

Nonetheless, such a mode of enforcement appears to be non-exhaustive and solely complementary to other modes of enforcement. Prospective litigation is expected to ensue especially if States Party to the Paris Agreement were not to devise effective enforcement mechanisms within the Paris Agreement itself, thus falling short of existing societal expectations.

ACCESS TO INFORMATION, THE HIDDEN HUMAN RIGHTS TOUCH OF THE PARIS AGREEMENT?

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KEYWORDS

Access to information; Climate change; Paris Agreement; Procedural rights

INTRODUCTION

In a conference on the importance of procedural environmental rights, aimed at collecting and comparing experience gained with the adoption and implementation of these rights under various legal instruments, our contribution explores how the Paris Agreement on Climate Change echoes Principle 10 of the Rio Declaration, as far as the 'access to information' pillar is concerned.

'Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement¹.'

This is what Article 12 of the Paris Agreement stipulates, a provision that did not reach the headlines in Paris during COP21 in December 2015, and the formulation of which did not raise heated debates at that very moment. However, the explicit mention of the importance of public access to information with respect to enhancing actions in the Paris Agreement on Climate Change deserves notice and explanation for at least two reasons: firstly, due to the scope and status of the Paris Agreement; secondly, due to the specific nature of procedural rights.

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Scope and status. The 2015 Paris Agreement on Climate Change is a worldwide agreement, negotiated within the framework of the United Nations, and a legally binding treaty within the meaning of the Vienna Convention on the Law of Treaties.² By contrast, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters³, which decisively pushes the right for everyone to obtain access to environmental information held by public authorities, is only a regional treaty – it was negotiated within the framework of the UN Economic Commission for Europe –, even if its sphere of influence is actually much broader than the territory of its 47 Parties.⁴ As far as Principle 10 of the 1992 Rio Declaration⁵ is concerned, the Declaration only pertains to the category of ‘soft law’, a classification revealing its strong inspirational effect but lack of formal bindingness, even if this did not prevent it from gaining a major jurisprudential relevance.⁶ Due to the fact the Paris Agreement is both, formally, a ‘hard law’ and ‘worldwide’ instrument, the mention of the importance of public access to information on the environment opens interesting perspectives. Negotiated under the framework of the United Nations and directly linked to the 1992 Framework Convention on Climate Change, the Paris Agreement has the potential to gather together a large number of Parties, far beyond the relatively modest number of Parties which gather for the Aarhus Convention⁷, and far beyond the sole legal orders where public access to information on the environment is already firmly established. Considering this context, one can legitimately ask whether, due to Article 12 of the Paris Agreement in particular, the international community is now set on the path towards globalising some of the democratic requirements that are inherent to Principle 10 of the Rio Declaration. Could the Paris Agreement serve as a vehicle for consolidating fundamental democratic values across the globe?

- ² D. Wirth, Cracking the American Climate Negotiators’ Hidden Code: United States and the Paris Agreement, *Climate Law*, Vol. 6, No. 1–2, p. 152–170, 2016/Boston College Law School Legal Studies Research Paper No. 393, March 24, 2016, p.3; S. Maljean-Dubois, M. Wemaere, The Paris Agreement, a starting point towards achieving climate neutrality?, *Carbon & Climate Law Review*, 2016, pp.1–4.
- ³ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998; in force 30 October 2001) (‘Aarhus Convention’).
- ⁴ M. Pallemerts (Ed.), *The Aarhus Convention at Ten*, Europa Law Publishing, 2011, 440 p.; J. Ebbesson, Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention, *Erasmus Law Review* (2011), 71–89.
- ⁵ Rio Declaration on Environment and Development, Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992), Annex (‘Rio Declaration’), Principle 10.
- ⁶ J. Viñuales (Ed.), *The Rio Declaration on Environment and Development: a Commentary*, Oxford, OUP, 2015, p.34.
- ⁷ Such as Canada and United States, Members of the UNECE, but not signatories to the Aarhus Convention.

Procedural rights. The second reason explaining the interest Article 12 of the Paris Agreement could raise stems from the debate on human rights. As the reader may know, no mention of the wording ‘human rights’ could be made explicitly in the final main part of the Paris Agreement, despite fierce plaidoyers and long-prepared negotiations dealing with that aspect.⁸ Except for an acknowledgement in the preamble and an implicit reference in Article 2, via the expression ‘in a manner that does not threaten food production’⁹, human rights are often, to the dismay of many, said to have been fully wiped out.¹⁰ But are human rights really out of the game in the new climate regime? When one knows the crucial importance of procedural human rights¹¹ with particular respect to enhancing environmental protection¹², could we not consider that Article 12 is the hidden human rights touch of the Paris Agreement, that could potentially evolve towards something much more substantial in the mid-term future?

- ⁸ See, inter alia: D. Bodansky, Climate change and human rights, unpacking the issues, *Georgia Journal of International and Comparative Law*, 38, 2010, pp. 511–524.
- ⁹ Article 2, §1, b.
- ¹⁰ As recalled by D. Magraw, A. Rosenberg, D. Padmanabhan, Deepika, Human Rights, Labour and the Paris Agreement on Climate Change, *Environmental Policy and Law*; 46.5 (October 2016), 313–320: “In terms of human rights, as well as labour issues, an unprecedented coalition bringing together a variety of constituency groups, including human rights and environmental NGOs, trade unions, women and gender-based groups, indigenous peoples, youth and peasants pushed strongly for robust language in the authoritative parts of the agreement; the demand was for placement of this text in the Preamble as well as in the operative Article 2 of Section C. As one of the last compromises made in Paris, however, language on these was restricted to the Preamble alone”.
- ¹¹ UNEP report on Climate change and Human rights, 2015, 43 p.; J. Knox, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Focus report on human rights and climate change, Report of the Special Rapporteur on the issue of Human Rights, June 2014; J. Knox, Human Rights Principles and Climate Change (July 9, 2014), Oxford Handbook of International Climate Change Law, Cinnamon Carlarne, Kevin R. Gray, and Richard Tarasofsky eds., 2015; Wake Forest Univ. Legal Studies Paper No. 2523599. Available at SSRN: <https://ssrn.com/abstract=2523599>; J. Knox, Climate Change and Human Rights Law, 50 VA. J. INT’L L., 2009, 163; OHCHR, Report on the Relationship Between Climate Change and Human Rights, UN Doc 2009, A./HRC/10/61.
- ¹² “In recent years, international human rights tribunals and other bodies have identified ways that environmental harm can interfere with the enjoyment of human rights, and have clarified that States have obligations to protect human rights against such interference. For example, States have duties to provide access to environmental information, to protect rights of free expression and association in relation to environmental issues, and to provide for participation in environmental decision-making”; “Human rights law imposes procedural obligations on states, including duties to assess environmental impacts on human rights and to make environmental information public, to facilitate public participation in environmental decision-making, and to provide access to effective legal remedies for environmental harm to the enjoyment of human rights. Closely related to the right to participate in environmental decision-making are the rights of freedom of expression and of association”, as recalled by J. Knox, Human Rights, Environmental Protection and The Sustainable Development Goals, 24 Washington International Law Journal 517 (2015), pp. 1–3; M. Dellinger, Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law, 18:1 Colorado Journal of International Environmental Law and Policy Law (2009), 311–364.

Our contribution to the present volume, which, as presented at the EELF Wrocław conference in September 2016, was only exploratory, is built around three questions:

- Does the mention of the importance of public access to information in the Paris Agreement confirm previous discourse or, on the contrary, reveal a breakthrough as far as provisions of multilateral treaties on climate change are concerned?
- Does this interest in public access to information become crystallised in the nationally determined contributions¹³ – those spontaneous pledges that are a new central feature in the climate regime – as submitted by states from all over the world in preparation and implementation – of the Paris Agreement?
- More crucially, what might the follow-up of Article 12 involve, both for Parties and for existing institutions? Could, for instance, the crucial and specific focus on transparency, which is also at the very heart of the Paris Agreement, be inspired or even moulded by procedural rights to access to information?

But before proposing to answer these three questions and in order to better contextualise their relevance, it is necessary to provide a short description of the Paris Agreement.

1. THE PARIS AGREEMENT ON CLIMATE CHANGE

1.1. A TREATY

The Paris Agreement on Climate Change is a new treaty, legally binding under the international law of treaties.¹⁴ It was finalized in Paris in December 2015 and it entered into force on 4 November 2016, an unprecedented speed with respect to multilateral environmental agreements. The normative density of the Agreement is weak but its strengths lay in the new collaborative processes it entails. The Treaty holds the international community together around the reaffirmation of a same concern and, more importantly, reboots the global 'commoning process' towards the achievement of a very demanding, but shared, project. That project is to hold the increase in the global average temperature to well below 2 °C above

¹³ As described under Article 3 of the Paris Agreement, "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement."

¹⁴ As governed by the Vienna Conventions on the Law of Treaties. See note 2 here above. The agreement that was reached in Paris, in 2015, is actually made of two parts: a Treaty (the binding Paris Agreement) and an accompanying Decision (non-binding, but that shall be an element of the context helping to interpret the Treaty), Decision 1/CP21.

pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.¹⁵

1.2. NOT A TREATY FOR ALL

The treaty is binding upon the parties but the density of the normative content is weak. That very weakness was actually one of the conditions of its adoption. This must be explained in the light of various factors. Among them is the trick that has been used in the hope to guarantee its swift entry into force, a trick that indeed kept its promises. Due to the specificities of American politics, it appeared necessary to mould the new proposed instrument under the form of an 'executive agreement', that could be adopted by the sole President without passing through Congress. A Congress, with its republican majority, which is definitely not keen to adopt very prescriptive new regimes.¹⁶ The purpose of such a by-pass was to guarantee that the United States could effectively and rapidly become Party to this new Agreement – a difficult issue when one remembers that the United States did not join the Kyoto Protocol. It was also necessary in order to meet the threshold of 55% of the global emissions that was fixed for the entry into force of the new Agreement. However, this arrangement had to be genuine and, as a consequence, it did drastically impact the content of the new Agreement: no assigned substantive reduction targets nor possibilities to impose any kind of sanctions at an international level etc. In short, the content had to be smooth and lenient enough to allow for it to be viewed as the mere execution of a previously adopted legal base, such as a treaty on Climate Change – not the 1997 Kyoto Protocol but the 1992 United Nations Framework Convention on Climate Change (UNFCCC).

1.3. A LONG-AWAITED TREATY

Besides that issue, Paris cannot be properly understood without taking the measure of other difficulties encountered in the past¹⁷, while negotiating the follow-up of the Kyoto Protocol and its fatal deadline of 2012. A difficulty that culminated with the setback of the Copenhagen Conference of the Parties, in 2009, nearly putting

¹⁵ Article 2, a, Paris Agreement.

¹⁶ D. Wirth, 'The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?', *Harvard Environmental Law Review*, Vol. 39 Iss. 2; 2015, p. 522; L. Rajamani, 'The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations', 2015, 78 MLR 826.

¹⁷ See among others: L. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', *Journal of Environmental Law*, 2016, 28, 337–358; S. Lavallée & S. Maljean-Dubois, 'L'Accord de Paris: fin de la crise du multilatéralisme climatique ou évolution en clair-obscur?', *RJE*, 2016, 41, 19–36.

a final point to the common project. A project that formally started some decades ago, in 1992, with the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) and soon became more sophisticated in 1997 with the adoption of the Kyoto Protocol. The Kyoto Protocol, praised on the European scene and despised on the other side of the Atlantic, directed the international community towards more severe commitments: it assigned quantified reductions of greenhouse gases with fixed deadlines. But these more severe commitments rested only on the Parties listed in Annex I to the Framework Convention – a list of developed countries, according to the categorization of the early nineties, with no consideration of the fact that new economic competitors on the worldwide scene had already emerged. Parties that were not on the list were not submitted to any quantified restrictions, but were still engaged in the continuation of promises to do their best in assessing their own emissions and pay further attention to the climate change problematic with the possible help, precisely, of Annex I countries. That bipolarity was one of the building blocks of the whole climate regime when it all started, as its very existence is constructed upon a principle of 'common but differentiated responsibilities'. An asymmetry in duties and obligations, in full consideration of the respective responsibilities¹⁸, capacities but also needs of each part of the world, but reduced to a binary configuration. With, on the one hand, a list of debtors (the historic polluters) and, on the other hand, non-Annex I countries which rather adopted a posture of creditor that they will not easily be prepared to surrender.

1.4. A BRAND NEW TYPE OF TREATY

So, writing the next chapter of the common battle against greenhouses gases was certainly no trifling matter and the Paris agreement was, in that sense, an immense diplomatic success. A success forged on a bet and a change of paradigm. The daring was to ask Parties to spontaneously propose what they were ready for, instead of continuing to try, desperately, to mutually agree upon the adoption of assigned commitments. The change of paradigm was to allow trust to be built around shared but global objectives, via a specific rhythm of procedural obligations, while parties hold control on what they agree to be committed to. The bet was that the compilation of all 'intended nationally determined contributions' could effectively lead to the transition the world needed in an acute and urgent climate change crisis.

¹⁸ Climate change is linked to anthropic greenhouse gases. A large part of them comes from the combustion of fossil fuels – a combustion that started, on a very large scale, with the industrial revolution in Northern Countries two centuries ago. This allows for an understanding of their role as 'historic polluter' that justified, in 1992, post-developed countries to install at the forefront of the combat against climate change, including on financial transfer issues.

Self-commitments. Under that configuration, various concepts are essential. Among them, the 'nationally determined contribution'¹⁹. 'Each Party shall prepare, communicate and maintain successive nationally determined contributions *that it intends to achieve*.' The binding force of the substantial part of these contributions will depend upon the specifications of their own content which is, so far, not standardized. Still, the Treaty specifies in the same Article 4.1. that 'Parties shall pursue domestic mitigation measures, with the aim of *achieving* the objectives of such contributions'²⁰. This sounds rather like an obligation to reach a result (would a result be mentioned in there). Moreover, those national contributions shall not remain static. They are submitted to an obligation to be changed every five years. Those frequent changes must 'represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'²¹.

Transparency. Another key concept is 'transparency', as governed under Article 13 which establishes 'an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience', this 'in order to build mutual trust and confidence and to promote effective implementation'. On that aspect, the Treaty is very detailed as regards the purpose of such a transparency framework: 'The purpose of the framework for transparency of action is to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions, etc.'²². There is less detail on what shall happen with the submitted information, except that it shall undergo a technical expert review²³, which shall consist of a consideration of the Party's support provided, as relevant, and the implementation and achievement of its nationally determined contribution.²⁴ The review shall also identify areas of improvement for the Party, and include a review of the consistency of the information, taking into account the flexibility accorded to the Party in the light of their capacities. But how shall the review be connected to the necessity to expose the results of that exercise to the public at large, is not yet specified. A lack of precision that might be more than an oversight. Regarding the broader issue of

¹⁹ For which no definition is provided.

²⁰ Emphasis added.

²¹ Article 4, §3. All these terms would of course need further developments.

²² Article 13, §5. And, according to §4: 'The transparency arrangements under the Convention, including national communications, biennial reports and biennial update reports, international assessment and review and international consultation and analysis, shall form part of the experience drawn upon for the development of the modalities, procedures and guidelines'

²³ Article 13, §11.

²⁴ Article 13, §12.

public participation in the new transparency processes, S. Duyck already pointed out, at the time the new Agreement was still at an early stage of negotiation, that 'in Cancun, governments elaborated a new MRV²⁵ process, abandoning the existing institutional framework providing positive and negative incentives to promote the implementation of the convention. Doing so, negotiators endorsed the view that respect for commitments can be meaningfully promoted through reliance on reputational costs associated with non-compliance. At the same time the procedures adopted by parties restrict the opportunities for an engagement of civil society in this process. The states-centric nature of the MRV process thus ignores the crucial role that NGOs could play in providing public exposure with regards to the successes and failures of governments to respect their mitigation commitments'.²⁶

This being explained, we shall now turn back to our three questions regarding the relevance and possible impact of Article 12 of the Paris Agreement, as far as the public access to information dimension is concerned.

2. ACCESS TO INFORMATION IN INTERNATIONAL AGREEMENTS ON CLIMATE CHANGE

2.1. PREVIOUS AGREEMENTS ON CLIMATE CHANGE

The mention of access to information in the Paris Agreement is, as such, not new to international agreements on climate change. Both the 1992 Framework Convention on Climate Change and the 1997 Kyoto Protocol contain provisions on access to information. According to Article 6, UNFCCC, Parties shall '*promote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: (...) (ii) public access to information on climate change and its effects.*' According to Article 10, e, of the Kyoto Protocol, '*All Parties shall facilitate at the national level public awareness of, and public access to information on, climate change.*'

But the wording in Article 12 ('Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement') is not a copy-and-paste of either of those provisions. It is not the mere repetition of what

²⁵ Measurement, Reporting and Verification Framework.

²⁶ S. Duyck, MRV in the 2015 Climate Agreement: Promoting Compliance Through Transparency and the Participation of NGOs (January 10, 2015). Carbon and Climate Law Review, 2014/3, 175–187, Available at SSRN: <https://ssrn.com/abstract=2557175>, p.21.

can be found in the framework Convention to which it is embedded.²⁷ There are interesting differences which deserve to be enhanced.

First, the core of Article 12 is the reference to a necessity to cooperate: Parties shall cooperate²⁸ – a cooperation between Parties on Public Access to Information. That wording sets Article 12 apart from the wording of the two other Treaties (Article 6 UNFCCC; Article 10 Kyoto Protocol) but also of Principle 10 of the Rio Declaration, all specifically focused on the national dimension, a domestic promise that is not always highlighted: 'although the Rio Declaration has an international dimension, Principle 10 is actually domestic in scope.'²⁹

What is more, Paris insists on '*the importance of these steps with respect to enhancing actions under this Agreement.*' The statement can be tracked back to a jargon that has been used for some years now in various meetings and decisions related to the implementation of Article 6 of the UNFCCC.

Article 6 UNFCCC led to an intense diplomatic activity, culminating in the creation of a 'Dialogue on Action for Climate Empowerment'³⁰, with a Doha programme that heavily insisted on the 'country-driven approach' to the implementation of Article 6 of the Convention but also explicitly admitted that 'international cooperation can enhance the collective ability of Parties to implement the Convention', identifying the need to establish a network of national focal points and to facilitate a regular exchange of views in order to build or strengthen existing skills and capacities.³¹ The focus is on the facilitation of public access to information, by providing the information that is needed, taking into account factors such as quality of internet access, literacy and language issues. Rights are not explicitly mentioned in that Doha programme but, beyond the appearance of keeping the issue of access to information to something rather technical, its operationalisation also discusses possible linkage to the issue of rights and obligations, as under the Aarhus Convention model.³² In Lima, at COP20 in 2014, a Ministerial Declaration explicitly stressed 'that education, training, public awareness, public participation, public access to information,

²⁷ The Paris Agreement complements the 1992 Framework Convention on Climate Change (UNFCCC); all its Parties must be Parties to the framework Convention; all definitions on the framework Convention are applicable to the Paris Agreement; The Paris Agreement enhance the implementation of the Framework Convention; The Conference of the Parties of the framework Convention shall serve as the meeting of the Parties to the Paris Agreement. The obligation 'shall' and not the potestative 'should'.

²⁸ E. Dannemaier, A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums, Oxford Yearbook of International Environmental Law, Vol. 18, 2007, pp. 32–64.

²⁹ Decision 15/CP.18, a participatory platform acting as a regular forum to Parties to share their experiences in the implementation of Article 6 of UNFCCC, launched in 2012 at COP18 (Doha) with a 'Doha Work Programme on Article 6 of the Convention', a new step in the continuation of other programmes.

³⁰ FCCC/SBI/2016/6, May 2016 Report on the Progress made under that Doha Programme, p.11.

³¹ Idem.

knowledge and international cooperation *play a fundamental role in meeting the ultimate objective of the Convention and in promoting climate-resilient sustainable development*'.³³

As a consequence, it appears that Article 12 of the Paris Agreement cannot be approached, in any way, as a breaking point. It is rather the outcome of a slow maturation, bringing added value in comparison with pre-existing provisions.

2.2. AARHUS' IMPACT

One can also wonder whether the surge of such a provision in the Paris Agreement could also be rooted in the external dimension of the Aarhus Convention, emerging from its Article 3.7, according to which *'Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment'*. This requirement is known as having actually contributed to the diffusion of an Aarhus-type participatory model within international negotiations, and inside the Conference of the Parties, especially within the UN Climate Change regime.³⁴ It opened doors to non-state actors and transformed the composition of national delegations, exactly as is expanded upon in the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums.³⁵ As observed by E. Dannemaier, Article 3.7 of the Aarhus Convention has normative and methodological implications and participates in the construction of some form of global environmental citizenship.³⁶ One step further, one can ask whether the spilling-over effect might also impact the content of new treaties, and not only the negotiation processes, as we see happening with Article 12 of the Paris Agreement.

³³ Decision 19/CP.20. Emphasis added.

³⁴ S. Duyck, Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime, RECIEL 22 (4) 2015, pp. 123–138. The author mentions that 'Governments that are parties to both legal instruments have relied on three main approaches to promote the Aarhus principles in the UNFCCC: (i) involvement of domestic stakeholders when preparing contributions to the negotiation process; (ii) promotion of public participation in the negotiation process itself; and (iii) support for UNFCCC outputs that uphold public participation in the implementation of climate policies and projects', while noticing that the third option was only very modestly activated.

³⁵ Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums ('Almaty Guidelines'), in: Aarhus Convention, Decision II/4, Promoting the Application of the Principles of the Aarhus Convention in International Forums (UN Doc. ECE/MP.PP/2005/2/Add.5, 20 June 2005); U. Beyerlin, Aligning international environmental governance with the 'Aarhus principles' and participatory human rights, in A. Grear and L. Kotze, Research Handbook on Human Rights and the Environment, EE, 2015, pp. 333–352.

³⁶ E. Dannemaier, op.cit., pp. 49–50.

2.3. A SPECIAL PLACE IN THE PARIS AGREEMENT

Article 12 of the Paris Agreement is short and does not contain any detail, in contrast to most other articles of the Paris Agreement which present the particularity to be rather 'overinflated'. It fits between an Article 11 devoted to capacity-building and an Article 13 devoted to Transparency.

The draft version of that provision cannot be traced back any earlier than the version of 23rd October 2015³⁷, under a new 'Article 8 Bis' that managed to squeeze in the pre-existing structure with a choice to be made between two similar options, containing only two brackets ('shall', 'should'). That choice was quickly settled in favour of the prescriptive 'shall', as can be inferred from the 5th December version, on the eve of the COP21, under its current wording, confirming it did not raise much discussion in the crucial last round in Paris.

The real challenge was actually not 'if' but 'where'.³⁸ Mention in an isolated article has already proved to be a winning strategy for attracting attention and insisting on the importance of the issue, with regard to all actions that shall take place under the Paris Agreement. Attracting attention also means financing and the possible promotion of a specific working group and process, in the continuity of UNFCCC's Article 6 Dialogue on Empowerment.

The accompanying decision of the Conference of the Parties³⁹ keeps the legacy of that discussion. It only addresses the 'public access to information' discussion into its section on 'capacity building'⁴⁰, which is a bit confusing. But what it stipulates is worth noticing, as the Decision is, in itself, an important part of what was agreed upon in Paris and it will play a role in the interpretation of the formal Agreement:

The Conference of the Parties '§83. Calls upon all Parties to ensure that education, training and public awareness, as reflected in Article 6 of the Convention and in Article 12 of the Agreement are adequately considered in their contribution to capacity-building';

'§84. Invites the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session to explore ways of enhancing the implementation of training, public awareness, public participation and public access to information so as to enhance actions under the Agreement'.

³⁷ Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the ADP contact group, Version of 23 October 2015, 23:30hrs.

³⁸ According to our contacts within the Belgian Delegation to the COP21.

³⁹ Decision 1/CP.21, FCCC/CP/2015/10/Add.1.

⁴⁰ At its §§83 & 84.

3. THE CONTENT OF NATIONALLY DETERMINED CONTRIBUTIONS

The content of the nationally determined contributions is not standardized. Each future Party had to determine what it wanted to pledge and submit, as it wished, in preparation for COP21.⁴¹ The content of these proposals has not been formally integrated to the Paris Agreement, but they are made accessible online. Since the entry into force of the Agreement, it is an obligation resting on the secretariat to record nationally determined contributions communicated by Parties in a public registry.

Among those contributions are very few that pay attention to the issue of access to environmental information, besides their main provisions on emissions mitigation and adaptation to climate change.

The contribution of Costa Rica insists on the adoption of an 'Open Government policy', strengthening accountability mechanisms, information access and availability, and citizen participation.⁴² Less to the point, but still relevant, Mexico's contribution includes a specific focus on early warning systems that could protect the population and increase its adaptive capacity. China expresses the wish to strengthen the role of public supervision and participation in low-carbon development.

Many contributions insist, on the other hand, on the fact that they were elaborated through a genuinely participatory process.⁴³

According to the data produced in a May 2016 report on the progress made in implementing the Doha work programme on Article 6 of the 1992 Framework Convention on Climate Change, 'around 134 Parties mentioned at least one of the six elements covered by Article 6 of the Convention⁴⁴ in their intended nationally determined contributions. Several Parties reported that they involved

⁴¹ There proposals when then called INDC's (intended nationally determined contributions).

⁴² It provides details on a National Environmental Information System (SINIA) that was created under the National Geo-Environmental Information Center (CENIGA) at the Ministry of Environment and Energy, and foresees promoting an open data policy for all relevant climate information available for any citizen, announcing the creation of two open participation councils, one technical-scientific and one multi-stakeholder platform which will accompany the government's climate planning and management.

⁴³ All contributions are available on a NDC registry, available at www4.unfccc.int/ndcregistry/Pages/Home.aspx.

⁴⁴ Besides access to information, Article 6 UNFCCC mentions education, raising awareness, public participation, training of professionals and ... international cooperation (understood as follows: International cooperation and exchange can play a major role in strengthening national activities on climate change education, training and public awareness. Many governments need access to expertise and financial and technical resources so that they can develop their own climate change programmes. And all countries can benefit from sharing success stories, exchanging personnel and strengthening institutional capacity. This section features links to experts and organizations that are committed to promoting international cooperation in this field), as synthesized on the UNFCCC portal.

civil society, the private sector, academia, NGOs, multilateral organizations and other relevant stakeholders in the design of their INDCs. Some Parties indicated that public participation would be enhanced for coordinating and implementing their INDCs. Parties also stressed the key role that international cooperation will play in enhancing the implementation of their INDC's.⁴⁵

4. THE FOLLOW-UP OF ARTICLE 12

4.1. BEYOND CAPACITY-BUILDING: AN INTEGRATION CLAUSE

Article 12 conveys an important message but it remains to be seen how far it could impact the Paris process itself, beyond a multiplication of international encounters aiming at 'sharing experiences' and 'drawing lessons', in the continuation of capacity-building essentials.

Due to the special nature of the Paris Agreement, the involvement of the public in the follow-up of measures to be effectively adopted by Parties shall be crucial in its success. The care governments will take of this follow-up will be definitively dependant on and responsive to what the respective public opinion requests.

Public access to information, however, is not proposed as a cross-over dimension under the Paris Agreement. Unless we consider it to be, under Article 12 – more precisely if it is interpreted as a possible integration clause.

There is a need, for instance, to draw clearer links between the implementation of Article 12 and the work that shall be done on Article 13, dedicated to transparency, that is broadly acclaimed as being one of the main innovations – if not the most important, indeed the true backbone⁴⁶ – of the Paris Agreement. As already mentioned, Paris does not directly contain strict and explicit reduction targets as far as greenhouse gas emissions are concerned, but creates virtuous circles inviting Parties to constantly work on their ambition, in a collective effort to reach global goals. In that regard, Article 13 is central, for it fixes the essentials of the reporting process and organises a review of the information that shall be transmitted by all parties. The review is announced to be a very difficult exercise, due to a kind of bias which places sophisticated greenhouse gas accounting at the core centre of the verification processes. The review is described as being 'technical'⁴⁷, and experts will be the main operators. If, as mentioned

⁴⁵ FCCC/SBI/2016/6, §71, p.13. The Parties are not named.

⁴⁶ C. Martini, Transparency: The Backbone of the Paris Agreement, Yale Center for Environmental Law & Policy, policy paper, May 29, 2016, available at <http://envirocenter.yale.edu/transparency-the-backbone-of-the-paris-agreement>.

⁴⁷ Article 13, §11.

by J. Vinuales⁴⁸, one of the novelties in Article 13 is precisely that it 'relies on public pressure (perhaps a form of 'naming and shaming') to nudge States into taking action', we might ask if the current guarantees (yet to be expanded) are solid enough to make sure that the huge amount of information collected under Article 13 shall be available to all, and understandable to the general public. Quoting A.S. Tabeau, it might also be recalled that 'global governance has created a new level of political opacity that requires rebalancing through the adoption of transparency measures'.⁴⁹ An opacity that, if not taken care of, could prevent the public from exercising its constructive pressure.

How they are to be performed and what is to become of these technical reviews is still to be decided at the conference of the Parties, which received the mandate to adopt common modalities, procedures and guidelines, as appropriate for the transparency of action and support.⁵⁰ It could be useful to take hold of Article 12 to request *inter alia*, under Article 13, a need to provide for non-technical summaries and a public access, in due time, to the conclusions of the reviews.

Idem under Article 14 and its periodical global stocktakes the outcome of which 'shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action'.

4.2. TOWARDS A COOPERATION ON CREATING NEW RIGHTS

Many steps down the line, one can also ask whether that call for a better international cooperation in relation to public access to information might create new opportunities to improve the issue of 'public access' across the world to information on climate change (and related policies), through the adoption of new collaborative implementing instruments.

There might be a very long way to go between stating the importance of public access to environmental information in enhancing actions under the Paris Agreement and the recognition of a subjective right to such access to information. Still, when one knows that 'at least half of the nations of the globe have adopted comprehensive legislation aimed at guaranteeing access to environmental information, whether through general, cross-cutting information laws, or through laws dealing specifically with environmental information'⁵¹,

⁴⁸ J. Vinuales, 'The Paris Climate Agreement: An Initial Examination', February 2016, available at <https://www.ejiltalk.org>.

⁴⁹ A.S. Tabeau, 'Evaluation of the Paris Climate Agreement According to a Global Standard of Transparency', CCLR, 1, 2016, p.24.

⁵⁰ Article 13, §13.

⁵¹ As mentioned in UNEP, 'Putting Rio Principle 10 into Action', 2015.

one might think that, for the other half, Article 12 could still usefully act as a seed tray.

Procedural dimensions – and associated rights – are a sort of detour that has proved to be an excellent manner to pave the way towards the recognition or affirmation of more substantial rights. Not only an interesting trigger factor, but also a crucial one in boosting the follow-up of environmental issues by the public at large.⁵² The right of access to information is also a prerequisite to the exercise of other procedural rights relating to public participation and access to justice.⁵³

Public access to information on climate change science and policies is not yet guaranteed as a right under all national constitutions or national legislations across the world and there is certainly a need to consolidate that dimension where it already exists, *de iure* or *de facto*, passively or actively.⁵⁴

4.3. A NECESSARY PART OF FUTURE NATIONALLY DETERMINED CONTRIBUTIONS

The importance of public access to information 'with respect to enhancing actions under this Agreement' might suggest that such a dimension should also be integrated in nationally determined contributions, would Parties happen to reach an agreement, in the future, on a common template.

Of course, Article 12 is not mentioned in Article 3, which invites Parties to undertake and communicate ambitious efforts 'as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement'. But either on the basis of the integrative dimension we propose, or due to the fact the accompanying Decision demonstrates, as already explained, that the mention of Article 11 actually also encompasses the dimensions embraced under Article 12, this would certainly fit with the purpose of the instrument, the 'NDCs'.

An insertion in all national contributions would entail a submission to the non-regression requisite that shall characterize these self-made commitments, as they are supposed to represent 'a progression beyond the Party's then current nationally determined contribution' and reflect 'its highest possible ambition', whatever that idealistic-sounding request may mean.⁵⁵

⁵² A. Boyle, 'Human Rights and the Environment: Where Next?', *The European Journal of International Law*, vol.23, 3, 613–642.

⁵³ UNEP report on Climate change and Human rights, 2015, p.16. Cfr Report of the Special Rapporteur on the issue of Human Rights, 2016.

⁵⁴ *New York Times online*, January 20, 2017, 'With Trump in Charge, Climate Change References Purged From Website', by C. Davenport.

⁵⁵ Article 4, §3.

5. CONCLUSION

A bit too far-fetched for a 'non-issue'? There might indeed be something in Article 12 of the Paris Agreement that needs to be highlighted, in relation to Principle 10 of the Rio Declaration in theory and practice.

Article 12 is a potential crucible for a renewal of the dynamics, at worldwide level, on how to improve concerted action in relation to access to environmental information, in direct relation to climate change facts and policies – or even more generally, especially in countries where the Aarhus Convention does not apply. Such discussions do actually already take place under Article 6 of the UNFCCC but they could find in Article 12 a new impetus and a new motivation, beyond the mere continuation of capacity-building essentials, in order to move the discussion on public access to information to the explicit field of procedural rights.

Article 12 could also act in an interesting way as a horizontal integration clause, that might condition the content of the nationally determined contribution, or even give more flesh to the notion of 'transparency', as currently understood under the Paris Agreement. There cannot be true transparency without broad and guaranteed public access to environmental information. If 'the obligation to endure gives us the right to know'⁵⁶, so does the obligation to trust the sugary promises made under the Paris Agreement. In that regard, Article 12 could provide one of the impetuses the international community still needs to consolidate that right to know, in relation with the achievement of the global objectives the Agreement proposes.

⁵⁶ R. Carson, *Silent Spring*, Houghton Mifflin, New York, 1962, Chapter 2.

ACCESS TO JUSTICE IN CLIMATE CHANGE LITIGATION FROM A TRANSNATIONAL PERSPECTIVE: PRIVATE PARTY STANDING IN RECENT CLIMATE CASES

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ABSTRACT

Climate change litigation has grown intensively in recent years, becoming an important feature of climate governance in the US and a growing trend in some other jurisdictions. However, climate plaintiffs have traditionally encountered many procedural hurdles, including standing, which has often barred access to justice. To have standing, a party must be able to show some kind of interest in the outcome of the case, which usually stipulates the presence of a concrete injury emanating from an identifiable entity or the existing law. In case of climate change litigation, plaintiffs must thus assert actual injury from industry or state action/inaction with regard to GHG emissions and the resulting climate change, which may still be somewhat difficult from a scientific point of view. This chapter seeks to explore the current trends in private party standing in the US, Australian and European climate cases.

KEYWORDS

Access to justice; Australia; climate change; Europe; litigation; private parties; standing; United States

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