Interlegality - Symposium

From Conflictual to Coordinated Interlegality: The Green New Deals Within the Global Climate Change Regime

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Abstract

Climate change is one of the most wicked problems we have to deal with in the 21st century. No need to say, it is a problem of politics. The paper will first outline, taking a historical perspective, the institutional developments global climate change governance has been experiencing within the last two decades, with a particular focus on the contrast between Kyoto Protocol (KP) and Paris Agreement (PA) and their distinctive mode of governance. It is going to argue that the PA created an atmosphere not only for the flourishing of transnational and national actors but also for the popping up the Green New Deals all across the world.

The conflictual relationship between different national legal orders is likely to turn to a more coordinated one thanks to the fertile mode of governance established with the PA. In its final part, the article will analyze this turn to cooperative relationship, upon having shown the deficiencies of GAL and mere political approaches, through the lenses of inter- legality.

I. Introduction

The European Union (EU) launched its Green New Deal (GND) on December 2019 just before the explosion of the health crisis caused by COVID-19. With the pandemic emergency, other new GNDs have been launched across the world by major states such as the US, China, and India. Recently, South Korea has also followed this trend by giving GND a prominent place in its post-COVID-19 stimulus plan.[1] What is more, today the GND is a highly debated phenomenon even in countries where it is yet to be realized.[2] Unsurprisingly, the repercussions of the EU's GND have been felt even in countries where climate change is traditionally not an item on the agenda such as Turkey. Such plurality of GNDs raises a number of questions: What are the underlying reasons for this trend of

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[1] J.H. Lee and J. Woo, 'Green New Deal Policy of South Korea: Policy Innovation for a Sustainability Transition'12 (23) *Sustainability*, 10191 (2020).

[2] See for Latin America D.A. Cohen and T. Riofrancos, 'Latin America's Green New Deal' 52(4) *NACLA Report on the Americas*' (2020); for South Africa B. Bungane, 'S. Africa: SANEDI endorses Green New Deal for economic recovery' (2020), available at https://tinyurl.com/2p83823h (last visited 31 December 2021).

GNDs? Why are we witnessing the rise of GNDs? And is this trend a mere reflection of the global regulatory competition between global powers with respect to the question of how to regulate climate change regime (complex)? [3] Or does it result from the flexible and productive legal framework created by the Paris Agreement?

To address these questions, this article will first look at the climate change regime by taking an institutional perspective (§ II). In doing so, it will show how the institutional structure of the climate change governance system led by the United Nations (UN) and its mode of governance have undergone a process of transformation, not least in the period following the Copenhagen Accord (§ II.1 - II.2). By highlighting the differences between Kyoto Protocol and Paris Agreement, the article will argue that the mode of governance established with the Paris Agreement has provided a fertile ground for both empowerment and subjectivation of the nation-states (§ II.3), and this has in turn given rise to the flourishing of the GNDs all across the world because the states are obliged to honor their promises (nationally determined contributions) they pledged (§ II.4). In the second part, it, upon refuting the arguments deployed by political scientists, will shed light on the relationship between legalities within the global climate change regime by adopting a legal realist lens and benefiting from the theoretical approaches such as Global Administrative Law and Inter-legality (§ III). To this end, it will focus on the territorial, or state-based legalities within the global climate change regime, that is, it will dwell on infra-systemic inter-legality and disregard the impacts of the other sectoral regimes on climate change regime. Resting its analysis on infra-systemic inter-legality, the article will argue that we are experiencing a turn from conflictual to coordinated relationship between legalities under the global climate change regime, not least after the significant changes introduced with the Paris Agreement (§ IV). It will conclude by hinting at some possible ramifications of the GND for the EU.

II. The UN Climate Change Regime

1. Situating the Institutional Problems

Climate change is one of the gravest problems we must deal with in the 21st century. Needless to say, it is a problem of politics. It forces us to face the

[3] For the sake of linguistic simplicity, the article will use the term climate change regime; nevertheless, it should not come to mean that climate change regime is a full-fledged regime as exemplified by the WTO. Hence, the term is used during the article in the loose sense in a way that encapsulates integrated regimes, loosely coupled regime complexes, and the various modes of experimental governance situated between these two opposite poles. See for a very illuminating study that highlights these various modes of governance G. de Búrca, R.O. Keohane and C. Sabel, 'New Modes of Pluralist Global Governance' 45 *NYU Journal of International Law and Politics*, 723-786 (2013).

ineffectiveness of the international legal order established after the Second World War and our failure in how we are tackling global collective action problems. Traditional international law paradigm steeped in the idea of equality of states and unanimity rule for decision-making, on the one hand, and state's reluctance and diverging interests, on the other, are probably main reasons for this failure. It signals also how ineffective our international legal order, established after the Second World War, is in the face of today's highly challenging problems. Thus, it is not a coincidence that with the turn of the century we witnessed a Cambrian explosion of transnational organizations (TNO) as a complement to the ill-founded intergovernmental organizations (IGO)[4] of the cold-war period. By way of illustration, transnational organizations, controlled by non-state actors and performing administrative-like functions, has mushroomed in the last three decades, while the IGOs has remained static and fluctuated around Two Hundred and Fifty.[5] On top of this, states have circumvented formal and multilateral international treaties such as UN-led climate change regime and had recourse to informal, clublike structures to reach a decision that has a global effect despite the lack of participation. This trend shows that the gap created by the shortage of IGOs in addressing the new challenges of global governance has been filled by functionally equivalent institutions. In other words, the 21st century brings with it not only an apparent rise in the quantity of international organizations, transnational institutions, international agreements and treaties but also a qualitative change in the form of international authorities such that it has heightened the likelihood of collision of legalities, be it in the form of institutional or normative collisions.[6]

2. Institutional Developments Outside the UN-Led Climate Change Regime

Such 'institutional revolution'[7] was nothing more than an answer to the spatial revolution of the globalization displacing the states from their position of general ends entity.[8] On this account, states are either under-effective because

[4] K.W. Abbott, 'The Transnational Regime Complex for Climate Change' 30(4) *Environment and Planning C: Government and Policy*, 571-590 (2012); K. Dingwerth and J.F. Green, 'Transnationalism', in K. Backstrand, E. Lövbrand eds, *Research Handbook on Climate Governance* (Cheltenham Glos-Northampton Massachusetts: Edward Elgar Publishing, 2015), 155.

[5] K.W. Abbott, J.F. Green and R.O. Keohane, 'Organizational Ecology and Institutional Change in Global Governance' *International Organization*, 249 (2016); S. Battini, 'The Proliferation of Global Regulatory Regimes', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham Glos-Northampton Massachusetts: Edward Elgar Publishing, 2016), 47.

[6] See for a concise summary of the literature engendered by the fragmentation of international law C. Kreuder-Sonnen, M. Zürn, 'After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management' *Global Constitutionalism*, 9(2), 241-267 (2021).

[7] K.W. Abbott, J.F. Green and R.O. Keohane, n 5 above, 271-272.

[8] 'A state is a "general ends" entity, and its job is to be responsible for the whole, without

they cannot cope with the global dimension of regulation by themselves or over-effective because their regulations may have extraterritorial effects (regulation without representation).[9] While states may address the effectiveness deficit by controlling the foreign regulations effecting its own legal order, they may wipe out the accountability deficit by paying heed to the outsiders' interest.[10] As a result, the international order established after the Second World War in which states are the main actors gave way to a more pluralist, even partially nonconsensual legal order with globalization.[11] In short, '(t)he national differentiation of law is now overlain by sectoral fragmentation',[12] and territorially bound legal jurisdiction is replaced or complemented by functionally determined jurisdictions that claim global validity. When it comes to climate change regime, transnational organizations come to the help of climate change legal order instituted by the Rio Declaration when it stops short of addressing the environmental problems. Alongside the formal legal institutions of the Rio such as the UN Framework Conventions on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD) we have witnessed the rise of transnational organizations such as ISO 14000 environmental management standards, Carbon NZero, and CarbonFree Certified, on the one hand, and clublike small, minilateral arrangements and temporary collaborations such as G7/G8, G20, and MEF.

The UNFCCC was supposed to be complemented and fleshed out with the further annual conferences of the Parties (COP). Thus, the Convention, adopting 'framework convention plus model, took on essentially a procedural form' and 'its substantial provisions were formulated in rather vague language'.[13] By analogy, it is the framework constitution setting the boundaries and general purposes of the climate change rather than a substantive one. For instance, Art 2 of the UNFCCC laid down that the objective of the treaty is to stop the

aiming to execute one particular function at the expense of others'. G. Palombella, 'Theory, Realities and Promises of Inter-Legality: A Manifesto', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019), 369. Raz also points to this feature of legal systems, claiming that legal systems are comprehensive, that is, they 'claim authority to regulate any type of behaviour. In this they differ from most other institutionalized systems. Sport associations, commercial companies, cultural organizations or political parties are all established in order to achieve certain limited goals and each claims authority over behaviour relevant to that goal only', J. Raz, *Practical Reasons and Norms* (Oxford: Oxford University Press, 3rd ed, 1999), 150.

[9] S. Battini, n 5 above, 49-50.

[10] ibid 53.

[11] See for the failure of consensual multilateralism and the turn to informal, non-consensual rulemaking N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' 108(1) *American Journal of International Law*, 1-40 (2014).

[12] G. Teubner and A. Fischer-Lescano, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25(4) *Michigan Journal of International Law*, 1008 (2004).

[13] D. Coen, J. Kreienkamp and T. Pegram, *Global Climate Governance* (Cambridge: Cambridge University Press, 2020), 18.

greenhouse gas (GHG) emission 'at a level that would prevent dangerous anthropogenic (ie, human) interference with the climate system'. It was assumed that further conferences or treaties will put flesh on the bones of the framework treaty. The first attempt in this endeavour came with the Kyoto Protocol, ratified in 1997 and entered into force in 2005, aimed at operationalizing the UNFCCC's objectives. It set specific binding GHG emission reduction targets for the developed countries[14] by somehow under the spell of the success coming with the Montreal Protocol on Substances that Deplete the Ozone Layer, which is also embraced a top-down and highly prescriptive approach.[15] In turn, it failed to live up to its promises and Canada, Russia and Japan abstained from adopting new targets for the 2013-2020 period.[16] It was, as highlighted by Heyvaert, a

> 'paragon of regulatory precision, laying down quantified emission reduction targets relating to specific greenhouse gases, to be achieved within a well-defined timeframe'.[17]

In the face of this obvious failure of multilateralism and formal climate change regime, countries and transnational organizations headed towards different organizations or institutions to promote their own interests[18]. While 'fragmenters' resisted the UN-led formal climate change regime due to its strict mitigation targets and negative effects on economy, on the other are 'deepeners', which pushed forward for more ambitious measures and policies by dint of their dissatisfaction with the ineffective UN regime[19]. Under these conditions, the fora such as G7/8, G20, MEF, APP, and countless transnational organizations served the interest of both groups. They were used for either good cause in order to induce the recalcitrant states to take further actions or for bad reason in order to sidestep the UN regime and shy away from the Kyoto Protocol's strict provisions. While the EU and its member states exemplify the former, the United States (US) can be conceived of as the prime example of the latter. It was in this context that climate change problems gained significant traction outside the formal framework of climate change regime by virtue of transnational organizations and minilateral, clublike meetings in the first decade of the twenty-first century.

[14] B.A. Dikmen, 'Global Climate Governance Between State and Non-State Actors: Dynamics of Contestation and Re-Legitimation' 8 (Özel Sayı) *Marmara Üniversitesi Siyasal Bilimler Dergisi*, 64 (2020).

[15] D. Coen, J. Kreienkamp and T. Pegram, n 13 above, 18.

[16] D. Bodansky, 'Transnational Legal Order or Disorder?', in T.C. Halliday and G. Shaffer eds, *Transnational legal orders* (New York: Cambridge University Press, 2015), 293.

[17] V. Heyvaert, 'Regulatory Competition—Accounting for the Transnational Dimension of Environmental Regulation' 25(1) *Journal of Environmental Law*, 13 (2013).

[18] This phenomenon is couched in different terms such as contested multilateralism, regime shifting, counter-institutionalism, and competitive multilateralism. See eg, J.C. Morse, R.O. Keohane, 'Contested multilateralism' 9(4) *The Review of International Organizations* (2014).

[19] B.A. Dikmen, n 14 above, 64.

3. The Transnationalization of International Law with the Paris Agreement

a) Modus Operandi of Climate Change After the Paris Agreement

Although the Copenhagen Accord had bitterly shattered the hopes of environmental activist owing to its failure in concluding a new comprehensive agreement as a replacement of the Kyoto Protocol (KP), the following COPs set the stage for the landmark COP21 Paris Agreement (PA), which then transformed drastically the *modus operandi* of the climate change governance.[20] The PA explicitly stipulated that it would 'be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties'.[21] Thus, it was a further movement from the top-down approach of the KP towards a designed 'bottom-up architecture, consisting of national pledges and international scrutiny'.[22] In a nutshell, it was 'a transition from a 'regulatory' model of binding, negotiated emissions targets to a 'catalytic and facilitative' model that seeks to create conditions under which actors progressively reduce their emissions through coordinated policy shift'.[23] In the subsequent years following the CA, it is also telling to see the rise of transnationalism and regime complex scholarship, which portrayed the climate change governance as a regime complex consisting of 'loosely coupled system of institutions' without 'no clear hierarchy or core'[24] as opposed to a full-fledged regime with substantive treaty and high court exemplified with the World Trade Organization (WTO) and trade regime.

In the first instance, the PA dispensed with the idea that developed countries, which are mostly responsible for climate change, have to take necessary measures while developing countries are not obliged to make any effort due to their very limited contribution to it. By doing so, it dissolved the crude distinction between developed and developing countries, and instead embraced a more nuanced and cooperative approach to the principle of common but differentiated responsibility (CBDR).[25] Now, each country, irrespective of the degree of its economic development and contribution to the climate change, will certify its

[20] M. Fermeglia, 'Comparative Law and Climate Change', in F. Fiorentini and M. Infantino eds, *Mentoring Comparative Lawyers: Methods, Times, and Places* (Berlino: Springer, 2020), 238.

[21] Art 13 of the Paris Agreement, available at https://tinyurl.com/2p95jt7u (last visited 31 December 2021).

[22] D. Bodansky, 'Transnational Legal Order or Disorder?' n 16 above, 293.

[23] T. Hale, ' "All Hands on Deck": The Paris Agreement and Nonstate Climate Action' 16(3) *Global Environmental Politics*, 12 (2016); Id, 'Catalytic cooperation' 20(4) *Global Environmental Politics,* 73-98 (2020).

[24] R.O. Keohane and D.G. Victor, 'The Regime Complex for Climate Change' 9(1) *Perspectives on politics,* 9 (2011); see for the argument that Keohane and Victor dwell on international organizations in their analysis on climate change regime complex, thus theirs is an international regime complex rather than a transnational one, K.W. Abbott, n 4 above, 571-590.

[25] D. Coen, J. Kreienkamp and T. Pegram, n 13 above, 21

nationally determined contribution (NDC) to emission cuts every five years though it is incumbent upon the states to determine their own contribution to the global emission cut. In each five-year evaluation period, the countries will also be reviewed and evaluated as to their success in reaching the targets that was already set out by themselves. It, in doing so, refrained from giving a one-right-answer to the question to what extent developed countries should contribute to the GHG emission reductions *vis-à-vis* developing ones, and thereby kept its silence on the distributive questions at least for now.[26]

Second, it incorporated the transnational institutions into the UN-led climate change regime by considering them not 'as an alternative to the UNFCCC process, or as merely a helpful addition, but as a core element of its logic of spurring rising action on climate over time'.[27] This in fact contradicts with the traditional approach taken on by international environmental law scholarship whereby transnational actors may become an active member of international law only if their demands are mediated through states or the states serve as a transmission belt.[28] Hence, the PA signifies a turn to transnationalism, whose origins could be traced back to the Copenhagen Accord.[29] In other words, the agreement granted legal status to the transnational organizations, empowered and enlist them to help when the support of activists, journalists, scientist, civil societies, non-governmental organizations (NGOs), etc are in dire need. As poignantly stated by Slaughter,

> '(b)y the standards of a traditional treaty, it falls woefully short. Yet its deficits in this regard are its greatest strengths as a model for effective global governance in the twenty-first century'.[30]

In sum, the PA marks out a significant and very important moment of transition from hard to soft mode in climate change governance, as being also one of the prime examples for the global governance in the twenty-first century. It is not because it includes very important legal provisions in the formal treaty, but because it created a specific procedural structure that empowers transnational actors. As Bodansky recently put forward, the COPs has also undergone a significant transition during this period. And once it was centred around governments and their officials, now it is fair to say that

[26] R. Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' 92(5) *International Affairs,* 1115 (2016).

[27] T. Hale, ' "All Hands on Deck" 'n 23 above, 13-14.

[28] D. Bodansky, 'Thirty Years Later: Top 10 Developments in International Environmental Law: 1990-2020' *Yearbook of International Environmental Law*, 19, available at https://tinyurl.com/yhmx29bw (last visited 31 December 2021).

[29] T. Hale, ' "All Hands on Deck" ' n 23 above, 13 (drawing attention to the increased scholarly interest in transnationalism)

[30] A.M. Slaughter, 'The Paris Approach to Global Governance' *Project Syndicate,* 28 December 2015.

> 'all the action was really in the Bonn zone. When you go to the Bula Zone, where governments are negotiating … it was just pretty dead… there was no energy whatsoever'.[31]

In a nutshell, today it is safe to say that transnational organizations hold a very important place, not least thanks to the framework set up with the PA, in climate change governance, even much beyond the legal framework.

The ways that transnational organizations may engage in the review process are three-fold: i) in the global stocktakes, ii) in the transparency framework (Art 13), and iii) compliance mechanism (Art 15).[32] Given that global stocktake should rest on the 'best available science' pursuant to Article 14(2), it falls to the NGOs to observe the extent to which it complies with this requirement by also benefiting from the Intergovernmental Panel on Climate Change (IPCC) reports. With respect to the transparency framework, it is still a matter of controversy to what extent the PA displays a departure from the Kyoto Protocol. While some argues that the PA by prioritizing transparency over compliance marks a shift from compliance to transparency or 'from selective coercion to collectively supported competition',[33] others are sided with the idea of 'accountability continuum',[34] claiming that the parties' obligations vary from mere procedural, transparency requirement to binding compliance mechanism. For instance, the parties are obliged to deliver a Biennial Transparency Report (BTR) beginning from 2024, in which they must provide sufficient information on how they are to achieve and implement their NDCs. Despite this binding procedural obligation, the BTRs are not designed to enhance compliance, so they are supported only with weak compliance mechanisms such as Technical Expert Review and Facilitative Multilateral Consideration of Progress.[35] By contrast, the communication of the NDCs is an obligation backed by a stronger compliance mechanism, in the breach of which the Art 15 Committee will automatically initiate the consideration of the case. Against this backdrop, the transnational actors may first nudge half-hearted states through 'naming and shaming'[36] and push national governments to more ambitious NDCs in the

[31] In Bonn/Fiji COP 23 (2017), due to the absence of a large enough conference area, the two different area are allocated respectively for governmental officials (Bula Zone) and non-governmental organizations (Bone Zone). See for the Prof. Daniel Bodansky's speech; Daniel Bodansky, COP26 Lecture 1 – Prof. Daniel Bodansky, 'Road to Paris and Glasgow' *Youtube,* uploaded by Durham University, 9 March 2021, https://tinyurl.com/5funmvcr (00:38:40 – 00:39:00) (last visited 31 December 2021).

[32] H. Van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance Under the Paris Agreement' 6(1-2) *Climate Law*, 99 (2016).

[33] A.M. Slaughter, n 30 above.

[34] C. Voigt and X. Gao, 'Accountability in the Paris Agreement: The Interplay Between Transparency and Compliance' 1 *Nordic Environmental Law Journal*, 31-57 (2020).

[35] Art 13 of the Paris Agreement.

[36] B.A. Dikmen, n 14 above, 74; see for the argument that states may also exert pressure to each other R. Falkner, n 26 above, 1121-1123.

upcoming terms. However, this is the role that has already been played by the transnational organizations from the first years of climate change governance.[37] Having said that, it can be argued that transnational organizations, when armed with the IPCC's scientific reports and the PA's transparency requirements, may play a very important role in rendering these formal reports such as the BTCs and NDCs accessible to the public.

In addition to this shift in the mode of governance, the PA is a compromise and a response to the demand of the deepeners, aiming to politicize and prioritize climate change, on the one hand, as well as of the fragmenters, escaping from the shackles of Kyoto Protocol and UN-led climate change regime.[38] Seen from this perspective, the PA is the outcome of a struggle between two sides, both of which searching for solutions outside of the UN framework. So, it is highly likely to consider the PA as a great achievement, especially when its aspiration towards gathering both minilateral fragmenters and transnational deepeners under the framework of the UN climate change regime is realized and acknowledged.[39] For whilst the procedural obligation of states to submit a more demanding pledge in the each successive five-year-period may be conceived of as a response to the counter-institutionalization demand of the recalcitrant states, the empowerment of transnational actors as the watchdog of the NDCs is the outcome of the politicization of the climate change and the pressure exerted by the deepeners states.[40] This new logic is described by Falkner as 'domestically driven climate change action'.[41] To sum up, the PA as the epitome of post-sovereign global governance, did not only allocate responsibility by either giving more leeway to the actors (states) within the formal treaty mechanism or integrating some into the formal treaty framework, but also imposes some procedural obligations on the actors. When it comes to state, they have to comply with some procedural rules in their NDCs and BTRs, and this open up a space for non-governmental organizations to step in. As such, it strikes a delicate balance between the IGOs and its transnational competitors. In some sense, international law has been transnationalized while transnational law has been internationalized

> 'through nonhierarchical 'orchestration' of climate change governance, in which international organizations or other appropriate authorities support and steer transnational schemes'.[42]

[37] H. Van Asselt, n 32 above, 94.

[38] B.A. Dikmen, n 14 above, 70-76.

[39] ibid

[40] ibid, see for the watchdog role of non-state actors K. Bäckstrand, J.W. Kuyper, B.O. Linnér, and E. Lövbrand, 'Non-state Actors in Global Climate Governance: From Copenhagen to Paris and Beyond' 26(4) *Environmental Politics* (2017).

[41] R. Falkner, n 26 above, 1118-1124.

[42] K.W. Abbott, n 4 above, 571; see for a very similar argument T. Hickmann, O. Widerberg, M. Lederer, and P. Pattberg, 'The United Nations Framework Convention on Climate Change

There is one final dimension that is worth mentioning. The institutional compromise between internationalism and transnationalism is not oblivious to the inherently problematic nature of the climate change with respect to sharing the responsibilities and burdens and allocating the resources. As it is out of question, climate change governance is, more than ever, beset with the question of how to distribute the responsibilities and burdens coming necessarily with the mitigative responses between developing and developed countries. Seen from the perspective of global justice, it is clear that while the Global North has been reaping the benefits of carbon-based industrialization, the Global South, in which almost eighty-five per cent of the world reside, bears the brunt of its negative impacts. To illustrate,

> 'between 1850 and 2002, countries in the Global North emitted three times as many GHG emissions as countries in the Global South, where approximately 85 per cent of the global population also resides'.[43]

What is more, today fifty per cent of the total GHG emission is caused by the wealthiest ten per cent.[44] This is why any measure taken against climate change should, from a normative perspective, take account of the parties' responsibilities and its subsequent distributive results. What is significant for the PA is that it not only contains provisions about mitigation, associated with diminishing or putting a halt on the GHG emission, but also includes clauses for adaptation and loss & damage policies, which are related to the distributive and corrective measures and pertain to impeding the negative consequences of climate change. Thus, it could be asserted that the PA signifies a turn towards distributive and burden-sharing policies. However, it is also essential to point to the fact that this compromise could only be realized after the countries such as China and India surpassed the majority of Western countries on the GHG emission.[45]

b) Politics of Paris Agreement

So far, the article has discussed the institutional dimensions and implications of the climate change regime. First, it has taken a historical perspective with a

Secretariat as an Orchestrator in Global Climate Policymaking' *International Review of Administrative Sciences,* 1 (2019), available at https://tinyurl.com/mrdrb7ku (last visited 31 December 2021); see for a study questioning the effectiveness of this orchestration S. Chan and W. Amling, 'Does orchestration in the Global Climate Action Agenda Effectively Prioritize and Mobilize Transnational Climate Adaptation Action?' 19(4-5) *International Environmental Agreements: Politics, Law and Economics*, 429-446 (2019).

[43] H.K. Paul, 'The Green New Deal and Global Justice' 28(1) *Renewal*, 64 (2020).

[44] ibid

[45] In 2006, China's total GHG emission exceeded the US, and today these countries total GHG emission almost amount to half of the world's total emission. See H. Ritchie and M. Roser, 'CO_2 and Greenhouse Gas Emissions' *Our World in Data* (May 2017), available at https://tinyurl.com/2p8d78u4 (last visited 31 December 2021).

view to casting a light on *the modus operandi* of these institutions and the dynamics between them. In that regard, it has shown how the institutional changes have been accompanied with, or even forced by, the defined and redefined peculiar roles assigned to each actor, be it IGOs or TNOs. To this end, it has outlined the trajectory of institutional evolution having been occurred in the last two decades within the global governance of climate change. It has also showed that while the deficiencies of the formal UN-led regime brought about counter-institutional (by fragmenter states) and progressive political (deepener transnational organizations and the EU) movements, these non-UNFCCC movements, by acting as a legal irritant[46], have later obtained formal recognition by the PA.

What is more, these institutional transformations brought with themselves some important changes in the legal instruments made use of by these organizations in the global climate change regime. By way of illustration, it is very rare to encounter legal obligations in non-obligatory sense in multilateral environmental agreements even though they may include a mix of soft and hard obligations.[47] However, the PA exemplifies a delicate 'mix of hard, soft and non-obligations, the boundaries between which are blurred, but each of which plays a distinct and valuable role'.[48] This is a remarkable shift from the predictable, clear and rule-based governance approach, which imposes important costs on national sovereignty, to a more vague and principled- and process-based approach. Needless to say, this is also a transformation in our conceptualization of law and rule of law.[49] It is a turn from formal understanding of Rule of Law introduced and advanced by Fuller to a more institutional and procedural one defended by Waldron. The upshot of this change is, for the purpose of this article, that the functioning of the institutions gained priority over the shape and form taken by these products at the end of the process. This change, seen from a normative perspective, can even be considered as a positive move towards the core idea of the rule of law, that is, the plurality of legalities is the *condicio sine qua non* for the ideal of rule of law rather than something that is to be suppressed for the sake of the uniform application of law.[50]

[46] Here, I am using irritation in the way it is conceptualized by Teubner. See G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies' 61(1) *The Modern Law Review,* 11-32 (1998).

[47] L. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-obligations' 28(2) *Journal of Environmental Law,* 352 (2016).

[48] ibid 337.

[49] See for formal understanding of rule of law L.L. Fuller, *The Morality of Law* (New Haven, London: Yale University Press, 1969) (His eight principles for legality includes: 1. Generality, 2. Publicity, 3. Prospectivity, 4. Intelligibility, 5. Consistency, 6. Practicability, 7. Stability and 8. Congruence); see for an institutional and procedural approach to the rule of law J. Waldron, 'The Rule of Law and the Importance of Procedure' 50 *Nomos,* 3-31 (2011).

[50] See for the argument that the rule of law, in its essence, is an institutional ideal that requires at least two different legalities, namely legal duality, through which the sovereign legislature will be automatically constrained by the other legalities G. Palombella, 'The Rule of

It is a widely held assumption that with the rise of neoliberalism and the expansion of globalization, the differences among nation-states and cultures are going to gradually erode, and the world would end up being a more flattened global sphere in which states have less significant role to play.[51] Nevertheless, things have not gone as expected since neoliberalism and states, rather than being in opposition between themselves, have built up complementary relationship with neoliberalism. As taught by Foucault, neoliberalism and its market logic, rather than taking something away from government, transformed the ways through which states should/could pursue their own ends.[52] By the same token, geopolitics, having become highly popular following the 11 September 2001, corresponds to this idea that states pursue their own interest and that they do not shy away from using its political, economic, legal and even normative power. Thus, when seen through the lenses of geopolitics, global climate change regime, and in particular the Paris Agreement, are not only more understandable but also represent a projection as to the future of climate change governance.

In the climate change governance, the EU has been considered, particularly for the last two decades, as the forerunner of progressive climate policies.[53] It is the main polity going beyond the UN-led climate change regime, taking on diametrically opposed policies to the fragmenters such as the US and BASIC (Brazil, South Africa, India, and China) countries. With the fear of China's rising economic power, the US, not least with the turn of the century, left the environmental leadership to the EU for the sake of its own economic interests. It seems fair to say that the EU, with the intention to fill this gap, 'attempted to lead by example' and demonstrated its leadership ambition not only with words but also with deeds.[54] In the period spanning from Rio to Paris, the EU's

Law at home and abroad' 8 *Hague Journal on the Rule Law*, 1-23 (2016); see also for the criticism of Waldron's procedural conception of the Rule of law on the basis that it rests on an implicit cosmopolitan vision and global legal monism due to its treating individuals as the mere legitimate subject of international rule of law in disregard of the states, ibid 18; see for a further analysis of the international Rule of law that draws attention to the dangers posed by the transnational standard-setting organizations, which somehow bears always the potential of turning their epistemic expertise to practical authority Id, 'Two threats to the rule of law: legal and epistemic' 11 *Hague Journal on the Rule of Law*, 383-388 (2019); see for a similar criticism in support of margin of appreciation as the provider of the duality of legalities Id, 'Non-arbitrariness, rule of law and the "margin of appreciation": Comments on Andreas Follesdal' 10(1) *Global Constitutionalism*, 139-150 (2021).

[51] S. Roberts, 'Neoliberal Geopolitics', in S. Springer, K. Birch, and J. MacLeavy eds, *Handbook of Neoliberalism* (New York: Routledge, 2016), 433.

[52] M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (New York: Springer, 2008), 121 (translated by G. Burchell).

[53] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (USA: Oxford University Press, 2020), 207-231.

[54] C.F. Parker and C. Karlsson, 'Climate leadership', in K. Backstrand and E. Lövbrand eds, *Research Handbook on Climate Governance* (Cheltenham Glos-Northampton Massachusetts: Edward Elgar Publishing, 2015), 195; see also a different argument focusing on the process following the US's withdrawal from the Kyoto Protocol and the EU's turn from carbon tax to

fundamental climate change policy was to sustain the system of Kyoto Protocol, if not, to replace it with a new one in the same top-down logic. As to the US, it was the supporter of a symmetrical treaty as opposed to asymmetrical KP discriminating developing countries at the expense of developed ones. Therefore, for the US,

> 'the new agreement should have a pledge-and-review structure that allows bottom-up, or 'nationally determined mitigation commitments', rather than top-down, binding targets and timetables, such as the EU has pushed for in the past'.[55]

As regards China, it has traditionally taken side with developing countries and presented itself as the representator of this bloc by endorsing the ideas such as climate justice, historical responsibility of the West, and distributive financial policies.[56] It therefore pushed forward an agreement that draws a distinction between developed and developing countries, thereby binding the former with top-down targets while granting the latter much discretion to set up its own climate change policies.[57] However, the rapid economic development of China and other BASIC countries have given rise to a discordance between these countries and the remainder of developing countries. For they have also became the perpetrator of climate change rather than being a victim thereof.

The EU took important lessons from its failure in shaping the global regulatory structure of climate change governance on the Copenhagen Accord (CA), which lays down non-binding pledge and review procedure and only concluded between the US and BASIC countries despite the EU's ambitions for a more top-down agreement.[58] As such, the EU, upon its enlightenment and realization that it should give up its 'normative agenda and unrealistic expectations', embarked on a novel strategy, which is more pragmatic and responsive to the geopolitical realities of the existing 'power constellations', in Durban (COP 17).[59] This strategy paid off, and the parties could reach an

the ETS and explain the global leadership with the domestic developments D. Ellerman, 'The Shifting Locus of Global Climate Policy Leadership', in C. Bakker – F. Francioni eds, *The EU, the US and Global Climate Governance* (London: Routledge, 2014), 41-57; see for a similar argument attributing the change of policies more to the domestic policies than to some normative reasons R.D. Kelemen and D. Vogel, 'Trading Places: The Role of the United States and the European Union in International Environmental Politics' 43(4) *Comparative Political Studies* 1-30 (2010).

[55] ibid 198.

[56] ibid 196.

[57] ibid 197.

[58] '… the EU was not even in the room when the final details on the Copenhagen Accord were hammered out' C.F. Parker, C. Karlsson, and M. Hjerpe, 'Assessing the European Union's Global Climate Change Leadership: From Copenhagen to the Paris Agreement' 39(2) *Journal of European Integration*, 247 (2017).

[59] K. Bäckstrand and O. Elgström, 'The EU's Role in Climate Change Negotiations: From Leader to 'Leadiator' 20(10) *Journal of European Public Policy,* 1369 (2013).

agreement on extending the KP at least up to 2020 with the support of developing countries. More importantly, the countries reached a compromise on the necessity to finalize a new legally binding treaty by the end of 2015 in the Durban COP after the traditionally reluctant states such as the US and China had voiced their supports.[60] The EU played a very important and essential role not only by acting as a mediator between the parties in the course of the negotiations but also by acting as a 'leadiator', to wit, a leader bridging the gap between the parties with its deeds outside the negotiations.[61] In the run up to the PA, the EU by showing a perfect example of its directional leadership, recalibrated its 2030 GHG emission targets to forty per cent reduction, compared to 1990, with its 2030 Climate and Energy Framework on October 2014.[62] It is only against this backdrop that the bilateral agreement concluded between the US and China as to the necessity of a new climate change treaty flared up the hopes for a positive outcome from the Paris.[63] In Paris, the EU, taking on an approach similar approach to that of Durban, advocated for a 'legally binding agreement with strong provisions for transparency and accountability, and a mechanism for raising the ambition over time'[64] and secured a 'hybrid set up with bottom-up reduction pledges combined with a top-down review of performance'.[65]

4. Global Green New Deal or Plurality of Green New Deals?

Although important developments have turned up in the global climate change regime for the last couple of years such as the enactment Global Pact for the Environment[66] and Paris Rulebook,[67] it is fair to say that none of them has become as influential as the recent rise of the Green New Deals (GNDs) across the world. These GNDs, bearing also the promise of a revolutionary transformation reminiscent of Roosevelt's New Deal, are by and large pursuing to achieve climate neutrality by 2050 'in a way that also expands decent job opportunities and raises mass living standards for working people and the poor throughout the world'.[68] It is in this potentially special makeover that to find novel and more

[60] ibid 1382.

[61] ibid 1380-1381.

[62] European Council EUCO 169/14 of 24 October 2014 on 2030 Climate and Energy Policy Framework.

[63] R. Falkner, n 26 above, 1114.

[64] European Parliament (2015) EU Position for COP21 climate change conference available at https://tinyurl.com/2tkfc3vx (last visited 31 December 2021).

[65] C.F. Parker, C. Karlsson, and M. Hjerpe, n 58 above, 249.

[66] See for the explanations about how unsatisfying the content of the treaty when compared to its title L. Kotzé, 'A Global Environmental Constitution for the Anthropocene?' 8(1) *Transnational Environmental Law*, 23-27 (2019).

[67] L. Rajamani, and D. Bodansky, 'The Paris Rulebook: Balancing International Prescriptiveness with National Discretion' 68(4) *International & Comparative Law Quarterly*, 1025 (2019).

[68] N. Chomsky, R. Pollin, and C.J. Polychroniou, *Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet* (London: Verso Book, 2020), 54 (ebook version).

clean ways for energy production and the intervention of the state to the market bear significant importance.[69] As such, the GNDs have necessarily bearing on a manifold of diverse sectors ranging from industry to agriculture, from consumption to transportation, and they are therefore calling for comprehensive reconstruction of our relationship with environment as well as ourselves. It is also for this reason that it is revolutionary for international law in general as well as international environmental law.[70]

The IPCC's 2018 climate change report pays our attention not only to how a 1.5 °C increase in global average temperature is set to affect the climatic system in the world but also to the ways how to rein in global warming. True that this is not the first-time states are encountered with a scientific document that warn them against the negative environmental effects of the so far pursued policies, yet it is still plausible to assert that it rang the alarm bell that awakens the big powers from their sleep. For instance, the democrats in the US proposed a resolution for the Green New Deal, which will be later turned into the CLEAN (Climate Leadership and Environmental Action for Our Nation's) Future Act after having attracted fierce criticism from the more libertarian camps because of its highly transformative aspirations.[71] Even though the presidency of Donald Trump put a halt to the US Green New Deal, it may be assumed that with the election of Joe Biden the US will much probably return to the game as a much more motivated player. Joe Biden, in a way that bears out this assumption, made clear in his first speech following the Democrat Party's electoral victory that America is 'going to make sure that labor is at the table and environmentalists are at the table in any trade deals' that will be made.[72] Similarly, China, albeit still lacking a comprehensive Green New Deal regulation, clinched its aspiration to achieve climate neutrality by 2060.[73] Further, there is also significant pressure on China exerted particularly by the Global North about its position and responsibility for global climate change governance. To illustrate, the new trade agreement concluded between China and the EU includes provisions concerning China's policies on 'environment, climate change and combatting forced labor'.[74]

All these developments, when seen in conjunction with the EU's Green New Deal set in motion in December 2019, could be considered as part and

[69] ibid.

[70] See for the transformative character of climate change, E. Fisher, E. Scotford and E. Barrit, 'Legally Disruptive Nature of Climate Change' 80(2) *The Modern Law Review*, 173 (2017).

[71] J. Conca, 'Democrats' Green New Deal Becomes the CLEAN Future Act' *Forbes,* available at https://tinyurl.com/2dp9rvkn (last visited 31 December 2021).

[72] A. Fang, 'Biden says US needs to align with democracies after RCEP signing' Nikkei Asia', available at https://tinyurl.com/2vj3ff58 (last visited 31 December 2021).

[73] W. Changua, 'China's Great Green Reset: Carbon Neutrality by 2060' CGTN', available at https://tinyurl.com/2p9c7yhr (last visited 31 December 2021).

[74] European Commission Press Release of 30 December 2020 on 'EU and China reach agreement in principle on investment', available at https://tinyurl.com/2p93hspx (last visited 31 December 2021).

parcel of the new mode of governance initiated by the PA.[75] Even though some may lambast this assumption as a mere conjecture or speculation, when these developments are seen in connection with the PA and the other similar phenomena such as the rise of climate change litigations and the bourgeoning of domestic climate change regulations, it is much more defensible to connect the rise of GNDs to the PA's *mode* of governance. By means of illustration, the PA compels the states to participate in global decision-making process, to pinpoint their NCDs, to become part of the process, and to engage with the problems of climate change from their own perspective. As such, it empowers the states more than subordinating them to a treaty; it makes them active subjects of the UNFCCC and international law in general. It forces the states to contribute to the process of problem-solving, demand them to establish their own way of tackling climate change, and plan their own environmental policies.

What is more striking for the PA is that it has enabled the NGOs and any interested individual to have a say in the global climate change governance. To illustrate, the PA contains some procedural obligations incurred on the states, eg, to set up, communicate and uphold the NDCs and to provide transparency, and it by doing so provided jurisdictional data that may be used by the courts to hold the states responsible for their pledged NDCs.[76] Moreover, the NGOs may impel the government to provide reasons and justification in support of their climate change policies by bringing the transparency requirement to bear.[77] As it is already shown in the literature, the more the courts are furnished with the data such as scientific evidence and impact assessments the more they have a chance to engage in more in-depth and holistic analysis of the political decision-making processes than merely dealing with assumptions and outcomes.[78] As such, these procedural obligations that are to be observed by the states may have a functionally similar impact on the climate change litigations as impact assessments have in the EU legal order.[79]

[75] U. Von der Leyen, 'Political Guidelines for the Next European Commission 2019-2024' *A Union that strives for more: My agenda for Europe,16;* European Commission COM (2019)640 of 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on 'The European Green Deal', Communication from the Commission, available at https://tinyurl.com/2hnsb99f (last visited 31 December 2021).

[76] L. Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' 9(1) *Transnational Environmental Law*, 28-30 (2020).

[77] ibid 35.

[78] 'The fact is, that courts have more opportunities to function as regulatory watchdogs and intensify their proportionality review in case legislators and regulators are prepared to provide more specific information about the aims of the drafts, the choice of regulatory instruments, and the methods of ex ante evaluations they apply'. J. de Poorter, 'A Future Perspective on Judicial Review of Generally Binding Regulations in the Netherlands: Towards a Substantive Three-Step Proportionality Test?', in J. de Poorter, E.H. Ballin, and S. Lavrijssen eds, *Judicial Review of Administrative Discretion in the Administrative State* (New York: Springer, 2019), 97.

[79] See for how the policy of Better Regulation and Impact Assessments, together with the

Seen in this light, it seems highly likely that the IPCC's climate change reports, coupled with the PA's procedural obligations, bears significant potential of empowering NGOs and civil society actors to act as a NDC watchdog in the post-PA period. As each state is obliged to pledge its NDC and are responsible for honouring their promises, any citizen have somehow power to urge them to fulfil these promises. For instance, fifteen children under the leadership of Greta Thunberg have brought a lawsuit before the UN Committee on the Rights of Child against five countries, arguing that those states, which are party to the Convention on the Rights of Child, have so far failed to do their best to protect the future generations from the catastrophic effects of the climate change crisis.[80] More importantly, they benefited from the PA, claiming that

> '(e)ach respondent has set inadequate emission reduction targets in its Paris Agreement pledges—and then failed to even meet these inadequate goals'.[81]

On top of this, they lent support to this argument by referring to the IPCC reports and paid attention to the fact that these policies are scientifically inadequate to attain the objectives set in the PA. As such, it can be said that there is an elective affinity between the PA and the rise of climate change litigations, for the latter could find a fertile ground to flourish only after the emergence of the former.[82] It is, nevertheless, highly crucial to emphasize that if PA is to live up to its promises it should enlist the support of NGOs and the other transnational actors to nudge the political actors and take advantage of the Urgenda-type climate change litigations.[83]

As stated above, climate change litigation is one of the phenomena that emanated from the fertile ground created by the PA. Aiming at holding the governments to account for their failure in honouring their pledges, they are showing up across the world as exemplars of this post-sovereign model.[84] The plaintiffs in these cases are by and large environmental NGOs, and they do follow a similar line of argument that is already exemplified in *Urgenda I*, according to which international norms, albeit lacks imposing a direct obligation on the states, has a 'reflex effect' on the national legal orders and may be used in

rise of administrative state in the EU, brings about openness, transparency, and participation, as well as the rise of evidence-based or procedural judicial review. A. Alemanno, 'Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control' 17(3) *European Public L*aw, 485 (2011).

[80] https://tinyurl.com/2phh3bvv (Children Climate Case) (last visited 31 December 2021).

[81] Children Climate Case, para 21.

[82] G. Çapar, 'What have the Green New Deals to do with the Paris Agreement?: An Experimental Governance Approach to the Climate Change Regime' *Rivista quadrimestrale di diritto dell'ambiente*, 111-143 (2021).

[83] C.W. Backes and G.A. Van der Veen, 'Urgenda: the Final Judgment of the Dutch Supreme Court' 17(3) *Journal for European Environmental & Planning Law*, 318 (2020).

[84] L. Wegener, n 76 above, 18.

the interpretation of the open norms in the domestic legal orders.[85] In other words, they benefit from international (human rights) norms in order to support their claims in domestic legal orders, and thereby international norms are deemed to be 'an interpretive aid rather than being the source of obligations'.[86] Even though the Appeals Court in *Urgenda II*, expanding the function of ECHR, stated that Arts 2 and 8 are directly applicable in determining the degree of state's responsibility,[87] it is still a matter of controversy whether it is the best strategy to ground the responsibility of states in international human rights law rather than to base it on the UNFCCC and international environmental law in general. Nonetheless, the Dutch Courts in Urgenda saga prioritized the IPCC reports prepared by the United Nations Environment Program, the target set by the Paris Agreement, and the relevant COPs as part and parcel of the UNFCCC. And it turns out that the climate change regime and the PA has so far stand in the shadow of the arguments from human rights and international human rights regime.

In sum, the global GNDs are only one side of 'this global green movement in which transnational actors serve as the NDC watchdog'[88] in support of the courts that are functioning as gatekeepers. In a way bearing out this argument, we are observing positive climate change litigations in various domestic legal orders that demand governments to clarify how they are planning to reach their emission targets.[89] For instance, the French government is asked to make clear how it will reach its 2030 targets that it already committed to in the *Counseil d'Etat*' its *Grande-Synthe* decision in November 2020. Similarly, the *Bundesverfassungsgericht* (BVerfG) in April 2021, following in the footsteps of *Counseil d'Etat*, found some of the provisions of the German Federal Climate Act incompatible with fundamental rights because 'they lack sufficient specifications for further emission reductions from 2031 onwards' and 'irreversibly offload major emission reduction burdens onto periods after 2030'.[90] Here, it is of crucial importance to stress out that both ruling concerns the domestic regulations that purports to tackle climate change and legislated with the intention to materialize

[85] 'When applying and interpreting national-law open standards and concepts, including ... the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a 'reflex effect' in national law'. *Urgenda I*, para 4.43.

[86] R. Suryapratim, 'Urgenda II and Its Discontents' 13(2) *Carbon & Climate Law Review* 132 (2019); M. Minnesma, 'The Urgenda case in the Netherlands: creating a revolution through courts' in C. Henry, J. Rockström, and N. Stern eds, *Standing up for a Sustainable World* (Cheltenham: Edward Elgar, 2020), 144.

[87] R. Suryapratim, n 86 above, 133-134.

[88] G. Çapar, n 82 above, 113.

[89] Counseil d'Etat 19 November 2020 no 427301, available at https://tinyurl.com/y6erh4fa (last visited 31 December 2021).

[90] Bundesverfassungsgericht 29 April 2021 no 31/2021, available at https://tinyurl.com/ycx7eras (last visited 31 December 2021).

the targets set by the PA.[91] For this reason, it can be argued that the PA does not only have a reflexive effect on domestic legal orders and empower transnational actors as the watchdogs of the NDCs, but also have an indirect on national legal orders as it urges domestic governments to actively deal with climate change by making new legislations.[92] It is not hard to see that this trend of holding governments to account will probably spill over the global oil companies, and a recent case from the Hague District Court, which the Shell is ordered to reduce its CO2 emissions by forty-five per cent in 2030 compared to 2019, is a perfect harbinger of the things to come in the next decade.[93]

It is apparent from the foregoing that the GNDs or similar type of domestic regulations are popping up across the world and the main reason for that seems to be the PA and its specific mode of governance. One of the main arguments raised against the PA's normative impact on the GNDs comes from the realist camp,[94] arguing that it is a mere reflection of the geopolitical regulatory competition between different legal orders such as the US, the EU and China. So, it does have nothing to do with the normative framework established with the PA. In its description of the evolutionary track of the climate change regime, the article places significant importance to the political background against which the legal framework is constructed. In doing so, it in fact adopted a legal realist lens, accepting the claim that law is the outcome of the undergirding political struggles. In the next chapter, it will deal with the question of whether the rise of GNDs is more about the geo-politics and global regulatory competition than the normative framework established with the PA. In so doing, it will first outline the global regulatory competition, and then touch respectively upon (international) legal realism, global administrative law, and inter-legality to account for the rise of GNDs.

III. The Climate Change Regime from the Perspective of Law

1. The Approach of Political Science Scholarship

We are confronted with a climate change complex[95] instead of a full-fledged

[91] Art 1 of the Bundes-Klimaschutzgesets '... The basis of the Act is the obligation according to the Paris Agreement, under the United Nations Framework Convention on Climate Change, to limit the increase in the global average temperature to well below two degrees Celsius and...', available at https://tinyurl.com/mr2vurvk (last visited 31 December 2021).

[92] See for a study analyzing the recent proposal for the European Climate Law, A. Giorgi, 'Substantiating or Formalizing the Green Deal Process? The Proposal for a European Climate Law' *Rivista Quadrimestrale di Diritto Dell'Ambiente*, 6-18 (2021).

[93] See The Hague District Court 26 May 2021 no C/09/571932 / HA ZA 19-379, available at https://tinyurl.com/4bc56f9r (last visited 31 December 2021).

[94] See eg, S.M.G. Pratti, 'Bad Moon Rising: The Geen New Deals in the Globalization Era' *Rivista Quadrimestrale di Diritto Dell'Ambiente*, 144-162 (2021).

[95] Lederer classifies the scholars of global governance with respect to their analysis of

comprehensive regime due, *inter alia*, to the diversity of interest and uncertainty, which are exacerbated by the cross-cutting nature of climate change problem.[96] In their seminal article, Keohane and Victor foresaw that there are no grounds for hope that the efforts to form an integrated institutional climate change regime is likely to succeed. Nevertheless, this was not a reason for despair, because

> '(i)n settings of high uncertainty and policy flux, regime complexes are not just politically more realistic, but they also offer some significant advantages such as flexibility and adaptability'.[97]

To put it clearly, there is no need to put all the problems in one package. It is possible to address the same problems with a holistic lens without engaging in all of them at the same institution, at the same time, and at the same bargaining process. Therefore, a complex, the argument goes, reduces the political importance of bargaining process and gives way to more fragmented but coordinated approaches in the furtherance of climate change objectives. The best thing to be done, given these perennial political problems, is to take advantage of climate change complex under the orchestration of UNFCCC/Paris Agreement as an umbrella treaty.[98]

Written in a context where the disappointment created by the Copenhagen Accord[99] was still up in the air, they suggested a more promising path to follow: It is much better to embrace a pragmatic approach and set out to focus on sector-based problems than being obsessed with big treaties, names and institutions. We do not need a formal global environmental constitution in order to fulfil the functions served by the constitution. This is the backdrop against which the PA was ratified and seen from this perspective it represents a firm line of continuity with the logic adopted in the Copenhagen Accord, rather than being a radical rupture from the latter. As already alluded to above, the PA marks a critical turning point in the mode of governance, for it, by empowering the nation-states and watering down the density of the UN framework, replaced

climate change regime and put forwards that there are three different groups: those who are optimistic, agnostic and pessimistic. Whereas, for optimistic view, there are still functions to be performed by IGOs, the pessimistic and agnostic views give up their hope that the UN-led climate change regime may still have something to contribute. As to the regime complex, he argues that it falls under the rubric of agnostics along with the approaches like polyarchy, orchestration and regime interplay. Yet for me, it is more aligned with optimistic approach, not least when considered the latest studies of Keohane and Victor. See M. Lederer, 'Global governance' in K. Backstrand and E. Lövbrand eds, *Research Handbook on Climate Governance* (Northampton: Edward Elgar Publishing, 2015), 5-9.

[96] R.O. Keohane and D.G. Victor, n 24 above, 7-9.

[97] ibid 7.

[98] K.W. Abbott, n 4 above, 573; R.O. Keohane and D.G. Victor, n 24 above, 19.

[99] '…the Copenhagen climate summit proved to be a turning point, not only for climate change politics but also for regime literature, as a consensus emerged that international negotiations would not initiate a strong regime', M. Lederer, n 95 above, 4.

the top-down approach with the bottom-up one. By doing so, it found a delicate balance between international prescriptiveness and national discretion.[100] Thus, it seems fairly sound to argue that no matter how thin it is there is a global climate change regime under the orchestration of the UN framework. And the Green New Deals, even though they are to some extent related to geopolitics, are the outcomes of this regime (re)established with the PA; therefore, they operate within the UN legal framework with the aim to prevent an environmental catastrophe.

The heydays of intergovernmentalism, which explains the international organizations and global governance based on the self-interested choices and preferences of states, has been over a long time ago.[101] It is understandable to stress the importance of geo-politics and the counter-institutional tendencies of self-interested states at a time when international law is much more fragmented and institutionally much denser and more diversified than the cold-war era;[102] however, to reduce the level of normativity created by international organizations to mere politics is a step too far. It is true that the rise of global south has seriously undermined the Western liberal international legal order, which was established in the wake of the Second World War,, and this has sparked off the so-called crisis of international law.[103] Yet, law is, as stressed by Weber, has relative autonomy from society and politics, and it is, therefore, not warranted to reduce the normativity of law mere politics[104] even if the ontological question of international law,[105] namely the law-ness of international law still holds an

[100] L. Rajamani, and D. Bodansky, n 67 above, 1023-1040.

[101] See for intergovernmentalism and its critiques M. Cini, 'Intergovernmentalism', in M. Cini and N.P-S. Borragan, *European Union Politics* (Oxford: Oxford University Press, 5th ed, 2017), 65-79.

[102] Dyzenhaus also argues that 'we are in a period in which, as Hans Kelsen's former student and influential international lawyer Josef Kunz put it, the 'swing of the pendulum' is to an 'underestimation of international law' because of a sense of crisis--that we are living in an epoch marked by insecurity, in which 'realism' compels us to see that power not law rules' (citations omitted) D. Dyzenhaus, 'Kelsen's Contribution to Contemporary Philosophy of International Law' (April 8, 2020), available at SSRN: https://tinyurl.com/24u4v8wh (last visited 31 December 2021).

[103] Domingo attributes the current crisis of the international law to the fact that it places an undeserved and artificial place to the states without much consideration to the individual and human dignity. See, R. Domingo, 'The crisis of international law' 42 *Vanderbilt Journal of Transnational Law*, 1543.

[104] Klabbers warns international lawyers to be vigilant against any type of reductionism and 'jealously guard the relative autonomy of their discipline' J. Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity', 1 *Journal of International Law and International Relations,* 36 (2004/2005); see also for how law is relatively autonomous from underlying socio-political context and how he rejects Marxian deterministic account where law is determined solely by underlying socio-political structure, D.M. Trubek, 'Max Weber and the Rise of Capitalism' *Wisconsin Law Review*, 720, (1972).

[105] See for a study dealing with the question of the nature of international law, arguing that international law, rather than tackling this ontological question, should adopt a less robust methodology - prototype theory rather than metaphysical conceptual analysis – that may open

important place in international law scholarship.

In order to understand how law separates itself from politics and creates a normative domain that is at least relatively autonomous, it seems useful to bring into sharp focus how legal realism differs from both legal formalism and critical legal studies. As reminded by Leiter, law is not indeterminate in *latu sensu* or 'globally indeterminate'[106] from the perspective of legal realism. If anything, it should be determinate enough to lend itself to prediction in the sense that a bad man whose sole interest is staying out of jail and avoiding any behavior that will bring punishment might foresee the decisions of the courts.[107] For this reason, the indeterminacy of law concerns only the domain of adjudication, and it results from 'the existence of conflicting, but equally legitimate, interpretive methods'[108] even in the absence of any external political influence. It is, therefore, crucial to draw a distinction between indeterminacy in the strict and general senses. It is one of the main reasons for the failure in distinguishing legal realism from critical legal studies, which claim that law is *per se* indeterminate because it does not enjoy at least a relative autonomy from social and political domain. To the contrary, legal realist take law seriously and approach law inside even though they do not embrace an internal point of view,[109] and they never question the relative autonomy of law. Legal realism levels, at bottom, a criticism against legal formalism not against law as such; therefore, its critical dimension should not be conflated with critical legal studies and similar Marxian approaches that treats law as mere reflection of economy politics.[110] Thus, it steers a middle course between legal formalism and political reductionism, and thereby is compatible with any account of law giving a prominent place to the normativity of law such as legal positivism after H.L.A. Hart.[111]

Leiter argues that naturalism and pragmatism are the two foundational

a space for the conceptualization of international law. He, further, contends that 'A social practice is typically judged as falling within the category of "law" if it consists of rules purporting to coordinate behavior of actors and to settle their disputes (normativity); if it at least possesses institutions in charge of judging whether those rules were violated (institutionality); if the rules in question are guaranteed, normally through some form of coercive mechanisms ([coercive] guaranteeing); and if the rules are, overall, apt for inspection and appraisal in light of justice (justice-aptness)'. M. Jovanović, *The Nature of International Law* (Cambridge: Cambridge University Press, 2019), 4.

[106] B. Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' 76 *Texas Law Review*, 273 (1997)

[107] O.W. Holmes, Jr., 'The Path of the Law', 10 *Harvard Law Review*, 457 (1897).

[108] B. Leiter, n 106 above, 273.

[109] S.J. Shapiro, 'What is the internal point of view?' 75 *Fordham Law Review*, 1159 (2006).

[110] G. Shaffer, 'The New Legal Realist Approach to International Law' 28 *Leiden Journal of International Law*, 196 (2015)

[111] '... legal realism is not necessarily contrary to legal positivism … some legal realists will accept Hart's pedigree view on legal sources, while contending that those legal sources play only a partial role in determining how law acquires meaning and has effects.' G. Shaffer, n 110 above, 193-194.

philosophical commitments of legal realism.[112] Whereas naturalism corresponds to the idea that adjudication should 'be continuous with empirical inquiry in the natural and social sciences',[113] pragmatism is associated with anti-foundationalism, according to which justification of our beliefs should not rest on a foundation, no matter what it is, but should 'be accepted simply because they 'work' relative to various human ends'.[114] In short, naturalism is at odds with legal formalism because the latter disregards how law operates in reality, whereas pragmatism points to law's instrumental dimension, namely, how it is 'used, like a technology, to respond to and resolve problems encountered in the world.'[115] In similar lines, a bunch of scholars have recently militated for a new realist approach to the international law,[116] arguing that international lawyers should not grapple with the conceptual questions such as

> 'what is law in the abstract, or what is the relation of law to morals'; instead, they should concern themselves with inquiries such as 'how actors use and apply law in order to advance our understanding of three interrelated questions – how law obtains meaning, is practiced (the law-in-action), and changes over time'.[117]

Thus, they assert, taking issue with any type of reductionist approaches to the law, that international law should be seen through the lenses of socio-legal studies and treated 'as a semi-autonomous field constituted by internal and external factors that shape law's meaning, practice, and consequences',[118] ie, power and reason or apology and utopia. Shaffer also puts forward six key attributes of a legal realist approach to international law: International law should be i) empirical, ii) pragmatically oriented, iii) viewed in processual terms, iv) transnational, v) conditionally normative, and v) 'be reduced neither to universalist reason (of ideal liberal theory), nor to hegemony operating in the guise of law (from a critical or Marxist perspective)'.[119] All in all, the gist of legal realist approach to international law lies in the argument that law necessarily lay claims to legitimacy and normativity, but this potential is 'grounded in law's particular epistemologies, forms of reason-giving, and communicative practices, in tension

[112] B. Leiter, n 106 above, 274.
[113] ibid 285.
[114] ibid, 305.
[115] G. Shaffer, n 110 above, 202.
[116] See for the argument that there is nothing new in this so-called new legal realist approach, D. Bodansky, 'Legal Realism and its Discontents' 28(2) *Leiden Journal of International Law*, 267-281 (2015).
[117] G. Shaffer, n 110 above, 189.
[118] G. Shaffer, 'Legal Realism and International Law' *UC Irvine School of Law Research Paper*, (2018-55); see also for a realist construction of the concept of international law H. Dagan, 'The Realist Conception of Law', 57 *University of Toronto Law Journal*, 607 (2007)
[119] G. Shaffer, n 118 above, 200-206.

with power'.[120] And it is the task of international lawyers to investigate and carve out this potential by revealing how it is actualized.

Seen against this background it goes without saying that it is a mistake to read institutional and normative transformations that global climate change governance has undergone only through the lenses of political science, and to claim that it has only to do with geopolitics. It is, of course, about geopolitics, but it does not suffice to explain regulatory competition between legal orders and interaction of legalities within the climate change regime. As Raz emphasized, 'truth is not enough. A good theory of law is, of course, true. But it is not a good theory just because it is true'.[121] Hence, what we need is an adequate theory that goes beyond an external explanation and aims at seeing the normativity of law from the perspective of the participants who actively participating in the legal discourse.[122] It is true that law comes into existence in the end of a political process in which conflicting interests are put forward, yet as it clarified above it is a mistake to wither away the normativity of law.[123] The acceptance of something as a rule or norm has such drastic influence on the practical reasoning of the participants that it, converting the character of the arguments from political to the legal, transforms value into fact.[124] With Raz's parlance, this underlying first order (political) reasons became, from that time on, legal reasons, namely second order reasons even though they are not totally exclusive. It goes without a saying, when seen from this perspective, that the political realist approaches fall short of illuminating how the interaction between legalities give rise to novel normative frameworks independent of the political process itself. The climate change policies of different legal orders do not only compete with and shape each other's policies, but they also give shape to the global climate change governance. And most importantly, these legal interaction takes place in a relatively independent domain from the underlying political decisions,

[120] ibid, 207.

[121] J. Raz, *Between Authority and Interpretation*, (Oxford: Oxford University Press, 2009), 93.

[122] See for study arguing that international law should be studied with a scientific approach 'that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world'. D. Abebe, A. Chilton, and T. Ginsburg, 'The Social Science Approach to International Law' 22 *Chicago Journal of International Law*, 1, 23 (2021), and a further criticism of this approach with the argument that the problems of international law cannot be solved by adopting an 'external' and therefore objective or privileged position. International law's structure and history make academics necessarily participants as well as observers. S. Chesterman, 'Herding Schrödinger's Cats: The Limits of the Social Science Approach to International Law' 22(1) *Chicago Journal of International Law*, 49 (2021).

[123] Jovanovic draws a distinction between two types of how questions of normativity: Whereas one of them is about how to determine the sources of international law, the other concerns itself with the question of how norms provide reasons for action. And he argues that law's normativity competes with the normativity of the other orders, so there is nothing as to the normativity of law. Here normativity is used in the same sense as it is put by Jovanovic. See M. Jovanović, n 105 above, Chapter 4 (78-155).

[124] J. Raz, n 121 above, 109, 115.

contestations and struggles.

As such, it is a necessity to give up political realist lenses and adopt a legal realist one to account for how different legal orders – the UN, the EU, the US, and China – interacts with each other. It is unquestionable that this interaction of legalities does not only take place in a specific regime such as climate change, but it also unfolds between different sectoral regimes. Nonetheless, this article confines itself with the analysis of the interaction of domestic legal orders within the climate change regime and their bearing on the global climate change regime with no regard to the influence of the other sectoral regimes on climate change. And thus, further study is required to bring into focus the inter-sectoral interaction of legalities. In short, whereas this study deals with what may be called infra-sectoral inter-legality, it clears the way for further studies that may tackle inter-sectoral inter-legality.

2. A Perspective from Global Administrative Law

The first potentially useful theoretical approach is that of Global Administrative Law (GAL), which provides an alternative to the traditional international law paradigm, arguing that international law is neither is about states nor founded on their consent. So, there is much more to see if the so far prevalent vantage point is altered.[125] From the point of view of GAL, this traditional paradigm, fails to come to grips with the challenges posed by globalization, for its conceptual blindness is ill suited for detecting the 'unnoticed rise of global administrative law'.[126] Today, 'many of the international institutions and regimes that engage in 'global governance' perform functions that most national public lawyers would regard as having a genuinely administrative character: they operate below the level of highly publicized diplomatic conferences and treaty-making'.[127] In some sense, it seems plausible to assert that GAL is defined by reference to what it is not: It is neither international nor national, then it should be global; it is neither constitutional nor judicial, then it should be administrative; it is not hard law obsessed with compliance; then it includes also soft law. Further, GAL presumes that there is a global administrative space

> 'populated by several distinct types of regulatory administrative institutions and various types of entities that are the subjects of regulation,

[125] See for a seminal article about the birth of GAL, S. Cassese, 'Administrative Law Without the State-The Challenge of Global Regulation' 37 *New York University Journal of International Law and Politics*, 663-694 (2005); see also for a concise summary of GAL S. Cassese, 'Global Administrative Law: The State of the Art 13(2) *International Journal of Constitutional Law*, 465-468 (2015).

[126] B. Kingsbury, N. Krisch, and R.B. Stewart, 'The Emergence of Global Administrative Law' 68(3/4) *Law and contemporary problems*, 15-18 (2005).

[127] ibid 18.

including not only states but also individuals, firms, and NGOs'.[128]

The point that connects these territorially dispersed global administrative bodies to each other is the idea that they should hold to account for their activities by benefiting from the tools we developed in our domestic administrative legal systems such as transparency, proportionality, participation, justification, and so on so forth. It is, therefore, not an exaggeration to contend that one of the core concepts of GAL is 'accountability'.[129]

However, there is one fundamental problem that seems to be highly challenging for the GAL scholarship is that they cannot still overcome the sector-based fragmentation of international law. As they placed their emphasis on developing infra-systemic administrative procedures that will force the global administrative bodies to behave like a responsible administrative agent reminiscent of domestic national legal orders, they cannot address the problem of 'the self-referentiality of global regimes'.[130] In other words, even though the global administrative law enables us to address the problem of accountability by somehow flattening the territorial borders,[131] yet it seems fair to state that it contributes to the erection of sectoral borders. As GAL concentrates more on the sector-specific accountability than the consent of territorial states, it overemphasizes the importance of output legitimacy at the expense of input legitimacy. Seen in this light, it goes without saying that global administrative bodies, which has neither demos nor a state to rely on, has only one thing to hold on to: accountability, namely output legitimacy. As such, it may be argued that the fact that global administrative bodies as members of the global administrative space are immune to a significant extent from the political influence of states may result in technocracy or juristocracy. It is my contention that this is the point, which is in stark contradiction with the realities of climate change governance, because it is impossible to belittle the importance of the role played by states in global climate change governance.

From the foregoing it may be implied that one of the weakest points of GAL is its assumption that there is a global administrative space composed of territorially dispersed yet sectorally connected administrative institutions, and this holds the potential to turn into a technocratic administrative governance without a necessary political or constitutional input. So, it seems valid to impugn the level of coordination presumed by the GAL scholarship between a manifold of geographically scattered administrative bodies, not least at a time when global regulatory competition between powerful states is much more

[128] ibid 19.

[129] N. Krisch, 'The Pluralism of Global Administrative Law' 17 (1) *European Journal of International Law*, 248 (2006).

[130] G. Palombella, ' "Formats" of Law and Their Intertwining', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-Legality* n 8 above, 35.

[131] ibid 37.

visible. Hence, it underestimates or does not stress out the importance of geopolitics. What is more, this endows GAL with some kind of output legitimacy as if it would bring a kind of order to the order(less) climate change regime.[132] In a similar vein, Chiti, by pointing to this 'stabilizing and legitimizing' aspirations of GAL, calls into question whether 'the reference to global administrative space bring about the risk of an idealization of GAL as an institutional project'.[133] GAL is therefore vulnerable to criticism coming from legal pluralism because no matter how much it puts emphasis on plural and multilateral aspect of global governance it still goes global by giving a prominent place to *global* administrative space. And this is a normative aspiration no matter how weak it is because it assumes that administrative bodies operating within the global administrative space either develop mechanisms of accountability or call each other to account in such a way that this creates order out of chaos. Chiti puts this dimension of GAL clearly as follows:

> 'the notion of global administrative space qualifies the regulatory organizations beyond the state as 'administrations' or 'institutions', thus referring to a unitary – though internally plural and fragmented – legal order in which the various systems operate as institutions'.[134]

Contrary to these optimistic presuppositions, the interaction between different administrative bodies or regulatory regimes may be conflictual and competitive as well as it may be complementary as exemplified so far by the climate change complex.

3. Inter-Legal Approach to Climate Change Regime

Inter-legality is one of the recent attempts aiming at coming to terms with the fragmentation of international law and its attendant consequences, that is, the existence of functionally differentiated multiple legal orders alongside domestic legal orders.[135] The scholarships of global legal pluralism, even though they have minute differences, set out to find a middle course between pluralism and universalism (globalism) without prejudice to neither of them. Yet, as

[132] D. Bodansky, 'Transnational Legal Order or Disorder?' n 16 above, 287.

[133] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' 13(2) *International Journal of Constitutional Law*, 489 (2015).

[134] E. Chiti, 'Shaping Inter-legality: The Role of Administrative Law Techniques and Their Implications', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-Legality* n 8 above, 298.

[135] J. Klabbers and G. Palombella, 'Introduction', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* n 8 above, 1-20; see for some other studies aspiring to tackle the problem of competing legal regimes N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); T. Broude and Y. Shany eds, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011); P. S. Berman ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020).

poignantly argued by Lindahl,

> 'at issue in globalization is not only the unity and plurality of legal orders but rather processes of legal unification and pluralization that come about through inclusion and exclusion'[136]

because law by nature cannot include without excluding and cannot empower without disempowering.[137] Berman, in the same vein, aims at steering a middle course between two extremes, on the one hand, and reconciling them on the other. To this end, he proposes some

> 'pluralist procedural mechanisms, institutional designs, or discursive practices that maintain space for consideration of multiple norms from multiple communities'

such as

> 'margins of appreciation, complementarity, subsidiarity, zones of autonomy, hybrid participation agreements, reciprocal recognition, and so on'.[138]

As it may be inferred from these procedural tools, the only (global) value that may be tolerated, in Berman's global legal pluralism, is the ones that promote dialogue across differences.

Nevertheless, it is also very crucial not to miss the point that how law includes and excludes is as much important as its mere exclusion and exclusion. As argued by Palombella, when legalities interact with each other in a content-dependent way, it may lead in the end to 'a further and competing level of *recognition*' and 'offer a link between different legal orders, otherwise unavailable'.[139] It bears also significant importance to stress out that this does not amount to a coordinated or cooperative relationship between legalities rather than a conflictual one; instead, it draws our attention to the fact that when legalities interact the things or possibilities once invisible is rendered visible irrespective of the quality of the relationship. For instance, when legalities do not treat each other as a mere fact,[140] which is irrelevant to their own legal orders unless triggered by a rule of recognition, there will be a possibility that the confrontation between legalities may bring with it some

[136] H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 39.

[137] ibid 46-96.

[138] P.S. Berman, 'Understanding Global Legal Pluralism: From Local to Global, From Descriptive to Normative', in Id ed, *The Oxford Handbook* n 135 above, 25.

[139] G. Palombella, 'The Rule of Law Beyond the State: Failures, Promises, and Theory', 7(3) *International Journal of Constitutional Law*, 459 (2009).

[140] ibid 90.

'identifying common standards'.[141]

Despite their commonalities, all the foregoing approaches have a distinct way of engaging with the problem of fragmentation. Inter-legality, by embracing a descriptive approach to global legal reality, zoom in on the interactions between these legal orders.[142] As opposed to GAL, which implicitly presupposes a coordinated global administrative space, for inter-legality interaction does not come to mean that there is a 'coordinated effort or a joint enterprise'.[143] It has also a thin normative dimension, which springs from the perspective of law rather than an external normative reference point giving an answer to the questions of what a good society or just law is. Accordingly, it is about seeing the injustice glossed over, disguised, and even camouflaged behind one-dimensional, monolithic perspectives. Yet, this normative dimension thereof is beyond the scope of this study since it is more related to the judge's perspective and judicial decision-making than observing the interaction of legalities.[144]

If one were to describe inter-legality with one catchy word, it would most probably be 'recognition'.[145] Each legal order, irrespective of the quality of interaction, cannot but recognize the others due to inevitable interconnections between legal orders, resulting directly from the subject matter at stake. In other words, despite our attempts at categorizing the life into legal systems such as consumer law, anti-trust law, data protection law, and climate change law, it is not possible to comprehensively encapsulate the case at hand within one category (or system). Thus, any effort devoted to fit the interconnectedness and plurality of life into the bed of Procrustes, regardless of the quality and flexibility thereof, is doomed to failure.[146] The life is in and of itself interconnected, and inter-legality is a lens through which this interconnectedness is rendered visible. Thus, as drawn attention by Chiti, 'each legal order has its own administrative machinery responsible for' addressing the question of how to respond to the intersection of legalities or how to take the other legalities into consideration, in

[141] ibid 95.

[142] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 272; see for a study suggesting that balancing may be used as a legal tool in order to reach a conclusion in case of legal orders' interaction G. Encinas, 'Inter-legal Balancing' *Inter-legality Working Paper Series*, Working Paper No 02/2020 (2020).

[143] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 272.

[144] See for a study that takes an approach to inter-legality from the perspective of judges and adjudication and revealing the inherent connection between environmental and human rights legal orders T. Zhunussova, 'Human Rights and the Environment Before the Inter-American Court of Human Rights' *Inter-legality Working Paper Series*, Working Paper No 05/2020 (2020); see also for a comprehensive analysis of the same (Teitiota) case emphasizing the point of interaction between environment and human rights E. Sommario, 'When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Right's Committee's *Teitiota* decision' 77 *Questions of International Law*, *Zoom-in*, 51-65 (2021).

[145] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276.

[146] E. Uzun, 'Hukuksal Pozitivizmi Doğru Okumak' (Reading Legal Positivism Carefully) 5(3) *Hukuk Kuramı*, 90 (2018).

the culmination of which 'trigger(s) the process of recognition that is the heart of inter- legality'.[147]

The rule of recognition is generally associated with the idea of legal system because it has a function to enclose legal system by serving as a validity criterion in discriminating law from non-law. Even though it is mostly assumed that there is only one rule of recognition in each legal system, Raz explicitly asserts that 'though every legal system must contain at least one rule of recognition, it may contain more than one'.[148] Recently, Ralf Michaels, somehow taking this argument seriously, put forward that there is also a rule of external regulation different from the rule of internal regulation.[149] Contrary to the latter that serves to enclose the legal system by functioning as an internal criterion of validity, the former is about recognizing external legal orders.[150] He further contends that the relationship between legal orders is not secondary to the definition of a concept of law in the first instance; on the contrary, inter-legality (interaction of legalities) is such 'engrained into the very nature of legal orders' that any understanding of law dealing with the conceptualization of law cannot but do 'work interlegality into the concept of law itself'.[151] This is why the rule of external regulation is not grounded in an asymmetric relationship between legal orders as exemplified in the approaches from legal positivism or weak form of legal pluralism.[152] If anything, each legal order is standing on equal footing with each other in this radically egalitarian paradigm.

In sum, if we put aside the questions such as what will be the legal status of external recognition for the existence of a legal system or whether external recognition will have a constitutive or declaratory nature, we can summarize the so far portraited picture as follows,

> 'A legal order, in this definition, requires not two but three kinds of rules. It requires primary rules as its content. It requires secondary rules for its operation. And it requires tertiary rules to establish its relation with other legal orders, whether they are called interface norms, linkage rules or something else'.[153]

[147] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276.

[148] J. Raz, n 7 above, 147; see also a very similar argument made in the analysis of the relationship between the EU and member states Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), 117-118.

[149] R. Michaels, 'Law and Recognition – Towards a Relational Concept of Law', in N. Roughan and A. Halpin, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017), 90.

[150] ibid.

[151] ibid 94-95.

[152] See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 44-48; J. Griffiths, 'What is Legal Pluralism? 24 *Journal of Legal Pluralism and Unofficial Law*, 1233-1235 (1986).

[153] R. Michaels, n 148 above, 108; see for a similar analysis D. von Daniels, *The Concept of*

Palombella also draws attention to the importance of process, arguing that

> 'the actual center of gravity of complex legal systems is not in its apex, … but in a special practice of recognition, which … offers, through time and circumstances',[154]

some common and shared principles even though we do still assign different meanings to them. In short, the process of inter-legality set in motion a process of confrontation and mutual recognition that a common shared ground of legality will begin to crystallize. This is why it is more important to focus on the quality of interaction between legalities rather than being content with detecting the level of de(fragmentation) of international law or of the institutional complexity of regimes. For, the existing institutional fragmentation, overlapping norms, or overlapping regimes may not always lead to a conflictual situation. To the contrary, this may even serve as a catalyzer for the flourishing of some procedural secondary norms, which may help the normativization process of international law. Hence, to adopt an internal perspective to the functioning of global regimes bears significant importance to address the questions of

> 'what actually happens at the interface of the fragments that compose the international legal system or between the elemental institutions that compose a regime complex. Do overlaps really result in interface conflicts?'[155]

As such, we may resort to a heuristic tool to analyze the interaction of legalities. Here, Chiti's three-fold classification of the way in which legalities accord recognition to and interact with each other: a) joint responsibility, b) coordinated responsibility, c) conflicts of responsibilities in either infra-sectoral or trans-sectoral inter-legality.[156] Joint responsibility is the type of administrative interaction in which 'there has been a process of interconnection between two or more legal orders at the level of their political decision-making'[157] so much so that they operate as if they are part of a 'common administrative systems'.[158] In the absence of such political consensus at the constitutional level that may guide the administrative machineries, the legal orders may try either to abstain from 'the possible inconsistencies, overlaps and tensions that may arise between

Law from a Transnational Perspective (Farnham: Ashgate Publishing, 2010), 158-166.

[154] G. Palombella, n 139 above, 466.

[155] C. Kreuder-Sonnen and M. Zürn, n 6 above, 249.

[156] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276; see for a similar distinction (compatible, coordinated, and conflicting interaction between authorities) N. Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013), 48-59. Similarly, Kreuder-Sonnen and Zürn draw a distinction between cooperative and non-cooperative conflict management, see C. Kreuder-Sonnen and M. Zürn, n 6 above, 253-259.

[157] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276.

[158] ibid 277.

them at the operational level and in the management of issues determined by their overlaps'[159] (coordinated responsibility), or 'to reciprocally protect their regulatory policies and choices'[160] even at the expense of a conflictual and competitional relationship (conflicts of responsibilities). The way in which Chiti classifies the types of interaction between legal orders can be utilized as a framework in our analysis of the relationships between various Green New Deals with an eye on their impacts on the UN-led climate change regime.

IV. In Lieu of Conclusion: Inter-legal Analysis of the Global Climate Change Regime

As aforementioned, a global climate change regime, orchestrated by the UN framework, has developed over the years, which includes the climate change policies of different national legal orders. Among them the legal orders such as the EU, the US and China bear significant importance because they have the power to shape the global climate change regime by merely regulating their own legal orders and leveraging their own market power. Taking a cue from Bradford's Brussels Effect, there may be a Beijing Effect or a Washington Effect one day.[161] According to Bradford's argument, the EU, by merely regulating its own market, has been regulating the global marketplace with the help of its market and regulatory power.[162] For her, what differs the EU from the US and China is its regulatory capacity, which is absent in the latter due to its recent economic rise.[163] When it comes to the US, the quality of its regulations, even though it has also as much regulatory capacity as the EU, differs significantly from the EU. For instance, 'the US authorities are often more mindful of the detrimental effects of inefficient intervention' whereas 'the EU is more fearful of the harmful effects of nonintervention'.[164] To this, we may add numerous other differences such as the EU's integration through law strategy as being an

[159] ibid 285.

[160] ibid 287-288.

[161] A. Bradford, n 53 above, 64.

[162] There are five components of the Brussels effect: market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility. See for explanations, A. Bradford, n 53 above, 25-63; see also M. Cremona and J. Scott eds, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press, 2019); I. Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Oxford: Hart Publishing, 2019).

[163] 'This is evident in the case of China, where the country's impact on global financial regulation has been limited, despite its vast capital reserves and extensive holdings of US treasuries. China's limited influence can be traced, in part, to its lack of effective and independent bureaucratic institutions overseeing national market rules in this area. Thus, acknowledging that sophisticated regulatory institutions are required to activate the power of sizable domestic markets means that few jurisdictions aside from the United States or the EU today have the capacity to be regulators with global reach' A. Bradford, n 53 above, 31.

[164] ibid 102.

uncompleted federation and the EU's becoming a regulatory state due to the scarcity of its budget. To put it differently, the EU, having neither purse nor sword, took advantage of the only thing it had: regulation.[165] Consequently, these created a culture for minimalist regulation in the US, while in the EU a race to the top has generally prevailed. As such, the EU has become the regulator of the globe in the policies ranging from data protection to market competition, from environment to consumer health and safety.[166]

It is fair to say that when it comes to climate change, the EU's unilateral approach to global regulation is likely to change because of the mode of governance and favorable climate created with the PA. The conflictual relationship between developing and developed countries, on the one hand, and between the US and the EU, on the other, is likely to turn into a cooperative one. One of the main reasons for this expectation is the obligations, primarily the obligation to pledge NDC for every five years, set out by the PA that empowers the state as an actor in climate change governance. Thus, it is not an exaggeration to assume that the countries will take somehow similar steps heading in the same direction to reduce net CO2 emissions to zero by 2050s even though their pace and policies varies. This is an observation that is not made for the first time by this article, even in 2016 Savaresi put forward that the PA

> 'marks a new season in international climate diplomacy, with the emergence of a cooperative spirit that will hopefully continue in the years to come, breaking away from the rancorous and largely circular and sterile rhetoric that has long characterised international climate negotiations'.[167]

To reach the purposes set by themselves, some countries such as the EU, the US, India, and South Korea have already adopted their own Green New Deal policies.[168] What is more, the EU, rather than leveraging its market power unilaterally, is more intended to use bilateral cooperation agreements on climate policy. On the 7th of October 2017, India and the EU signed a joint statement on clean energy and climate change, by means of which both countries

> 'are committed to lead and work together with all stakeholders to combat climate change, implement the 2030 Agenda for Sustainable Development and encourage global low greenhouse gas emissions, climate

[165] 'In the world where the United States projects hard power through its military and engagement in trade wars, and China economic power through its loans and investments, the EU exerts power through the most potent tool for global influence it has—regulation', ibid 24.

[166] ibid 99-231, for environment see chapter7.

[167] A. Savaresi, 'The Paris Agreement: A new beginning?' 34(1) *Journal of Energy & Natural Resources Law*, 26 (2016).

[168] J.H. Lee and J. Woo, n 1 above.

> resilient and sustainable development'.[169]

As for the relationship with the US, the (EU) Commission, with the intention to turn the election of Joe Biden into an opportunity, drew up 'A new EU-US agenda for global change' in which climate change is one of the most important headings alongside the COVID 19 measures. It is clear from the agenda that the EU makes a call for collective and collaborative action with the US by stressing out the importance of the stance that will be taken by the US for climate change policies. Last but not least, it is important to underline that the agenda touches also upon the EU-China relations and clearly underscores the importance of taking a similar approach against China, which 'is a negotiating partner for cooperation, an economic competitor, and a systemic rival'.[170] All of these emerging GNDs or similar environmental regulations can also be regarded as the outcome resulted from the mere interaction of legalities regardless of its communicative quality.

In the light of the foregoing, it is plausible to contend that the climate change regime will present an example of collaborative responsibility, for the threat of climate change is more than ever perceivable. Granted, the degree of collaboration will depend on the numbers of countries that are participating in the communication, yet in any case it is fair to expect a more collaborative relationship than the pre-Paris period in which conflict is definitely the word to describe the interaction between legalities. Further, it is all but impossible to cope with climate change without the contribution of China and the other BASIC countries; therefore, we 'need to welcome and embrace the pluralism and diversity of the climate change movements'[171] as long as they all move towards the same direction. Additionally, the mode of governance the PA established calls for active participation of nation states, and this in turn brings with it a collective but differentiated move towards Green New Deal policies. When it comes to the question of how different these Green New Deals are, Lee and Woo, in their study which they compare the Green New Deals of the EU, US, and South Korea, observed that they

> 'all share one goal—tackling the climate change crisis and shifting toward a sustainable society. They all offer solid frameworks around which to shape the policy ambition for large-scale investment programs to foster

[169] EU – India Joint Statement on Clean Energy and Climate Change, New Delhi (6 Oct 2017), available at https://tinyurl.com/2dasxhf3 (last visited 31 December 2021).

[170] European Commission JOIN (2020) 22 of 2 December 2020 Joint Communication to the European Parliament, the European Council and the Council on 'A New EU-US Agenda for Global Change', 8, available at https://tinyurl.com/56ytxxem (last visited 31 December 2021).

[171] J. Bloomfield and F. Steward, 'The Politics of the Green New Deal' 91(4) *The Political Quarterly*, 776 (2020).

> a green economic transition'.[172]

In the same vein, Bloomfeld and Steward put forward that

> '(d)espite the gulf between European and North American discourses, and between moderate and radical interventionism, there are striking similarities in the novel policy architecture shared by the two green deal proposals'.[173]

From this, it can be derived that, the Green New Deals point to the same direction: To reach the targets laid down in the Paris Agreement and to render the continent carbon-free by 2050 (2060). Post-Covid era provides us new opportunities that lacked in the post-2008 crisis period[174] because it showed us once again not only how fragile we are in front of the environment but also that we need solidarity to overcome these challenges. Thus, Covid-19 is more foundational than the mere economic crisis of 2008, for it directly has a bearing upon our lives.

From the foregoing it may be implied that in the global climate change regime, the interaction between different Green New Deals/legalities will probably be more collaborative and coordinated than the pre-Paris period. It is, however, important to emphasize that it seems highly unlikely that this may lead, in the short term, to the emergence of a full-fledged global climate change regime, that is, the constitutionalization of the regime.[175] Here, it may be useful to benefit from the three-fold distinction proposed by Kreuder-Sonnen and Zürn as to the cooperative ways to solve what they call (interface) conflicts, arising from the situations in which actors (in our context nation states) purport to justify their position 'with reference to different norms and rules of which at least one is associated with an international authority'.[176] They argue that when the conflict is solved neither 'within institutionalised procedures providing norms of meta-governance'[177] (constitutionalized conflict-management) nor with reference to conflict of norms or functionally equivalent norm (norm-based conflict-management), we are faced with a situation of decentralized conflict management in which actors 'show a willingness for mutual accommodation and political compromise in the process of handling positional differences'[178].

[172] J.H. Lee and J. Woo, n 1 above, 11.

[173] J. Bloomfield and F. Steward, n 171 above, 773; pay attention also to the illuminating figure showing the similarities between two green new deals in the same article.

[174] ibid 776-777.

[175] See for a highly illuminating study arguing that there are multifarious different types of experimental mode of governance, which is positioned between full-fledged integrated organizations such as the WTO and loosely coupled regime complexes. G. de Búrca, R.O. Keohane, and C. Sabel, Global Experimental Governance, *British Journal of Political Science*, 477-486 (2011).

[176] C. Kreuder-Sonnen and M. Zürn, n 6 above, 252.

[177] ibid, 257.

[178] C. Kreuder-Sonnen and M. Zürn, n 6 above, 258.

Seen in this light, it becomes almost apparent that the climate change regime suits very well the decentralized way of cooperative conflict-management.

The legalities, rather than competing whether to regulate or not, will cooperate in order to fight effectively against climate change. The treaties the EU signed with China and India and the message it sent to the US for an enhanced transatlantic collaboration are the first signs of this change in the quality of interaction between different legal orders. When it comes to the question of what factors contributed to this shift, it is essential to underscore the importance of the legal framework established with the PA alongside the opportunities created by the Covid-19. Green New Deal without a doubt requires revolutionary transformations in our economic, social, and political life. It will also necessitate some radical legal and institutional changes within the EU's substantive constitution which is founded on the ordoliberal idea that despite the economic integration and supranationalization of economic policies, the distributive and social policies should be confined to domestic level.[179] As aforementioned, it is a new deal demanding from the states more active intervention to the market in order to solve the crosscutting and complex problems of climate change. It is a problem that can be solved neither within the confines of territorial borders of states nor infra-systemic policies of global regimes. So, it rings also the bells for the EU and demands a constitutional change if the EU is serious and sincere in its aspirations that it announced explicitly in its GND as to being a global leader in climate change.

Thus, the GND poses also a constitutional challenge for the EU whose treaties represent the logic of ordoliberal policies with their significant focus on the self-operating and independent logic of the market. This is most obvious in the distribution of powers between the EU and member states with respect to the economic and monetary policies, granting the former exclusive competence on the area of monetary policy whereas leaving the latter's exclusive competence on determining their fiscal policies.[180] This creates a situation in which the EU cannot intervene in the market directly and makes only use of regulatory policies instead of social policies. With this logic comes also the no bail-out clause provision, namely Art 125 of the Treaty on the Functioning of the European Union (TFEU), stipulating that neither the EU nor the member states can take on the depts of another member state. As such, it becomes almost impossible to distribute responsibility between Member States on the one hand, and between the EU and Member States on the other. In this picture, solidarity becomes only an exception achieved at the expense of constitutional structure of the EU. From here arises the question whether the EU can be a leader of global climate

[179] C. Joerges and F. Rödl, 'Social Market Economy as Europe's Social Model' *European University Institute LAW*, 2004/08 (2004), available at https://tinyurl.com/yp4sy93w (last visited 31 December 2021).

[180] See Art 3 of the Treaty on the European Union (TEU).

change by bridging the gaps between developing and developed countries and being a leader not only with words but also with deeds while it still shies away from taking on distributive policies within its internal borders. It is my contention that the EU's GND could achieve its global aspirations only if the EU free itself from the shackles of the impossibly trinity: fiscal sovereignty, no-bailout clause, and independent monetary policy.[181] Therefore, the EU's Green New Deal will probably strike a fatal blow to the EU's constitutional/institutional crisis, which are further exacerbated with the measures taken to tackle economic crisis during the last decade.[182] On this account, no need to be a soothsayer to predict that the EU is going to/should enter in a new constitutional process with a view to aligning its Green New Deal policies with its substantive constitution. For the EU's GND is likely to function as a 'constitutional/institutional irritant' to the EU's substantive constitution, which is founded on the idea of 'monetary solidarity' forcing member states to be kept in solitary confinement when it comes to fiscal policies that necessarily demands (re)distribution.

[181] H. Beck and A. Prinz, 'The Trilemma of a Monetary Union: Another Impossible Trinity' 47(1) *Intereconomics* (2012) 39-43.

[182] See for the EU's multidimensional crisis, which is not only economical but also political and institutional E. Chiti and P.G. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' 50(3) *Common Market Law Review*, 683 (2013).