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AMBITION TRAP OR ACCELERATOR: COOPERATIVE APPROACHES UNDER THE PARIS AGREEMENT

Dr. Charlotte Streck*

I. INTRODUCTION

On December 12, 2015, 196 Parties to the United Nations Framework Convention on Climate Change (UNFCCC or Convention) adopted the Paris Agreement, a long-term framework for an internationally coordinated effort to address climate change.¹ The Paris Agreement represents six years of international climate change negotiations under the auspices of the United Nations and was reached under intense international pressure to avoid a repeat of the failure of the 2009 Copenhagen climate conference to reach an agreement.²

The Paris Agreement establishes global warming goals of “well below 2°C on pre-industrial averages” and a “balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases (GHGs) in the second half of this century.”³ To achieve these goals, all Parties to the Paris Agreement need to make profound changes to their economies. The Paris Agreement requires countries to formulate progressively more ambitious climate targets

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² Id.

consistent with these goals. In addition to formulating overall mitigation goals and processes seeking to enhance ambition and transparency, Article 6 of the Paris Agreement establishes a framework for cooperative action on climate change beyond 2020. The Agreement allows Parties to engage in “voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity.”

However, without further interpretation and guidance, the provisions of Article 6 remain vague and lack the specificity to enable Parties to make use of the flexibility in implementing mitigation actions. The role of cooperative approaches in achieving the Paris Agreement’s goals depends on how Parties decide to operationalize the provisions in Article 6. The extent and level of detail the Conference of the Parties, serving as meeting of the Parties (CMA), will adopt modalities and procedures to guide the implementation of cooperative approaches remains to be seen. However, it is unlikely the Parties will receive a level of guidance as clear as the Marrakech Accords, which provide a detailed rulebook for the implementation of the Kyoto Protocol’s carbon market mechanisms.

At worst, no agreement on modalities and procedures guiding Article 6 implementation will be reached, risking a paralysis of cooperation. However, the open formulations of the Paris Agreement also could provide an opportunity for those Parties that want to pioneer cooperation on their own terms. Rather than be held back by the absence of international mechanisms, proactive Parties could forge strong cooperative bonds by entering into contracts that endow Article 6 with action and promise.

This article discusses the role of cooperative approaches under the Paris Agreement. It first provides context of flexibility and cooperation under the Paris Agreement (Section II). In the next step,

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4 Id. at art. 4.3.
5 Id. at art. 6.1.
6 The current deliberations on Article 6 of the Paris Agreement under the UNFCCC focus on formulating relatively broad accounting guidelines. Check for Party submissions and up-to-date negotiation schedule at UN CLIMATE CHANGE NEWSROOM, http://newroom.unfccc.int/ (last visited May 15, 2017).
it contrasts this flexibility to the market-based flexible mechanisms of the Kyoto Protocol (Section III). In the following sections, the article analyzes challenges and opportunities associated with cooperation under the Paris Agreement, as well as steps that must be taken to mitigate identified risks (Sections IV and V). The article concludes with several recommendations to international country negotiators, as well as to national policy makers, seeking to further detail the Paris Agreement (Section VI).

II. COOPERATIVE IMPLEMENTATION UNDER THE PARIS AGREEMENT

The Paris Agreement defines a universal, legal framework to strengthen “the global response to the threat of climate change.”7 It establishes the obligation of all Parties to contribute to “climate change mitigation and adaptation.”8 In contrast to the Kyoto Protocol, which formulated emission reduction targets for developed countries but not for developing countries, the Paris Agreement requires all Parties to develop plans on how to contribute to climate change mitigation.9 Based on these plans, countries have to formulate and communicate nationally determined contributions (NDCs) to the Secretariat of the Convention.10

The Paris Agreement recognizes the different starting points and responsibilities of countries and emphasizes the Agreement will be implemented in accordance with the “principle of common but differentiated responsibilities and respective capabilities,” which applies “in the light of different national circumstances.”11 This means developed countries acknowledging their historic responsibility and higher capacities to confront the problem must continue to take the lead in mitigating climate change and support actions taken by developing countries.12

Each Party must prepare, communicate, and maintain successive NDCs at a minimum of every five years.13 Developed countries

7 Paris Agreement, supra note 3, at art. 2.
8 Id. at art. 2.
9 Id.
10 Streek, supra note 1, at 5.
11 Paris Agreement, supra note 3, at art. 4.3.
12 Id. at art. 2.2.
13 Id. at art. 9.3.
should adopt economy-wide, absolute emission reduction targets immediately, and developing countries should aim for such targets over time. Each subsequent NDC must represent a progression beyond the Party’s last NDC. Importantly, however, the obligation to implement NDCs is not a part of the Paris Agreement. Rather, the Paris Agreement and accompanying decisions provide binding, procedural rules for the preparation and assessment of NDCs—not their execution. To increase the likelihood Parties will achieve progress on their NDCs, Parties are required to account for their NDCs in a way that ensures environmental integrity. Parties shall provide information necessary for clarity, transparency, and understanding. Information submitted will undergo a technical expert review. This process foresees a continuous progression of ambition with each NDC. So long as Parties enhance their level of ambition, Parties may also adjust their NDCs at any time during those five years.

In the last hours of the Paris climate change conference, Parties to the UNFCCC agreed to include a provision that would provide a framework for cooperation and recognition of market-based approaches in the Paris Agreement. Parties were previously reluctant to explicitly refer to carbon markets, due partly to concerns regarding the environmental integrity of the Agreement and also due to ideological opposition towards market-based instruments in the

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14 Id. at art. 4.A.
15 Id. at art. 4.3.
16 See id. at art. 4.2 (stating although Parties “shall pursue domestic mitigation measures, with the aim of achieving the objective of [their] contributions,” there is no requirement such measures be implemented. The E.U. had argued for such an obligation but achieving the NDC at all seemed to be more relevant than implementing it).
17 Streck, supra note 1, at 5.
18 Paris Agreement, supra note 3, at art. 4.13; see also Streck, supra note 1, at 13.
19 Paris Agreement, supra note 3, at art. 4.8.
20 Id. at art. 13.11.
21 Id. at art. 4.3.
22 Id. at art. 4.11.
context of climate change. The incorporation of an entire article dedicated to cooperation into the Paris Agreement hence has been described as “major success and a minor miracle.” Throughout 2015, and during the Paris conference itself, the prediction was for a very small reference—if existent at all—to markets in the final text.

Article 6 of the Paris Agreement recognizes cooperative approaches, the transfer of mitigation outcomes, and generation of emission reductions in projects, which provide useful mechanisms for countries to enhance their ambition and achieve the goals of the Agreement. But concern about the environmental integrity of carbon markets is palpable; it finds its expression in references to environmental integrity, robust accounting and the avoidance of double-counting, that all activity needs to be voluntary and authorized by the relevant Parties, and reduction generation of overall emission. References to markets are counterbalanced with a clear recognition of cooperation outside of markets. Specifically, the Paris Agreement defines three ways in which Parties can cooperate in meeting their NDCs:

(1) Cooperative Approaches. Parties may engage in voluntary cooperation and adopt cooperative approaches to implement their NDCs. Such cooperation may take different forms. Among others, Parties can use “internationally transferred mitigation outcomes” (ITMOs) to achieve their NDCs. The awkward terminology is purposefully open and undefined, providing an umbrella for a wide array of different mechanisms and methodologies that generate mitigation outcomes. Cooperative approaches can cover all sectors, including sequestration (removals of GHG from the atmosphere, e.g.

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24 Id. at 7.
25 Id. at 1.
26 Id.
27 Paris Agreement, supra note 3, at art. 6.2.
28 See id. at art. 6.1.
29 Id.
30 Id. at art. 6.3.
31 Id. at art. 6.4.
32 Id. at art. 6.8.
33 Id. at art. 6.1.
34 Id. at art. 6.2.
by trees or soils).\textsuperscript{35} Note the flexibility under Article 6.2 is different from the concept of joint NDCs under Articles 4.16–18.\textsuperscript{36} Under Article 6.2, Parties link their separate NDCs by transferred mitigation outcomes, whereas joint NDCs will fall under a common accounting framework.\textsuperscript{37}

(2) \textit{A Mechanism to contribute to sustainable development.} Based on an intervention by Brazil and the E.U., the Paris Agreement also defines a sustainable development mechanism, allowing private and public entities to support mitigation projects that generate transferrable GHG emission reductions.\textsuperscript{38} Programs and projects developed under this new mechanism can generate emission reductions that may be used by another Party to fulfill its NDCs.\textsuperscript{39} The mechanism is implemented under the authority and guidance of the CMA, which, according to the Paris Decision, is to develop relevant “modalities and procedures.”\textsuperscript{40} When requesting the new mechanism be built on previous experience, the provision in the accompanying UNFCCC decision links back to the mechanisms of the Kyoto Protocol, namely the Clean Development Mechanism (CDM) and Joint Implementation (JI).\textsuperscript{41} Similar to the CDM, the mechanism addresses subnational public and private entities, and it foresees a share of proceeds to cover both administrative costs and adaptation needs for countries most vulnerable to climate change.\textsuperscript{42}

However, unlike the CDM, the new mechanism must “deliver an overall mitigation in global emissions.”\textsuperscript{43} That is, it must go beyond merely offsetting and have a net positive mitigation effect. Emission

\textsuperscript{35} See Rep. of the Conf. of the Parties on its Twenty-First Session, \textit{Adoption of the Paris Agreement}, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 26, 2015).

\textsuperscript{36} Paris Agreement, \textit{supra} note 3, at arts. 4.15–4.18.

\textsuperscript{37} Id. at art. 6.2.

\textsuperscript{38} Id. at art. 6.4.

\textsuperscript{39} Id.

\textsuperscript{40} \textit{Adoption of the Paris Agreement}, \textit{supra} note 35, at paras. 37–38.

\textsuperscript{41} Id. at para. 38(f)(7).

\textsuperscript{42} Paris Agreement, \textit{supra} note 3, at art. 6.6.

\textsuperscript{43} Id. at art. 6.4(d).
reductions may be accounted for only once in the context of NDCs, either by the host Party or by another Party.\footnote{Id. at art. 6.5.}

(3) \textit{Framework for non-market approaches.} The Paris Agreement recognizes “[t]he importance of integrated, holistic and balanced non-market approaches” to assist Parties with implementing their NDCs in the context of sustainable development and poverty eradication.\footnote{Id. at art. 6.8.} It aims at both mitigation and adaptation, “enhance[s] public and private sector participation,” and seeks opportunities for coordination “across instruments and relevant institutional arrangements.”\footnote{Id. at art. 6.8(b)-(c).} The conceptual scope and meaning of non-market approaches—as opposed to the kind of instruments that are seen as a platform for market mechanisms—is hard to gauge. In a 2014 technical paper, the UNFCCC Secretariat summarized non-market approaches as “any actions that drive cost-effective mitigation without relying on market-based approaches or mechanisms (i.e., without resulting in transferable or tradable units).”\footnote{U.N. Framework Convention on Climate Change,\textit{ Non-market based approaches: Technical Paper}, para. 2.10, U.N. Doc. FCCC/TP/2014/10 (Nov. 24, 2014).} The technical paper lists examples from country experience, such as fiscal instruments (e.g., carbon taxes) and regulation, as well as voluntary agreements on mitigation action and results-based payments for reduced emissions from deforestation and forest degradation (REDD-plus).\footnote{See id.} In this interpretation, the concept is very wide, indeed. There will be much work ahead for the Subsidiary Body for Scientific and Technological Advice, which is charged with preparing a draft work program until next year’s session.\footnote{Adoption of the Paris Agreement, supra note 35, at para. 3.40.}

Reference to both market and non-market mechanisms provides balance and neutrality to the Paris Agreement with respect to the use of the mechanisms—recognizing their place and usefulness depending on context and country.
III. ANTECEDENTS: THE KYOTO PROTOCOL

The 1992 UNFCCC provides the basis of the climate change regime and, since it entered into force in 1994, has established the platform for international climate negotiations. The basic objective of the Convention is not to reverse GHG emissions but to stabilize them “at a level that would prevent dangerous anthropogenic interference with the climate system.”  

The Convention mandates developing countries “adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.”  

In Article 4.2.b, the Convention contemplates the need for cooperation in the objectives of “returning [GHG emissions] individually, or jointly, to their 1990 levels . . .”  

However, the Convention fails to formulate any emission reduction targets and does not mandate individual Parties to communicate mitigation actions. It also fails to specify what cooperation could look like under the Convention.

It fell upon the 1997 Kyoto Protocol to strengthen the commitments of the Convention by setting out a firm schedule for reductions of GHG emissions from developed countries (listed in its Annex I), as well as providing firm targets to be met within an agreed first commitment period (2008–12).  

The Protocol envisages the Annex I countries reducing their emissions in an aggregate of 5.2% from 1990 levels.  

The specific targets (or assigned amounts) are set out in Annex B of the Protocol.  

The Protocol echoes the wording of the Convention because it reaffirms emission reduction targets may be achieved individually or jointly.  

This is developed further in Article 4 in response to requests by the E.U. to allow it to be affected within the E.U. Member States as a whole.  

In the case of joint efforts, an agreement to meet Kyoto targets must be formally

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51 Id. at art. 4(2)(a).  
52 Id. at art. 4(2)(b).  
54 See id.  
55 See id.  
56 See id. at art. 3.1.  
57 See id. at art. 4.
concluded and notified to the UNFCCC Secretariat. In the event of failure of the Member States to meet the required reductions, each Party becomes individually liable for its own levels of emissions.

The Kyoto Protocol is also the first international climate instrument allowing Parties to use market mechanisms to meet their targets: it establishes market-based mechanisms that allow Parties to achieve some portion of the required emission reductions beyond their own borders through the use of a variety of economic instruments. These instruments define project-based mechanisms under Article 6 (JI) and Article 12 (CDM) of the Kyoto Protocol; each envisions that, in various ways, emission reductions financed in other countries might be set-off against the financiers’ GHG reduction targets. In addition to the project based Mechanisms of JI and CDM, Article 17 contemplates a system of emission rights trading whereby one Annex I country might directly purchase from another Annex I country some of its rights to emit GHGs. These rights are known as Assigned Amount Units (AAUs).

AAUs, the base unit of the Kyoto Protocol, are equivalent to one metric ton of carbon dioxide emissions. Developed countries were given AAU budgets for the first commitment period, which were calculated in relation to their baseline emissions; for most countries, the baseline emissions were from 1990. Annex I Parties could choose whether to achieve the emission reduction target through domestic reduction efforts alone or to purchase additional units from other countries. Newly created units came in two forms: (1) Certified Emission Reductions (CERs)—i.e., units generated in developing countries and traded into developed countries through the CDM—and (2) Emission Reduction Units (ERUs)—units generated by JI projects in industrialized countries with specific accounting rules towards the AAU budget of the country of generation.

The trade with CERs under the CDM became of particular practical importance when the linking of the European Union Emissions Trading System (EU ETS) made such trading popular.

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58 See id. at art. 4.2.
59 See id. at art. 4.5.
60 See id. at art. 3.
61 See id. at arts. 6, 12.
62 Id. at art. 17.
63 Id. at art. 4.
64 Id. at art. 6.
among the European private sector.\textsuperscript{55} Covering the E.U. Member States plus Iceland, Lichtenstein, and Norway, the EU ETS is a cap-and-trade system with allowances traded between market participants.\textsuperscript{56} A number of other developed countries have also introduced market mechanisms as a means to regulate pollution from major emitters such as power stations and industrial plants, including New Zealand’s Emissions Trading Scheme and Australia’s Carbon Farming Initiative; the EU ETS remains the largest and longest lived.\textsuperscript{67}

To operationalize the market-based mechanisms of the Kyoto Protocol, the Conference of the Parties of the UNFCCC serving as the Meeting of the Parties to the Kyoto Protocol (hereafter CMP) agreed with the Marrakech Accords on a comprehensive set of rules regarding how the mechanisms would be governed.\textsuperscript{68} The CMP also established institutions to operate and administer the agreed upon mechanisms in order to enable their functioning and ensure their integrity.\textsuperscript{69} The CDM Executive Board establishes eligibility requirements, accredits auditors, approves CDM projects, and supervises a registry into which CERs are being issued.\textsuperscript{70} Similarly, the Joint Implementation Supervisory Committee serves as governing body of the Joint Implementation mechanism established under Article 6.\textsuperscript{71} The involvement of multiple participants and multiple carbon units required the development of a system of interlinked trading registries, which are able to hold, transfer, convert, and retire

\begin{footnotesize}
\textsuperscript{55} Id. at art. 3.
\textsuperscript{56} Id. at annex B.
\textsuperscript{61} Rep. of the Conf. of the Parties serving the Kyoto Protocol, supra note 68, at 14–16.
\end{footnotesize}
various types of GHG (or carbon) units. Developed country Parties
to the Protocol must keep a national registry to track and record
transactions carried out under the mechanisms. The UNFCCC
Secretariat administers a clean development mechanism registry,
which keeps an independent transaction log to verify that transactions
are consistent with the rules of the Protocol. Additionally, expert
review teams have been set up to ensure compliance.

The market-mechanisms of the Kyoto Protocol, while not
beyond criticism, have established a type of market architecture that
facilitates international transactions in carbon units. While the
process has been described as heavily politicized, lengthy and
cumbersome, and burdened with claims questioning the
environmental integrity of the CDM and JI projects, the Kyoto
Protocol has given rise to an international carbon market and “created
a global partnership between countless actors united in their efforts to
finance emission-reducing projects and create emission reductions.”
It has also allowed investors to meet emission reduction obligations

72 Fact sheet: The Kyoto Protocol, UNFCCC 1, 2 (2011),
73 Id.
74 Andrei Marcu, The Role of Market Mechanisms in a Post-2020
Climate Change Agreement, 87 CEPS SPECIAL REP. 1, 8 (2014),
75 Charlotte Streek & Jolene Lin, Making Markets Work: A Review of
CDM Performance and the Need for Reform, 19 EUR. J. OF INT’L L. 409, 425
(2008); see also Christiana Figueres & Charlotte Streek, The Evolution of the
CDM in a Post-2012 Climate Agreement, 18 J. OF ENV’T & DEV. 227, 235
(2009); Daisuke Hayashi & Axel Michaelowa, Lessons from submission and
approval process of large-scale energy efficiency CDM methodologies
HWWI Research Paper, No. 4-11, HAMBURG INST. INT’L ECON. (2007),
https://www.econstor.eu/bitstream/10419/48262/1/663972035.pdf; Axel
Michaelowa, Strengths and weaknesses of the CDM in comparison with new
and emerging market mechanisms, CDM POL’Y DIALOGUE (2012),
76 See Christopher Arup & Hao Zhang, Lessons from Regulating
Carbon Offset Markets, 4 TRANSNATL ENVTL. L. 169 (2014); see also
Alexander Ovendenko, The Global Climate Regime: Explaining Lagging
77 David Freestone & Charlotte Streek, Introduction – The
Challenges of Implementing the Kyoto Mechanisms, 2 ENVTL. LIABILITY 47,
52 (2007).
at reduced costs and facilitated public and private investment into clean technologies in developing countries.  

"[The Protocol] has helped to leverage funds for renewable energy technologies and other emission reducing activities."  

"[L]ast but not least, it has helped to test methods to calculate emissions and emissions reductions, develop monitoring protocols, and an essential infrastructure of emission registers."  

IV. COOPERATION UNDER THE PARIS AGREEMENT: CHALLENGES

A lot has changed since the adoption of the Kyoto Protocol. Back in 1997, climate change was a concern of the few, mostly developed country governments, who considered it an environmental issue and manageable through internationally negotiated climate targets. At the time of the adoption of the Paris Agreement, climate change had been elevated to a global concern that affected all countries and all sectors. After the failure of the Copenhagen climate summit in 2009, most country negotiators and commentators agreed internationally imposed targets were unlikely to provide an attainable—possibly not even an effective—goal of international climate policy. The top-down approach of the Kyoto Protocol gave way to the bottom-up approach of the Paris Agreement, which provides a mere framework for nationally formulated mitigation contributions.

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78 See id.
79 Id. at 52.
80 Id.
82 See Paris Agreement, supra note 3.
84 See Paris Agreement, supra note 3; see also Luke Grunbaum, Note, From Kyoto to Paris: How Bottom-Up Regulation Could Revitalize the UNFCCC, GEO. ENVTL. L. REV. ONLINE (2015) (explaining what the Paris Agreement's bottom-up framework entails and how the bottom-up framework differs from the top-down framework of the Kyoto Protocol).
Many weaker Parties will need support in order to implement their NDCs, and some will want to reduce costs of compliance through international offset provisions. Cooperative approaches, including the transfer of mitigation outcomes and project-based mechanisms, are important instruments to support, among others, developing country Parties. The open formulations of Article 6 of the Paris Agreement give an appreciative nod to the multitude of forms support and cooperation can take, reflecting the proliferation of market and non-market based approaches. But the lack of definition and centrally established mechanisms and institutions also creates uncertainty with respect to the overall effectiveness of the agreement. Where countries agree to transfer ITMOs, the lack of common accounting rules and an institutional architecture also creates risks with respect to the environmental integrity of these transfers. The following challenges must be addressed for the mechanisms of Article 6 to be both implementable and environmentally effective.

A. CHALLENGE I: ENVIRONMENTAL EFFECTIVENESS

All Parties to the Paris Agreement must contribute to its success for it to indeed be a success; the global nature of the Agreement may be its single most important feature. There is, however, a price for the universal application of the Agreement: it relies on voluntary action, and there is no assurance that the bottom-up, voluntary efforts of Parties will add up to the level of action needed to achieve the overall goals of the Agreement. The NDCs communicated by the time the Agreement entered into force, which was on November 4, 2016, fall short of the efforts needed to reach the goals of the Paris Agreement. While the global stock-take established in Article 14.1 will allow Parties to assess collective progress in achieving the agreement’s long-term goals every five years, ambition and

85 See Paris Agreement, supra note 3, at arts. 4, 9, 10 & 11.
87 See Paris Agreement, supra note 3, at art. 6.
environmental effectiveness of the Paris Agreement are by no means certain.\(^9^9\)

The cooperative approaches have the potential to both strengthen and further undermine the ambition of the Agreement. Developing countries will depend on assistance in the form of finance, capacity building, and technology transfer to achieve their NDCs.\(^9^0\) Many countries also indicated their intent to use market mechanisms to implement their climate change plans.\(^9^1\) More than half of the intended NDCs submitted by countries contemplated the use of international carbon markets as part of their climate strategies; however, most of these NDCs come from developing countries.\(^9^2\) Among the developed countries, only Switzerland refers to market transactions in its NDC.\(^9^3\) While markets and the transfer of ITMOs should create a positive incentive for enhanced ambition, the transfer of mitigation outcomes resulting in the offsetting of emissions or claimed compliance with NDCs leads to undesired outcomes where NDCs lack ambition.\(^9^4\) Furthermore, ITMOs can undermine ambition when sound accounting does not back them and fictitious emission reductions are being used to offset real emissions. Participation in international market mechanisms can also create disincentives to pursue mitigation action. “Countries could have incentives to set mitigation targets at unambitious levels, or to define

\(^9^9\) See Paris Agreement, supra note 3, at art. 6.

\(^9^0\) Wiseman, supra note 86.


\(^9^2\) See generally UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE: NDC REGISTRY (2014), http://www4.unfccc.int/ndcregistry/Pages/All.aspx (stating the UNFCCC Secretariat is in the process of setting up an NDC registry).


the scope of targets narrowly, in order to accrue more benefits from selling units internationally.\textsuperscript{95}

It is essential, therefore, that voluntary cooperation outlined in Articles 6.1 and 6.2 is only pursued to allow for higher ambition.\textsuperscript{96} Transfers of mitigation outcomes in general, and market mechanisms in particular, should only be used if they allow a significant increase of ambition. Such ambition must also be upheld over time. This may require an adjustment of reference levels to measure emission reductions in response to events unrelated to climate policy, such as economic or natural events that lead to drastic reduction in emissions. Parties also should contemplate transferring emission reductions without using them as offsets or, alternatively, using only a portion of the total transfer to offset emissions. Parties may transfer emission reductions and cancel them, and/or a portion of emission reductions may remain with the generating Party and be used against that country’s NDC. The CMA supported by civil society should also monitor Parties’ use of Article 6 to increase levels of ambition.

B. CHALLENGE II: ACCOUNTING

In addition to the risk of undermining ambitious NDCs, the mechanisms of Article 6 also risk flawed emissions accounting and double-counting mitigation outcomes. These risks are relevant in the following scenarios:

- \textit{Double-counting and claiming of emission reductions within NDCs.} Emission reductions generated by different activities and in different, but overlapping, accounting schemes could be counted more than once. For example, double-counting may occur where a country accounts for emission reductions in the land sector under a deforestation (REDD+) reference level \textit{and} in the context of an agricultural or fuel wood program.

- \textit{Claiming an emission reduction and reporting it in more than one NDC.} Transfers of ITMOs in the

\textsuperscript{95} Id.

\textsuperscript{96} Paris Agreement, supra note 3, at art. 6.
context of emission trading transactions can lead to the claiming of emission reductions (on purpose or by mistake) under the NDC of the recipient and the transferring Party.

- **Double-claiming with private market transactions.** Double-claiming also can occur if the Party hosting a mitigation project counts the emission reductions against its NDC and if the private or public entity acquiring the emission reductions counts those same emission reductions towards voluntary or compliance targets. This could occur where projects are developed under existing or future mechanisms because they lead to the issuing of units, which can eventually be surrendered by an entity that is not the host Party.

- **Double-claiming of emission reductions generated by donor funding.** Climate finance loans or other financial instruments provided by donors generating emission reductions can also lead to a situation where both the host Party and the donor account for the resulting emission reductions.\(^7\)

In addition to considerations relating to the provisions of the Paris Agreement, there is already a robust market involving the transfer of emission reductions at considerable scale. Specifically, the CDM and GHG operating in the voluntary carbon market (e.g., the Verified Carbon Standard or the Gold Standard) continue to operate and generate emission reductions being transferred across borders. The transfer of these emission reductions will need to reflect the reality of the Paris Agreement. This means that these transfers will likely need to be recognized by Parties once their NDCs fall into place in order to avoid double-counting or -claiming.

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Coupled with the risks associated with the allocation and accounting of emission reductions, there are also risks associated with the measuring and issuing of emission reductions. Problems occur if different mechanisms use different reference points to calculate GHG emissions and removals or follow different standards to set baselines and reference levels. Finally, there is also the risk emission reductions are issued into one or more GHG registries. This means one single ton of emission reductions results in the issuance of more than one carbon unit.

This risk of counting emission reductions more than once jeopardizes the environmental integrity of the Agreement. Double-counting leads to an overestimation of mitigation results, so failing to prevent double-counting could hinder the achievement of internationally agreed mitigation objectives and undermine the credibility of the climate regime. Mindful of this risk, the Paris Agreement therefore calls for clear provisions to prevent the double-counting of emission reductions by Parties, as well as public and private authorized entities.98

Solving double-counting issues requires the resolution of a wide array of questions. Such questions include to what extent Parties can credit and transfer emission reductions outside of their NDCs (e.g., generated by REDD+ or by CDM/Article 6.4 projects); what if a country transfers ITMOs or emission reductions but fails to meet its NDC goals; or how ITMOs relate to allowances or offsets recognized under domestic emission trading schemes? These questions can be solved only by robust accounting rules backed by registries that track the transfers of ITMOs and emission reductions generated under Article 6.4. Considering the complexity of the questions to be addressed and the wide range of NDCs and systems, an agreement on accounting rules is likely to take several years to negotiate. To avoid the delays in cooperation, Parties must agree on interim accounting rules, either through bilateral agreements or within the agreements governing multilateral partnerships. However, such agreements again result in the risk of a multitude of overlapping accounting agreements.

C. CHALLENGE III: CURRENCY OF TRANSFER

98 See Paris Agreement, supra note 3, at arts. 4.13, 6.2, & 6.5.
The Paris Agreement does not furnish implementers with either the definition of Article 6.2 ITMOs or with the details on the emission reductions expected to be generated under Article 6.4. While the Agreement defers the formulation of guidance in Article 6.2, as well as the rules, modalities, and procedure in Article 6.6, it is unlikely the CMA will provide much clarity on the legal and transactional nature of mitigation outcomes in the foreseeable future.

The transfer of ITMOs as contemplated in Article 6.2 is commonly understood to authorize the creation of and allow for the transfer of tradable carbon rights. Market enthusiasts have been quick to refer to ITMOs as a new carbon commodity,99 but the text of the Agreement itself does not suggest that a harmonization of outcomes into a new commodity would necessarily happen. It is more likely that, by not defining any base unit—as the KP did with its Assigned Amount Units—the Paris Agreement will provide the grounds for the transfer of units from different mechanisms, systems, and bilaterally negotiated transactions involving intra-government transfers as well as transactions between private parties. It also includes the possibility to link NDCs of two or more Parties, as well as national policy instruments based on emission trading systems.

Harmonization of carbon units is necessary where different trading systems are linked.100 Such a link is implicit of all cross-border transactions under Article 6 of the Paris Agreement because the units are generated in different jurisdictions and subject to different legal rules.101 Linking becomes more complex if it extends beyond government-to-government transactions and includes the linking of national climate policies, such as emission trading systems.102

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101 Paris Agreement, supra note 3, at art. 6.
102 Stavins & Stowe, supra note 100, at 58.
Registries and transaction logs depend on a level of harmonization to allow the linking between schemes.\textsuperscript{103} The definition of carbon units most likely would also include a reference to their generation, legal properties, and conditions for acquisition and transfer. In national legal systems, the character of the units as a property right and their treatment for tax and financial accounting purposes would also be relevant.\textsuperscript{104} But the Paris Agreement does not only depend on the definition of basic accounting rules for ITMOS, which would enable smooth transfers and linking of registries; it also requires agreement and mutual acceptance of each other’s current and prospective future contribution to the joint program, as well as the harmonized trading unit.

The E.U. has been responsible for most of the system linking, which has been achieved to date.\textsuperscript{105} In 2007, the E.U. agreed to incorporate Norway, Iceland, and Liechtenstein into its emission allowance trading system and, in 2016, agreed on linking with the much smaller Swiss emission trading system.\textsuperscript{106} Linking could also include subnational systems such as the emission trading systems of U.S., Canadian, and Mexican provinces. Any transfers of carbon units accountable under the Paris Agreement must be authorized by the relevant Parties.\textsuperscript{107}

\textbf{D. CHALLENGE IV: TRANSPARENCY}

The success of the Paris Agreement depends on the eventual ability of Parties to formulate and implement ambitious NDCs. The level of ambition depends not only on feasibility but also on a shared


\textsuperscript{106} \textit{Id.}

\textsuperscript{107} Paris Agreement, \textit{supra} note 3, at arts. 6.3-6.4.
trust that all Parties contribute to climate change mitigation according to their abilities. The transparency provisions of the Paris Agreement aim at fostering such trust, as well as creating a framework allowing the assessment of overall progress towards meeting the overall goal of limiting climate change to an increase of global temperature to 2°C. Transparency—including transparent measurement, reporting, and verification (MRV)—are essential for an environmentally transparent implementation of the Article 6 provisions. Recognizing the close association between market functioning and transparency, Article 6.2 of the Paris Agreement clarifies cooperative approaches Parties engage in “internationally transferred mitigation outcomes towards NDCs [shall] ensure environmental integrity [and] transparency, including in governance . . .” A reasonable interpretation of the agreement also suggests the transparency framework developed under Article 13 and the modalities and procedures that guide the compliance mechanism in Article 15 will also apply to the two market-oriented Article 6 provisions.

The mechanism contemplated under Article 6.4, which seems destined to share many features with the CDM, is likely to be administrated by the UNFCCC Secretariat. This mechanism provides assurance accounting and transparency provisions are being applied, and accurately, and thus facilitate confidence in associated market transactions. In contrast, transfers of ITMOs under Article 6.2 are unlikely to come with a stamp of approval from the UNFCCC. The wording in the Agreement suggests the modalities of the transactions are to be decided between Parties, which are granted the freedom to set up appropriate governance arrangements as long as they comply with the overall transparency and environmental integrity expectations of the Paris Agreement.

Transparency and access to information both prevent market manipulation and abuse and are essential elements of oversight in

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108 Id. at art. 2.1.
109 See Stavins & Stowe, supra note 100, at 62.
110 Paris Agreement, supra note 3, at art. 6.2.
111 See generally id. at arts. 6, 13 & 15.
112 Id. at art. 6.4.
113 Id. at art. 6.2.
carbon markets, among others. The variance of expected transactions, the different standards and rules, and an array of effective MRV approaches make comparison and accountability challenging, even if all Parties cooperate and act with good faith. Whether provided through the UNFCCC itself or through scrutiny by the CMA and observers, rules guiding disclosure and repositories of information are key to ensure transparent disclosure of relevant information. But transparency not only enables Parties and observers to ensure the integrity of transactions; it also enables learning and provides opportunities for replication. Such replication relates to MRV provisions and to policy learning and the structure of partnerships and transactions under Article 6.2.

Overall, for Article 6 to play a central role in the implementation of the Paris Agreement, much will depend on the modalities and procedures that will guide the implementation of cooperative approaches. As with most provisions of the Agreement, however, that work will mean little if Parties do not seek the opportunity for complementary action, or if they do not show willingness to link finance and domestic action with action under the provisions of the Paris Agreement.

V. COOPERATION UNDER THE PARIS AGREEMENT: OPPORTUNITIES

The nationally driven and flexible approach of the Paris Agreement finds its reflection in the open formulations of Article 6. Over the last two decades, a rich landscape of climate institutions developed; accordingly, only a multifaceted approach can effectively involve the many national and international policies and agencies concerned with climate change likely to play a key role in the implementation of NDCs. Consequently, rather than following a single rulebook, the open formulation of Article 6 provides an umbrella for a multitude of possible instruments, mechanisms, and partnerships.

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114 See Stavins & Stowe, supra note 100, at 43–46.
115 See id.
116 Id. at 13–17.
A. Opportunity I: Flexibility

The lack of concrete rules or mechanisms defined in Article 6 provides an opportunity for Parties to forge partnerships reflecting their interests and concerns and enables ambitious mitigation action. To be clear, from a markets perspective, the Kyoto Protocol had many advantages over the Paris Agreement. It set a cap, defined a currency, formulated accounting rules, and took precaution against double-counting and overselling of units. Unfortunately, the Paris Agreement does not provide the same level of certainty to its Parties. Rather than putting the emphasis on a particular set of trading mechanisms, the Paris Agreement promotes cooperation in any form. Satisfying market supporters and opponents, the formulations of Article 6 break with the rigid definition of the Kyoto Protocol’s flexible mechanism and make way for cooperation that can rely on carbon markets, include the transfer of carbon units or the mere right to account for emission reductions and mitigation outcomes, and directly or indirectly involve the private sector.

The Paris Agreement opens the door to flexible solutions that can accommodate the particular economic structures of sectors, as well as the social and economic circumstances and capabilities of participating countries. There is no limit to the type of partnerships that can be forged under Article 6, with or without market link. Such partnerships could include the following:

- Government-to-Government transactions (Article 6.2, Article 6.8);
- Full or partial linking of emission trading systems (Article 6.2);
- Agreement on offset programs between two or more partner countries (based on the CDM, Article 6.4, or rules agreed within the partnership);
- Definition of agreed rules for sectoral programs in the context of multilateral partnerships (e.g. on REDD+) (Articles 6.2 or 6.8);
- Joint NDCs or joint implementation programs around particular supply chains (e.g., agricultural

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117 See generally Paris Agreement, supra note 3, at art. 6.
drivers of deforestation) or fuels (global partnership on clean energy) (Article 6.8); and

- Joint programs to manage (ecosystem-based) adaptation programs across trans boundary landscapes (Article 6.8).

In all of these cases, Parties can agree on whether they wish to transfer mitigation outcomes so long as they cooperate within the boundaries and rules of the Agreement — meaning to increase ambition in the context of full environmental integrity that is backed by robust accounting. The cooperation around the development and increased ambition of NDCs could also broaden the participation of multiple actors within and across countries and thereby create positive momentum around deeper emission cuts.

Likeminded countries, or those facing similar challenges, could come together in clubs or coalitions that coalesce around particular mechanisms, interests, or sectors. Coalitions of carbon market jurisdictions have been proposed to increase the ambition around carbon markets.118 Such coalitions could spearhead the development of accounting rules and common trading platforms and shared market infrastructure. However, cooperation is also possible outside of carbon markets: For example, through the incubating and scaling of business models that promote a transition to clean energy, low emissions transport and industry, as well as sustainable agriculture and landscapes.

B. OPPORTUNITY II: BEYOND MARKETS

The Paris Agreement breaches the trenches between proponents of market and non-market mechanisms because it promotes party-driven cooperation over a particular modality of cooperation.119 The inclusion and use of carbon market mechanisms is one of the most controversially discussed features of the international climate regime. Hailed as the most cost-efficient way to reduce emissions, the transfer of carbon (pollution) rights has always nurtured concerns about the environmental integrity of emission trading systems, as well as their legitimacy in terms of distributional justice and access to

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118 See Stavins & Stowe, supra note 100, at 61-64.
119 See Paris Agreement, supra note 3.
global goods and natural resources.\textsuperscript{120} Facing the opposition of a number of countries vehemently against carbon markets, Article 6 approves both market and non-market approaches.\textsuperscript{121} In the Articles that can be interpreted to refer to markets, the authors of the article have avoided using the word “markets” and chose instead to refer to the possibility of transfer of mitigation outcomes and emission reductions.\textsuperscript{122}

The use of market mechanisms remains uncertain, even among those Parties that are not ideologically opposed to markets. The Paris Agreement has dramatically changed the international context for the use of market mechanisms.\textsuperscript{123} Many developing countries that put forward their NDCs stated a reduction goal to be achieved through domestic efforts (called an “unconditional” contribution) plus additional mitigation with international support (which many called a “conditional” contribution).\textsuperscript{124} Among those countries that indicated such dual pledges, a number have also stated they intend to use, or reserve the right to use, international market-based mechanisms to meet the emission reduction goals stated in the NDC.\textsuperscript{125} Among those Parties that have not communicated dual pledges, there will be some reluctance to transfer ITMOs. The fact that all Parties must contribute to mitigation actions means developing countries need emission reductions to meet their own NDCs, i.e., some countries are concerned about selling off their abatement options.\textsuperscript{126} Others that once supported carbon market participation may now give transfers of public funds priority over market-based finance because it provides greater flexibility in using emission reductions to achieve their NDCs.

Article 6 will be able to accommodate all these different ways of cooperation. It can provide the basis for a wide range of government-to-government transactions, ranging from service

\textsuperscript{120} See Thomas H. Tietenburg, Emissions Trading: Principles and Practice (2nd ed. 2006); see also, e.g., Simon Caney, Markets, Morality and Climate Change: What, if Anything, is Wrong with Emissions Trading?, 15 NEW POL. ECON. 197 (2010).

\textsuperscript{121} See Paris Agreement, supra note 3, at art. 6.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} See Stavins & Stowe, supra note 100, at 20–21.

\textsuperscript{125} Id. at 13, 23; see also Paris Agreement, supra note 3, at art. 4.

\textsuperscript{126} See Paris Agreement, supra note 3, at art. 4.
contracts that pay for environmental services and cooperative finance agreements to grants that do not require any formal consideration in return for the payment. The advantage of these trades is there is no need for harmonization of design elements, infrastructure, or acceptance of a common carbon price.\textsuperscript{127} Parties can agree contractually which Party accounts for mitigation outcomes. As long as double-counting is avoided, the accounting is robust, and the transaction increases the ambition of the Parties, transactions can fall under Articles 6.1 and 6.2 (with the transfer of ITMOs) or Articles 6.1 and 6.8 (without the transfer of ITMOs).

\textit{C. FAST START}

There is no reason to wait. The Paris Agreement neither formulates a start date for cooperation nor suggests that the CMA will restrict flexibility beyond the modalities and rules it is mandated to develop. There is no reason to wait until 2020, either. Parties may start cooperating now and pilot transactions under Article 6.2. In the context of bilateral or multilateral partnerships, such transactions will help to test rules, act as discussion forums for Parties, and facilitate a later agreement on modalities and procedures.

Cooperation can emerge within existing fora, such as the World Bank administered Forest Carbon Partnership Facility, the Carbon Pricing Leadership Coalition, or the Pilot Auction Facility, but also within the context of regional cooperation or existing government networks (such as the G20 or the Mayor Economies Forum).

\textbf{VI. CONCLUSIONS}

The Paris Agreement establishes an iterative process of NDCs that should become increasingly ambitious over time.\textsuperscript{128} The cooperative approaches of the Agreement can support a positive momentum towards stronger mitigation action. Article 6 can help to create a framework for market and non-market based cooperation between parties. Transparent governance and conservative GHG accounting are needed to ensure the environmental integrity of mitigation outcomes where these mitigation outcomes are used to

\textsuperscript{127} See Stavins & Stowe, supra note 100, at 57–60.

\textsuperscript{128} See Paris Agreement, supra note 3, at art. 4.
meet progress towards NDCs. Ideally, internationally agreed modalities and procedures will be adopted without delay to allow Parties to engage in transactions that avoid emission reductions being counted either twice, or not at all, against NDCs.

International rules are important because they help build trust into the Paris Agreement. Ideally, such rules are environmentally conservative without unnecessarily curtailing the appetite of Parties to act cooperatively. The Kyoto Protocol and the detailed Marrakech Accords favored mechanism design over action. These agreements established a detailed rulebook concerned with avoiding “hot air” transactions or carbon rights not backed by emission reductions. As a price, it excluded important sources of emissions (such as tropical deforestation). Many poorer developing countries had limited opportunities to benefit from the CDM due to high transaction costs and a bias towards larger investment projects. At the same time, and despite all efforts to the contrary, the exclusive character as an offset mechanism meant the CDM never could shrug off suspicions of providing grounds for environmentally dubious transactions.

Article 6.4 foresees the definition of a project-based mechanism, which is likely to share many basic features of the CDM. It seems to have been negotiated to provide a continued framework for carbon market and private sector transactions while creating a net environmental benefit. Carbon market proponents and investors will be happy to see this article be linked with direct investments in mitigation projects.

Transactions under Article 6.2 can involve the transfer of mitigation outcomes but are more open in their nature. The article does not prescribe the context in which such transactions should be placed. It requires transactions to apply standards of environmental integrity and foster overall ambition, but how this is done is up to Parties to define. Where no transaction of emission reductions or allowances is contemplated, Article 6.8 acknowledges the importance of non-market based approaches.

The open architecture provides as much risk as it provides opportunity, whereby one often is the reflection of the other. Negotiators seeking to operationalize Article 6 rules by adopting

\[129\] *See id. at art. 6.4.*

\[130\] *Id. at art. 6.2.*

\[131\] *Id. at art. 6.8.*
international guidance should prioritize a few key rules to safeguard environmental integrity while facilitating cooperation, with the following being most important:

- Link the transfer of ITMOs to emission reductions goals that go beyond what a Party has defined as its own contribution, whereby this contribution should represent a genuine effort to reduce domestic emissions and lead towards a carbon-balanced economy.

- Take measures to avoid double-counting by requiring the establishment of GHG registries that account for national emissions, imported as well as exported ITMOs and emission reductions.

- Provide for disclosure requirements that allow effective review of NDCs and the transfer of ITMOs.

At the same time, national policy makers and implementers should grasp the opportunity provided by Article 6 and creatively establish partnerships that allow cooperation in particular sectors:

- Defining rules in the context of multilateral government-to-government cooperation in sectors of common interest. Such cooperation could include partnerships around REDD+, decentralized energy, transport emissions, or buildings. They could include the transfer of ITMOs as means to pay for mitigation results or involve grant-based financing.

- Partnerships could also be multi-sectoral and include private actors. They could, for example, focus on particular commodities that are associated with high emissions (ranging from coal to beef). They could also evolve around certain technologies (ranging from cars to cement).

- Parties with domestic emission trading systems could link these systems according to negotiated
rules that safeguard the functioning of the respective systems.

Whatever the preferred mode of cooperation will be, there is no reason to wait for further international action. Immediate action is needed to avoid the most severe effects of global climate change, and the goals of the Paris Agreement require action before detailed rules are in place. Article 6 provides a unique and much needed opportunity for collaboration within the context of the Paris Agreement without holding Parties hostage to further rules to be agreed upon in the snail-like pace of international negotiations.