biermann (ed), *Governing through Goals - Sustainable Development Goals as Governance Innovation* (MIT Press 2017).

¹⁰⁶ This categorisation of review processes is borrowed from Bodansky, *Art and Craft* (n 26) 242.

¹⁰⁷ Decision 1/CP.16, 42.

¹⁰⁸ *Ibid*, 44-46 and 63-64.

¹⁰⁹ As noted for example in Jane Ellis and Sarah Moarif, 'Identifying and Addressing Gaps in the UNFCCC Reporting Framework' (OECD 2015) <<http://www.oecd.org/environment/cc/Identifying-and-addressing-gaps.pdf>> accessed 24 February 2016.

¹¹⁰ *ibid* 4.

¹¹¹ As of January 2016, only 24 developing country Parties had submitted their biennial update reports, whereas all developed countries Parties have submitted their biennial reports.

2015 Review,¹¹² but did not result in a process to adjust Parties' level of ambition.

The Paris Agreement is expected to build and expand on existing review procedures under the UNFCCC,¹¹³ and to address their shortcomings. Its rule-book is expected to standardize the reporting of information for all Parties, largely doing away with the differentiation between developed and developing countries.¹¹⁴ A Capacity-building Initiative for Transparency is set to support developing country Parties in meeting their enhanced reporting obligations.¹¹⁵ Most crucially, the Paris Agreement has, at least in principle, levelled the process for the review of implementation of Parties' obligations in relation to mitigation,¹¹⁶ establishing the premises for the creation of a machinery to periodically scrutinise these, at both the individual and the aggregate level.

At the individual level, the review of implementation of the agreement will be coupled with an expert-based, facilitative compliance mechanism.¹¹⁷ Even though the details of this mechanism remain to be determined, it seems clear that it will follow what has been described as a 'managerial', rather than an 'enforcement' model.¹¹⁸ Therefore, and in line with arrangements under other MEAs, the Paris Agreement will not so much coerce, but rather encourage compliance, enabling Parties' consultation, cooperation and peer pressure. It seems doubtful that Parties will agree to equip this mechanism with the means to attach consequences to instances of non-compliance, as under the Kyoto Protocol. Yet, the very existence of a mechanism to consider questions of compliance for all Parties, rather than for developed ones only, is a major novelty.

At the aggregate level, alignment with the temperature goal enshrined in the Paris Agreement will be periodically assessed, in the context of a so-called global stocktake exercise.¹¹⁹ This brand-new element in international climate governance is aimed to enable the review of effectiveness of Parties' action and induce them to adjust the level of ambition in their NDCs over time.¹²⁰ The global stocktake is crucial to ensuring that the bottom-up architecture envisioned in the Paris Agreement will deliver the results it was designed to produce. Even though global goals and targets are commonplace in MEAs, effectiveness review procedures to assess Parties' alignment with the achievement of these are not. Therefore, it is presently hard to predict how the global stocktake will work in practice.

Non-state actors can potentially perform an important role in this context, both by contributing to the provision of information, as well as by putting pressure upon Parties.¹²¹ The Paris Agreement is silent on this matter. Yet,

¹¹² Decision 1/CP.16, 4 and 138.

¹¹³ Decision 1/CP.21, 99.

¹¹⁴ Paris Agreement, Article 4.13; and *Ibid*, 31.

¹¹⁵ Decision 1/CP.21, 85.

¹¹⁶ Paris Agreement, Article 13.

¹¹⁷ *Ibid*, Article 15.

¹¹⁸ Bodansky, *Art and Craft* (n 26) 242.

¹¹⁹ Paris Agreement, Article 14.

¹²⁰ *Ibid*, Article 14.3.

¹²¹ As suggested in Harro van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance Under the Paris Agreement' (2016) 6 *Climate Law* 91, 106.

negotiations on the rule-book may open the door to greater involvement of non-state actors, for example enabling in the review process, building upon precedents established with other MEAs.¹²²

Greater institutional cooperation with other international bodies may have implications for the review of implementation of Parties' obligations too. In this connection, human rights bodies' emboldened efforts to monitor and sanction human rights violations associated with climate change, and the implementation of climate change response measures mentioned above may be regarded as a promising development.

4 Conclusion: what the past tells us about the future

The Paris Agreement laid the foundations of a reformed international climate change governance architecture. This architecture hinges on a bottom-up, pledge and review approach and, at least in principle, relies on greater non-state actors' involvement and inter-institutional cooperation. Compared with the UNFCCC, the Paris Agreement is a great leveller of Parties' obligations, in the sense that now all Parties are expected to reduce their emissions, and all are going to be subjected to a process for the review of implementation and compliance. Compared with the Kyoto Protocol, less pervasive substantial obligations under the Paris Agreement are compensated for by a universal commitment to emission reductions, as well as by a process for the review of effectiveness.

From a law-making perspective, the adoption of the Paris Agreement has initiated a new complex rule-making season. This sees Parties engage in a collective exercise to fill in with content the provisions in the treaty concerning crucial elements of the new international climate change governance architecture, such as NDCs, and the procedures for review of implementation, compliance and effectiveness. The meeting of Parties and subsidiary bodies thus far has clearly shown how complex this whole endeavour is. In an ideal world, Parties would use this opportunity to simplify the remarkable institutional and regulatory complexity that plagues the climate regime, doing away with rules and institutions which are no longer needed. In reality, so far, rather than manage this complexity, some Parties have used it to throw a spanner in the works for the adoption of the Paris Agreement's rule-book.

From a governance perspective, it is vital that rule-making under the Paris Agreement delivers a robust framework to ensure adequate coordination between Parties' actions. As is often the case with international law, the main purpose of the Paris Agreement is to put pressure on Parties to adopt measures at the national level suited to tackle a problem. While in and of itself international law cannot deliver the solution to the epochal challenge of climate change, it clearly plays an important part in engendering peer pressure to engage in delivering a solution. Notwithstanding the shift to a bottom-up, pledge and review approach, the job of international rules therefore remains the same: the delivery a robust architecture for the review of implementation, compliance and effectiveness, as well as the means to collaborate internationally, through the

¹²² *ibid* 96.

provision of finance, capacity-building and the exchange of information.

It would be naïve to expect the Paris Agreement to be a miraculous cure for all the maladies that have affected international cooperation on climate change thus far. Whilst the adoption of a new approach to international climate governance was a matter of political necessity, a change in architecture is not in itself a guarantee of success. Indeed, while the rhetorical value of identifying global goals is beyond dispute, their suitability to deliver concrete results is yet to be demonstrated. More generally, the Paris Agreement leaves unsolved a series of unpalatable political questions and complex technical details. The devil clearly is in these details, yet experience accrued with the implementation of the UNFCCC and the Kyoto Protocol is a precious term of reference to assist with detecting the pitfalls lying ahead, and how to avoid repeating the mistakes of the past.

The Paris Agreement has already marked some progress, by dismantling the differentiation firewall, replacing it with a more flexible approach, which is cognizant of the need to involve all Parties in tackling climate change. It also planted the seeds to establish processes for the review of implementation, compliance and effectiveness that involve all Parties. The Paris Agreement also seems to have opened up new avenues to involve non-state actors in climate governance and to improve coordination and address synergies between international regimes with a mandate that is related to climate change. Indeed, when an issue has over-arching implications for a range of different international regimes, it seems wise to emphasise, and vigorously explore, avenues for coordination. All these elements seem to augur well, but only time will tell whether these auspicious signs marked a fresh start for a regime whose journey has thus far been anything but plain sailing.