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The Paris Agreement: Reflections on an International Law Odyssey

Annalisa Savaresi

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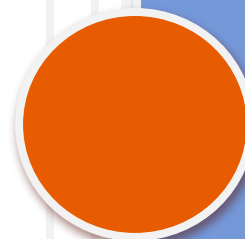
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Abstract:

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

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

Author Information:

Lecturer in Environmental Law, University of Stirling Law School, Scotland, United Kingdom.

Email: annalisa.savaresi@stir.ac.uk.

SSRN: <http://ssrn.com/author=1492966> This paper builds and expands upon the author's previous works, including: Annalisa Savaresi, 'The Paris Agreement: A New Beginning?' (2016) 34 Journal of Energy & Natural Resources Law 16; Annalisa Savaresi, 'The Paris Agreement: A Rejoinder' <<http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>> accessed 20 April 2016; 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.

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1. Introduction

Since its adoption, the 1992 United Nations Framework Convention on Climate Change (UNFCCC)¹ has had a rather eventful and dramatic history. In spite of having been ratified by virtually all States,² and of the adoption of the 1997 Kyoto Protocol,³ Parties to the Convention have struggled to reach the objective of stabilizing greenhouse gas concentrations in the atmosphere ‘at a level that would prevent dangerous anthropogenic interference with the climate system’.⁴

As a framework Convention, the UNFCCC does not contain much detail on action that Parties should undertake to achieve this objective. Instead, rather like other multilateral environmental agreements (MEAs), the convention largely focuses on setting out an institutional framework and a series of principles to guide Parties’ action.⁵ The UNFCCC thus performs a constitutional role, laying down the foundations of the climate regime. This regime has over the years been progressively constructed by means of the rule-making activities of treaty bodies, which, for example, established harmonized procedures concerning the reporting of Parties’ emissions.⁶

International cooperation on climate change has henceforth 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 the UNFCCC process is ‘particularly important’ but ‘not unrivalled’.⁷ In its twenty odd years of existence, the international climate regime has become

¹ United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994) (‘UNFCCC’).

² As of 31 January 2016, 197 Parties (including the European Union) have ratified the Convention. See UNFCCC, Status of Ratification, available at <http://unfccc.int/essential_background/Convention/status_of_ratification/items/2631.php>.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005) (‘Kyoto Protocol’).

⁴ UNFCCC, Article 2.

⁵ UNFCCC, Articles 3 and 7-11, respectively.

⁶ The conceptualization on the constitutional vis-à-vis the regulatory and harmonization role of international law is operated in Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009), at 9-10.

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

increasingly compartmentalised and fragmented,⁸ through the interaction of law-making and standard-setting processes carried out within and without the institutional scope of the UNFCCC.⁹

These intense law- and institution-making activities have produced important results, when one considers the high level of compliance with Parties' reporting obligations, as well as with the targets embedded in the Kyoto Protocol.¹⁰ Yet doubtlessly action undertaken to date is inadequate to achieve the objective identified in the UNFCCC, raising uncomfortable questions about the adequacy of the climate regime to provide actual solutions to the problem at hand.

After much tribulation and the almost collapse of the whole architecture in 2009, the quest for the means to achieve the objective of the UNFCCC resulted in the 2015 Paris Agreement.¹¹ Following a record-breaking ratification process, the Agreement entered into force on 4th November 2016, not even a year after its adoption.

The expectations for this new treaty could hardly be any higher: the Paris Agreement embeds a new approach to international climate governance, which is expected to move Parties beyond the stalemate that has hindered progress towards tackling climate change. Formally the Paris Agreement can be regarded as an ancillary treaty to the UNFCCC,¹² building on its principles¹³ and institutional arrangements,¹⁴ and is explicitly meant to enhance its implementation.¹⁵ As such, the Paris Agreement does not dismantle the pre-existing international climate change law architecture, but rather builds upon it. Yet, the agreement embraces a new bottom-up approach to climate change governance, which postulates the re-design of the existing international climate change institutional and regulatory architectures. Most crucially, the Paris Agreement sheds no light on the future of the Kyoto Protocol, an embattled treaty that includes no sunset clause, but has clearly been superseded by circumstances and whose future Parties to the climate regime have long struggled to determine.

This paper considers the evolution of international climate change law-making and governance, focussing on challenges that have faced the implementation of existing climate instruments, and on the suitability of the Paris Agreement to address these challenges. The paper follows a two-

⁸ As suggested for example in Cinnamon P Carlarne, 'Good Climate Governance: Only a Fragmented System of International Law Away?' (2008) 30 Law & Policy 450; and 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).

⁹ 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), at 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, at 446.

¹⁰ See Michael Grubb, 'Full Legal Compliance with the Kyoto Protocol's First Commitment Period – Some Lessons' (2016) Climate Policy 1.

¹¹ Paris Agreement, Paris, 12 December 2015, not in force.

¹² As argued also in Savaresi, 'The Paris Agreement' (n 1), at 20.

¹³ Paris Agreement, Preamble and Article 2.

¹⁴ Paris Agreement, Articles 16-18.

¹⁵ Paris Agreement, Article 2.1.

pronged approach. The first part reflects on international climate change law-making, and on what has changed with the adoption of the Paris Agreement. The second part of the paper considers the shift in international climate change governance, from the demise of the ‘targets and timetables’ approach embedded in the Kyoto Protocol, to its replacement with the ‘pledge and review’¹⁶ approach embedded in the Paris Agreement. While the suitability of the latter approach to deliver the solution to the climate change problem remains to be tested, this paper reflects on the past of the climate regime, to gauge where the implementation of the Paris Agreement may lead, as well as potential pitfalls lying ahead.

2. International climate change law-making

As all other climate treaties before it, the Paris Agreement will be formally binding upon its Parties. The scope of Parties’ obligations, nevertheless, will depend on the interpretation of the language in each provision of the treaty. Some provisions in the Agreement establish categorical obligations, such as, for example, that to pursue domestic mitigation measures.¹⁷ Others, instead, are expressed in less categorical terms, like that concerning developing countries move towards emission reduction targets.¹⁸ 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.¹⁹ The nature of obligations enshrined in the Paris Agreement therefore depends on the way they are termed in the treaty, and, most importantly, on Parties’ interpretation of these obligations in the practice of implementation. This practice may turn what may sound like hortatory provisions into a sophisticated web of reciprocal State obligations, and, conversely, turn into dead letter what were construed as categorical obligations.

The climate regime provides eloquent examples of both. One example of the first is the body of rules concerning REDD+.²⁰ These rules have emerged in a tumultuous fashion, from a long string of decisions adopted by the Conference of the Parties (COP) to the UNFCCC,²¹ which are *ex se*

¹⁶ The conceptualization of 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.

¹⁷ Paris Agreement, Article 4.2.

¹⁸ Paris Agreement, Article 4.4.

¹⁹ Paris Agreement, Article 6.

²⁰ 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 Long-term Cooperative Action under the Convention (UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011), at paragraph 70.

²¹ These decisions are recalled in Paris Agreement, Article 5.2.

non-legally binding. This quintessentially bottom-up architecture has progressively hardened in a set of specific obligations, which now encumber Parties wishing to carry out REDD+ activities.²²

Conversely, the Kyoto Protocol features several examples of categorically formulated obligations that have progressively descended into irrelevance. The Protocol famously enshrined in its annex specific targets and timelines for the progressive reduction of emissions in developed countries. These targets and timelines were multilaterally negotiated in a process of political bargaining and formally enshrined in the Protocol,²³ following the model deployed with the Montreal Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer.²⁴ Even though the Protocol unequivocally requires all developed country Parties to adopt targets for subsequent periods,²⁵ after the elapse of the first one, it was impossible to negotiate new targets for some developed country Parties. And even for those Parties who did undertake new targets, commitments for the period 2013-2020 are presently not formally binding, pending the entry into force of the related amendment to the Kyoto Protocol.²⁶

This interplay is far from unique to the climate regime. So-called ‘autonomous institutional arrangements’²⁷ are a recurrent feature of MEAs and render international environmental law treaties living instruments into which, to say it with Brown Weiss, Parties ‘continuously breathe life and to which they give new directions by acting as informal legislatures.’²⁸ MEAs treaty bodies perform a variety of law-making functions. At times these functions are an emanation of specific delegated rule-making powers.²⁹ The rationale for delegating the adoption of such rules to treaty bodies is that to flexibly negotiate technical matters that need periodical review and adjustment and would scarcely be suited to be embedded in treaty text.³⁰ 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 their decisions obligatory.³¹ Whether or not the decisions of treaty bodies acquire the guise of binding law, therefore, is a matter of context specific assessment and interpretation.³²

²² As argued in Christina Voigt, ‘Introduction: The Kaleidoscopic World of REDD’ in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (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).

²³ Kyoto Protocol, Article 3.1 and Annex B.

²⁴ Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987, in force 1 January 1989).

²⁵ Kyoto Protocol, Article 3.9.

²⁶ Doha Amendment to the Kyoto Protocol, Doha, 8 December 2012, not in force.

²⁷ 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.

²⁸ Edith Brown Weiss, ‘The Rise or the Fall of International Law’ (2000) 69 *Fordham Law Review* 345, at 352.

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

³⁰ As suggested in Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007), at 216-220; and in Gregory C Shaffer and Mark A Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2009) 94 *Minnesota Law Review* 706, at 719.

³¹ As suggested also in Boyle and Chinkin (n 32), at 151-152.

³² As pointed out also in van Asselt, Sindico and Mehling (n 7), at 430.

Even within the context of MEAs, international climate change law is remarkable for its latitude. The UNFCCC and the Kyoto Protocol may be regarded as conspicuous examples of living international law instruments, and the negotiated expression of Parties' consensus embodied in guidance adopted by treaty bodies has become the backbone of the climate regime.³³ The UNFCCC COP, its subsidiary bodies³⁴ and their homologues under the Kyoto Protocol³⁵ have been most prolific international law-making machineries. These bodies 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 'amplified' the terms of UNFCCC and the Kyoto Protocol, filling in their 'open-textured'³⁶ provisions with content, by adopting both hard rules that Parties are expected to uphold in implementing their obligations,³⁷ as well as soft guidance that may be regarded as 'authoritative' sources of interpretation of the terms of treaties, or even practice that concurs to the formation of customary rules.³⁸

The recent adoption of the Paris Agreement marked the beginning of a new, predictably lengthy law-making process, whereby Parties will fill with content the open-textured provisions in the new treaty. Some details of this process are already charted in the COP decision that formally adopted the Paris Agreement.³⁹ The decision entrusts some issues to the COP serving as the meeting of the Parties to the Paris Agreement; others 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 UNFCCC subsidiary bodies. In multilateral environmental governance prolonged rule-making is standard practice after constitutional moments, like the adoption of the Paris Agreement. Nevertheless, the path lying ahead of the APA is laden with potentially explosive issues, including the future of the Kyoto Protocol and of the institutions it created.

Adjusting the extant institutional framework to support the implementation of Parties' obligations will be a delicate task. While the debate on this issue has already started, it will take time and effort to revisit the present existing institutional and legal frameworks to adequately serve the purposes of the Paris Agreement. This challenging task is no mean undertaking for the climate regime's treaty bodies, which typically operate on the basis of consensus. In a process with 197 Parties, consensus is hard to obtain and often leading to lowest common denominator outcomes,⁴⁰

³³ Along similar lines, see French and Rajamani (n 8), at 445.

³⁴ UNFCCC, Article 7.2(i).

³⁵ Kyoto Protocol, Article 13.4.

³⁶ These expressions are used in Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly* 901, at 905.

³⁷ Building upon specific mandates conferred upon them by the treaties, e.g. Kyoto Protocol, Articles 3.4 and 12.7.

³⁸ Cf. Boyle (n 25), at 905 and 903, respectively.

³⁹ As detailed in Decision 1/CP.21, Adoption of the Paris Agreement, (UN Doc. FCCC/CP/2015/10, Add.1, 29 January 2016), at 26, 28, 31, 34, 92-95 and 100-102 for the Ad Hoc Working Group on the Paris Agreement; and 29, 34, 37, 39-41, 58, 68, 76-77 and 101 for the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice.

⁴⁰ As suggested in Boyle and Chinkin (n 32), at 159.

and where institutional viscosity is the norm.⁴¹

Another major element yet to be determined is the role of non-State actors in international climate change governance. International climate law-making has long been characterized by the participation of a very diverse constituency of non-State actors.⁴² Non-State actors may attend meetings of the Parties, without voting.⁴³ These actors cannot formally participate in international law-making, but have over the years gained increasing visibility.⁴⁴ In lead up to the adoption of the Paris Agreement, unprecedented UNFCCC initiatives showcased and promoted voluntary emission reductions by non-State actors such as companies and subnational governments.⁴⁵ The preamble of the Paris Agreement builds upon these initiatives, recognizing for the first time in a climate treaty the importance to engage ‘all levels of government’ and ‘various actors’ in addressing climate change.⁴⁶ Furthermore, while the UNFCCC already made generic reference to public participation in addressing climate change and its effects and developing adequate responses,⁴⁷ the Paris Agreement specifically emphasizes enhanced public and private sector participation in the implementation of States’ nationally determined contributions (NDCs).⁴⁸

These recent 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, negotiations on arrangements for the review of implementation of the Paris Agreement may also open the door to greater non-State actors’ involvement in international climate change governance, for example enabling their participation in the review process, building upon precedents established with other MEAs.⁴⁹

Another element that came to fore during negotiations of the Paris Agreement is the need to build synergies with other international law forums whose mandate overlaps with that of the climate regime. The Paris Agreement has broken new ground by tracing explicit links between climate change and human rights,⁵⁰ and its accompanying COP decision acknowledges the importance of liaising with other international processes on matters such as climate finance⁵¹ and human

⁴¹ On the notion of viscosity, see Daniel W Drezner, ‘The Viscosity of Global Governance: When Is Forum-Shopping Expensive’ (2006) <https://www.princeton.edu/~pcglobal/conferences/IPES/papers/drezner_S1100_16.pdf> accessed 11 October 2016.

⁴² Bas Arts, *The Political Influence of Global NGOs: Case Studies on the Climate and Biodiversity Conventions* (International Books 1998).

⁴³ UNFCCC, Article 7.6 and, Kyoto Protocol, Article 13.8.

⁴⁴ See e.g. 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).

⁴⁵ See Lima-Paris Action Agenda and the Non-State Actor Zone for Climate Action (NAZCA) platform launched in 2014.

⁴⁶ Paris Agreement, Preamble.

⁴⁷ UNFCCC, Article 6

⁴⁸ Paris Agreement, Article 6.8.

⁴⁹ 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, at 96.

⁵⁰ Paris Agreement, Preamble.

⁵¹ Decision 1/CP.21, at 44.

displacement.⁵² The years ahead will show whether and how these openings will provide new tools to tackle issues, like finance and human displacement, which have long been neglected by the climate regime.

3. International climate change governance: from top-down to bottom-up

The Paris Agreement enshrined in treaty form the bottom-up pledge-and-review approach to international climate governance emerged since the ill-fated Copenhagen Climate Change Conference in 2009.⁵³ This approach relies on Parties unilaterally declaring the action they intend to undertake to reduce their emissions, which is in turn to be subjected to a review process. In this context, the international climate change bureaucracy works as a notary collecting, and eventually enabling the review of the implementation of Parties' pledged action. This new architecture leaves a very wide margin of discretion to States on how to contribute to the endeavor of tackling climate change. The Paris Agreement imposes upon each Party the obligation to prepare, communicate and maintain successive NDCs and to pursue mitigation activities at the national level.⁵⁴ These obligations of conduct,⁵⁵ whereby each Party is required to submit information on how they intend to reduce their emissions and by how much, are largely procedural in nature.⁵⁶ While 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.⁵⁷ This guidance is crucial to the review Parties' action.

The Paris Agreement lays out the foundations of a new system to review the effectiveness, implementation and compliance with Parties obligations.⁵⁸ Even though the details of this architecture remain to be determined, it is worth reflecting on what is actually new in the legal framework established by the Paris Agreement, and why this is important.

Before the adoption of the Paris Agreement, the climate regime was already equipped with tools to enable the review of implementation and compliance.⁵⁹ The UNFCCC and the Kyoto Protocol established two separate and overlapping review systems. The Kyoto Protocol and the decisions

⁵² Decision 1/CP.21, at 50.

⁵³ Decision 2/CP.15, Copenhagen Accord, UN Doc. FCCC/CP/2009/11/Add.1, 30 March 2010.

⁵⁴ Paris Agreement, Articles 3 and 4.2.

⁵⁵ Paris Agreement, Article 4.2.

⁵⁶ As argued also Daniel Bodansky, 'The Legal Character of the Paris Agreement' (forthcoming, 2016) 25:2 Review of European, Comparative and International Environmental Law; and Annalisa Savaresi, 'The Paris Agreement: A Rejoinder' (*EJIL: Talk!*, 16 February 2016) <<http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>> accessed 20 April 2016.

⁵⁷ Paris Agreement, Article 4.13; and Decision 1/CP.21, at 31.

⁵⁸ This categorisation of review processes is borrowed from Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011), at 242. See also Savaresi, 'The Paris Agreement' (n 52).

⁵⁹ This conceptualisation of review processes is made in Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011), at 242. I relied on this conceptualisation also in Savaresi, 'The Paris Agreement' (n 52).

of its treaty bodies created a machinery to review of implementation and compliance that is rather sophisticated and advanced by MEAs standards.⁶⁰ Under the Protocol, the reporting of information, and the process for the review of implementation of Parties' obligations, are geared towards ascertaining fulfillment of developed countries' emission reduction and limitation targets. These targets represent obligations of result,⁶¹ which are assisted by a rich set of obligations of conduct concerning the reporting of information, to enable the review of Parties' implementation and compliance. These reporting obligations build and expand upon those already established under the UNFCCC.

The UNFCCC contains only skeletal references to the review of implementation of Parties obligations and is not endowed with a compliance mechanism. Nevertheless, with the emergence of a pledge and review approach to climate change governance in 2009, Parties' reporting obligations under the UNFCCC were increased in frequency and expanded in scope, including new elements, such as, for example, the provision of assistance to developing countries.⁶² The review processes for developed and developing countries, however, remained differentiated.⁶³ The review of compliance was carried out only under the Kyoto Protocol, and only in relation to developed countries. The review of effectiveness of action, instead, was unsuccessfully attempted with the so-called 2013-2015 Review,⁶⁴ and did not result in a process to adjust Parties' level of ambition.

The UNFCCC and the decisions adopted by its treaty bodies have over the years established a facilitative process to provide information on the implementation of their obligations, which does not attach consequences to lack of compliance. While implementation of these arrangements has only recently begun, it has already evidenced some shortcomings.⁶⁵ First, the lack of a standard template to report pledged mitigation action before 2020 hindered comparison between Parties' efforts. Unsurprisingly, implementation of the review arrangements under the UNFCCC has shown that the reporting of information in a transparent and complete manner is harder where no standard definitions and/or methods exist.⁶⁶ Second, the review process under both the Kyoto

⁶⁰ As argued for example also in Renee Lefebvre and Sebastian Oberthür, 'Key Features of the Kyoto Protocol's Compliance System', *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press 2011), 77; and Meinhard Doelle, 'Compliance and Enforcement in the Climate Change Regime' in Erkki Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer 2012), 165.

⁶¹ 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.

⁶² Decision 1/CP.16, at 42.

⁶³ Decision 1/CP.16, 44-46 and 63-64.

⁶⁴ Decision 1/CP.16, at 4 and 138.

⁶⁵ 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.

⁶⁶ As reported in Ellis and Moarif (n 66), at 4.

Protocol did not provide means to ‘ratchet up’ ambition over time and align with recommendations received from climate scientists. Third, developing countries have struggled to comply with their increased reporting obligations under the UNFCCC,⁶⁷ thus drawing attention to the need for dedicated assistance and capacity building.

The Paris Agreement builds and expands upon existing review procedures under the UNFCCC,⁶⁸ potentially addressing these shortcomings. The Agreement provides for the development of a set of rules to standardize Parties’ reporting of information.⁶⁹ A Capacity-building Initiative for Transparency is set to support developing country Parties in meeting their enhanced transparency obligations.⁷⁰ Most crucially, the Paris Agreement has largely leveled the approach to the review of implementation,⁷¹ which will build on and supersede extant arrangements.

The Paris Agreement establishes the premises for the creation of a machinery to periodically review Parties’ efforts, both at the individual⁷² and at the aggregate level.⁷³ Implementation of the Agreement will furthermore be assisted by an expert-based, facilitative compliance mechanism.⁷⁴ Even though the details of this compliance mechanism remain to be determined, it seems clear that it will follow what has been described as a ‘managerial’, rather than an ‘enforcement’ model.⁷⁵ In other words, as under other MEAs, the Paris Agreement’s compliance committee will not so much coerce, but rather encourage compliance, enabling Parties’ consultation, cooperation and peer pressure. 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.

The possibility to create a Kyoto Protocol-like review of compliance for all Parties in the near future seems fanciful. Building upon the architecture developed under the Kyoto Protocol would however have obvious advantages. First, it would enable Parties to capitalize on experience accumulated with the implementation of extant rules and review processes, adjusting them to the specific regulatory needs arising under the Paris Agreement. Second, it would cater for the needs of Parties wishing to avail themselves of emission trading for climate change mitigation, enabling the tradability of credits across jurisdictions, as well as to attach consequences to non-compliance that have a strong bite. In an ideal world, rules adopted under the Kyoto Protocol would therefore be scaled up to apply to all Parties, after having been reformed to address shortcomings that have become apparent in their implementation.⁷⁶ Whether Parties to the Paris Agreement have the political will necessary to build such a robust framework seems doubtful. Yet, it is vital that over

⁶⁷ 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.

⁶⁸ Decision 1/CP.21, at 99.

⁶⁹ Paris Agreement, Article 4.13; and Decision 1/CP.21, at 31.

⁷⁰ Decision 1/CP.21, at 85.

⁷¹ Paris Agreement, Article 13.

⁷² Paris Agreement, Article 13.

⁷³ Paris Agreement, Article 14.

⁷⁴ Paris Agreement, Article 15. See also Christina Voigt, ‘The Compliance and Implementation Mechanism of the Paris Agreement’ (2016, forthcoming) 25:2 *Review of European, Comparative and International Environmental Law*.

⁷⁵ Bodansky (n 58), at 236.

⁷⁶ This suggestion is made also in Savaresi, ‘A Glimpse into the Future of the Climate Regime: Lessons from the REDD+ Architecture’ (n 8).

time all Parties move towards a robust framework for reporting and reviewing the implementation of their obligations.

Finally, another novel aspect of the Paris Agreement is that alignment with the 2° C goal will be periodically assessed, by means of a so-called stock take exercise, which, at least in theory, will induce Parties to adjust their action over time.⁷⁷ How this process will work in practice remains to be seen. Still, this global stock take already is an evolution when compared with the lack of means to ratchet up ambition under the UNFCCC. Here too, non-State actors can be expected to perform an important role, both in terms of the provision of information, as well as of means to put pressure upon Parties.⁷⁸

4. Conclusion: what the past tells us about the future

The Paris Agreement can be regarded as an expression of political will to tackle climate change in a new way, and in conformity with the all-encompassing nature of the problem at hand. The Agreement also seems to mark a new start in international climate governance, through a bottom-up approach to State action and greater non-State actors' involvement. Compared with the UNFCCC, the Paris Agreement is a great leveler of Parties' obligations, most saliently in relation to mitigation and the provision of information. Compared with the Kyoto Protocol, the diminished legal force attached to Parties' substantive commitments is compensated by the ecumenical commitment to emission reductions, as well as by a unitary system for the review of implementation, compliance and effectiveness.

From a law-making perspective, the adoption of the Paris Agreement is the beginning of a new lengthy regulatory season, whereby Parties will engage in a collective exercise to interpret and fill in with content the broadly worded obligations enshrined in the treaty. The history of international climate change law-making thus far indicates that crafting these rules is unlikely to be easy or quick. The first session of the subsidiary bodies after the adoption of the Paris Agreement has already shown that keeping this process orderly and efficient is paramount. In this process, Parties should resolutely tackle the institutional proliferation that plagues the climate regime, discarding processes and institutions that are no longer needed.

From a governance perspective, it is vital that law-making under the Paris Agreement delivers adequate intergovernmentally-coordinated rules, without leaving excessive discretion to Parties. This is especially so in relation to the carbon integrity of Parties' action. Even in a bottom-up architecture, the reporting of information concerning emissions and removals needs to align with rigorous and homogenous rules and review procedures, which should be applicable to all Parties. Another area where some coordination is indispensable is the development of common standards for emission trading. Experience with extant arrangements has revealed concerns over double counting and leakage. The secondary rules adopted under the Paris Agreement should tackle these concerns head-on, establishing common parameters to ensure the integrity of emission trading.

⁷⁷ Paris Agreement, Article 14.3

⁷⁸ As suggested in van Asselt (n 46), at 106.

It would nevertheless be naïve to expect the Paris Agreement to be a miraculous cure for all the maladies of the climate regime. While the adoption of a new approach to international climate governance was a matter of necessity, given the toppling of the approach embedded in the Kyoto Protocol, a change in architecture is not in itself a guarantee of success. The Paris Agreement leaves unsolved a series of difficult and unpalatable questions. The devil clearly is in the details, and in coming years much work will be needed to craft the rules to operationalize the related provisions and reach political compromise.

Experience accrued with the implementation of the UNFCCC and the Kyoto Protocol is a precious term of reference to detect the pitfalls lying ahead, and how to avoid repeating the mistakes of the past. The Paris Agreement already encompasses new elements, which were missing or inadequately addressed in the existing climate architecture. It adopts a collective long-term goal on climate change mitigation, to be supported by efforts from all Parties. It establishes a periodic process for the submission of information on Parties' efforts, laying out the premises for their standardization over time, as well as for their review, both at the individual, as well as at the aggregate level. Most crucially, the Agreement has dismantled the differentiation firewall in the Kyoto Protocol, replacing it with a more flexible approach, which is cognizant of the need to involve all Parties in tackling climate change. All these factors augur well for a regime whose outlook has been rather bleak for quite a while. Only time will tell whether these auspicious signs have in fact marked a genuine palingenesis in international climate governance.