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Addressing Complexity

The rise of the hybrid multilateral climate regime and its impact on the role played by ENGOs in the governance of climate change.

by

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Abstract

The spread of transnational and global phenomena is putting under strain the state-centric bias crystalized, *inter alia*, in inter-national law and in traditional forms of multilateralism. In this context, climate change can be considered as the transnational and global phenomenon par excellence, and for this reason it might be relevant to investigate over new forms of multilateralism enhancing the role played by NSAs and increasing the effectiveness of the global climate governance system. Accordingly, after duly addressing the literature on the issue at stake, this study has developed the concept of 'hybrid multilateral climate regime' (HMCR) and it has taken trace of its process of materialization with the aim of understanding to what extent does the HMCR emerging from the Paris Agreement has strengthen the role played by a particular category of NSAs (*i.e.*, ENGOs) in the global system of climate governance.

Key-words

Hybrid Multilateral Climate Regime, Environmental NGOs, NSAs, Climate Change, Global Climate Governance.

1. Introduction

1.1 The analytical problem

International Law is based, *inter alia*, on the postulate of full sovereignty of states,[II] which have long dealt with complex international issues by establishing multilateral regimes. While the beginning of multilateralism can be identified in the process which led to the Peace of Westphalia of 1648,[III] permanent systems of multilateral diplomacy emerged in Europe just after the end of the Napoleonic Wars,[IV] and then spread at the planetary level during the 20th Century.

Numerous multilateral regimes have emerged for the regulation of various aspects of international law and politics. However, there is a new realm of the international agenda, *i.e.,* the governance and protection of the global environment, which is gaining unprecedented importance, and which is unlikely to be effectively regulated through the establishment of a multilateral regime which still puts at the centre the self-interest of independent sovereign states. Indeed, 'no crisis in world history has so clearly demonstrated […] the increasing interdependence of governments and other stakeholders as the contemporary global environmental crisis',[V] and this is due to the fact that, as the US Diplomat George Kennan stated already in 1970, 'the entire ecology of the planet is not arranged into national compartments'.[VI]

When it comes to the environmental crisis, climate change can be considered as the transnational and global environmental phenomenon *par excellence*. As a matter of fact, while climate change is unequivocally caused by the anthropogenic emission of greenhouse gasses (GHGs) in the atmosphere, which is virtually generated as a subproduct of any economic activity performed by any subject in any region of the Globe, the consequences of climate change range from floods to droughts,[VII] and from rising sea levels[VIII] to ocean acidification[IX] (*i.e.,* phenomena which are transboundary in nature and which do not necessarily take place in the same region in which GHGs were emitted).

The singular nature of climate change, therefore, poses unprecedented governance challenges, as it requires the establishment of a regime that is qualitatively different from most of those which are already in place. This new regime requires, *inter alia*, a greater participation of non-state actors (NSAs), in order to bypass the traditionally state-based

dimension of both international law and traditional multilateralism. In fact, according to a functionalist perspective, the emergence of phenomena and threats which are transnational in nature requires the rise of equally transnational actors and structures in order to be duly addressed. Here is where the role of NSAs comes in.

The concept of 'hybrid multilateralism' has recently emerged in order to fill the voids that traditional multilateralism brings about when it comes to the governance of climate change. Nevertheless, this concept has not yet been tested against its potential to enhance the role of environmental NGOs (ENGOs) through the establishment of a hybrid multilateral climate regime. Therefore, this research will try to map the evolution of the concept of 'hybrid multilateralism' and the materialization of the 'hybrid multilateral climate regime', and it will consider the implications that the hybrid multilateral climate regime brings about when it comes to the enhancement of the role played by ENGOs in the governance of climate change.

1.2 The state of the art

The main focus of scholars studying NSAs' role in international environmental and climate law has changed over time. Accordingly, a chronological classification of the state of the art has been conducted, and four different phases have been identified: a) late '90s-early 2000s; b) run-up of the Paris Agreement; c) aftermath of the Paris Agreement; d) most recent years and emergence of hybrid multilateralism.

a) During the '90s, Cameron provides a focus on three (back then) recent 'developments in international environmental law',[X] one of which is the 'evolving role of non-state actors' in international environmental law.[XI] The author observes that the position of NSAs is problematic, as it is difficult to both develop a 'workable mechanism for non-state actor participation',[XII] and to provide NSAs with greater recognition within the international environmental law framework.

The problematic nature of NSAs is the main object of study of Alkoby, who thoroughly discusses 'the paradox of non-state actors' in the aftermath of the Kyoto Protocol.[XIII] Indeed, despite the great role played by NSAs in the negotiation processes leading to the creation of the Protocol of 1997, they still lack a clearly defined legal and political status.

These two works map the new role played by NSAs from the early '90s, and shift scholarly attention on the need to institutionalize NSA's participation in the international

environmental regime. However, these articles still do not focus on the international climate regime, and do not provide a legal analysis of the contribution that NSAs could play in enhancing climate governance.

b) The object of analysis changes with Dannenmaier, who observes that 'NSAs have helped to advance the international climate regime',[XIV] and that their role in climate compliance has slightly increased through the creation of the Kyoto Protocol. Furthermore, Dannenmaier wishes post-2012 negotiators to create a system which gives more room for NSAs' intervention in climate compliance mechanisms.

The work by Savaresi tries to understand to what extent NSAs influence states' behaviours on climate policies. According to the author, international environmental law is 'increasingly shaped with a crucial input from civil society',[XV] and this contributes to explaining the different role played by the EU and the US in the international climate regime.

The abovementioned works analyse the role of NSAs in the international climate regime, and they also deepen the study on NSA's influence on states' behaviour. However, having being published before 2015, they are still built on the study of the post-Kyoto climate framework, and they miss the new features introduced with the Paris Agreement.

c) Starting from the analysis of the Paris Agreement, Van Asselt observes that, given their very nature and capabilities, 'NSAs should be assigned a clear role in review processes'.[XVI] However, as the scholar observes, NSAs have been assigned no formal role by the Agreement itself, so that an explicit recognition of their function will hopefully take place in successive negotiations.

Afterwards, Colombo seeks methods for enforcing international climate law. According to the author, the role of NSAs bringing cases before domestic courts will gain new centrality in the enforcement of climate law, as it also emerges from both the Urgenda Case and the Leghari Case. As Colombo observes, 'it appears that similar decisions are more likely to morph out of the Paris Agreement in comparison with previous agreements'.[XVII]

All in all, the post-Paris literature focuses on the identification of methods through which NSAs could play a role in the enforcement of international climate law. In this context, while van Asselt pushes for the formal inclusion of NSAs in the international climate regime, Colombo focuses on NSAs' capacity to bring climate cases before domestic courts. Nevertheless, it should be observed that, although four years have passed since the

publication of Colombo's article, still no consistent practice on the enforcement of international climate law in domestic courts has emerged.

d) While Bäckstrand et al. assert that the traditional inter-state multilateral approach does no longer represent the reality of the international climate regime, and they describe the emergence of a system of hybrid multilateralism (conceived as a 'heuristic to capture [the] intensified interplay between state and non-state actors in the new landscape of international climate cooperation')[XVIII] from Copenhagen (2009) to Paris (2015), Kuyper et al. focus on how the Paris Agreement institutionalized such hybrid multilateral system through the introduction of nationally determined contributions, which will allow NSAs to enhance the 'justice, legitimacy, and effectiveness'[XIX] of the international climate regime.

Afterwards, Dryzek maintains that hybrid multilateralism opens new opportunities to NSAs, 'especially when it comes to that of intermediary in processes of orchestration',[XX] while Zelli et al. observe that different levels of institutionalization of hybrid multilateralism 'characterise selected sub-areas of global climate governance' in accordance with the specific problem-structure concerned.[XXI]

Finally, also Rajavuori acknowledges 'the gradual rise of hybrid multilateralism',[XXII] but he observes that the category of NSAs is too broad and diversified to provide a coherent analysis of the emerging climate regime complex.

The concept of 'hybrid multilateralism' is likely to be a valuable instrument for the conduct of further studies on the architecture of the post-Paris international climate regime. However, as Rajavuori asserted, a generalized study of NSAs' role in hybrid multilateralism is neither feasible nor desirable, given the existence of great differences between NSAs.

Consequently, the contributions deriving from this 'fourth period' go in the direction of focusing on the role played by particular categories of NSAs in the hybrid multilateral framework established under the Paris System. The current research, therefore, will try to understand whether the post-Paris hybrid multilateral climate regime is being capable of enhancing the role played by ENGOs (*i.e.*, a peculiar category of NSA) in climate change governance. Still, a definition of hybrid multilateral climate regime (HMCR) has never been provided before, so that this research will also try to address this literature gap.

1.3 Research question

The overarching question that this research will answer is: *To what extent does the hybrid multilateral climate regime emerging from the Paris Agreement System give environmental NGOs a stronger stand in the governance of climate change?*.

In order to provide a satisfactory answer to the research question, the following sub-research questions will be asked, and each one of them will be addressed in a separate paragraph:

I. What is a hybrid multilateral climate regime and which elements of the Paris Agreement can be reconducted to it?
II. What are environmental NGOs, and what is their role in the global governance of climate change?
III. To what extent did the presence of NGOs and ENGOs in the international climate regime increased over time, and was there any significant change after the establishment of the Paris Agreement?

The main research question is of major importance in order to properly address the analytical problem that has been identified (*i.e.*, the need to involve qualitatively new systems and actors in the governance of climate change). Furthermore, the research question is perfectly suitable to fill the gaps and expand the current state of the art concerning the role played by NSAs in the governance of climate change.

In addition to this, the three sub-research questions do not only aim at disassembling and clarifying the content of the main research question, but they also contribute to deepening its level of analysis.

1.4 Methodology

The current research will be conducted as a desk-study. As a matter of facts, all the data and information that will need to be processed in order to both answer to the main research question and to the sub-research questions can be found in international legal documents and in the existing literature.

Therefore, while the second paragraph (§2) will be developed through the adoption of both doctrinal and legal document analysis in order to clarify the meaning of hybrid multilateral climate regime, and to identify the elements of the Paris Agreement which can be reconducted to it, paragraph 3 (§3) will mainly rely on doctrinal analysis in order to clarify

the nature of NSAs, NGOs, and ENGOs, as well as the means at their disposal in the global governance of climate change.

Finally, legal document analysis will be central, again, in order to answer sub-research question III, in paragraph 4 (§4). In this occasion the reports produced by the SBSTA over the last two decades will be examined in order to understand if there has been any significant shift in the role played by NGOs and ENGOs over this timeframe (a special eye will be kept on the post-2015 changes).[XXIII]

1.5 Structure of the work

While the objective of this introductory paragraph (§1) was to highlight the problematic discrepancy between a state centric international climate regime and the transnational and global nature of the phenomena that it tries to address, to review the literature on the role of NSAs in international environmental and climate change law, and to introduce a research question aimed at addressing the literature gap, the second paragraph (§2) of this research will aim at clarifying the concept of hybrid multilateral climate regime, as well as at identifying the elements established by the Paris Agreement which can be reconducted to it. Accordingly, after shortly introducing the basics of international regime theory, the (limited) scholarly literature on hybrid multilateralism will be revised. Hence, a definition of hybrid multilateral climate regime will be drawn, and some considerations on what does HMCR entails will be provided. Finally, the paragraph will consider the Paris Agreement in order to understand which of its elements can be reconducted to the HMCR.

Secondly, provided that the category of non-state actors is too broad to conduct a coherent analysis of their role and behaviour in hybrid multilateral systems,[XXIV] and given that ENGOs represent a particularly interesting sub-category of NSAs when it comes to the role played in the HMCR,[XXV] paragraph 3 (§3) will provide an analysis of ENGOs' role in the climate governance system. Indeed, after defining the categories of NSA and NGO, and having described their functioning in the climate governance system, a definition of ENGO will be provided, as well as the analysis of ENGOs' role in the global governance of climate change. Finally, the potential for enhancing ENGOs' role through the strengthening of the HMCR will be considered.

Afterwards, to answer sub-research question III, paragraph 4 (§4) will pass through the SBSTA's 'reports on the session' that have been produced under the UNFCCC, and it will

track whether (and, eventually, to what extent) did the presence of NGOs and ENGOs within the SBSTA processes changed over time. Accordingly, this paragraph will firstly introduce the SBSTA, and it will explain why the monitoring of its reports can provide significant information. Subsequently, the data gathered through the analysis of SBSTA's reports will be revealed and commented, and the answer to sub-research question III will be provided.

In conclusion, after reporting a summary of the findings of each paragraph of this research, paragraph 5 (§5) will answer to the research question formulated in paragraph 1. Lastly, further grey spaces of the literature will be identified and signalled in order to prompt the conduct of new research directly or indirectly related to the issues which have been covered in this work.

2. What is a hybrid multilateral climate regime and which elements of the Paris Agreement can be reconducted to it?

2.1 International regimes' scholarship

Scholarly attention over international regimes started to emerge during the '70s and spread in particular during the '80s, *inter alia*, thanks to the precious contributions brought about by Robert Keohane's works.[XXVI] The study of international regimes has become so popular among IR scholars that, nowadays, regime theory is conceived as an established sub-field of international relations, which focuses in particular on the analysis of the origin, transformation, and effectiveness of international regimes.[XXVII]

Many definitions of international regime have been provided over time, but the one which is still considered the most authoritative and comprehensive was provided by Stephen Krasner who, in 1982, defined an international regime as a set of 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[XXVIII] Still, even this definition presents some shortcomings, because vague concepts as 'principles' and 'norms' remain poorly definite.[XXIX] Therefore, some scholars adopted a much narrower conception of international regime, and they conceived it as a system that only exists when institutionalized through the establishment of multilateral agreements.[XXX]

Apparently, international regimes can contrast the state of anarchy which, according to realist thinkers, would characterize inter-state relationships, and they can do so by creating stable platforms for inter-state cooperation which can facilitate international commitments, increase the cost of free-riding, and ease the establishment of new international agreements. As a matter of facts, international regimes favour the creation of iterated negotiation processes, consent the reduction of information costs, facilitate the establishment of monitoring systems, and are deemed effective in curtailing domestic opposition when it comes to the signature of new inter-state agreements.[XXXI]

It appears that issue-specific international regimes have emerged in all main global policy areas, including environmental protection, and more specifically climate change governance.[XXXII] Nevertheless, it should be noted that international regimes have been traditionally framed as exclusively composed by states and, even though some efforts to grant a bigger role to NSAs within this framework have been made, 'regime theory [still] regards States as principal actors in world politics'.[XXXIII]

2.2 The rise of hybrid multilateralism

Interestingly, while the scholarship on international regimes originated decades ago, in the Cold War context, and it was initially focused on international security concerns, the scholarship on hybrid multilateralism has much more recent origins, and it emerged from the scholarly field on climate governance. After passing through the relevant literature, only three definitions of hybrid multilateralism have been identified. These definitions present three main problems: they are not particularly intelligible and coherent with each other, they do not focus on the role played by the Paris Agreement, and they generally seem to confine hybrid multilateralism to the sole policy field of climate governance.

Firstly, as it has already been stated in the introductory paragraph of this research, the concept of hybrid multilateralism was developed by Bäckstrand et al., who defined it as 'a heuristic' to capture the 'intensified interplay between state and non-state actors in the new landscape of international climate cooperation'.[XXXIV] According to these scholars, hybrid multilateralism takes into account two new tendencies of global climate policy, *i.e.* the emergence of a hybrid climate policy architecture, and an intensified interaction 'between multilateral and transnational climate action'.[XXXV] In the same year, Dryzek has taken up the concept of hybrid multilateralism which, according to the author, is 'defined by emerging

linkage between the established multilateral negotiations and the plethora of self-organizing governance initiatives involving varieties of non-state actors cooperating with one another'.[XXXVI] Finally, Strachová has more recently defined hybrid multilateralism as a form of 'cooperation among different actors at different levels'.[XXXVII]

What emerges from these definitions is not merely the newfound accent put on the role played by NSAs, but also the heterogeneity they bring about as they define hybrid multilateralism as a 'heuristic', as a 'linkage', and as a form of 'cooperation'. Indeed, not only these terms strongly differ with each other, but they are also characterized by a strong level of vagueness.

Secondly, the relationship between hybrid multilateralism and the establishment of the Paris Agreement must be taken into account. In fact, it should be observed that many scholars focusing on the study of the climate regime have ascertained that hybrid forms of multilateralism just materialized with the establishment of the Paris Agreement. Indeed, already in 2016 (*i.e.*, one year before the definition of hybrid multilateralism was provided), Rockström et al. referred to the 'hybrid model' emerging from the Paris Agreement,[XXXVIII] while van Asselt et al. more specifically referred to 'the hybrid model of international climate policy embodied in the Paris Agreement'.[XXXIX] Still, it should be observed that in these first cases, the term 'hybrid' is referred to the mix of bottom-up and top-down provisions that the Agreement brings about, especially when it comes to the NDCs system, and it does not explicitly mention the enhancement of NSAs in this new framework. Afterwards, in 2017, Bäckstrand et al. plainly asserted that 'the Paris Agreement has led to a system that institutionalizes hybrid multilateralism',[XL] while Kuyper et al., one year later, argued that 'the Paris Agreement cements an architecture of hybrid multilateralism'.[XLI]

Evidently, the establishment of the Paris Agreement has strongly contributed to the materialization of hybrid multilateralism. Nonetheless, the definitions of hybrid multilateralism only focus on its functioning and constitutive elements, without referring to the Agreement whose establishment has been necessary in order to make the rise of hybrid multilateralism possible. Hence, the identification of a conceptual tool linking the rise of hybrid multilateralism to the establishment of the Agreement of 2015 could prove to be particularly useful in order to add coherence and continuity to this picture.

Thirdly, it might be noted that two out of three of the existing definitions of hybrid multilateralism directly reconduct this 'heuristic', 'linkage', or form of 'cooperation', to the field of climate governance. Indeed, while Strachová's definition adopts a more opened approach (as it describes hybrid multilateralism as a form of cooperation, without specifying the policy field in which this cooperation occurs), Bäckstrand et al.'s and Dryzek's definitions exclusively reconduct hybrid multilateralism to the climate policy field. This last approach seems to exclude the possibility for hybrid forms of multilateralism to materialise in further policy areas in which the role of transnational phenomena and NSAs is actually central, and in which hybrid multilateral systems maybe could (and should) be identified (*e.g.* policy fields of transnational migration, food security, and healthcare).[XLII]

Provided that the current research does not want to *a priori* exclude the possibility for hybrid forms of multilateralism to emerge in other policy fields in the future, it identifies the need to qualify those forms of hybrid multilateralism emerging in the climate policy field as peculiar (and not general) forms of hybrid multilateralism.

2.3 The Hybrid Multilateral Climate Regime

In order to preserve the broader vision brought about by the concept of hybrid multilateralism, but also to overcome its shortcomings and the inconsistency underpinning its definitions, the concept of hybrid multilateral climate regime is hereby introduced. This research defines the hybrid multilateral climate regime as a global regime, characterized by hybrid forms of multilateralism, which started to emerge in the field of climate governance after the establishment of the Paris Agreement. The existence of hybrid forms of multilateralism within the HMCR manifests itself through the enhanced role attributed to NSAs, which can also further evolve, *inter alia*, through the creation of new COP documents within the UNFCCC process.

The concept of HMCR can prove to be particularly useful as it incorporates the concept of hybrid multilateralism, while putting it in a more coherent and definite context. As a matter of facts, the HMCR clearly is a regime; however, it is not defined as an 'international regime', in order to avoid the state-centrism which characterises international regime theory.

Moreover, already in its name, HMCR is defined as a particular type of regime (hybrid multilateral c*limate* regime) in order not to exclude the possibility for the emergence of further Hybrid Multilateral Regimes not directly concerning the system of climate governance.

In addition, the emergence of the HMCR is explicitly reconducted to the establishment of the Paris Agreement. The aim of this passage is twofold: on the one hand, it takes on board the analysis of scholars identifying the emergence of hybrid forms of multilateralism in the Post-Paris institutional architecture; on the other hand, it also subtracts some levels of fuzziness to the definition of global regime, by circumscribing it to the system emerging after the creation of a peculiar international agreement. In this context, a critical voice might argue that linking the HMCR to the establishment of the Paris Agreement (*i.e.,* an inter-national treaty) actually means not to get rid of the state-centric approach which the creation of the HMCR aims to overcome. However, it should be noted that, in order to move form a traditionally international regime to a hybrid multilateral regime, a fist act of devolution of duties and tasks from states to NSAs should firstly take place. Therefore, in this framework, the establishment of the Paris Agreement might be seen as an act conducted by the (narrowly defined) inter-national community, in order to constitutionalise the emergence of the HMCR.[XLIII]

Finally, the HMCR is not defined as a static entity at the last stage of a process, but rather as a new start: the enhancement of the role played by NSAs (firstly triggered by the creation of the Paris Agreement) is just at its early stages, and its future evolution is anything but obvious or necessary.

2.4 The Paris Agreement and the HMCR

The Paris Agreement is an international climate treaty established within the UNFCCC framework at COP 21 in 2015. Given the limitations characterizing the Kyoto Protocol's top-down approach (*i.e.,* the strict division between Annex I and non-Annex Parties, and Annex I Parties' incapacity to extend and scale-up their obligations in a new commitment period)[XLIV] the Paris Agreement adopts a quite different stance towards climate governance. Indeed, instead of identifying binding individual obligations of result for 'developed' country Parties, the Agreement set global obligations of result,[XLV] and it also introduces individual obligations of conduct, binding for all country Parties,[XLVI] in a bottom-up fashion. Actually, it is in the establishment of a bottom-up system that some scholars identify the first traces of hybrid multilateralism emerging from Paris.[XLVII]

Therefore, the first relevant element which can enhance hybrid forms of multilateralism, and which can constitute the basis of the HMCR, needs to be identified at art.3 of the Paris

Agreement. Indeed, this article firstly introduces NDCs which Parties have to produce 'with the view to achieving the purpose […] set out in Article 2' (*i.e.,* keeping global temperature rise within 2°C and preferably within 1.5°C above the pre-industrial level). According to subsequent articles, 'each Party shell prepare, communicate, and maintain' NDCs,[XLVIII] new NDCs have to 'represent a progression beyond the Party's then current NDC',[XLIX] and 'each Party shall communicate a NDC every five years'.[L] NDCs surely are the keystone of the Paris Agreement's mitigation objective, and there is no doubt that in this context NSAs will play a crucial role 'as governors, implementers, experts and watchdogs'.[LI]

The presence of a bottom-up approach, which can also enhance NSAs' role and broaden the basis of the HMCR, should also be identified at Articles 7 and 14. Indeed, similarly to NDCs, National Adaptation Plans (NAPs) 'shall' be produced by each country Party, and together with the NDCs, they will be periodically assessed in the global stocktake process.[LII] Also in this case, it can be expected that a large variety of NSAs (ranging from ENGOs to HR-NGOs, banking institutions, consulting agencies, local communities, and further private companies) will have a large role to play in the process of planning, monitoring, and evaluation that both the creation of NAPs and the global stocktake will entail.[LIII] Indeed, as Article 7(5) clearly states, 'adaptation action should [take] into consideration vulnerable groups, communities and ecosystems, and […] traditional knowledge, knowledge of indigenous peoples and local knowledge systems'.[LIV]

However, there are also some elements of the Paris Agreement which cannot be directly reconducted to its bottom-up architecture, but that still play a role in the materialization of the HMCR. In this context, provisions explicitly referring to an enhanced role of NSAs can be identified at Article 6. Indeed, while Article 6(4) establishes a market mechanism in order to substitute the outdated Clean Development Mechanism, through a mechanism which shall, *inter alia*, 'incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities',[LV] at Article 6(8) country Parties recognize the importance of adopting 'non-market based approaches' for the implementation of their NDCs, with the aim to, *inter alia*, 'enhance public and private sector participation'.[LVI]

Further provisions which contribute to the expansion of the role played by NSAs are Article 11, on capacity-building, and Article 12, on climate education and awareness. Indeed, it is clearly asserted at Article 11(2) that 'capacity-building should be […] responsive to national needs, and foster country ownership of Parties, […] including at the national,

subnational, and local levels',[LVII] while Article 12 stresses the role of 'public participation' in the process of spreading climate change education.[LVIII]

In addition, the enhanced transparency framework established at Article 13 and the compliance mechanism identified at Article 15 also deserve to be mentioned. As a matter of fact, the enhanced transparency framework obliges each Party to regularly prepare 'inventory report of anthropogenic emissions',[LIX] and also requires Parties (though in a non-binding fashion) to provide information 'related to climate change impacts and adaptation'.[LX] In this context, the role of NSAs may be focused on (but not limited to) supporting country Parties in preparing official reports, or in conducting informal analysis and studies which may enhance the transparency of the system. Moreover, the compliance mechanism, to be carried out in a 'transparent, non-adversarial and non-punitive' way, 'shall be expert-based'.

It is in the political independence of the technical experts that, according to Van Asselt, the link between the compliance mechanism and the enhancement of NSAs' role can be identified.[LXI]

Importantly, also Article 16 deserves some attention, as it focuses on policy-making, and more specifically on the role that the Conference of the Parties has to play within the framework established under the Paris Agreement. In this context, Article 16(8) is particularly relevant, as it establishes that 'any Body or agency, [including] non-governmental [organizations], which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties serving as the meeting of the Parties to this Agreement as an observer, may be so admitted'.[LXII]

Lastly, it is important to observe that all the aforementioned provisions should be read in light of the Agreement's Preamble which recognizes, *inter alia*, 'the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge' and, even more importantly, 'the importance of the engagements of all levels of government and various actors'.[LXIII] In fact, while the firstly quoted paragraph clearly underlines the role of scientific knowledge (which can only be brought about by the scientific community, epistemic communities, and ENGOs, *i.e.* NSAs) in climate action, the second one explicitly mentions the importance of including actors beyond governments.

3. What are environmental NGOs, and what is their role in the global governance of climate change?

3.1 Non-State Actors and Non-Governmental Organizations

The category of NSAs is a particularly broad one, and this is the reason why a large variety of definitions of NSAs have been created over time. While Clapham uses an opened approach, as he defines NSAs as 'any entity that is not actually a state',[LXIV] Josselin and Wallace define NSAs as 'actors which are at least in principle autonomous form the structure and machinery of the state, [and which] are primarily transnational in organization and objectives'.[LXV] The term NSAs includes 'a spectrum from rebels, to terrorists, and Al-Qaeda, through to business, non-governmental organizations, and religious groups'.[LXVI] Indeed, while some scholars and policymakers identify NSAs as the 'bad guys', others associate them with civil society.[LXVII]

Apparently, NSAs have started to influence a number of fields of international law and politics, including environmental law, criminal law, transnational terrorism, global migration, and human rights protection, and such a great heterogeneity probably explains why no official definition of NSA has emerged from international law documents up until now.

Despite not constituting a compact and coherent group of actors, NSAs can play a formal role, at the international level, through different pathways, as they 'participate as observers in international organizations, […] and they participate in the national and international implementation of principles and rules adopted at the regional and global level'.[LXVIII] In addition, a more informal influence of NSAs on the global political agenda takes place, *inter alia*, through information sharing, financial pressures, and public awareness-rising.[LXIX]

The emergence and diffusion of NSAs at the global level allowed them to impact international law and to participate in international legal processes throughout history.[LXX] This 'explains why state-exclusivist approaches to international law and international relations are deficient and the study of nonstate actors and their interaction with multiple international legal dimensions and processes is called for'.[LXXI] Obviously, the rising relevance of NSAs also led a number of scholars to carryout research focusing, *inter alia*, on non-state power, non-state governance, private regulation, NSAs' interaction with international law, and NSAs' relationship with civil society.[LXXII]

NGOs can be considered as a sub-category of NSAs. Provided that the NGO-category is more homogeneous than the category of NSA, it is possible to identify some references to NGOs in international treaties and in international organizations' documents.

A first reference to non-governmental organizations can be identified at art.71 of the UN Charter, which allows the UN Economic and Social Council (ECOSOC) to make arrangements for consultations with NGOs. Furthermore, ECOSOC Resolution n.1296 firstly identified the criteria to provide NGOs with consultative status before the UN Economic and Social Council, and it was subsequently amended by further ECOSOC Resolutions. However, none of these Resolutions included any explicit definition of NGO.

Some NGOs also have consultative status in other intergovernmental or supranational organizations (as the Council of Europe and the European Union), and they receive significant public funds.[LXXIII] However, the absence of a common definition of NGO at the European level was strongly criticised by the European Court of Auditors, which also put into question the transparency of the European Commission's accounting system.[LXXIV]

A definition of NGO is provided by the OECD, which defines NGO as 'any non-profit entity organised on a local, national or international level to pursue shared objectives and ideals, without significant government-controlled participation or representation'.[LXXV] A further definition comes from the Encyclopaedia Britannica, which defines the NGO as a 'voluntary group of individuals or organizations, usually not affiliated with any government, that is formed to provide services or to advocate a public policy'.[LXXVI]

As well as NSAs, NGOs play a role in various fields of international law and politics, ranging from environmental protection, to human rights protection, healthcare assistance, conflict monitoring, economic development, and transnational migration.[LXXVII] Provided that NGOs both operate at the domestic and transnational level through lobbying, consulting, and monitoring activities, they exercise a considerable power that has sometimes been criticized in terms of legitimacy and accountability.[LXXVIII] As a matter of facts, despite usually relying on broad public support, NGOs remain private actors pursuing particular interests, their decisions are mainly expert-based, and their representative have not (necessarily) been elected by a democratic majority. For this reason, the rising relevance of NGOs at the global level gives birth to what Turner calls 'the new politics of expertise', *i.e.,* a form of politics characterized by the presence of several highly technical and complex issues, which therefore

enhance the position of experts, who 'might [in the worst-case scenario] place topics that should be subject to public discussion in the domain of expert knowledge'.[LXXIX]

Nevertheless, as Wapner demonstrates, NGOs are not less accountable than states.[LXXX] In fact, NGOs have to deal with issues of internal accountability (*e.g.* need for high number of participants, and for participants' donations), and external accountability (*i.e.,* NGOs operate in a global network in which they interact and share information with other NGOs, IGOs, and States), that make them 'not more accountable than states, but differently accountable'.[LXXXI]

3.2 Environmental NGOs

As Rajavuori observed, the category of non-state actors is too broad to provide a coherent analysis of their role and behaviour in hybrid multilateral systems.[LXXXII] Therefore, it is necessary to focus on a particular sub-category of NSAs in order to understand which is its specific role in the global governance of climate change. Although there are many different categories of NSAs deeply influencing the system of climate governance and which have been included in the HMCR, this study has decided to focus on ENGOs. Indeed, ENGOs constitute a particularly interesting subject, as they entail, *inter alia*, scientific expertise, massive public participation, and they specifically operate with the aim of protecting or restoring the natural environment.[LXXXIII] It seems reasonable then, to consider ENGOs as subjects endowed with a great potential for enhancing the global climate governance system, and whose institutionalization within the HMCR could bring about substantial benefits to the system itself.

No official definition of environmental NGO can be identified in international law documents. Nonetheless, the central role of non-governmental organization has been recognized in environmental (soft and hard) law documents as the Agenda 21 and the Aarhus Convention. In fact, the Agenda 21 states that 'relevant NGOs' (*i.e.,* ENGOs) 'should be given opportunities to make their contributions and establish appropriate relationships with the United Nations system',[LXXXIV] thus enhancing, *inter alia*, ENGOs' capacity to obtain consultative status before UN institutions. The Aarhus Convention goes even further, as it does not only provide any NGO 'qualified in the fields to which this Convention relates' (*i.e.,* ENGO) the right 'to participate as an observer' to the meeting of the Parties established by

the Convention,[LXXXV] but also grants any ENGO ('who considers that [its] request for information under article 4 has been ignored') with access to justice.[LXXXVI]

Furthermore, ENGOs can obtain observer status before international bodies that do not directly refer to NGOs in their constitutive treaty. For instance, ENGOs 'can get directly involved with UNEP by applying for Accreditation to the United Nations Environment Assembly (UNEA) of UNEP, which grants them observer status to UNEA'.[LXXXVII]

Despite the absence of an official definition, the ENGO can be defined as a particular category of NGO which is mainly concerned about addressing environmental issues. The first ENGOs emerged already in the mid-Nineteenth Century; however, progress in the fields of natural sciences led to a substantial expansion of public environmental concerns, which also led to a significant spread of ENGOs at the global level since 1970s.[LXXXVIII]

Nowadays, ENGOs can cover a large number of environmental problems ranging from species protection, to (general or specific) habitat protection, biodiversity conservation, contrasting waste pollution, ozone layer preservation, and fight against climate change. Therefore, it is also possible to distinguish between sector-specific ENGOs, which only focus on particular environmental issues (*e.g.* 'Sea Shepherd' on marine conservation; 'Traffic' on wildlife trade monitoring; 'Climate Action Network' on climate change mitigation and adaptation), and generalist ENGOs, which address a larger number of environmental topics (*e.g.* Greenpeace, World Wildlife Fund, and Client Earth).

Given the subject of this research, it is the case of focusing on ENGOs' role in tackling climate change. In this context, a distinction must be drawn between formal and informal ways through which ENGOs can contribute to the system of climate governance.

As well as other NGOs, the main pathway that ENGOs can undertake to formally participate to the system of climate governance concerns the possibility of obtaining observer status before intergovernmental or supranational organizations. Importantly, ENGOs can obtain observer status before the Conferences of the Parties under the UNFCCC. In this case, the application procedure is quite long (as it takes around 18 months), but it is based on a one-off process. Indeed, once obtained the observer status, the ENGO acquires the right to join any future UNFCCC COP, and it can therefore contribute to meetings and participate to the process of climate policy formulation.[LXXXIX]

Notwithstanding this, ENGOs remain secondary actors in the process of climate policy formulation, but they play a more prominent role in climate law implementation.[XC]

Climate law implementation is mainly conducted by ENGOs through informal pathways. Indeed, as also further NSAs and NGOs do, ENGOs can contribute to law and policy implementation by sharing information, rising public awareness, conducting scientific and legal analysis, and by engaging in monitoring and reporting activities.[XCI] Nevertheless, one of the peculiar instruments that ENGOs use in order to implement climate law is climate litigation.

It should be observed that ENGOs (and NGOs in general) have generally no standing before international tribunals and courts. Indeed, procedures before international arbitrators as the International Court of Justice (ICJ) and the International Tribunal on the Law of the Sea (ITLOS), can only be submitted by States recognizing these arbitrators' jurisdiction.[XCII]

The situation is slightly different in regional human rights courts. Indeed, while cases can be brought before the European Court of Human Rights by NGOs only in exceptional circumstances,[XCIII] recognized NGOs can lodge cases before the Inter American Commission of Human Rights,[XCIV] and before the African Commission on Human and Peoples' Rights.[XCV] The issue of linking HR law to climate change law is a complex one, and it will not be addressed in the current research. Given the aim of this work, however, it is relevant to underscore that no effective climate change litigation case has been brought before a regional HR Court by an environmental NGO up until now.

Finally, some encouraging results come from climate litigation cases lodged before domestic courts. The most prominent case in this regard is the 'Urgenda Case', started in 2015, in which the Urgenda Foundation (*i.e.,* an ENGO) brought the State of the Netherlands before the Dutch District Court (then the case passed to the Court of Appeal and to the Dutch Supreme Court) claiming that Dutch climate laws were unlawfully too loose.[XCVI] A similar case started in 2020, in the 'Neubauer et al. v. Germany'. In the German case, 'Friends of Earth Germany' (*i.e.,* an ENGO) was only one of the claimants who filed the case before the Federal Constitutional Court.[XCVII] Still, in both cases the courts have supported the ENGOs' claims, and they have ordered governments to adopt more stringent climate targets.

Furthermore, also private companies have been brought before domestic courts by ENGOs. This was the case in 'Milieudefensie et al v. Royal Dutch Shell', in which ENGOs lodged a case against the Dutch oil company, claiming a violation of Shell's duty of care. Also

in this case, the court argued in favour of the claimants and required Royal Dutch Shell to reduce its emission by 45% in 2030, having 2019 as a baseline.[XCVIII]

In light of the aforementioned successful cases, two caveats must be introduced.

Firstly, cases as 'Urgenda', despite praised by many, have also been criticized by some lawyers, who identified in the Court's ruling against the Dutch government a violation of the principle of separation of power.[XCIX] In order to solve this puzzle, it can be argued that, 'if a judicial decision defends environmental interests against majority decisions, this is legitimate only if constitutional value is attached to the environment'.[C]

Secondly, it is important to consider that different national legal systems can be more or less opened to accept NGOs' standing before domestic courts. Therefore, despite the great relevance of the aforementioned (domestic) cases, it should be kept in mind that ENGOs' capacity to bring climate cases before domestic courts strongly changes from one country to another. Hence, given the great potential for ENGOs to implement climate law through climate change litigation, to level the field of ENGOs' access to tribunal remedies would be crucial.

3.3 Next steps for the enhancement of ENGOs

As Berny and Rotes argued in 2018, ENGOs find themselves at a crossroad and, as any other form of civil society organization, they will have 'to take power or to compromise'.[CI] Undoubtedly, ENGOs' possibility to obtain observer status before international climate bodies (as the UNFCCC COPs) represents an important, though still limited, step towards the institutionalization of ENGOs' role in the process of climate law formation, and constitutes a central element for the building and enhancement of the HMCR. To account for the evolving role of ENGOs in UNFCCC processes would be particularly useful in order to understand how fast this development is taking place, and also in order to try to comprehend which future developments we can expect to occur in the coming years. For this reason, the next paragraph of this research will analyse the development of ENGOs participation to SBSTA sessions, which will be considered as a proxy of ENGOs' involvement in the international climate regime.

Furthermore, it would also be valuable to enhance NGOs' capacity to access tribunals. As a matter of facts, ENGOs proved to be particularly active watchdogs in terms of (national and private) climate targets' adequacy evaluation. Nevertheless, ENGOs' capacity to reach

domestic tribunals starkly changes depending on the domestic legal system. Still, climate change is a global phenomenon, and the harmonization of all country's domestic legal system could prove to be terribly complex, if not impossible. Therefore, to reform the functioning of existing international tribunals with a general subject-matter jurisdiction (as the ICJ) in order to provide ENGOs with the possibility of accessing them would be a terribly important step in the process of enhancement of the rising HMCR. Evidently, the conduct of future research on ENGOs' access to justice would be highly desirable.

4. To what extent did the presence of NGOs and ENGOs in the international climate regime increased over time, and was there any significant change after the establishment of the Paris Agreement?

4.1 The Subsidiary Body for Scientific and Technological Advice: limitations and strengths of this specific focus

As it has already been clarified, this research conceives the international climate regime as a particular regime that emerges in the policy area of climate governance when the (narrowly defined) international community (formed by once fully sovereign and independent states) devolves part of its power and responsibility to a broader climate governance system.[CII] It can be said, then, that the international climate regime emerged with the creation of the first international climate treaty (*i.e.*, the UNFCCC). Accordingly, in order to answer sub-research question III, it would be useful to pass through the SBSTA's 'reports on the session' that have been produced under the UNFCCC, and to track whether (and, eventually, to what extent) did the presence of NGOs and ENGOs within the SBSTA processes changed over time.

As a consequence, this research will consider the number of references to statements made by NGOs and ENGOs in SBSTA's 'reports on the session' as proxies of NGOs' and ENGOs' presence in the international climate regime. Such an approximation is not arbitrary but related to the prominent role played by the SBSTA under the three International Climate Treaties, as well as to the (even) political nature of this Body, and to the particularly high number of 'reports on the session' that it produced.

As a matter of facts, the SBSTA was established at Article 9 of the UNFCCC, in order to 'provide the Conference of the Parties […] with timely information and advice on scientific and technological matters relating to the Convention'.[CIII] Its duties include, but are not limited to, assessing 'the state of scientific knowledge relating to climate change', identifying 'innovative, efficient and state-of-the-art technologies […] on the ways and means of promoting development and/or transferring such technologies', and providing 'advice on scientific programmes, international cooperation in research and development related to climate change'.[CIV] Furthermore, the role of this permanent Body to the UNFCCC was reiterated by both the Kyoto Protocol and the Paris Agreement, stating that the functioning of the SBSTA applies '*mutatis mutandis*' to both the Protocol and the Agreement.[CV] In addition to this, in more than one occasion the SBSTA has been entrusted, by the COP, with the responsibility of organizing cycles of workshops focusing on specific and highly technical topics.[CVI]

Despite being a technical Body, the SBSTA is not politically independent (as 'it shall comprise government representatives'),[CVII] and for this reason the analysis of the reports that it produced over the last decades provides a valuable picture which combines both the scientific and political developments characterizing international climate politics. In addition, the SBSTA has been a particularly active Body, as it has published (up to date) almost fifty 'reports on the session' since 1997. By contrast, over the same time span, the Conference of the Parties has solely produced 24 (mainly political) reports, and the IPCC 29 (fully scientific) reports.

Still, also the limits of the approach adopted by this paragraph must be recognized. Firstly, the SBSTA remains a technical Body to the UNFCCC, not endowed with any concrete decision-making power, but only entrusted with the responsibility to provide information and advice to the Conference of the Parties.[CVIII] Therefore, to account for the number of references to NGOs' and ENGOs' statements within the SBSTA could be a limited way for approximating the evolving role of ENGOs within the broader international climate regime. Despite this, it is the very nature of the SBSTA to make it a suitable place for the interaction among states and specialized non-state actors as ENGOs, so that the analysis of SBSTA's reports represents an interesting occasion for observing the changing role of NGOs and ENGOs within the permanent body of the UNFCCC where such change is more rapid and evident.

Secondly, it can be observed that, if one relies on a broader definition of international climate regime (*i.e.*, by considering the international climate regime as something that goes beyond the institutions established under the three International Climate Treaties), the analysis provided by this paragraph, that solely focuses on NGO's and ENGOs' activities within the SBSTA, might appear even more limited. Nonetheless, to adopt a narrower conceptualization of international climate regime has been necessary in order to enable the operationalization of the current research.

Thirdly, also those who equate the international climate regime to the complex of climate institutions emerging since1992 (*i.e.*, since the establishment of the UNFCCC) could assert that there are international bodies or fora whose works are better representative than the SBSTA in terms of NGOs' and ENGOs' evolving role within the international climate regime, and which should therefore be taken as proxies instead of SBSTA's reports. However, as it has been stated, the analysis of SBSTA's works has been chosen because of a number of reasons, including SBSTA's prominent role within the international climate regime, the high number of reports it published, and its peculiar (*i.e.*, mainly scientific but also political) nature.

Furthermore, the decision to specifically account for the number of references to statements made by NGOs and ENGOs may be questioned as well. Nevertheless, it has been decided to solely account for references to NGOs' and ENGOs' statements, instead of focusing (more generally) on the number of references to NGOs and ENGOs in SBSTA's 'reports on the session', in order to really look at the space that NGOs and ENGOs have obtained over time within SBSTA's discussions, so to avoid superfluous references to NGOs (as those which aim at regulating their *modus operandi* within the SBSTA) that do not really provide an idea of their increasing presence within the SBSTA.[CIX] Moreover, the number *of references* to NGOs' (and ENGOs') statements has been accounted, instead of the number *of NGOs' statements*, because SBSTA's reports do not explicitly mention the number of statements made by NGOs and ENGOs in each session.

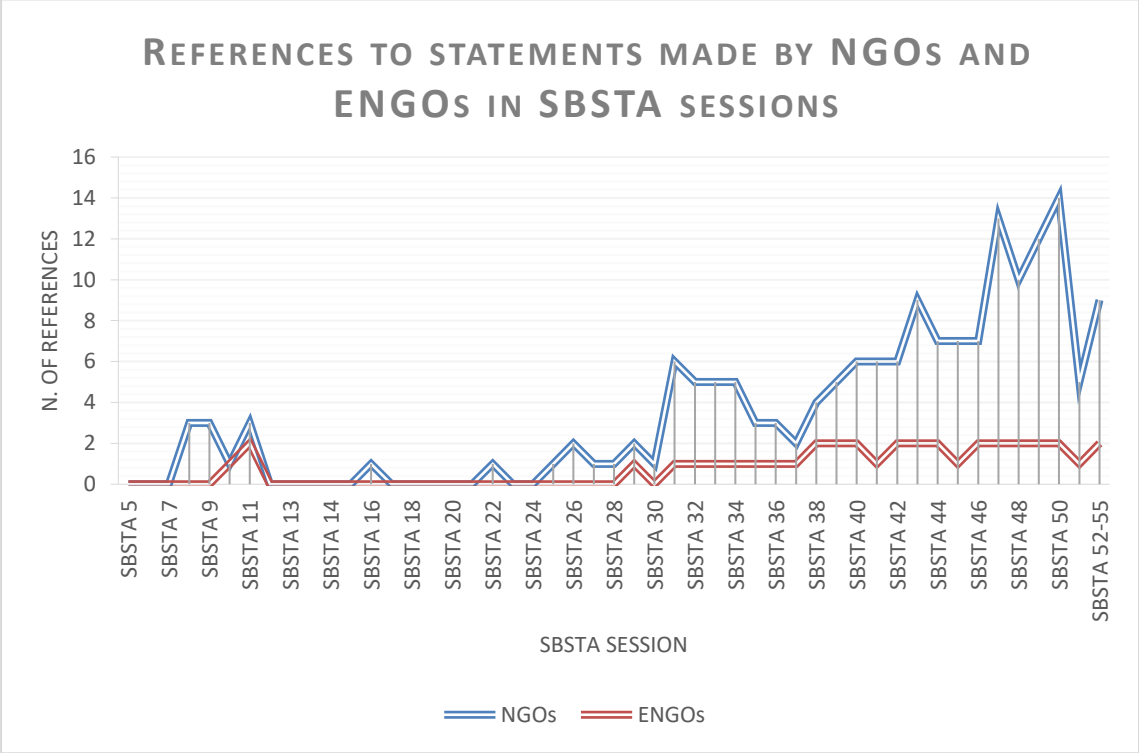
Finally, also the decision of relying on a quantitative method in order to trace the evolving role of NGOs and ENGOs within the international climate regime (*i.e.*, by counting the number of references to NGOs' and ENGOs' statements in SBSTA's reports) could be objected, and it might be argued that the adoption of a qualitative method of analysis could have produced more reliable information. However, the aim of this paragraph is to provide

a general trend of NGOs' and ENGOs' presence in the international climate regime since its establishment over twenty years ago, and for this reason it has been decided to analyse a larger number of reports, covering a longer period of time (24 years), at the cost of simplifying the level of analysis.

4.2 The result of the analysis

The data gathered from the analysis of all the 'reports on the session' published by the SBSTA up until now have been reported both in tables and graph. The first report that has been analysed is the one produced at SBSTA 5, as no report has been published by the SBSTA before that session.

Session	Year	NGOs	ENGOs
SBSTA 5	1997	0	0
SBSTA 6	1997	0	0
SBSTA 7	1997	0	0
SBSTA 8	1998	3	0
SBSTA 9	1998	3	0
SBSTA 10	1999	1	1
SBSTA 11	1999	3	2
SBSTA 12	2000	0	0
SBSTA 13	2000	0	0
SBSTA 13-2	2000	0	0
SBSTA 14	2001	0	0
SBSTA 15	2001	0	0
SBSTA 16	2002	1	0
SBSTA 17	2002	0	0
SBSTA 18	2003	0	0
SBSTA 19	2003	0	0
SBSTA 20	2004	0	0
SBSTA 21	2004	0	0
SBSTA 22	2005	1	0
SBSTA 23	2005	0	0
SBSTA 24	2006	0	0
SBSTA 25	2006	1	0
SBSTA 26	2007	2	0
SBSTA 27	2007	1	0
SBSTA 28	2008	1	0
SBSTA 29	2008	2	1
SBSTA 30	2009	1	0
SBSTA 31	2009	6	1
SBSTA 32	2010	5	1
SBSTA 33	2010	5	1
SBSTA 34	2011	5	1
SBSTA 35	2011	3	1
SBSTA 36	2012	3	1
SBSTA 37	2012	2	1
SBSTA 38	2013	4	2
SBSTA 39	2013	5	2
SBSTA 40	2014	6	2
SBSTA 41	2014	6	1
SBSTA 42	2015	6	2
SBSTA 43	2015	9	2
SBSTA 44	2016	7	2
SBSTA 45	2016	7	1
SBSTA 46	2017	7	2
SBSTA 47	2017	13	2
SBSTA 48	2018	10	2
SBSTA 49	2018	12	2
SBSTA 50	2019	14	2
SBSTA 51	2019	5	1
SBSTA 52-55	2021	9	2



Furthermore, the last SBSTA session, taking place in 2021, includes SBSTA 52, 53, 54, and 55. As a matter of facts, the COVID-19 pandemic impeded the SBSTA to hold its ordinary sessions in 2020, and forced the Body to catch up in 2021 through an extra-ordinary session.

The first result emerging from the tables concerns the evidently higher concentration of references to statements made by NGOs and ENGOs in the second half of the time span analysed. As a matter of facts, the tables clearly shows that, up until SBSTA 30, there had never been more than 3 references to NGOs' statements within the same SBSTA session, and references to ENGOs' statements were only present in 3 out of the first 27 SBSTA sessions. By contrast, from SBSTA 31 to SBSTA 55, the number of references to NGOs' statements in each session ranged between 2 and 14, with 5 being the mode. Furthermore, in any SBSTA session from 31 onwards there has always been at least a reference to statements made by ENGOs, with 2 being the mode.

Afterwards, by looking at the graph, the first important factor which emerges is the volatility of the number of references made to NGOs' statements over time. For this reason, it might be important to divide the graph in different periods.

In the first period, going from SBSTA 5 to SBSTA 30, the number of references to NGOs' statements has been consistently low. The main exception to the steady trend of the first period can be identified between SBSTA 8 and SBSTA 11, when NGOs and ENGOs showed greater interventionism in the phase of implementation of the Kyoto Protocol's most technical provisions, as those concerning the regulation of LULUCF.[CX]

A second period can be identified from SBSTA 31 to SBSTA 37. In this shorter phase, the trend is mainly descending. Indeed, after the peak constituted by SBSTA 31, caused by NGOs' unusually high number of interventions both in relation to the 'Nairobi work programme on impacts, vulnerability and adaptation' and in the 'closure of the session',[CXI] the number of references steadily declined until SBSTA 37.

Thirdly, from SBSTA 38 onwards the trend has been generally positive. In particular, SBSTA 43, taking place in December 2015 (*i.e.*, a few days before the establishment of the Paris Agreement) represents an important peak in terms of references to NGOs' statements (highest number ever reached until then). After that, the number of references reached its historical apex between SBSTA 47 and SBSTA 50, and it became more scattered again from SBSTA 51 onwards. Importantly, the incredibly high number of NGOs' interventions from SBSTA 47 onwards is largely (but not only) due to the effort to operationalize the Paris Agreement. In particular, NGOs' statements focused on the need to operationalize Article 6 of the Paris Agreement, to review the Warsaw International Mechanism for Loss and Damage, to put in place the financial measures identified in the Paris Agreement, and to solve issues related to agriculture.[CXII] Another factor which contributed to the relatively higher number of references to NGO's statements is related to SBSTA's new habit to distinguish among different types of NGOs. This element also explains the higher number of references to ENGOs, and it will be better addressed in the following paragraphs.

The number of references to ENGOs' statements is undoubtedly less volatile than the number of references to the statements of NGOs. Moreover, it is surely important to observe that the same three periods identified for NGOs' statements are also useful when it comes to analyse the trend of ENGOs' statements.

Indeed, while from SBSTA 5 to 30 there has been almost no reference at all to ENGOs' statements (with exceptions only constituted by SBSTA 10, 11 and 29), between SBSTA 31 and 37 there has always been one reference to ENGOs' statements. It is also relevant to

observe that, during this second period, some form of praxis seemed consolidating, which led ENGOs to customarily make statements in the phase of 'adoption of the agenda'.[CXIII]

Finally, the third period, from SBSTA 38 to 55, is marked by a very stable trend, with 12 reports out of 15 including two references to ENGOs' statements. In this last period a new praxis seems to emerge, as the intervention of ENGOs both in the phase of 'adoption of the agenda' and 'closure of the session' becomes a new constant of SBSTAs' sessions. In this period, the topics addressed by ENGOs' interventions are pretty much the same as those addressed by NGOs (*i.e.,* operationalization of Article 6 of the Paris Agreement, loss and damage, climate finance, and agriculture),[CXIV] hence they generally gravitate around the implementation of the Paris Agreement. Importantly, from SBSTA 43 onwards (*i.e.*, since the establishment of the Paris Agreement) 8 reports out of 10 included two references to ENGOs' statements.

Before drafting the conclusion of this paragraph, it should also be observed that, beyond the great opportunity that the Paris Agreement represented for scaling up NGOs' and ENGOs' presence in the SBSTA, a major driver increasing the number of references to NGOs' statements over time stands in SBSTA's greater differentiation among different categories of NGOs.

Indeed if, on the one hand, it has been possible to assist to the creation of a praxis that seems institutionalizing the role of NGOs and ENGOs in the phases of 'adoption of the agenda' and 'closure of the session' (*inter alia*, because of NGOs' intrinsic capacity to play a role in the implementation of the Paris Agreement),[CXV] on the other hand, SBSTA's greater attention to the diverse categories of NGOs should not be ignored.

As a matter of facts, while up to its 30th session the SBSTA only referred to 'non-governmental organizations' whatsoever, from SBSTA 31 onwards SBSTA's reports started to systematically distinguish among different types of NGOs (*e.g.* agricultural, youth, industrial, trade, environmental, etc.). This passage obviously increased the number of references to NGOs' statements in SBSTA's reports, but also the variety of NGOs included in SBSTAs' processes, as well as the absolute number of NGOs' statements in SBSTA's reports on the session.

Although the effects of a greater presence of industrial and trade NGOs in SBSTA's processes will surely require future assessment (especially when it comes to these particular categories of NGOs' capacity to hamper the achievement of climate-oriented and effective

results), the greater sensibility of the SBSTA towards different types of NGOs surely is an encouraging element when it comes to assess the process of establishment of the HMCR.

4.3 On ENGOs' intervention: a focus on the post-Paris situation

Zooming on the ENGOs' interventions from SBSTA 43 onwards, it emerges that the organizations which more frequently intervened in SBSTA's dialogues on behalf of environmental NGOs are the Climate Action Network (CAN) and Climate Justice Now (CJN), which intervened, respectively, 9 and 3 times between SBSTA 43 and SBSTA 55.[CXVI]

As it has been noted in the previous paragraph, most ENGOs' statements took place in the 'opening' and 'closure' phases of SBSTA sessions. Furthermore, the content of many ENGO's statements results being mainly vague and generic, not endowed with any practical suggestion, project, or critique.[CXVII] Therefore, what emerges is the strongly symbolic character of ENGOs' interventions, which mainly aim at pushing up other Parties' climate ambitions, but remain characterized by limited power of initiative and bargain (if any).

Still, ENGOs have also made some more technical and detailed interventions, especially in the most recent years.[CXVIII] It is, *inter alia*, by increasing the number of these technical interventions, which also contain analysis, new data, and strategies for the future, that ENGOs could *de facto* enhance their capacity to shape SBSTA's negotiating processes.

Lastly, a deeper analysis of ENGOs' statements from SBSTA 43 onwards also allows to observe that the vast majority of ENGOs' interventions explicitly mention the Paris Agreement or its targets.[CXIX] This element is particularly interesting, especially when considered together with the nature of the topics which have more frequently been addressed by ENGOs' in the last 13 SBSTA sessions, that include: the NDCs, the global stocktake, the global adaptation goal, Article 6 of the Paris Agreement, loss and damage, and food security (*i.e.*, central elements of the international climate law framework introduced with the establishment of the Paris Agreement).[CXX]

Hence, what emerges from this picture is that the greater involvement of ENGOs in SBSTA discussions after 2015 can (at least in part) be explained by the creation and entrance into force of the Paris Agreement.

4.4 Wrapping up the analysis' results

By considering the number of references to NGOs and ENGOs' statements in SBSTA's reports on the session as proxies of their presence in the international climate regime, it can be stated that the presence of NGOs and ENGOs in the international climate regime has strongly increased over time.

As matter of facts, notwithstanding the limitation of the approach that has been used, what emerges from the analysis of SBSTA's reports is a much stronger presence of references to NGOs' and ENGOs' statements in the second half of the timespan that has been considered. Indeed, references to NGOs' statements have reached their apex in the sessions following SBSTA 43 (i.e., just ahead of the date of establishment of the Paris Agreement), and references to ENGOs' statements have stabilized, with few exceptions, on 2 references per session from SBSTA 38 onwards.

When it comes to analysing the presence of NGOs and ENGOs after the establishment of the Paris Agreement, it is relevant to highlight that the report on the session of SBSTA 43 was characterised by the highest number of references to NGOs' statements up until then, as well as by 2 references to ENGOs. Moreover, in the SBSTA sessions taking place after the establishment of the Paris Agreement, the number of references to NGOs' statements has been considerably higher than in the preceding years.

This higher number of references to NGOs' and ENGOs' statements should mainly be reconducted to two factors. First, the adoption of the Paris Agreement brough about the necessity to address a number of issues (*i.e.*, operationalization of Article 6 of the Agreement, loss and damage, financial issues, and agriculture) which increased NGOs' and ENGOs' capacity to be involved in SBSTA's processes and which led, *inter alia*, to a habitual presence of ENGOs' statements both in the phases of 'adoption of the agenda' and 'closure of the session' of each SBSTA's report. Second, from SBSTA 31 onwards, SBSTA's reports started to distinguish among different types of NGOs, and this necessarily led to an increasing number of references to (different types of) NGOs' statements.

Evidently, it can be stated that both NGOs' and ENGOs' presence in the international climate regime has increased after the creation of the Paris Agreement.

Nevertheless, it is maybe too early to establish a strong causal relationship between the establishment of the Paris Agreement and the increasing presence of NGOs (and ENGOs), and this is mainly due to two reasons. Firstly, the number of SBSTA sessions taking place

after 2015 is still too limited to identify a precise trend of reports on the session's references to NGOs' and ENGOs' statements taking place after Paris. Furthermore, the increasing sensibility that the SBSTA showed by differentiating among different types of NGOs, despite being particularly relevant when it comes to the establishment of a hybrid multilateral climate regime, started to take place already in 2009, and it can hardly be reconducted to the entrance into force of the Paris Agreement.

5. Conclusions of the research

5.1 Connecting the dots

The first paragraph of this research started with the identification of the analytical problem represented by the discrepancy between the qualitatively new challenge posed by a global and transnational phenomenon as climate change, and the nature of an international climate regime that still gravitates around the paradigm of self-interested and fully sovereign independent states. Provided that we cannot keep relying on the '17th Century institutional technology to confront 21st Century challenges',[CXXI] the traditionally state-centric multilateral approach underpinning the international climate regime (and international law more generally) has been put under scrutiny, and the emerging literature on hybrid multilateralism (*i.e.*, a multilateral scheme which is opened to the participation of NSAs that are as transnational in nature as the new challenges which humanity is going to face) has been schemed through. In this context, gaps in the existing literature have been identified, related to the limitations concerning the definition of hybrid multilateralism, the necessity to provide a definition of hybrid multilateral climate regime, and the consequences of the establishment of a HMCR on a peculiar categories of NSAs (as environmental NGOs). Therefore, before identifying an appropriate methodology for the conduct of this research, paragraph 1 has introduced the following research question: *To what extent does the hybrid multilateral climate regime emerging from the Paris Agreement System give environmental NGOs a stronger stand in the governance of climate change?* Furthermore, paragraph 1 has identified three sub-research questions which gave birth to the following paragraphs of this study.

Paragraph 2 introduced the origins and peculiarities of the concept of international regime, it reported on the genesis of hybrid multilateralism, and it identified the main

weaknesses of this last concept's definitions (*i.e.*, scarce coherence, lack of references to the Paris Agreement, and *a priori* exclusion of the possibility for hybrid multilateral arrangements to emerge in policy fields which differ from the climate policy field). Therefore, in order to keep on board the flexibility and openness brought about by the concept of hybrid multilateralism, but also to go beyond its shortcomings, the concept of hybrid multilateral climate regime has been introduced and defined as 'a global regime, characterized by hybrid forms of multilateralism, which started to emerge in the field of climate governance after the establishment of the Paris Agreement'.[CXXII] Afterwards, the paragraph has analysed the Paris Agreement's text, and identified important elements of it that seem to enhance the HMCR. These elements mainly relate to the Agreement's bottom-up approach, which is implemented, *inter alia*, through the establishment of NDCs, NAPs, and both a transparency framework and a compliance mechanism which devolve new rights and duties to NSAs. Moreover, also the provisions on market mechanisms, cooperation, and capacity-building can be considered relevant in the process of establishment of the HMCR, as they directly mention and expand the role of NSAs. Finally, it has been observed that the Agreement also opens the door to the role of NSAs in the process of policy-making, by adopting a particularly inclusive approach towards NSAs (including NGOs) which want to be represented at any session of the COP under the Paris Agreement. Nevertheless, as it has been noted, the HMCR is a fluid and evolving entity. Hence, its current materialization, triggered by the establishment of the Paris Agreement, should not be seen as definitive, but better as a further ring added to an evolving chain.

Having understood the framework within which we are moving (*i.e.,* the HMCR), it has been necessary to focus on the actors whose roles and functions have been affected by the establishment of the HMCR (*i.e.*, the ENGOs). Accordingly, paragraph 3 investigated over the definition and role of NSAs and NGOs, and it therefore introduced the peculiarities and features of environmental NGOs which, in light of the absence of a formal definition, have been simply defined by this research as 'a particular category of NGO which is mainly concerned about addressing environmental issues'.[CXXIII] As it has been observed, nowadays there are different pathways that ENGOs can go through in order to play a role in the governance of climate change. On the one hand, there are formal procedures through which ENGOs can obtain observer status before intergovernmental or supranational organization, among which there is, notably, the UNFCCC, and which can give ENGOs a role (though

still very limited) in the process of global climate policy-making. On the other hand, less structured paths allow ENGOs to play a relevant role in the governance of climate change, through actions that include spreading of information and public sensibilization, but also monitoring and reporting activities, and conduct of research. Furthermore, ENGOs are also increasing their capacity to bring issues before relevant courts (mainly at the domestic level) lodging cases against governments and private actors.

Nonetheless, the paragraph has also underscored that there are still great margins of manoeuvre for ENGOs to express their full capacity in the process of climate governance. In particular, an enhancement of their position in the process of global climate policy-making would be definitely desirable, as well as a structural reform of the rules for access to authoritative international tribunals (and mainly the ICJ). As a matter of facts, this would grant legal standing to NSAs (including ENGOs) whose internationally recognized rights and interests have been violated.

Finally, paragraph 4 has reported the results of an analysis aimed at tracing the evolving role of NGOs and ENGOs in the international climate regime, looking for relationships between the establishment of the Paris Agreement and an enhancement of ENGOs' role. The paragraph considered the number of references to NGOs and ENGOs' statements in SBSTA's 'reports on the session' as a proxy of their presence in the international climate regime and, after highlighting both the limitations and strengths of this approach, both tables and a charter were built in order to represent how this trend evolved over the last 25 years. Furthermore, a focus on ENGO's statements from SBSTA 43 onwards has been provided. Apparently, the presence of NGOs and ENGOs in the international climate regime remained generally latent up to SBSTA 30 (2009), and it saw a significant increase from SBSTA 31 onwards. In particular, from SBSTA 38 (2013) to SBSTA 50 (2019) there has been a consistent rise in the number of references to NGOs' statements, the number of references to ENGOs' statements has been maximum (*i.e.*, 2) 11 times out of 13, and SBSTA 43 (immediately prior to the Paris Agreement) represented a first peak of references to NGOs' statements. The results of this analysis suggest an increasing role of NGOs and ENGOs in the international climate regime, with a particular boost after the establishment of the Paris Agreement. As paragraph 4 has reported, this might be due both to the intrinsic capacity of NGOs and ENGOs to play a role in the implementation of the Paris Agreement, and to SBSTA's greater attention to the different categories of NGOs.

5.2 Answering the research question

The information gathered through the paragraphs of this work allow to provide an answer the research question formulated at paragraph 1. Therefore, it can be stated that an evident correlation (yet not a strong causal link) has been identified between the emergence of the hybrid multilateral climate regime and the stronger stand that environmental NGOs have obtained in the governance of climate change. This is especially true when it comes to the general (but implicit) recognition of ENGOs' capacity to play a role in the implementation of the Paris Agreement, and ENGOs' stronger involvement (as observers) in climate policy fora (which could once turn into a more active role in policy-making). Much stronger progress will be needed in terms of enhancing ENGOs' formal role in the international climate regime, as well as in providing ENGOs with a legal instrument (*e.g.* the access to an international tribunal) for carrying out transnational climate litigation processes. Importantly, as it has been stated, the HMCR should be seen as an evolving entity, so that the current research, as well as the current answer to the research question, only aims at capturing a snapshot of what is hopefully the starting phase of a longer, progressive process of enhancement of ENGOs' role in the governance of climate change.

Undoubtedly, the answer provided to the research question can be accused of ignoring some blind spots and of bringing about important shortcomings, some of which have already been raised during the research process.

A first shortcoming relates to the difficulty of identifying a causal relationship between the establishment of the HMCR and the enhancement of ENGOs' role. As a matter of facts, although a greater role of ENGO's in the international climate regime has been traced from 2013 onwards (and in particular since 2015), it might be still premature to strictly tie such phenomenon to the establishment of the HMCR.

This element is also linked to the second limitation of the current research: the narrow timespan that can be analysed since the entrance into force of the Paris Agreement. Indeed, the Paris Agreement was only created in December 2015, and entered into force in November 2016. Hence, the period of time that can be considered after the alleged establishment of the HMCR is maybe too restricted for identifying a consistent post-Paris trend. This is even more true if we consider the situation of exceptionality that the international climate regime has lived as a consequence of the COVID-19 pandemic. Still, what remains out of question is that, over the 25 years that have been analysed, a coincidence

between the emergence of the HMCR and the increasing role of ENGOs (and NGOs) can be identified.

Thirdly, the definition of hybrid multilateral climate regime, provided during the research process and necessary in order to answer the research question, can be claimed of being tautological. Indeed, it gives for granted the emergence of a HMCR after the establishment of the Paris Agreement, and it does not bestow any margin of manoeuvre for the put into question of the HMCR's actual existence. Nevertheless, the object of this research was not that of proving the existence of the HMCR. Instead, it relied on previous authors' identification of hybrid forms of multilateralism in the system of climate governance, and it built a new concept (*i.e.*, the HMCR) in order to bypass some misconceptions related to the concept of hybrid multilateralism, while maintaining on board its strengths. Therefore, in light of the investigation conducted at paragraph 2, mainly relying on doctrinal analysis, it seemed necessary to link the concept of HMCR with the establishment of the Paris Agreement.

Lastly, an important weakness concerns the limitations of the methodology that has been used in order to assess the evolving role of ENGOs within the international climate regime. In fact, despite being meaningful for a number of reasons,[CXXIV] the approximation of ENGOs' changing role within the international climate regime to ENGOs' evolving presence in the SBSTA remains open to criticism.

5.3 A new point of departure

This research has provided a first exploration of the concept of HMCR, and it has looked for the identification of a causal relationship between its establishment and the role played by a particular category of NSAs (*i.e.*, ENGOs). Still, as the concept of HMCR is an evolving one, this research does not aim at finding any definitive truth, but it better aims at starting a process of exploration of an evolving field, which could be seen as a new point of departure for further research.

Among the issues that it will be necessary to further explore, there is the very nature of hybrid multilateral climate regimes. To address the effectivity of the HMCR's definition provided by this research, and to better investigate HMCR's relationship with the establishment of the Paris Agreement will certainly be a priority for any research which will build on the analysis of the HMCR and on its consequences on relevant actors.

Another element which could be considered in future research is the role played by ENGOs (and NGOs) themselves in the process of establishment of the HMCR. In fact, this study mainly relied on a top-down conceptualization of the HMCR (according to which states voluntarily devolved part of their sovereignty to establish the Paris Agreement, *i.e.*, the international treaty constituting the first sparkle for the emergence of the HMCR), so that the conduct of new studies adopting a bottom-up definition of HMCR could certainly bring about new important insights over the nature and features of the HMCR.

Furthermore, it will be important to monitor the future transformation (and hopefully evolution) that the HMCR will undergo. As a matter of facts, having being defined as a non-static entity with many margins for improvement, the current shape of the HMCR is destined to change over time, and to monitor such changes will be necessary in order to obtain a clear and updated picture of the HMCR's shape and scope of action.

Moreover, it would be useful to spend further energies to investigate over the causal relationship between the establishment of the HMCR and its long-term consequences on ENGOs. Indeed, as it has been stated, this research has identified a correlation between the emergence of the HMCR and the stronger role played by ENGOs in the governance of climate change. Nonetheless, the identification of a strong causal relationship will require the construction of further studies relying on the analysis of longer periods of time since the establishment of the HMCR.

Even more, to conduct research on the HMCR's impact on ENGOs that relies on a different methodological approach will also be vital. In fact, this research considers the number of references to ENGOs' statements in SBTSA reports as a proxy of their evolving role in the international climate regime. In light of the limitation of the abovementioned approach, to analyse the changing role of ENGOs even outside SBSTA processes will be of great importance and will provide further information about the role they play in other areas of the international climate regime.

In addition, it could be important to look for the links between the evolution of the HMCR and the possibility to provide ENGOs (and NGOs more generally) with access to international tribunals. As a matter of facts, climate litigation processes proved to be powerful tools in the hands of ENGOs, and the identification of a legal instrument harmonizing ENGOs' access to transnational litigation actions would strongly enhance ENGOs' position in the governance of climate change.

Taking a step back from the focus on ENGOs, new research could also focus on the analysis of the consequences that the emergence of the HMCR is having on further categories of NSAs. In this regard, it might be particularly interesting to analyse a possible flaw of the HMCR constituted by the eventual reinforcement of the position of NSAs (*e.g.* private companies operating in the sectors of energy, livestock, etc.) whose short-term economic interests contrast and risk hampering an effective protection of the global environment and climate.

Finally, as it has been stated, the HMCR is only one of many types of hybrid multilateral regimes which could emerge on the global arena. To investigate on the emergence of further hybrid multilateral regimes (and on their consequences) in other, typically transnational, policy areas (*e.g.* migration, food security, healthcare) could prove to be particularly effective in tackling the spread of qualitatively new phenomena and threats that the traditionally state-based and multilateral institutions are unsuccessfully trying to address.

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[XXXIII] Anu Bradford (n 25) 4.
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[XLIII] See Ernani Contipelli, 'Polycentric Approach To Global Constitutionalism And Climate Change' (2019) Revista Catalana de Dret Ambiental.
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[XLV] See Paris Agreement (2015) Artt.2(1)(a) – 4(1) – 7(1).
[XLVI] Ibid. Artt. 3 – 4(2) – 7(9).
[XLVII] See Bäckstrand et al. (n 17) and Kuyper et al. (n 18).
[XLVIII] Paris Agreement (2015) Art.4(2).
[XLIX] Ibid. Art. 4(3).
[L] Ibid. Art.4(9).
[LI] Bäckstrand et al. (n 17) 568.
[LII] Paris Agreement (2015) Art.14.
[LIII] Harro van Asselt (n 15).
[LIV] Paris Agreement (2015) Art.7(5).

[LV] Ibid. Art.6(4)(b).
[LVI] Ibid. Art. 6(8)(b).
[LVII] Ibid. Art. 11(2).
[LVIII] Ibid. Art 12.
[LIX] Paris Agreement (2015) Art.13(7)(a).
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[LXI] Harro van Asselt (n 15).
[LXII] Paris Agreement (2015) Art.16(8).
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[LXXVI] Encyclopaedia Britannica (link to the website: https://www.britannica.com/topic/nongovernmental-organization).
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[XCV] See Christof Heyns, Magnus Killander, 'Africa' in Moeckli, Shah, and Sivakumaran (eds.) *International Human Rights Law* (2018) Oxford University Press, 472. As the scholars observe, 'while the Charter is silent on who can bring communications, the Commission has in practice accepted complaints from individuals as well as from NGOs'.
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[CIII] UNFCCC (1992) Art.9(1).
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[CVII] UNFCCC (n 102) Art.9(1).
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