

# THE IUCN AEL JOURNAL OF ENVIRONMENTAL LAW

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APRIL 2021

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Issue 11



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# A Word From the Editors

## *IUCN AEL Journal of Environmental Law, Issue 11*

We are very honoured to be in charge of the two editions of the AEL Journal of Environmental Law. This has a unique role and is part of an invaluable and collegial network of scholars. We admire the efforts of all our predecessors.

We have not changed anything to a formula that has allowed the Journal to share innovative analyses and critical thinking on policy and legal developments in the field of environmental protection. It remains a doubly *open* journal, on the one hand because we operate on the basis of a call for contributions favouring a broad representation, in particular of young or emerging colleagues, and on the other hand because the journal is fully in open access.

In this eleventh issue, the reader will find in Part 1 a special feature on “Democracy, emergency powers, anti-protest laws and the consequences of Covid-19”. In the context of the pandemic, executive governments were given unprecedented exceptional powers. Environmental democracy has regressed here and there. Environmental law itself has regressed in some countries. Some regulations have been bracketed in view of the health and economic emergency.

In this regard, Michel Prieur (France), who is considered as the “father” of environmental law in France, analyses two courageous decisions from a Brazilian Federal judge in Amazonia that make an unprecedented link between deforestation, the extension of Covid-19 and the health of indigenous peoples. Will the Escazú Agreement be a game changer regarding public participation for vulnerable groups amid a global pandemic? This is the question answered by Jakub Ciesielczuk and Gabriel Lopez Porras (United Kingdom) who analyse the implementation challenges of this recently entered into force treaty. On her part, Sarah Moulds (Australia) wonders about the role of parliamentary committees are playing holding executive government for lawmaking in a pandemic, and in particular assesses their capacity to effectively scrutinise and review changes to laws proposed or enacted since the outbreak of the pandemic.

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The consequences of the pandemic on the environment are ambivalent and difficult to anticipate. Admittedly, by halting or slowing down economic activity, it has led to a substantial drop in our greenhouse gas emissions in 2020, which may be one-off and not structural. For today, the economic recovery plans (to build the world that comes after), in a context of low oil prices, offer a historic opportunity to change our course, which unfortunately seems to be only imperfectly seized by governments or the European Union. Environmental democracy, and democracy in general, has never been more necessary to debate our future and that of the planet.

In addition to the special feature, the reader will find in Part 2, as usual, various country reports presenting recent legal and policy developments in member's jurisdictions. Tarin Frota Mont'Alverne and Julia Motte-Baumvol (Brazil) analyse the Brazilian policies and measures adopted since President Jair Bolsonaro came to power, showing that they are particularly detrimental to the implementation of multilateral environmental commitments and manifestly contrary to the provisions of the EU-Mercosur Agreement, which requires the implementation of the Paris Agreement. Géraud Delassus (Canada) highlights some recent developments in federal Canadian climate law discussing the innovative (still under discussion) Bill C-12. Mingzhe Zhu (China) shows that, despite the ongoing pandemic, China has invested a great deal of effort into implementing the idea of Ecological Civilization in legislative texts and judicial functions, even if many mechanisms are still waiting to be rationalized. On his side, Christian Dadomo (United Kingdom) puts an emphasis on a French experimentation of participatory democracy: the Citizens' Convention on Climate Change. For their part, Jakub Ciesielczuk and Gabriel Lopez Porras (United Kingdom) analyse a constitutional controversy on the Mexican water management. In the New-Zealand's country report, Trevor Daya-Winterbottom provides an overview of recent case law and legislative amendments regarding climate change mitigation, and the declaration of a climate emergency by the Parliament. Robert Percival (United States) analyzes President Biden's early decisions in the environmental field, attempting to rebuild a set of rules that President Trump had methodically tried to unravel. The case study of Norway by Christina Voigt and Sofie Van Canegem clearly elaborates actions taken by Norway to achieve reductions in line with its international obligations, underlining the importance of public participation in the decision-making process. To conclude this part, there is an excellent teaching article on the potentialities of legal clinics by Eve Truilhé (France). This is a model article and we would welcome more in this format for next year. Let us not underestimate the power of teaching and learning to equip future lawyers and academics with skills to face this new world.

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In Part 3 *Book Reviews/Short Opinions/Insight Papers*, our excellent colleague Samuel Varvastian of the Cardiff Law School, identified and commissioned several stimulating book reviews and the reviewers all did an amazing job on excellent books. There are also two *Insight papers*. On the one hand, H.J. Bosch and J. Gupta (University of Amsterdam) wonder if water permits enhance or hinder water governance, synthesising a wide analysis of water laws and policies in 60 countries in Asia and Africa. On the other hand, the reader will find a reflection on the legal status of climate change activists in Australia, learning from early jurisprudence in Queensland.

We wish you a good read and warmly invite you to contribute to future issues of the Journal. Next year, we would like to focus on carbon emissions reduction legislation and compliance issues. We would welcome more short opinions. Insight papers as well. Thank you to Kate Woods and the IUCN Academy at Maryland for sterling support with this edition

Jennifer McKay (University of South Australia, Australia) and Sandrine Maljean-Dubois (CNRS and Université Aix Marseille, France), Co-Editors-in-Chief

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## **Part 1. Special Issue : Democracy, emergency powers, anti-protest laws and the consequences of Covid-19**

Halte au COVID-19 en Amazonie : le juge au secours des indiens et de la forêt<sup>1</sup>

Michel Prieur, Professeur émérite à l'Université de Limoges (France), Président du Centre international de droit comparé de l'environnement

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### **RESUME**

Deux décisions d'un juge fédéral brésilien en Amazonie méritent de retenir l'attention. Grâce au droit de l'environnement, elles font le lien inédit entre la déforestation, l'extension du Covid-19 et la santé des populations indigènes. Ces décisions de première instance sont évidemment susceptibles d'appel. Quoi qu'il en soit, les deux affaires démontrent l'utilité des procédures d'urgence et les pouvoirs importants des juges pour ordonner des mesures provisoires. La multiplication des atteintes à la santé et donc au droit de l'homme à un environnement sain ne fait que confirmer l'urgente nécessité d'ouvrir enfin des négociations en vue de l'adoption d'un troisième Pacte international relatif aux droits de l'homme à l'environnement intégrant la santé, les peuples indigènes et les droits de la nature. Quel que soit l'avenir de ce projet de troisième Pacte, le courage des juges brésiliens doit être salué face aux nombreuses mesures prises par le président Bolsonaro visant à renier la défense de l'environnement alors que le Brésil a été un pionnier, en introduisant l'environnement dans sa constitution dès 1988.

### **ABSTRACT**

Two decisions from a Brazilian Federal judge in Amazonia deserve attention. Thanks to environmental law, they make an unprecedented link between deforestation, the extension of Covid-19 and the health of indigenous peoples. These first instance decisions are of course appealable. However both cases demonstrate the usefulness of emergency procedures and the important powers of judges to order interim measures. The increasing number of violations of health and thus of the human right to a healthy environment only confirms the urgent need to finally open negotiations for the adoption of a third International Covenant on Human Rights on the Environment integrating health, indigenous peoples and the rights of nature. Whatever the future of this project, the courage of

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the Brazilian judge must be commended in dealing with the many measures taken by President Bolsonaro to deny the protection of the environment whereas Brazil has been a real pioneer, by introducing environmental protection into its constitution as early as 1988.

Deux décisions d'un juge fédéral brésilien en Amazonie méritent de retenir l'attention. Grâce au droit de l'environnement, elles font le lien inédit entre la déforestation, l'extension du COVID-19 et la santé des populations indigènes.

La première affaire résulte d'une action civile publique intentée par le ministère public fédéral contre un décret du président J. Bolsonaro<sup>2</sup>. Celui-ci, étroitement lié aux intérêts économiques de l'agro-business, a en effet, par un décret du 5 novembre 2019 abrogé un décret du 17 septembre 2009 qui imposait un zonage agroécologique pour l'exploitation de la canne à sucre empêchant que la production d'éthanol n'encourage le défrichement d'espaces sensibles. Il résulte de cette réforme la possibilité d'étendre la surface plantée de canne à sucre en Amazonie et au Pantanal. Le ministère public a considéré que ce nouveau décret présidentiel aurait un impact sur la forêt et la biodiversité, entraînerait l'augmentation des occupations illégales de terres et la multiplication de feux de forêt comme on l'a constaté fin 2019. Compte tenu de l'absence de toute étude scientifique préalable et de motivation technique, le nouveau décret risquait de porter une atteinte irréversible à la forêt amazonienne en violation de l'article 225 de la constitution brésilienne. En effet, celui-ci garantit le droit à un environnement écologiquement équilibré et impose aux pouvoirs publics l'obligation de préserver l'environnement pour les générations présentes et futures.

Dans sa décision du 20 avril 2020 le juge fédéral de la 7<sup>o</sup> chambre environnementale et agricole de Manaus a considéré que le nouveau décret :

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<sup>1</sup> Sont ici remerciés pour leur contribution précieuse à la traduction et à l'interprétation des deux arrêts : Jose Antonio Tietzmann e Silva, avocat et professeur de droit à l'université PUCde Goiás, Brésil et à Fernanda Cavedon-Capdeville, chargée de recherche à l'université d'Etat de Santa Caterina à Florianopolis, Brésil. Avec l'aimable autorisation de *France-Forum* dans lequel cet article a été publié dans une version proche (juillet-août 2020).

<sup>2</sup> L'action civile publique est une procédure d'une grande efficacité qui permet au ministère public, à des entités publiques et à des associations de déclencher des poursuites contre une autorité publique ou une personne privée pour la défense d'intérêts collectifs et diffus, tels que l'environnement, les biens de valeur esthétique, historique, touristique et paysagère. Voir Paulo Affonso Leme Machado, « La mise en œuvre de l'action civile publiques environnementale au Brésil », *Revue juridique de l'environnement*, 2000, pp.63-77 ; *Direito ambiental brasileiro*, Sao Paulo, Malheiros editores, pp.458-460, 26<sup>o</sup> ed., 2018.

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- portait atteinte à l'intégrité de l'environnement qui ne peut être subordonnée à des motivations uniquement économiques ;

- constituait une violation du principe de non-régression comme principe général de droit de l'environnement en réduisant la protection environnementale garantie par la norme abrogée<sup>3</sup> ;

- menaçait les processus écologiques essentiels en portant atteinte aux noyaux durs juridiques contenus dans la Constitution ;

- risquait d'ouvrir les terres indigènes et les aires de protection environnementale à des désastres et des virus comme ceux à l'origine de la pandémie de COVID-19. En effet, l'actualité permet de constater que le manque de contrôle concernant deux espèces protégées (la chauve-souris et le pangolin) a généré le contact de l'homme avec le virus causant des préjudices économiques et sociaux sans précédent.

- Risquait de provoquer un dommage irréversible en ouvrant la forêt au défrichement en raison de l'augmentation de la culture de canne à sucre, ce qui porterait atteinte aux principes de précaution et de prévention qui doivent être respectés et interprétés selon le principe *in dubio pro natura ou pro salute* qui milite en faveur de l'environnement et de la santé<sup>4</sup>.

Pour toutes ces raisons, le juge a décidé, comme mesure d'urgence, de suspendre immédiatement l'exécution du décret attaqué jusqu'à ce que l'auteur du décret prouve, dans un délai de 180 jours, les raisons techniques et scientifiques qui ont motivé l'abrogation du zonage antérieur relatif à l'exploitation de la canne à sucre et démontre qu'il n'y aura pas de régression dans la protection de l'environnement, ni de risques de dommages graves et irréversibles. En attendant, les organismes fédéraux, les États membres et les municipalités concernées ne doivent pas autoriser de nouvelles activités de culture de canne à sucre dans la région. Cette décision préliminaire a été suspendue le 19 juin 2020 et le ministère public a fait appel devant le tribunal fédéral régional.

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<sup>3</sup> M. Prieur et G. Sozzo (dir.), *La non régression en droit de l'environnement*, Bruylant, 2012.

<sup>4</sup> La jurisprudence au Brésil, en Argentine et au Costa Rica, face à des conflits entre principes opposés, utilise le principe d'interprétation selon lequel « le doute doit profiter à la nature » et « le doute doit profiter à la santé ». Ce principe s'inspire du principe classique en droit pénal « le doute profite à l'accusé ». Voir l'article 395-4 de la constitution de l'Équateur de 2008 ; l'avis consultatif de la Cour interaméricaine des droits de l'homme du 15 novembre 2017, n°23/17, §42 ; Ahteensuu, M., *In dubio Pro Natura? A Philosophical Analysis of the Precautionary Principle in Environmental and Health Risk Governance*, Doctoral Dissertation, Department of Philosophy, University of Turku, 2008, 65 p.

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La seconde affaire est une décision de la même chambre environnementale et agricole de Manaus du 21 mai 2020. Il s'agissait ici d'une action préalable intentée par le ministère public fédéral sur la base d'une procédure d'urgence du code de procédure civile à la suite des constatations suivantes :

- Augmentation continue et accélérée de la déforestation en Amazonie avec une hausse de 74% dans les aires protégées et les territoires des peuples indigènes de 2018 à 2019 et un accroissement de 279% entre mars 2019 et mars 2020<sup>5</sup> ;

- Relâchement des contrôles et diminution des constats d'infraction en dépit de l'accroissement de la déforestation ;

- L'augmentation des infractions environnementales est une menace à la fois pour l'environnement et pour les peuples indigènes exposés à la contamination par le COVID-19 en raison de la présence des conducteurs d'engins, des bucherons, orpailleurs et accapareurs de terres ; de plus plusieurs missions de contrôle ont été annulées en raison de la pandémie et du licenciement du directeur de la protection de l'environnement de l'institut brésilien de l'environnement et des ressources naturelles renouvelables (IBAMA) ;

- Absence de représentants de l'État pour contrôler et sanctionner dans dix zones considérées comme des *hot spots* de la déforestation où les contrevenants agissent librement menaçant ainsi en toute impunité l'environnement et les populations indigènes ;

- Liens avérés entre la mortalité par le COVID-19 et le niveau de pollution atmosphérique provoquée par les incendies de forêt.

Le juge a justifié sa décision d'intervenir immédiatement en urgence en raison de la pandémie du COVID-19 et de la gravité des risques sanitaires et environnementaux affectant déjà le peuple de la forêt. Il a juridiquement fondé les mesures d'urgence ordonnées en s'appuyant sur les principes de précaution et de non-régression<sup>6</sup>. La dévastation de la forêt et la carence des organes de contrôle

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<sup>5</sup> Selon Global Forest Watch, le Brésil est à lui seul responsable de plus d'un tiers de la perte de forêt primaire tropicale dans le monde en 2019 avec un recul de 1,4 millions d'hectares, *Le Monde*, 3 juin 2020, p.8.

<sup>6</sup> De façon inédite, et contrairement à la pratique judiciaire française, le juge cite un auteur étranger, en l'espèce l'auteur français d'un article sur la non régression et les droits de l'homme, Michel Prieur, *O principio de « nao regressao » no coraçao do direito do homen e do meio ambiente*, in *Novas estudos juridicos*, Univali, vol.17, n°1, 2012.

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contribuent au génocide des peuples indigènes et à la destruction du patrimoine environnemental qui appartient au peuple brésilien<sup>7</sup>.

L'arrêt impose aux autorités fédérales compétentes respectives et aux agences concernées par l'environnement et les peuples indigènes une série d'obligations de faire :

- Prendre des dispositions pour stopper la propagation du virus COVID-19 parmi les peuples et communautés traditionnelles d'Amazonie ;
- Ordonner immédiatement et durant toute la période de pandémie, toute extraction et tout transport de bois dans les municipalités des *hot spots* où ont été constatées des infractions environnementales parce que l'extraction du bois n'est pas une activité essentielle et qu'il y a un risque de dommage irréversible du fait de la prolifération imminente du virus parmi les populations amazoniennes ;
- Suspendre pendant la pandémie les opérations d'achat et de vente d'or dans les *hot spots* où le nombre d'infractions environnementales est le plus élevé ;
- Adopter des mesures pour mettre fin aux actes de déforestation illicite.
- Présenter au juge dans un délai de cinq jours un plan de contrôle et de répression des activités forestières illicites sous peine d'astreinte par jour de retard.

Ces deux affaires démontrent l'utilité des procédures d'urgence et les pouvoirs importants des juges pour ordonner des mesures provisoires. Ces décisions de première instance sont évidemment susceptibles d'appel. Elles concrétisent l'interdépendance entre les droits des peuples indigènes, le droit de l'environnement et le droit à la santé. Dès 1966, le Pacte international relatif aux droits économiques, sociaux et culturels avait fait le lien entre santé et environnement dans son art. 12. La multiplication des atteintes à la santé et donc au droit de l'homme à un environnement sain ne fait que confirmer l'urgente nécessité d'ouvrir enfin des négociations en vue de l'adoption d'un troisième

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<sup>7</sup> Le photographe franco-brésilien Sebastiao Salgado a déclaré lui aussi « je crains que les peuples indigènes d'Amazonie ne subissent un 'génocide' faute de soins dans le Brésil de Jair Bolsonaro », AFP et Goodplanet.info, 22 mai 2020.

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Pacte international relatif aux droits de l'homme à l'environnement intégrant la santé, les peuples indigènes et les droits de la nature<sup>8</sup>.

Quelque soit l'avenir de ce projet de troisième Pacte, le courage des juges brésiliens doit être salué face aux nombreuses mesures prises par le président Bolsonaro visant à renier la défense de l'environnement alors que le Brésil était un pionnier, bien avant la France, en introduisant l'environnement dans sa constitution dès 1988. Le Brésil avait aussi à deux reprises contribué à l'essor de la protection de l'environnement au plan international avec les conférences de Rio en 1992 et de Rio plus 20 en 2012. La gravité des reculs juridiques dans la protection de l'environnement est telle que, au-delà des divergences politiques, tous les anciens ministres de l'Environnement, de droite comme de gauche, ont exprimé publiquement leur indignation en mai 2019 à Sao Paulo en dénonçant : « le démantèlement systématique, constant et délibéré des politiques environnementales ». Quant à l'association des professeurs de droit de l'environnement du Brésil, elle a adopté le 24 mai 2020 un manifeste :

- mettant en cause l'action et la probité du ministre de l'Environnement ;
- s'alarmant du démantèlement des agences compétentes sur l'environnement accompagné du remplacement des fonctionnaires compétents par des militaires sans formation ;
- constatant de nombreuses régressions du droit de l'environnement depuis la présidence de Bolsonaro, notamment en profitant des mesures d'urgence sanitaire provoquées par le COVID-19 pour supprimer ou assouplir les règles de protection de l'environnement.

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<sup>8</sup> Voir le projet de troisième Pacte élaboré par le Centre international de droit comparé de l'environnement [www.cidce.org](http://www.cidce.org) et proposé au Conseil des droits de l'homme à Genève le 15 février 2017, A/HRC/34/NGO/60.

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# Public Participation and the Escazú Agreement: Implementation Challenges for Vulnerable Groups Amid a Global Pandemic

*Jakub Ciesielczuk\* Gabriel Lopez Porras\**

## 1. Introduction

There are a few reasons why the Escazú Agreement,<sup>1</sup> could be regarded as novel. Apart from being the solely treaty to have emerged from 2012 Earth Summit, it is also the first regional treaty on environment of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). More importantly, the Escazú Agreement represents the only treaty worldwide that contains specific provisions for the promotion and protection of defenders in environmental matters.<sup>2</sup> Innovatively, special attention is also given to persons and groups in vulnerable situations, that is, that face particular difficulties to fully exercise their right to public participation as a result of the deeply rooted inequality and discrimination in the Latin America and the Caribbean.<sup>3</sup> The Escazú Agreement also provides provisions for public participation, which although are not novel in the global context, are welcomed in the Latin America and the Caribbean given the democratic deficits and participatory challenges troubling this region.<sup>4</sup>

While the adoption of the Escazú Agreement is of importance, there are many obstacles in the Latin America and the Caribbean to the implementation of this treaty, especially in terms of public participation. Those obstacles are social and institutional challenges, such as culture of privilege, killing of environmental activists, and COVID-19. All those challenges have nuanced impacts on

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We wish to thank Prof Elizabeth A. Kirk for the very useful comments on earlier drafts.

<sup>1</sup> United Nations, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean' (adopted on 4 March 2018, has not yet entered into force) C.N.195.2018.TREATIES-XXVII.18 of 9 April 2018 (Opening for signature) and C.N.196.2018.TREATIES-XXVII.18 of 9 April 2018 (Issuance of Certified True Copies).

<sup>2</sup> Ibid, Article 9.

<sup>3</sup> Ibid, Article 2(3).

<sup>4</sup> Ibid, Articles 5,6,7 and 8.

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persons and groups in vulnerable situation and often ensuring and protecting their right to public participation in environmental matters has not been possible. The question arises to what extent can the implementation of the Escazú Agreement overcome those challenges?

The aforementioned challenges need to be examined and addressed in order to ensure that the efforts of negotiating and adopting of the Escazú Agreement will not be in vein and the implementation of the this agreement is successful. Given that there is not much information guiding the Parties to the Escazú Agreement, or supporting the implementation of the Escazú Agreement, this article examines the implementation challenges that the Escazú Agreement will face in terms of ensuring public participation for persons and groups in vulnerable situations. In doing so, this article examines key obstacles to public participation in the Latin America and the Caribbean, the position of persons or groups in vulnerable situations, and the relevant provisions of the Escazú Agreement. Finally, this article discusses to what extent the Escazú Agreement can potentially overcome the existing challenges and ensuring public participation for persons or groups in vulnerable situations.

This article is divided in 5 sections. Section 1 begins with a brief introduction to the Escazú Agreement and sets up objective of this research. Section 2 discusses regional and global challenges to public participation for persons or groups in vulnerable situations. Consideration is given to various challenges to public participation; culture of privilege, killing of environmental activists and restrictions on civil freedoms related to the COVID-19. Section 3 provides a theoretical outlook of the Escazú Agreement. Section 4 gives a critical evaluation of the Escazú Agreement in the context of ensuring public participation for persons or groups in vulnerable situations, and foresees potential challenges that will be found during its implementation. The last section concludes the article and provides some recommendations for enhancing the implementation of the provisions on persons or groups in vulnerable situations of the Escazú Agreement.

## **2. Regional and global challenges to public participation in the Latin America and Caribbean for persons or groups in vulnerable situations**

The Escazú Agreement needs to be perceived and interpreted in the light of the Latin American and the Caribbean peculiarities, but also within the global context. The uniqueness of this region needs to be acknowledged, on the one hand the Latin America and the Caribbean has extremely rich biodiversity but on the other hand it has a complicated geopolitical position and turbulent social frameworks.

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## 2.1 Regional challenges: social and ecological context of Latin America and the Caribbean

Latin America and the Caribbean have an extremely rich and diverse natural capital; around 60% of Earth's terrestrial life is located in this region.<sup>5</sup> Latin America and the Caribbean hosts six of the seventy megadiverse countries, half of the global forests, and the second-largest reef system, however, unsustainable growth and development patterns are leading to worrisome environmental degradation in the region.<sup>6</sup> The region has lost around 30% of its original biodiversity, and another 23-24% of species located in the region are at risk of extinction.<sup>7</sup> Land degradation, climate and land-use change, pollution, resource overexploitation, and the introduction of invasive species are the main degradation drivers which are negatively impacting on region's biodiversity.<sup>8</sup> Furthermore, structural inequalities in the region's economic, social, and political systems are hindering all regulatory and institutional efforts to address environmental degradation.<sup>9</sup> As highlighted during the 'Forum of the Countries of Latin America and the Caribbean on Sustainable Development', environmental degradation has been inefficiently addressed, principally, as societal inequalities directly undermine "access rights"<sup>10</sup> that are key to protect the environment.<sup>11</sup> Weak protection of the right to public participation in environmental decision-making processes in Latin America and the Caribbean, undermine all social and political efforts for stopping environmental degradation.<sup>12</sup>

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<sup>5</sup> UNEP-WCMC, 'The State of Biodiversity in Latin America and the Caribbean: A Mid-Term Review of Progress towards the Aichi Biodiversity Targets' (2016).

<sup>6</sup> OECD, 'Biodiversity Conservation and Sustainable Use in Latin America Evidence from Environmental Performance Reviews' (2018) <[https://www.oecd-ilibrary.org/environment/biodiversity-conservation-and-sustainable-use-in-latin-america\\_9789264309630-en](https://www.oecd-ilibrary.org/environment/biodiversity-conservation-and-sustainable-use-in-latin-america_9789264309630-en)> accessed 11 August 2020.

<sup>7</sup> Stephen Leahy, 'Life on Earth Is Under Assault—But There's Still Hope' [2018] *National Geographic* <<https://www.nationalgeographic.com/news/2018/03/ipbes-biodiversity-report-conservation-climate-change-spd/>> accessed 11 August 2020.

<sup>8</sup> The State of Biodiversity in Latin America and the Caribbean, (n 5).

<sup>9</sup> Economic Commission for Latin America and the Caribbean (ECLAC), 'The Inefficiency of Inequality (LC/SES.37/3-P)' (2018); Global Witness, 'Defending Tomorrow, the Climate Crisis and Threats against Land and Environmental Defenders' (2020) <<https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>> accessed 11 August 2020.

<sup>10</sup> These consist of the rights to information, public participation and environmental justice. See Preamble 10 of the Escazú Agreement, page 8.

<sup>11</sup> The Economic Commission for Latin America and the Caribbean (ECLAC), 'Forum of the Countries of Latin America and the Caribbean on Sustainable Development. Third Meeting', *Foundational Thinkers on Sustainable Development* (2019) <<https://foroalc2030.cepal.org/2019/en/news/latin-american-intellectuals-warn-about-environmental-degradation-region-and-call-countries>> accessed 11 August 2020.

<sup>12</sup> Article 19, 'Un Verde Mortal Amenazas Contra Los Defensores Y Defensoras de Los Derechos' (2016) <[https://www.ciel.org/wp-content/uploads/2016/08/Deadly\\_shade\\_of\\_green\\_Spanish\\_Aug2016.pdf](https://www.ciel.org/wp-content/uploads/2016/08/Deadly_shade_of_green_Spanish_Aug2016.pdf)> accessed 31 August 2020.

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Another important element of the state of affairs in Latin America and the Caribbean is its culture of privilege that conditions and limits the enjoyment of some human rights (such as the right to public participation) according to the socioeconomic status, gender, the racial and ethnic identity, as well as geographical location.<sup>13</sup> This system emerged from the colonial era, establishing social asymmetries between the colonisers and the indigenous tribes, and reinforcing itself by granting (almost exclusive) participation to the elites on the economic and political matters, so they can preserve their privilege.<sup>14</sup> It is foolhardy to ignore the numerous ways of discrimination (e.g. religious, political, ethnic and racial) that hinder the right of participation of vulnerable people and that negatively impact the social and the ecological.<sup>15</sup> For instance, the Water Conflict Observatory created by the Mexican Institute of Water Technology, registered from 2004 to 2016, more than 100 water conflicts in Mexico because of the violation of the right to participation of indigenous peoples, threatening the existence of communities and their territories.<sup>16</sup>

Besides, those who, in the face of poor, unequal or null public participation, decide to raise their voices, express their disagreement, and carry out environmental activism, risk losing their lives. With 148 murders related to environmental activism in 2019 (more than two-thirds of murders of environmental activists worldwide), defending the environment has become a deadly activity in the Latin America and the Caribbean.<sup>17</sup> Environmental activism is mainly triggered by ecological damage and land disputes, taking place in the absence of suitable and open public spaces to participate in environmental decision-making processes.<sup>18</sup> Although figures on killings certainly underestimate the scale of the problem,<sup>19</sup> it has been found that mining and extractive sector, agroindustry, and logging are the main economic activities related to the killing of environmental

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<sup>13</sup> Forum of the Countries of Latin America, (n 11)

<sup>14</sup> Ibid.

<sup>15</sup> Roberto P Guimarães, 'Environment and Socioeconomic Inequalities in Latin America: Notes for a Research Agenda' (2012) 20.

<sup>16</sup> José Luis Martínez Ruiz, Daniel Murillo Licea and Luisa Paré, *Conflictos Por El Agua Y Alternativas En Los Territorios Indígenas de México* (Instituto Mexicano de Tecnología del Agua 2017) <[www.imta.gob.mx](http://www.imta.gob.mx)> accessed 1 February 2020.

<sup>17</sup> Global Witness, 'Defending Tomorrow, the Climate Crisis and Threats against Land and Environmental Defenders' ( 5 July 2020).

<sup>18</sup> Ibid.

<sup>19</sup> In the Latin America and the Caribbean, restrictions imposed on a "free press", underreported killing and threat cases, and difficulties related to information access, do not allow to accurately capture the severity of the problem.

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activists.<sup>20</sup> Likewise, either through the violent repression of protesters, labelling activists as gang members or terrorists, and issuing arrest warrants under false charges, governments in the Latin America and the Caribbean have been involved in harassment and aggression against environmental activists.<sup>21</sup> Moreover, there is a gender issue on this subject. The participation of women is a central element in the consolidation of contemporary democracy, however, women in general (and indigenous woman in particular) have less participation in decision-making processes in the Latin America and the Caribbean.<sup>22</sup> But the problem is not only limited to participation in environmental decision-making processes: if, as already stated, being an environmental activist in Latin America is dangerous enough, being a woman environmental activist is even worse. As an illustration, about 40% of the attacks, violence and murders of women environmental activists in Mexico have a gender component.<sup>23</sup> In addition, given the passive attitude and failure to act on this problem, governments of the Latin America and the Caribbean countries are partners in crime of the deaths of activists, since, in most cases, before being murdered environmental activists did report receiving life threats and the governments did not take any preventive actions.<sup>24</sup> In the Latin America and the Caribbean, ensuring the right to public participation, so environmental activists can effectively be included in formal decision-making processes, can have the potential to diminish life-threatening situations, by avoiding the exposure of environmental activists through “informal” ways of participation.

## **2.2 Global challenges posed to public participation**

In the global context, COVID-19 renders protecting the environment and the access rights, especially the right of public participation extremely difficult. As stated by the United Nations Secretary-General, given current global pandemic, environmental law enforcement is being relaxed while

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<sup>20</sup> Ibid.

<sup>21</sup> Global Witness, ‘Enemigos del Estado’ (30 July 2019) <<https://www.globalwitness.org/en/campaigns/environmental-activists/enemigos-del-estado/>> accessed 31 August 2020.

<sup>22</sup> Lizeth Pérez Cárdenas, ‘Participación Política de Mujeres Indígenas En Tiempos de La Revolución Ciudadana’ (2018) 28 *Alteridades* 61 <[www.doi.org/10.24275/uam/izt/dcsh/alteridades/2018v28n55/Perez](http://www.doi.org/10.24275/uam/izt/dcsh/alteridades/2018v28n55/Perez)> accessed 9 October 2020.

<sup>23</sup> Jose Luis Garcia Hernandez and Martin Lopez Gallo, ‘Mujeres Mártires Ambientales En América Latina. Una Visibilización de Los Ecofemicidios Por La Defensa Del Territorio En México’ (2016) 3 *HistoriAngenda* 13 <<http://revistas.unam.mx/index.php/historiagenda/article/view/64607>> accessed 18 March 2020.

<sup>24</sup> Un Verde Mortal Amenazas Contra (n 12); Dawn Paley, ‘Drug War as Neoliberal Trojan Horse’ (2015) 42 *Latin American Perspectives* 109 <<http://journals.sagepub.com/doi/10.1177/0094582X15585117>> accessed 18 March 2020.

violence against environmental activists and defenders is increasing.<sup>25</sup> That can be illustrated by the report of CIVICUS,<sup>26</sup> from which it is clear that because of COVID-19 outbreak, the Latin America and the Caribbean has suffered many restrictions on civic freedoms (Table 1). These restrictions consist of 1) censorship and restrictions on access to information, 2) threats and arrests for criticising state response, 3) restrictions on the media, and 4) targeting of human rights defenders.

*Table 1 Restrictions on civic freedoms related to COVID-19 in Latin America<sup>27</sup>*

<b>Country</b>	<b>Example of the civic freedom restricted by the government</b>
<b>Brazil</b>	<b>The president decreed that government officials did not have to answer any requests regarding the freedom of information.</b>
<b>El Salvador</b>	<b>Journalists are not allowed to ask questions related to the COVID-19 crisis or the government’s response.</b>
<b>Venezuela</b>	<b>A journalist was detained and accused of instigating hatred and public instigation for his reporting on the pandemic.</b>
<b>Honduras</b>	<b>A human rights’ activist was arbitrarily arrested for being on the street while she was buying food for her family. She states that this attack was a reprisal.</b>

<sup>25</sup> ECLAC, ‘United Nations Secretary-General Highlights the Escazú Agreement in His Policy Brief on the Impact of COVID-19 on Latin America and the Caribbean’ (3 August 2020) <<https://www.cepal.org/en/notes/united-nations-secretary-general-highlights-escazu-agreement-his-policy-brief-impact-covid-19>> accessed 27 August 2020.

<sup>26</sup> CIVICUS, Civic Freedoms and the COVID19 Pandemic: A snapshot of restrictions (*Civicus Monitor*, April 2020) 8 <<https://monitor.civicus.org/COVID19/>> accessed 10 August 2020.

<sup>27</sup> Ibid.

Colombia	Death squads are taking advantage of lockdowns to kill land and environmental activists.
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The restrictions on open civic spaces<sup>28</sup> described in Table 1, are directly undermining public participation, by hindering peoples’ freedom to associate, express their views, and assemble peacefully.<sup>29</sup> Of course, measures to prevent contagion should be implemented, for instance, compulsory wearing face masks and keeping distance in public hearings, citizen assemblies, or voting processes. However, decrees and emergency laws issued for addressing COVID-19 related problems, should not restrict certain fundamental rights, such as the right of public participation.<sup>30</sup> In the preface to the Escazú Agreement, one can read that it is a visionary and unprecedented agreement that reflects the ambition, priorities and particularities of the region. Nonetheless, it is necessary to look closer into the provisions of the Escazú Agreement and its standing in the intentional law arena in to order to examine whether it can overcome the preexisting challenges, which have been troubling the Latin America and the Caribbean.<sup>31</sup>

### 3. Theoretical outlook of the Escazú Agreement

The Escazú Agreement is deeply rooted in Principle 10 of the Rio Declaration on Environment and Development (Rio Declaration) which laid down the “*pillars of environmental democracy*” consisting of three different elements; participation in decision-making processes on environmental issues, access to environmental information and access to administrative and judicial proceedings.<sup>32</sup>

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<sup>28</sup> These are the physical, digital, social, legal, and cultural environments, where civil society organisations claim and exercise their rights, and effectively engage in political processes; definition obtained from Catherine Hyde Townsend, ‘A CSO playbook to reclaim civic space: Version 1.0 (2018) <<https://www.jstor.org/stable/pdf/resrep22533.pdf>> accessed 2 September 2020.

<sup>29</sup> Civic Freedoms and the COVID19 Pandemic (n 26).

<sup>30</sup> Ibid.

<sup>31</sup> Preface to the Escazú Agreement, page 8.

<sup>32</sup> Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874; see also preface to the Escazú Agreement.

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In fact, the Escazú Agreement became the second regional agreement which applies Principle 10 of the Rio Declaration, after adoption of the Aarhus Convention in 1998.<sup>33</sup>

As the Escazú Agreement is built on the core elements of Principle 10, it represents a regional elaboration of the Rio Declaration.<sup>34</sup> The Escazú Agreement consists of four procedural pillars: accessibility of environmental information (Articles 5 and 6); public participation in the environmental decision-making process (Article 7); access to justice in environmental matters (Article 8); and strengthening of national environmental capacities and cooperation between the member States (Articles 10 and 11). The resemblance between pillars of the Rio Declaration and the Escazú Agreement is clearly visible. Further, the structure of the Escazú Agreement is also similar to the text of the Aarhus Convention. However, that has been already been discussed elsewhere.<sup>35</sup> While the resemblance to the provisions included in the Rio Declaration and the Aarhus Convention is evident, the Escazú Agreement includes innovative provisions. In the context of this article, the following novel elements should be highlighted; right to a healthy environment; protection of human rights defenders; and norms related to vulnerability. Those unprecedented provisions will be examined in this section and then in the next section it will be determined whether they can help to address the challenges to public participation in the Latin America and Caribbean for persons or groups in vulnerable situations.

### **3.1 Sustainable development and indigenous communities**

Article 4(1) of the Escazú Agreement states that “*Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement*”. The wording of this provision implies that the right to the healthy environment should be regarded as a human right, which is supported by the Inter-American Court of Human Rights. In its advisory opinion on the environment and human rights the Inter-American Court of Human Rights, confirmed that a right to a healthy environment exists under the American

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<sup>33</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in 25 June 1998, entered into force in 30 October 2001) 447 UNTS 2161.

<sup>34</sup> Stephen Stec and Jerzy Jendrośka, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) *Journal of Environmental Law*, Volume 31, Issue 3, 533–545, 534.

<sup>35</sup> *Ibid*, 535-536.

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Convention on Human Rights.<sup>36</sup> Further, while the Aarhus Convention also recognises the right of “*of every person of present and future generations to live in an environment adequate to his or her health and well-being*”,<sup>37</sup> the Escazú Agreement goes a step further and acknowledges the “*right of every person of present and future generations to live in a healthy environment and to sustainable development*[emphasise added].”<sup>38</sup> The reference to the right to sustainable development is novel and very welcomed given the global attempts to ensure the sustainability in various areas including environment.<sup>39</sup>

While the legal meaning of the term “sustainable development” is not provided by the Escazú Agreement and is yet to be determined in the context of this regional instrument, this provision can be highly relevant for persons in vulnerable situations such as indigenous people, who often live in their traditional lands, which are very rich in biodiversity and natural resources.<sup>40</sup> On many occasions, indigenous peoples’ cultural and physical survival depends on those traditional lands. Hence, because of that relationship and dependency on traditional lands, indigenous people are often significantly affected by environmentally unsustainable projects (e.g. constructions of dams, deforestation or mining). Various human rights instruments acknowledge the importance of traditional lands.<sup>41</sup> Those instruments also call for protection of indigenous people’s interests *via* participation. For example, Article 5 of the Declaration on the Rights of Indigenous Peoples states that “*indigenous peoples have the right to maintain and strengthen their own institutions, while*

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<sup>36</sup> Advisory Opinion OC-23/17, Inter-Am Ct HR (ser A) No 23 (15 November 2017) <[http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf)> accessed 7 November 2020 (in Spanish)

<sup>37</sup> Article 1 of the Aarhus Convention.

<sup>38</sup> Article 1 of the Escazú Agreement.

<sup>39</sup> See e.g. United Nations Conference on the Human Environment, Declaration on the Human Environment, U.N. Doc. A/CONF.48/14 Corr. 1 (June 16, 1972); U.N. World Commission on Environment and Development, Our Common Future: Report of the World Commission on Environment and Development, chap. 2, paragraph 1, Annex to U.N. Doc. A/42/427 (Aug. 4, 1987); Decision No. 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development “Towards sustainability,” 1998 O.J. (L 275) (Oct. 10, 1998).

<sup>40</sup> See e.g. Maria A. Cruz-Saco, ‘Indigenous Communities and Social Inclusion in Latin America’ (2018) New York: United Nations Expert Group Meeting on Families and Inclusive Societies; Wilfredo Ardito, ‘Los indígenas y la tierra en las leyes de América’ (1996) Latina Survival International; Beatriz Huertas Castillo, ‘Los pueblos indígenas en aislamiento: su lucha por sobrevivencia y libertad’ (2002) IWGIA.

<sup>41</sup> See e.g. Article 25 of Declaration on the Rights of Indigenous Peoples, International Labor Organization’s Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries Articles 13-19; see also Principle 22 of the Rio Declaration.

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*retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State*". Likewise, Article 6 (1) (a) of the International Labor Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries obliges governments to consult indigenous peoples, through appropriate procedures and through their genuine representatives, whenever it is considering legislative or administrative measures which may affect them directly.<sup>42</sup> In fact, the right to participation in decision-making processes that are likely to have an impact on indigenous peoples is protected by judicial human rights bodies.<sup>43</sup> The right to healthy environment and to sustainable development can provide extra protection to vulnerable persons and groups. As explained in the previous section, in the cases where governments ignore the interests of vulnerable communities, including indigenous people, some decide to express their disagreement and carry out environmental activism, which is often deadly. The Escazú Agreement attempts to address that issue with a novel provision on protection of human rights defenders.

### **3.2 Human rights of persons or groups in vulnerable situations**

Article 9 of the Escazú Agreement provides obligations for Parties to "*guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.*" Further, paragraph 3 of Article 9 requires Parties to "*prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.*" This provision aims at providing extra protection for individuals and groups that promote and defend human rights in environmental matters. It could be argued that the Parties to the Escazú Agreement are already bound to certain degree to protect the human rights of people within their jurisdiction, according to their national law (including constitutions) and obligation under the human rights treaties.<sup>44</sup> In

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<sup>42</sup> For other references to the concept of participation in the Convention No. 169 see also articles 2,5,7, 15,17, 20, 22, 23, 25, 27, 28, 33

<sup>43</sup> See e.g. The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Comm. No. 155/96, Afr. Comm. on Human and Peoples' Rights, para. 53 (Oct. 13-27, 2001); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 172, para. 129, 133-34 (Nov. 28, 2007). Human Rights Committee, Lubicon Lake Band v. Canada, Comm. No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40), at para. 33 (Mar. 26, 1990).

<sup>44</sup> See e.g. the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988)

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fact, the resemblance between the wording of Article 9 and texts of certain human rights instruments on protection of individuals and groups that promote and defend human rights can be observed.<sup>45</sup> However, regardless of the existing obligations of the Parties to the Escazú Agreement under their national law and international human rights law, Article 9 is of importance from a political perspective. It places additional pressure on the Parties to the Escazú Agreement to stop and prevent killings of the environmental activists in the Latin America and the Caribbean, as well as to address the restrictions on civic freedoms which can be observed in the region since the global spread of COVID (Table 1). Given that most of the Parties to the Escazú Agreement, are also members of the Inter-American System of Human Rights, the cooperation and dialogue between the institutional bodies set by the Escazú Agreement and bodies of the Inter-American Human Rights System would be welcomed. That could in effect reduce the number of killings and provide more protection of human rights defenders in the region. Apart from acknowledging the protection of the human rights defenders, the Escazú Agreement also notices the importance of protecting persons or groups in vulnerable situations.

Expressly, Article 2(e) of the Escazú Agreement provides a definition of “*persons or groups in vulnerable situations*” for the first time ever in the international legal instrument. The definition states that “*Persons or groups in vulnerable situations’ means those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party’s national context and in accordance with its international obligations.*” This definition has a crucial role to play throughout the text of the Escazú Agreement, as it is linked to the exercise of the access rights in the Latin America and the Caribbean.<sup>46</sup> The relevant provision on access rights include e.g. Article 5(3) and Article 6(6) on facilitating access to environmental information for persons or groups in vulnerable situations, Article 7(14) on engaging persons or groups in vulnerable situations in decision-making processes and in Article 8(5) on providing persons or groups in vulnerable situations with access to justice. All those provisions seem to promote participation of

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reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L /II.82 Doc 6 Rev 1 at 67 (1992).

<sup>45</sup> See e.g. Article 9 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RES/53/144.

<sup>46</sup> See Article 4(5) of the Escazú Agreement, see also The Escazú Agreement and the Regional Approach (n 34), 541.

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persons or groups in vulnerable situations under equal conditions, by providing appropriate means and formats that are comprehensible to vulnerable groups. Those provisions are of importance in addressing the culture of privilege in the Latin America and the Caribbean, as they seem to acknowledge the diversity and special needs of persons or groups in vulnerable situations. Granting access right is not enough as those rights need to be tailored to the needs of individuals using them.<sup>47</sup> For example, the fact that some members of indigenous people's tribes might be illiterate, need to be taken into consideration by the facilitators of the participation processes.

### **3.3. Democracy and participation**

While not novel, the access rights provided in the first three pillars of the Escazú Agreement also require commentary as those rights are linked with theories of participation and literature on public participation. To put it simply, a person who is affected by an environmental matter should be informed about decision-making processes which aim to address that issue, and should also be able to get involved in those processes, or should be able to seek justice in the case of negligence in decision-making processes.<sup>48</sup> However, one could ask, is it not the job of our representatives in our governments to ensure that everyone's best interest and views are taken into consideration while making decisions on environmental matters?<sup>49</sup> In theory that should be the case, however in practice many governments worldwide have been suffering from the democratic deficit. That is clearly visible in the specific case of the Latin American and Caribbean governments which

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<sup>47</sup> See e.g. Norbert Weber and Tim Christopherson, 'The influence of nongovernmental organisations on the creation of Natura 2000 during the European policy process' (2002) *Forest Policy and Economics* 4, 1–12; Christina Prell and al., 'if you have a hammer everything looks like a nail: 'traditional' versus participatory model building' (2007) *Interdisciplinary Science Reviews* 32, 1–20.

<sup>48</sup> See e.g. Judith Petts, 'Public participation and Environmental Impact Assessment'. In Judith Petts, *Handbook of Environmental Impact Assessment*, (London: Blackwell Science 2003) 146. Those rights are also reflected in various human rights treaties see e.g. Article 25 of the International Covenant on Civil and Political Rights, article 23 of the American Convention on Human Rights, and Article 13 of the African Charter on Human and Peoples' Rights.

<sup>49</sup> Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law' (2011) *Colo. J. Int'l Envtl. L. & Pol'y* [Vol. 23:2], 313.

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struggle with challenges such as culture of privilege and unsuitable spaces for public participation.<sup>50</sup>

Decreasing democratic challenges in environmental decision-making processes is one of the key justifications for public participation.<sup>51</sup> Borrowing primarily from the literature of deliberative democracy, many have argued that participation allows sharing power between different groups and helps to democratise environmental decision-making.<sup>52</sup> Supporters of deliberative democratic theory, which is mainly influenced by the scholarship of Habermas,<sup>53</sup> generally criticise traditional polyarchal mechanisms of liberal-democratic systems in which individuals' participation is limited to voting in elections and call for "*debate and discussion aimed at producing reasonable, well-informed opinion in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants*".<sup>54</sup>

The overall objective of the participation from the standpoint of deliberative democracy is to provide broader democratic participation. In other words, it argues for improving the decision-making processes, which can be contrasted with another justification for participation, viz.,

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<sup>50</sup> See e.g. Mark Payne and et al., 'Democracies in Development: Politics and Reform in Latin America, IDB and International Institute for Democracy and Electoral Assistance' (2002); World Bank, 'Inequality in Latin America & the Caribbean: Breaking with History Washington' (2003); UNDP/PNUD, 'La Democracia en America Latina (2004).

<sup>51</sup> For overview of various theoretical perspectives on participation see e.g. Benjamin J. Richardson and Jona Razzaque, 'Public Participation in Environmental Decision Making (2006) Environmental Law for Sustainability, 165-194; Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) Journal of Environmental Law, Volume 27, Issue 1, 45-67, 48-50

<sup>52</sup> See, for example, Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach' (2001) 21 OJLS 415; John Parkins and Ross Mitchell, 'Public Participation as Public Debate: a Deliberative Turn in Natural Resource Management' (2005) 18 Soc Natur Resour 529; Ortwin Renn, 'Participatory Processes for Designing Environmental Policies' (2006) 23 Land Use Policy 34; see also John Dryzek, *The Politics of the Earth* (Oxford: Oxford University Press 1997), Chapter 5 on 'Democratic pragmatism'.

<sup>53</sup> Jürgen Habermas, 'The public sphere: An encyclopedia article' in Stephen Eric Bonner and Douglas Keller (eds) *Critical theory and society* (New York: Routledge 1989); Jürgen Habermas, 'The structural transformation of the public sphere. An inquiry into a category of bourgeois society', translated by Thomas Burger and Fredrick Lawrence (Cambridge, MA: MIT Press, 1989).

<sup>54</sup> Simone Chambers, 'Deliberative democratic theory' (2003) *Annu. Rev. Polit. Sci.* 6:307-326, 309. For the supports of the deliberative democratic theory see, for example John Dryzek, *Deliberative democracy and beyond. Liberals, critics, contestations* (New York: Oxford University Press, 2000); Jon Elster, *Deliberative democracy* (New York: Cambridge University Press 1998).

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improving the substantive “*results*” (*i.e.* outcomes – decisions) of decision-making processes.<sup>55</sup> Proponents of that argument claim that involving various actors in environmental decision-making processes can result in higher quality decisions, as those decisions involve a wide range of information and are more likely to foresee and ameliorate negative outcomes before they occur.<sup>56</sup> While the Escazú Agreement does not explicitly refer to justifications for providing public with participatory, it does call for providing “*the public with the necessary information in a clear, timely and comprehensive manner, to give effect to its right to participate in the decision-making process.*”<sup>57</sup>

Addressing the environmental matters very often include balancing out competing social values and political considerations.<sup>58</sup> For example, when decisions are made on the environmental protection it would include deciding on how much it would be “*reasonable*” to spend on measures designed to protect the environment. In order to make this decision, it has to be established how important is the protection of environment for the society and could that money be allocated somewhere else e.g. to build new schools or improve the health care system. Hence, it is not solely technical decision which can be made by experts alone. The local public often understands the issues at stake more intimately than the officials tasked with making the decision and thus can provide additional insight and work alongside experts.<sup>59</sup> The Escazú Agreement acknowledges the needs for balance between economic, social and environmental factors.<sup>60</sup> Growing number of scholars appears to argue that a combination of local and scientific knowledge is likely to lead to better decisions.<sup>61</sup> This is recognised in Article 5 subsections 3 and

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<sup>55</sup> See e.g. Bende Toth, ‘Public Participation and Democracy in Practice—Aarhus Convention Principles as Democratic Institution Building in the Developing World’ (2010) 30 J. Land Resources & Envtl. L, 295, 298.

<sup>56</sup> See e.g. Thomas M. Koontz, and Craig W. Thomas, ‘What Do We Know and Need to Know about the Environmental Outcomes of Collaborative Management?’ (2006) Public Administration Review 66, 111–122; Frank Fischer, *Citizens, experts and the environment. The Politics of Local Knowledge* (London: Duke University Press 2000); Thomas C. Beierle, ‘The quality of stakeholder-based decisions.’ (2002) Risk Analysis 22, 739–749.

<sup>57</sup> Article 7(4) of the Escazú Agreement.

<sup>58</sup> James L. Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (San Francisco: Jossey-Bass 2005), 15.

<sup>59</sup> Vera Rodenhoff, ‘The Aarhus Convention and its Implications for the ‘Institutions’ of the European Community’ (2002) Review of European Community & International Environmental Law, 11: 343-357, 344.

<sup>60</sup> Preamble 10 of the Escazú Agreement, page 8.

<sup>61</sup> See e.g. L.C. Stringer and Mark Reed, ‘Land degradation assessment in southern Africa: integrating local and scientific knowledge bases’ (2007) Land Degradation and Development 18, 99–116; David S.G. Thomas, and Chasca Twyman,

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4 of the Escazú Agreement, by establishing that indigenous persons and ethnic groups should have access to information according to their specific needs, to participate in decision-making processes under equal conditions.<sup>62</sup> As the result, the integration of the broader spectrum of views across various groups might pave the way to perception of “*a community ownership*” of a particular environmental decision embedded in national legislation or international treaty.<sup>63</sup> By strengthening democratic processes, allowing and facilitating public participation in environmental matters across various groups in the society, participants might perceive the decision-making process as more transparent and inclusive, which in turn might help to address the culture of privilege.<sup>64</sup>

Discussing the theoretical outlook of the Escazú Agreement is a vital step of this article, which leads to the critical examination of some of the relevant provisions of this agreement in order to determine whether it can overcome implementing challenges explained in Section 2.

#### **4. Critical evaluation of the Escazú Agreement in the context of ensuring public participation for persons or groups in vulnerable situations**

The effective implementation of the Escazú Agreement is prerequisite for addressing the regional and global challenges to public participation in the Latin America and Caribbean for persons or groups in vulnerable situations. The question then is: can the Escazú Agreement overcome the pre-existing challenges and ensure more protection and participatory rights for vulnerable communities in the Latin America and the Caribbean? In order to answer that, it is necessary to

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‘Good or bad rangeland? Hybrid knowledge, science, and local understandings of vegetation dynamics in the Kalahari’ (2004) *Land Degradation and Development* 15, 215–231. However, the counter argument is that the local knowledge is of limited importance in modern conservation management see; e.g. Joseph J. Molnar and al., ‘Agricultural science and agricultural counterculture: paradigms in search of a future’ (1992) *Rural Sociology* 57, 83–91; Kevin J. Morgan and Jonathan Murdoch, ‘Organic vs. conventional agriculture: knowledge power and innovation in the food chain’ (2000) *Geoforum* 31, 159–173.

<sup>62</sup> Ibid.

<sup>63</sup> Public Participation in Environmental Decision Making (n 51), 172; Thomas Webler at el., ‘What Is a Good Public Participation Process? Five Perspectives from the Public. *Environmental Management*’ (2001) Vol. 27, No. 3, 435–450, 444.

<sup>64</sup> See e.g. Caspian Richards and al., ‘Practical Approaches to Participation SERG Policy’ (2004) Brief No. 1. Macauley Land Use Research Institute, Aberdeen.

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critically examine some of the elements of the the Escazú Agreement, as well as lessons which can be learned from implementation of the Aarhus Convention.

#### 4.1 Guiding principles of the Escazú Agreement

Article 3 of the Escazú Agreement provides eleven guiding principles that each Party should use in implementing the agreement. While the examination of all those principles is outside the scope of this article, some commentary is provided on the principles, which are of importance in implementation of the access rights for the persons and groups in vulnerable situations. However, before moving to their examination, it should be noted that the Escazú Agreement does not define the guiding principles neither elaborates on how Parties should adopt them. The elaboration on those principles should be included in future implementation guide for the Escazú Agreement.<sup>65</sup> Further, most of the guiding principles included in the Article 3 of the Escazú Agreement are well-established in international law *e.g.* precautionary principle, preventive principle or principle of good faith.<sup>66</sup> Two principles which seem to be of importance in the implementation of the access rights for the persons and groups in vulnerable situations are; principle of intergenerational equity and principle of *pro persona*.

The former should be interpreted in light of “*the right of every person of present and future generations to live in a healthy environment and to sustainable development*” stated in Article 1 of the Escazú Agreement. Ensuring equity of persons and groups in vulnerable situations would require mitigating where possible the culture of privilege, so future generations that belong to currently marginalised communities, such as indigenous peoples, can have equal participation within environmental decision-making processes. Moreover, this principle should shed some light on the legal meaning of the term of sustainable development in the context of the Escazú Agreement.

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<sup>65</sup> See *e.g.* Implementation guide for the Aarhus Convention; UNECE, *The Aarhus Convention: An Implementation Guide* (1st edn, UN 2000), Foreword by Kofi Annan.

<sup>66</sup> See *e.g.* Rio Declaration, Principle 15 and 27; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Articles 26 and 31; see also Ellen Hey, ‘The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution’ (1992) 4 *Georgetown International Environmental Law Review* 303.

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The latter, the principle of *pro persona*, should be regarded in the context of culture of privilege and killings of environmental activists. This principle seems to be inspired by the Article 29 of the American Convention on Human Rights.<sup>67</sup> It links the Escazú Agreement with the jurisprudence of the Inter-American Court of Human Rights, in a similar way to the European Court of Human Rights being linked with the Aarhus Convention.<sup>68</sup> This principle has a potential to add another layer of protection to persons and groups in vulnerable situations and boost the dialogue between the Escazú Agreement and the Inter-American Human Rights System.

In general, by including the guiding principles in the text of the Escazú Agreement Parties seem to acknowledge the difficulties in implementation of international treaties in the Latin America and the Caribbean. While those guiding principles are welcomed and have a potential to enhance the implementation of the access rights for the persons and groups in vulnerable situations, much is contingent upon the interpretation of the provisions of the Escazú Agreement by its Parties.

#### **4.2 Limitations of the key provisions on protection and participatory rights of persons and groups in vulnerable situations**

While interpreting the Escazú Agreement, the Parties will find occasional lack of precision and vagueness in the language of the agreement, which is detrimental to effective implementation of access rights. The text of the Escazú Agreement appears less scrupulous in comparison with the Aarhus Convention. For example, it is argued that the wording of the Article 9, which provides protection for environmental human rights defenders, could be clarified as to not leave discretion to the Parties to decide what qualifies as promoting and defending human rights in environmental matters.<sup>69</sup> Further, the Escazú Agreement does not consider any mechanism of cooperation, transparency, monitoring, or security to guide the Parties towards the achievement of objectives related to stopping the killing of environmental activists. The fact that Article 9 represents

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<sup>67</sup> Organization of American States, American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (1979) 1144 UNTS 143.

<sup>68</sup> See e.g. Ole Pedersen, ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008–2009) 21 *Georgetown Int’l Env’tl L Rev* 74, 580.

<sup>69</sup> See the references to the environmental defenders in Office of the High Commissioner on Human Rights, Framework Principles on Human Rights and the Environment (2018) <<https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>> (‘Knox Framework Principles’) accessed 1 December 2020.

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separate provision on the environmental human rights defenders, and is not linked with access rights (as it is done with persons and groups in vulnerable situations and provisions on access rights) is another limitation in addressing killings of environmental activists in the Latin America and the Caribbean. As it is illustrated by the recent restrictions on civil freedoms related to the COVID-19, individuals are at risk while exercising their various access rights. Regarding this, if the Escazú Agreement calls itself a ground-breaking legal instrument for environmental protection, since it is also a human rights treaty, it fell very short on protecting the life of environmental activists.

Similarly, another novel provision of the Escazú Agreement, which is the protection of persons or groups in vulnerable situations, also lacks precision. Identifying persons or groups in vulnerable situations is subjected to “*conditions identified within each Party’s national context and in accordance with its international obligations.*” It is evident that it leaves a wide discretion to the Parties of the Escazú Agreement to choose who needs special protection and which individuals and groups can be excluded. Given that the concept of vulnerability is perceived through the social and context-specific lenses, achieving the uniform standards of it across the jurisdictions of the Parties to the Escazú Agreement is virtually impossible.<sup>70</sup> That is detrimental to addressing the culture of privilege in the Latin America and the Caribbean and has a little chance to improve the social inequalities in the region. Therefore, it appears that while providing unprecedented provisions, which are of importance for the protection and participatory rights for vulnerable communities in the Latin America and the Caribbean, the Escazú Agreement will struggle to overcome the challenges to its implementation. For this reason it is worth looking into the implementation process of the Aarhus Convention to determine what can Parties to the Escazú Agreement learn from it.

#### **4.3 Lessons to be learned from the Aarhus Convention**

The Aarhus Convention and the Escazú Agreement are often discussed together as both represent a regional application of Principle 10 of the Rio Declaration. Apart from the novel provisions of the Escazú Agreement, both treaties have a similar structure and provide provisions for access

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<sup>70</sup> The Escazú Agreement and the Regional Approach (n 34), 542.

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rights. Given that the Aarhus Convention was adopted over 20 years ago, its implementation can be used as a guidance for the Parties to the Escazú Agreement. While it is beyond the scope of this article to provide the thorough analysis of implementation process of the Aarhus Convention, there are three key aspects that need to be highlighted for the implementation of the Escazú Agreement.

Firstly, by looking at the implementation of the Aarhus Convention it is evident that the operation of its compliance committee (Aarhus Convention Compliance Committee (ACCC)) has been crucial in effective implementation of provisions enshrined in the text of this agreement.<sup>71</sup> Given that Article 18 of the Escazú Agreement establishes the Committee to Support Implementation and Compliance (CIC), it might be very useful to examine the practice of the ACCC. That should allow enhancing functioning of the CIC and learning from experiences of the Aarhus Convention. The rules of procedure of the CIC are yet to be determined by the Conference of the Parties at its first meeting, hence this article will not go into details of analysis of structure, effectiveness and limitations of the ACCC.<sup>72</sup>

Secondly, the implementation process of the Aarhus Convention illustrates that differences among jurisdictions (including constitutional and common law legal systems) have proved to have a significant impact on the implementation of the right to access to justice.<sup>73</sup> Differences in legal cultures in the Latin America and the Caribbean might also be challenging for the implementation of the access to justice and other key provisions of the Escazú Agreement. Learning from the Aarhus Convention and exploring how the Parties to this agreement dealt with that implementation challenge is crucial.

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<sup>71</sup> Ibid, at 545; Belen Olmos Giupponi, 'Fostering environmental democracy in Latin America and the Caribbean: An analysis of the Regional Agreement on Environmental Access Rights (2019) *RECIEL*; 28: 136– 151, 148-150.

<sup>72</sup> It was not discussed at the First Meeting of the Countries Signatory to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. See the report from that meeting, LC/ESZ.1/3 13 January 2020.

<sup>73</sup> Jan Darpo, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union' (2013).

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Thirdly, broadly understood non-State actors (e.g. non-governmental organisations, inter-governmental organisations etc.) had a substantial impact on the implementation of the Aarhus Convention. Various non-State actors got involved in negotiations and implementation of the Aarhus Convention by organising a strong on-European network.<sup>74</sup> The Aarhus Convention is also supported by the European Union (EU), which adopted directives to comply with the provisions of the Aarhus Convention.<sup>75</sup> The EU also supports the Aarhus Convention financially, which allows to allocate funds to various implementation mechanisms.<sup>76</sup>

While the Parties to the Escazú Agreement should cooperate with various non-State actors in implementation of this regional instrument, the situation in the Latin America and the Caribbean is very different from the realities in Europe.<sup>77</sup> There is no equivalence of the EU in the region and there is also a question to what extent various non-governmental organisations (NGOs) can effectively represent the interests of individuals.<sup>78</sup> Whilst it has to be acknowledged that many NGOs played an important role in the democratic transition in many Latin American and Caribbean states, their ability nowadays to represent the interests of marginalised and poor in the region is questionable.<sup>79</sup> Transparency, accountability and ability to effectively protect and represent people's interests of NGOs have been a topic of a scholarly debate.<sup>80</sup> Those concerns are especially applicable to the Latin America and the Caribbean given its level of corruption and democratic deficit. Some authors are sceptical about the credibility of NGOs in participatory processes as a tool for representativeness, for example Toth argues that NGOs might "*privilege a*

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<sup>74</sup> The Escazú Agreement and the Regional Approach (n 34), 545; see also Mariolina Eliantonio 'The role of NGOs in environmental implementation conflicts: 'stuck in the middle' between infringement proceedings and preliminary rulings?' (2018) *Journal of European Integration*, 40:6, 753-767.

<sup>75</sup> *Fostering environmental democracy in Latin America* (n 72), 149.

<sup>76</sup> The Escazú Agreement and the Regional Approach (n 34), 545.

<sup>77</sup> Although it should be noticed that some Parties to the Aarhus Convention are from Central Asia.

<sup>78</sup> *Ten Years of the Aarhus Convention* (n49), 316. For a general discussion on who can be a legitimate representative of people's interest see e.g. Samantha Besson and José Luis Martí, 'Legitimate actors of international law-making: towards a theory of international democratic representation' (2018) *Jurisprudence* 9:3, 504-540.

<sup>79</sup> Jenny Pearce, 'Collective Action or Public Participation? Complementary or Contradictory Democratisation Strategies in Latin America?' (2004) *Bulletin of Latin American Research*, vol. 23, no. 4, 483-504, 487

<sup>80</sup> See e.g. Cecilia Tortajada, *Nongovernmental Organizations and Influence on Global Public Policy*.

(2106) *Asia & the Pacific Policy Studies*, 3: 266-274; Mary Kaldor, 'The Idea of Global Civil Society' (2003) *International Affairs* (Royal Institute of International Affairs) vol. 79, 583-593, 589. See also *Public Participation and Democracy in Practice* (n 55).

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*narrow elitist pro-environmental orientation over the will of the larger public*".<sup>81</sup> That might be more applicable in the Latin America and the Caribbean, than in Europe, given the widespread culture of privilege.

Hence, while some lessons can be learned from the Aarhus Convention in the implementation process of the Escazú Agreement, the peculiarities of the Latin America and the Caribbean need to be taken into consideration. Relying on the experiences from the implementation of the Aarhus Convention should not be regarded as a panacea but rather as a guide on what can work in practice. However, given the preexisting problems in the Latin America and the Caribbean, the implementation of the Escazú Agreement will be extremely difficult. While it is yet to be determined, how effective the implementation of the Escazú Agreement will be, it appears that this regional instrument fails to address the identified problems such as the culture of privilege, killings of environmental activists and the restrictions on the civic freedoms related to COVID-19.

## **5. Conclusion**

The Escazú Agreement is a critical international treaty for strengthening international efforts to stop the alarming environmental degradation in the Latin America and the Caribbean. Among the relevance and novelty of this agreement, there are the provisions for the promotion and protection of access rights (such as the right of public participation in the environmental decision-making process) for environmental activists, as well as persons and groups in vulnerable situations. Nevertheless, for ensuring that the Escazú Agreement will succeed as a legal instrument for environmental and human rights protection, the Latin American and the Caribbean governments need to foresee the social and institutional challenges that can undermine the agreement's effectiveness.

This article has highlighted some regional (culture of privilege and killing of environmental activists), and global (COVID-19) challenges that require special attention when protecting the right

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<sup>81</sup> Public Participation and Democracy in Practice (n 55), 320. See also the discussion on how NGOs have been used to serve industry's interests in Francesca Spagnuolo, 'Diversity and Pluralism in Earth System Governance: Contemplating the Role for Global Administrative Law' (2011) 70 Ecological Economics 1875.

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of public participation in the environmental decision-making process of persons and groups in vulnerable situations. Likewise, it analyses whether the provisions established by the Escazú Agreement are suitable for overcoming those regional and global challenges that hinder the right of public participation of persons and groups in vulnerable situations. Moreover, this article highlights some lessons which can be learned from the implementation of the Aarhus Convention, so the Latin America and Caribbean can anticipate and overcome potential challenges posed to the implementation of the Escazú Agreement.

It is concluded that some of the key provisions on the protection and participatory rights of persons or groups in vulnerable position in the Escazú Agreement are vague and lack precision. There is a room for improvement of the legal language of this agreement which can be done by adopting subsequent agreements and/or amendments, as well as subsequent case law of the Inter-American Court of Human Rights. The potential way forward for the better protection of vulnerable persons and groups and ensuring their participatory rights is drafting guiding principles tailored to peculiarities of the Latin America and the Caribbean, considering the special status and needs of persons or groups in vulnerable situations.

While the Escazú Agreement should be considered as an important milestone in ensuring more environmentally oriented rules across the Latin America and Caribbean, and protection of rights of people in vulnerable situations, it is yet to be determined to what extent the Parties to the Escazú Agreement will adhere to its provisions.

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# Stemming The Tide Of Rights-Abrogating And Environmentally Destructive Laws: The Role Of Parliamentary Committees In Scrutinizing Lawmaking In A Pandemic

1 December 2020

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## ABSTRACT

In response to the complex and potentially devastating threat posed by COVID-19 Parliaments around the world have transferred unprecedented powers to executive governments and their agencies, often with the full support of the communities they represent. By any measure, this constitutes an extraordinary transfer of power away from the parliament towards the executive with clear impacts on individual rights and environmental protection. From within this rush of emergency law-making and institutional power transfer, one parliamentary oversight mechanism managed to struggle to its feet. The very same parliamentary mechanism that owes its existence to war-time law-making emerged as a touchstone for Westminster Parliaments in this modern crisis: the parliamentary committee. While parliaments themselves have suspended or reduced sitting days parliamentary committees have emerged as the forum of choice when it comes to providing some form of parliamentary oversight of executive action.

This article aims to provide a brief snapshot of the capacity of parliamentary committees to effectively scrutinise and review changes to environmental laws proposed or enacted since the outbreak of the COVID-19 pandemic. While there is strong grounds for scepticism about the capacity of these committees to resist or confront executive dominance in the context of environmental law-making, past research into emergency law-making in Australia suggests some room for hope – particularly when parliamentary committees are able to embrace the opportunities presented by new forms of ‘virtual’ public engagement.

## 1. Introduction

In response to the complex and potentially devastating threat posed by COVID-19 Parliaments around the world have transferred unprecedented powers to executive governments and their agencies (Edgar 2020), often with the full support of the communities they represent. This includes imposing travel bans, providing police with unprecedented discretion to implement and enforce fines and custodial penalties and authorising Ministers to make significant changes to existing laws and regulations without requiring parliamentary approval (Moulds, 2020). By any measure, this

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constitutes an extraordinary transfer of power away from the parliament towards the executive (de Windt, 2020) and it is a trend that has not abated since the start of the pandemic in early 2020.

In a jurisdiction like Australia, which lacks a constitutional Bill or Charter of Human Rights and where Australia's international commitments on environmental protection do not have automatic legal effect, parliamentary oversight of executive action is particularly critical (Williams and Burton, 2015). When that oversight role is diminished or excluded, there is a significant risk of misuse or overuse of executive power and a derogation of individual rights, including environmental rights (Bond, Morrison-Saunders, Retief, and Doelle 2020). This has been exacerbated by the sheer scope of the emergency management legislation enacted across Australia<sup>82</sup> (and around the world) that invests significant lawmaking power in government officials, excludes judicial or parliamentary oversight and gives members of the Executive the power to make a range of procedural changes to pre-existing legal frameworks, (Moulds 2020a).

It is not only the broad scope of discretionary lawmaking power in the hands of the executive that gives rise to concern for the future veracity of environmental protection regimes, but also the economic consequences the COVID-19 pandemic has left in its wake. As Bond, Morrison-Saunders, Retief, and Doelle have warned (2020), when economic growth and employment turns downwards, executive governments often look to weaken environmental legislation (Bond Pope et al 2014) including by 'rushing through' legislative reforms that remove or reduce environmental impact assessment criteria, under the justification of 'cutting green tape' for developers and other businesses who have been identified as reviving economic growth.

However, despite this gloomy picture, emergency lawmaking in response to the COVID-19 pandemic has not been completed devoid of democratic oversight in Australia or in other Westminster-inspired parliaments. From within this rush of emergency law-making and institutional power transfer, one parliamentary oversight mechanism managed to struggle to its feet. The very same parliamentary mechanism that owes its existence to war-time law-making emerged as a touchstone for Westminster Parliaments in this modern crisis: the parliamentary committee. While parliaments themselves have suspended or reduced sitting days (Twomey 2020) parliamentary committees have emerged as the

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<sup>82</sup> See e.g. *Emergency Management Act 2004 (SA)* which invests broad discretionary powers in the Commissioner of Police and Chief Medical Officers, including powers to make directives and impose penalties for breach.

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forum of choice when it comes to providing some form of parliamentary oversight of executive action (Moulds 2020a, 2020b).

## **2. The Scrutiny Role Of Parliamentary Committees In Australia**

Parliamentary committees - comprised of groups of members of parliament, usually supported by a professional secretariat and with specific powers to conduct public inquiries or scrutinising proposed laws or government expenditure – exist in a range of forms in different Westminster-inspired parliaments (Moulds 2020 Chapter 3, Grenfell 2015 p.19). At the federal level in Australia, these committees including pre-existing ‘standing committees’ such as the Senate Standing Committee for the Scrutiny of Bills; and the Senate Environment and Communications Legislation Committee (the Environment Committee), as well as special ‘select’ committees established for specific purposes, including reviewing laws made in response to the COVID-19 pandemic.

These committees have different functions and attributes: some, such as the Scrutiny of Bills Committee, are tasked with reviewing proposed laws against a set of administrative law principles and reporting back to Parliament on their findings. Other committees, such as the Environment Committee, can call for written submissions and examine witnesses as it reviews laws referred to it by the Senate relating to the environment, or as part of the Estimates process of scrutinising government expenditure within the environment portfolio.

In the Australian context, these committees have a paradoxical character when it comes to upholding individual rights or implementing environmental protections. On the one hand, their capacity to *change* the law or *remove or reduce* executive power is limited, including by the fact that (a) parliamentary committees can only *recommend* changes to the legislation or policy that must then be adopted (or rejected) by the Parliament as a whole (b) the political make-up of the different parliamentary committees may render their recommendations subject to executive dominance (for example if they are dominated by government members) or liable to be rejected on party-political grounds (for example if they are dominated by opposition members) (see e.g. Holland 2009, Monk 2010). On the other hand, past research into emergency law-making in Australia (Moulds 2020, Debeljak and Grenfell 2020) suggests some room for hope when it comes to the legislative and public impact of parliamentary committees, particularly when different committees in the system work together to slow down the reactionary ‘legislative rush’, create ‘safe spaces’ for members of parliament to change their mind or explore alternative, less rights-abrogating options for achieving the same policy goal.

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### 3. Case Study: Environment Protection And Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020

This paradoxical character of the Australian parliamentary committee system can be seen in the case of the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 (the Streamlining Approvals Bill).<sup>83</sup> This Bill makes significant changes to the Australian environmental protection approval regime by allowing the federal government to make an agreement with a state or territory government to create ‘single touch’ environmental approvals (Power 2020, p.10; Parliament of Australia, 2020 p. 3-5) where classes of actions are excluded from the general environmental approval regime contained in Part 7 of the *Environment Protection and Biodiversity Conservation Act*. As the Minister for Environment explained when introducing this Bill, this will have:

a significant impact on water resources ...; allow the minister to accredit a broader range of state and territory approval processes for the purposes of approval bilateral agreements; enable the states and territories to make minor changes to environmental assessment processes without the need for the amendment of a bilateral agreement or the re-accreditation of a management arrangement or authorisation process... (Hon Susan Ley MP, Minister for the Environment, House of Representatives, Parliament of Australia, *Parliamentary Debates*, 27 August 2020, p. 5757).

This Bill was introduced on 27 August 2020, during the height of the ‘second wave’ of the COVID-19 pandemic in Australia when the state of Victoria was in ‘lockdown’ and a range other restrictive measures were in place across Australia. It was seen by many commentators as a classic example of the government trying to ‘push through’ changes to environmental protection laws under the cover of the COVID-19 pandemic (see eg Gredley, 2020; Bond, Morrison-Saunders, Retief, and Doelle 2020). The Bill quickly passed through the House of Representatives, despite concerns being raised by Australian Greens member Adam Bandt (via video link from Melbourne) that the federal government was ‘taking a chainsaw to our environment laws’ and ‘making it easier for their corporate mates in mining, oil and gas to get their projects approved, which will put our environment and wildlife at risk’ (Adam Bandt MP, House of Representatives, Parliament of Australia, *Parliamentary Debates*, 3

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<sup>83</sup> This Bill was introduced into the House of Representatives by Minister for the Environment, the Hon Susan Ley MP, on 27 August 2020. The Bill largely replicates the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (2014 Bill), which was introduced into Parliament in 2014, but lapsed in 2016 at the prorogation of parliament for the federal election in 2016, see Power, 2020).

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September 2020, p.6545). The Labor Opposition also described the Bill as ‘bad legislation’ and vowed to oppose its passage in the Senate (see eg. Terri Butler MP, House of Representatives, Parliament of Australia, *Parliamentary Debates*, 3 September 2020, p.6522).

Once in the Senate - the upper house of the Australia bicameral Parliament where members are elected via a proportionate voting system and the government lacks a majority in its own right - the Bill’s progress slowed down. It was referred to the Environment Committee on 12 November 2020 for inquiry and report, with the Committee itself fixing a reporting date of 27 November 2020 after the Senate was unable to agree on a reporting date (Parliament of Australia, 2020, p. 1). The Committee set about calling for public submissions in response to the Bill and despite providing only four days for written submissions to be provided, it attracted 127 written submissions and 22,234 ‘form letters’ from members of the public – the vast majority of which strongly opposed the reforms proposed in the Bill (Parliament of Australia, 2020, p.2, 28-36). A public hearing was also held on 23 November in Canberra, with academics, conservation groups and government departments all questioned by the non-government dominated Senate Committee. The Conservation Council of South Australia provided a submission raising significant concerns with the reforms proposed and criticising the short period for review and scrutiny of the Bill (Submission No 1, 2020). It noted that the report upon which the Bill was supposedly based, conducted by Professor Graeme Samuel (Interim Report, 2020), had not yet been publicly released, making it impossible for the Committee or community groups to assess whether the changes proposed aligned with recommendation from the review. In the Committee’s report on the Bill, Committee Chair, the Hon David Fawcett, and the other Government members of the Committee stressed the need to ensure that bilateral agreements made by States and Territories under the Bill comply with strong Commonwealth-led National Environmental Standards, but ultimately recommended that the Senate pass the Bill (Parliament of Australia, 2020, Recommendations 1 and 2). However, strong dissenting reports were issued by the Labor Opposition members of the Committee (Parliament of Australia, 2020 p.41-51) as well as Australian Greens Committee member Senator Sarah Hanson-Young (Parliament of Australia, 2020 p.53-61), referring to the concerns raised by the Conservation Council and others relating to the potential for the Bill to weaken environmental protections, the absence of an independent regulator as part of the proposed regime, and the lack of relevant information being provided to the Committee or the Senate by the proponent Minister. These concerns were also echoed in a dissenting report provided by participating crossbench Senator Stirling Griff Jacqui Lamber and Rex Patrick

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(Parliament of Australia, 2020 p.63-64), whose support for the Bill will be critical to its passage in the Senate.

This scrutiny experience highlights the paradoxical character of the Australian parliamentary committee system referred to above. On the one hand, the majority of the Committee recommended that the Streamlining Approvals Bill be passed, despite many thousands of public submissions expressing the contrary view. However on the other hand, the work of the Environmental Committee has been instrumental in guarding against executive dominance in this area of lawmaking in Australia by alerting critical cross-bench Senators to the range of technical, legal and environmental concerns arising from the Bill and providing a forum for individuals and community groups to speak directly to the Parliament. Although in the minority on the Committee, the non-government members appear to have generated enough public concern about the proposed reforms to influence the position of key cross-bench senators (**Gredley, 2020**), upon whom the government relies to pass this legislation.

It is also important to note that the Environmental Committee worked alongside the Scrutiny of Bills Committees which also raised concerns with the Streamlining Approvals Bill, particularly in so far as the Bill allows for bilateral agreements to incorporate or adopt legal instruments or policies that do not exist at the time the agreement is entered into (Parliament of Australia, 2020 p. 18-20). This point became crucial to securing a recommendation by the government members of the Committee to amend the Bill's Explanatory Memorandum and to alerting key public servants to the need to develop clear guidance material to States and Territories to guard against the risk of non-compliance with national environmental standards. The Environment Committee also had the benefit of a detailed Bills Digest prepared by the Parliamentary Library that documents the history and key features of the Bill, which also proved instrumental in providing accurate, accessible information about the practical impact of the Bill to crossbench members and community organisations (Power 2020).

#### **4. Stemming The Tide Of Rights-Abrogating And Environmentally Destructive Laws**

Taken together, the scrutiny experience of the Streaming Approvals Bill shows that investing in the parliamentary committee system is a valuable way to ensuring democratic scrutiny of executive lawmaking, even in the context of an unprecedented global pandemic. The work of parliamentary committees may not always have a direct legislative effect on the shape of the enacted law (which may depend upon the political balance of power in each House of Parliament), but they do play a central role in creating a deliberative exchange between community members, experts and members

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of parliament that can over time work to shift public attitudes and effect legislative and policy change.

This is also evident in the case of the Senate Select Committee on COVID-19, which unlike the Environment Committee is chaired by a Labor Opposition Senator (Katy Gallagher) and has attracted around 500 written submissions, published over 500 responses to questions on notice from government departments, and conducted well over 30 online public hearings as it scrutinises key aspects of the Australian Government's response to the COVID-19 pandemic (Senate Committee on COVID19 website, accessed 1 December 2020). Although this COVID-19 Committee has yet to issue any report or make any formal recommendations, it has influenced several important policy and legislative changes by drawing sustained public and media attention to key rights related issues. For example, the work of the COVID-19 Committee has led to the enactment of new legislation providing privacy protections for information obtained via the Government's COVIDSafeApp, changes to the details of the JobKeeper and JobSeeker support programs (Moulds, 2020a) and changes in the government response to repatriating Australian citizens seeking to return to Australia from overseas (Manning, 2020). While none of these impacts could be described as 'rights remedying' in nature, and the Committee's role in improving the rights-compliance of Australia's response to the pandemic must be considered in light of a range of other dynamic factors, the fact that the Australian community has engaged so actively with the COVID-19 Committee tells us something important about the scrutiny culture that exists within the Australian parliamentary system (Moulds 2020, Chapters 9 and 10), and the central role parliamentary committees play in the Australian law-making process (Grenfell and Debeljak 2020).

It also suggests that while there is strong grounds for scepticism about the capacity of parliamentary committees in Westminster inspired Parliaments such as Australia to resist or confront executive dominance in the context of environmental law-making, there is some room for hope – particularly when parliamentary committees are able to work together to scrutinise government lawmaking (Moulds, 2020, Chapter 10) and embrace the opportunities presented by new forms of 'virtual' public engagement to speak directly with community members and experts offering alternative means of achieving legitimate policy objectives (Moulds, 2020b), including environmental protection objects and objectives relating to economic growth and employment.

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## Les cliniques juridiques et la protection de l'environnement

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Le titre de cet article peut surprendre. Pourtant, les cliniques juridiques solidement implantées dans les universités anglo-saxonnes et en progression constante en Europe, peuvent sans doute participer à une meilleure protection de l'environnement. En effet, à côté de l'intérêt pédagogique de l'enseignement clinique du droit, qui devrait constituer un atout non-négligeable pour une meilleure formation des futurs défenseurs de l'environnement, il nous semble que les cliniques ont également vocation à permettre un meilleur accès au droit en matière environnementale. Avant de voir de quelle manière, quelques rappels sur les cliniques sont sans doute utiles.

### *Qu'est-ce qu'une clinique juridique ?*

La notion de clinique juridique est utilisée en référence à l'organisation des études médicales. Durant leur formation, les étudiants en médecine, mais aussi en pharmacie, en odontologie, s'entraînent à la dispensation de soins médicaux sous la supervision de médecins confirmés. En tant qu'externes puis internes, leur participation aux soins augmente au fur et à mesure des années<sup>1</sup>. Il en va de même, ou presque, au sein d'une clinique juridique. Les étudiants en droit, encadrés par des enseignants-chercheurs et/ou des professionnels, travaillent sur des problèmes juridiques concrets : contentieux, transactions, plaidoyer, médiation ou encore *amicus curiae*, pour le compte d'un particulier, d'une association, ou, mais c'est plus rare, d'une entité publique ou économique. Ils apprennent et mettent

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<sup>1</sup> E. Millard, « Sur un argument d'analogie entre l'activité universitaire des juristes et des médecins », *Droits et libertés en question. Billets d'humeur en l'honneur de Danièle Lochak*, LGDJ, 2007, p. 343 s. ; S. Hennette-Vauchez et D. Roman, « Pour un enseignement clinique du droit », *Les Petites Affiches*, 2006, n° 2019, p.3 N. Olszak, « La professionnalisation des études de droit. Pour le développement d'un enseignement clinique (au-delà de la création d'une filière 'hospitalo-universitaire' en matière juridique) », *D.*, 2005, p. 1172.

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en œuvre des compétences pertinentes pour l'exercice du métier de juriste : s'entretenir avec un client, écrire et structurer des documents juridiques, argumenter à l'oral... Pour résumer, on peut donc affirmer avec le Réseau des cliniques juridiques francophones que « *les cliniques juridiques se consacrent à la formation des étudiants en droit par une expérience pratique de cette matière, sous la direction d'enseignants-chercheurs et de professionnels du droit, et généralement au service des populations défavorisées* »<sup>2</sup>.

### ***Retour sur l'essor des cliniques juridiques***

Nées aux États-Unis au début du siècle<sup>3</sup>, les cliniques juridiques essaient, ces dernières années à l'échelle mondiale<sup>4</sup> même si le continent européen est resté longtemps étranger au modèle de l'enseignement clinique du droit<sup>5</sup>. Si la prédominance de l'approche académique fondée sur le cours magistral explique principalement ce « retard » dans le développement des cliniques en Europe, on peut aussi évoquer avec Stéphanie Hennette-Vauchez et Diane Roman la généralisation de l'aide juridictionnelle gratuite. L'aide aux plus démunis ayant été une des raisons d'être des cliniques juridiques dans les pays anglo-saxons. Quoi qu'il en soit, en France, l'enseignement clinique du droit se développe rapidement ces dernières années et on peut recenser une petite vingtaine de cliniques juridiques, même si le terme recouvre des réalités bien différentes<sup>6</sup>.

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<sup>2</sup> Voir le site du Réseau des cliniques juridiques francophones : <https://www.cliniques-juridiques.org/cliniques/clinique-juridique-de-lenvironnement/>. Lire X. Aurey et M.-J. Redor-Fichot (dir.), *Les cliniques juridiques*, Presses universitaires de Caen, 2016.

<sup>3</sup> On pourra lire X. Aurey, « Les origines des cliniques juridiques », *Cliniques juridiques*, vol.1, 2017 ; J. Frank, « Why Not a Clinical Lawyer-School ? », 81 *U. PA. Law Review*, 1933, 907 ; M. Szewczyk, « Thoughts on the reform of the teaching of law, Legal Clinic, the Jagiellonian University in Kraków », in *Legal Clinics foundation, The Legal Clinic. The Idea, Organization, Methodology*, Varsovie, 2005, p. 17.

<sup>4</sup> S. Hennette-Vauchez, D. Roman, « *Pour un enseignement clinique du droit* », précité, p. 3.

<sup>5</sup> *Ibid.*

<sup>6</sup> Pour s'en rendre compte : Réseau des cliniques juridiques francophones, <https://www.cliniques-juridiques.org/cliniques/clinique-juridique-de-lenvironnement/>. X. Aurey et M.-J. Redor-Fichot (dir.), *Les cliniques juridiques*, précité.

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## *La double vocation des cliniques juridiques*

L'intérêt des cliniques pour les étudiants se comprend aisément. En dépit de la professionnalisation de plus en plus marquée des maquettes pédagogiques, du développement des stages obligatoires, le système universitaire français ne donne que peu d'occasions aux étudiants de se frotter à des cas réels et ainsi d'acquérir une réelle autonomie professionnelle. La question juridique soumise par telle association à telle clinique juridique ne ressemble en rien à l'exercice du cas pratique qui se veut être un exercice de mise en situation. Le cas pratique est créé, certes à partir le plus souvent de faits réels, mais simplifiés, modifiés, tordus pour correspondre aux attentes d'un enseignement, voire d'une séquence d'enseignement bien particulier. En conséquence l'apprentissage de la partie du cours correspondante suffit généralement à le résoudre. Au contraire, les cas soumis aux Cliniques présentent rarement des faits simples qui se prêtent à des réponses simples. La complexité et l'imprévisibilité du travail avec des personnes réelles, font de l'enseignement clinique du droit, un formidable outil d'acquisition des compétences professionnelles.

Mais il faut souligner que le développement des cliniques juridiques n'a pas reposé sur ce seul objectif pédagogique. La vocation sociale des cliniques juridiques est apparue dès leur création. Le système des cliniques juridiques est bien souvent un moyen d'accès à l'aide juridique pour les populations les plus défavorisées<sup>7</sup>. En conseillant et en accompagnant gratuitement les personnes physiques ou morales les moins favorisées, les cliniques remplissent également un rôle social. Qui nous paraît particulièrement pertinent en matière de protection de l'environnement.

### *Et l'environnement dans tout ça ?*

Disons d'abord que le champ de la protection de l'environnement constitue sans doute un lieu idéal pour l'enseignement clinique du droit. La règle de droit y est multiple, complexe et évolutive, elle brouille en permanence les frontières disciplinaires classiques. Une question faite en lien avec la protection de l'environnement appelle rarement une solution simple. Elle nécessite au contraire des recherches dans différentes branches du droit, débouche quelque fois sur des impasses, oblige à

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<sup>7</sup> O. Fontibus, « *Les cliniques du droit, outil de formation universitaire et d'accès au droit : un encadrement nécessaire* », Lexbase Professions, n° 295, 2019 ([N° Lexbase : N0974BYQ](#)).

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choisir des options, à prendre des risques... La *Clinique juridique de l'environnement*<sup>8</sup> hébergée par la Faculté de Droit d'Aix-Marseille Université, a été saisie, par exemple, d'une question portant sur la recherche et l'exploitation des hydrocarbures en mer Méditerranée. Sans que l'on puisse évoquer les détails de cette saisine, soumis à confidentialité, il s'agissait de dresser un bilan du droit applicable à ces activités et à leurs installations au niveau interne, notamment à travers le droit minier, mais aussi aux niveaux européen et international et d'indiquer les recours possibles devant le juge national et européen, compte tenu des enjeux que comportent de tels projets. La complexité des données techniques, la superposition des régimes juridiques applicables, et la forte dimension pluridisciplinaire de l'objet étudié, en font un cas d'étude idéal pour une Clinique juridique. En apportant des réponses à cette association, les étudiants ont eu une occasion unique d'exploiter leur connaissance du cadre juridique international applicable au milieu marin et des possibilités de recours juridictionnel à disposition des justiciables. Il va de soi qu'une meilleure formation des futurs acteurs de la protection de l'environnement ne peut qu'être bénéfique à celle-ci.

Mais si le rôle des cliniques nous paraît être important en matière de protection de l'environnement c'est également parce que les associations œuvrant pour la protection de l'environnement, même les plus actives, les plus reconnues, ne possèdent pas toujours en interne les compétences nécessaires pour faire valoir leurs intérêts en justice. Bien souvent dépourvues de service juridique, elles ne disposent souvent pas des ressources nécessaires pour avoir recours à un avocat. Travaillant *pro bono* -c'est-à-dire « pour le bien public »- les cliniques juridiques mettent gratuitement à disposition les compétences des étudiants, mais aussi des enseignants-chercheurs et des avocats partenaires. Loin de concurrencer les professionnels du droit, le passage par une clinique juridique est au contraire bien souvent un préalable avant de s'adresser à un avocat. Il s'agit de vérifier les risques et les chances de succès d'une action en justice. En cela, il nous semble que les cliniques juridiques participent à une meilleure effectivité du droit d'accès à la justice en matière environnementale, dont on sait qu'il dépend aussi largement des coûts que représente l'action.

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<sup>8</sup> <https://facdroitaix.wixsite.com/clinique-ceric>

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## COUNTRY REPORT: BRAZIL

### L'impact des politiques publiques environnementales brésiliennes sur la ratification de l'Accord d'association Union européenne - Mercosur

*Tarin Frota Mont'Alverne & Julia Motte-Baumvol*

#### ABSTRACT

After twenty years of negotiations, on 28 June 2019, the European Union and Mercosur adopted a draft containing the different chapters of the trade pillar of their Association Agreement. The sustainable development chapter of this draft, in line with the practice of the European union, is at the heart of the tensions relating to the ratification of the Association Agreement. These tensions are certainly not recent, but the current Brazilian context, arising from the implementation of the political project of its President, has certainly reinforced the opposition to the ratification by several EU Member states, and specially France. In this respect, this paper addresses Brazilian current environmental public policies that hinder the implementation of Brazil's climate change commitments provided for in the Paris Agreement, on the one hand, because they dismantle the Brazilian climate change governance structure and, on the other hand, because they organize the regression of the content of the Brazilian NDC in relation to the previous contribution.

#### Introduction

L'Union européenne (ci-après « l'UE ») est le premier partenaire du Mercosur en matière de commerce et d'investissement et le Mercosur, de son côté, est le deuxième partenaire commercial de l'UE, après la Chine, responsable pour 17,1 % du total des échanges commerciaux européens en 2019<sup>9</sup>. C'est ainsi en raison de l'importance des échanges entre les deux régions que, dès 1999, l'UE et le Mercosur ont souhaité promouvoir et approfondir leurs relations, en établissant un partenariat stratégique durable<sup>10</sup>, par le biais d'un accord d'association.

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<sup>9</sup> Suivant les données de la direction-générale au commerce de la Commission européenne, voir la fiche du Mercosur en date du 22 avril 2020, disponible sur [www.europa.eu](http://www.europa.eu).

<sup>10</sup> Les négociations de l'Accord d'association ont été lancées en juin 1999 à l'occasion du premier sommet Union européenne-Amérique latine et Caraïbes (UE-ALC), qui s'est tenu à Rio de Janeiro les 28 et 29 juin 1999. Voir à ce sujet la Déclaration de Rio de Janeiro, adoptée à l'issue de ce sommet, disponible sur [www.europa.eu](http://www.europa.eu).

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Après vingt ans de négociations, le 28 juin 2019, les deux parties ont adopté un document de principe contenant les différents chapitres du pilier commercial de l'Accord d'association<sup>11</sup>. Le principal objectif de ce pilier est de promouvoir l'intégration bi-régionale et intrarégionale, en libéralisant progressivement l'accès au marché pour les marchandises, y compris pour les produits agricoles et les services. La thématique du développement durable, même si présente de façon marginale dans les directives de négociation du Conseil de 1999<sup>12</sup>, a été amplement prise en compte par la Commission<sup>13</sup>. Le texte de l'Accord d'association adopté en juin 2019 est doté d'un chapitre « développement durable », en accord avec la pratique contemporaine de l'UE en matière de commerce extérieur<sup>14</sup>. Les 18 articles du chapitre « développement durable » comportent différents niveaux d'engagements : ils garantissent, entre autres, le droit de réguler et de conserver ses niveaux de protection environnementale ; ils réaffirment l'engagement des parties à mettre en œuvre les traités multilatéraux environnementaux auxquels elles sont parties et créent un mécanisme propre de règlement des différends. Malgré l'insertion de ce chapitre, ce dernier cristallise, à l'heure actuelle, l'essentiel des critiques de l'Accord : la question de l'impact de l'Accord sur la déforestation de la forêt amazonienne et sur les engagements climatiques du Brésil<sup>15</sup>.

Or, si le contenu du Chapitre développement durable de l'Accord d'association UE-Mercosur s'inscrit dans la pratique européenne, en suivant, pour l'essentiel, le contenu des accords précédents, pourquoi ce chapitre est-il, à l'heure actuelle, au cœur des tensions relatives à la ratification de l'Accord d'association, alors que pour les autres accords conclus par l'UE, il n'a pas été un véritable

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<sup>11</sup> Les différents chapitres du projet de pilier commercial de l'Accord, adopté le 28 juin 2019 et le document de travail de la Commission, *New EU-Mercosur trade agreement – The agreement in principle*, 1<sup>er</sup> juillet 2019, sont disponibles <https://trade.ec.europa.eu>. L'Accord d'association est également composé d'un pilier politique et d'un pilier de coopération, le texte du deuxième ayant déjà été négocié en juin 2018 à Montevideo (non publié).

<sup>12</sup> Conseil européen, *Directives des négociations, par la commission, d'un accord d'association entre les parties*, 17 septembre 1999, disponible sur [www.europa.eu](http://www.europa.eu).

<sup>13</sup> Et ce notamment parce que dans les négociations commerciales internationales, la Commission doit accorder la priorité « à la gestion durable et à la conservation des ressources naturelles et à la lutte contre le changement climatique ». Les accords de libre-échange conclus par l'UE doivent contenir « (...) des engagements ambitieux en matière de protection de l'environnement en rapport avec les accords multilatéraux sur l'environnement » Voir à ce sujet les articles 21 §2 d) et f) du Traité sur l'Union européenne et la nouvelle stratégie de la Commission européenne, *Le commerce pour tous – Vers une politique de commerce et d'investissement plus responsable*, 2015, disponible sur [www.europa.eu](http://www.europa.eu), notamment pp. 24 et 27-28.

<sup>14</sup> Voir notamment les Accords récents conclus par l'UE, dont le chapitre 16 de l'Accord de partenariat économique avec le Japon, en vigueur depuis le 1<sup>er</sup> février 2019, le chapitre 12 de l'Accord de libre-échange conclu avec Singapour, en vigueur depuis le 21 novembre 2019 et le projet d'Accord d'association avec le Mexique, du 21 avril 2018. Ces différents accords sont disponibles sur [www.europa.eu](http://www.europa.eu).

<sup>15</sup> Voir l'interview du Commissaire européen au commerce Valdis Dombrovskis : « Brussels Playbook : Out of control – Saving Mercosur – Oh to be a veep », *Politico*, 19 octobre 2020, disponible sur <https://www.politico.eu/>

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obstacle à leur ratification ? Ces tensions, certes, ne sont pas récentes, mais le contexte actuel brésilien a certainement renforcé l'opposition faite à la ratification de l'Accord. En effet, la campagne électorale du candidat Jair Bolsonaro aux élections présidentielles brésiliennes a été axée sur « les trois B » : balle, bible et viande bovine. Dans ce cadre, depuis le début de son mandat, le 1<sup>er</sup> janvier 2019, il œuvre, avec le soutien de la majorité du congrès brésilien<sup>16</sup>, vers le durcissement des mesures répressives politiques et la libéralisation du port d'armes<sup>17</sup>, vers l'attachement au conservatisme religieux (surtout évangélique) et vers un soutien renforcé pour le secteur de la viande bovine, ce qui implique l'élargissement des terres agricoles pour le fourrage et le pâturage du bétail<sup>18</sup>.

Du point de vue environnemental, ce projet se traduit par la négation puis l'absence de contrôle au niveau de l'État fédéral des incendies provoqués par des agriculteurs et des éleveurs en Amazonie afin d'étendre la frontière aux plantations de soja et au bétail<sup>19</sup>. Il s'est également traduit par une augmentation significative de l'autorisation d'usage de pesticides<sup>20</sup>; par d'innombrables tentatives d'incrimination et d'intimidation des peuples autochtones et des organisations non gouvernementales<sup>21</sup> et, enfin, par la suppression d'agences environnementales, le relâchement des contrôles et la diminution des constats d'infraction environnementale<sup>22</sup>.

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<sup>16</sup> Voir la composition du Congrès brésilien dans <https://www.camara.leg.br/deputados/bancada-atual>.

<sup>17</sup> Voir la Circulaire interministérielle n° 1.634/GM-MD du 22 avril 2020, qui établit notamment les personnes physiques autorisées à acquérir ou à porter des armes à feu, et par d'autres agents autorisés par une législation spéciale à porter des armes à feu, disponible sur <https://www.in.gov.br/>.

<sup>18</sup> Voir à ce sujet, S. Hecht, "Why the Brazilian Amazon Burns", *Current History*, vol. 119, 2020, pp. 60-65.

<sup>19</sup> Voir le discours du président brésilien Jair Bolsonaro à l'ouverture de la 75<sup>e</sup> session de l'Assemblée générale des Nations unies, le 22 septembre 2020, disponible sur <https://www.gov.br/mre> et RAJÃO, Raoni, The rotten apples of Brazil's agribusiness, *Science*, 17 Jul 2020, Vol. 369, Issue 6501, pp. 246-248.

<sup>20</sup> Le pouvoir exécutif brésilien a autorisé l'utilisation de plus de 1000 nouveaux pesticides. Voir à ce sujet Ato normativo n.70 du 23 décembre 2020, disponible sur <https://www.in.gov.br/>.

<sup>21</sup> Le Rapport Mondial des Droits de l'Homme de 2020 publié par l'ONG Human Rights Watch pointe l'intimidation croissante depuis 2019 des populations autochtones en Amazonie. Voir le rapport dans <https://www.hrw.org/>. Voir également les discours du Président Jair Bolsonaro à l'ouverture de la 74<sup>e</sup> session de l'Assemblée générale des Nations unies et celui du Sommet de la biodiversité de l'ONU, le 30 septembre 2020. Les documents sont disponibles dans <https://www.gov.br/mre>. Plus récemment, en 2021, la Fondation National des Indigènes (FUNAI) a publié la Résolution n° 4, du 22 janvier 2021, qui établit des critères pour l'identification des peuples et des individus autochtones, contredisant le droit à l'autodétermination des peuples autochtones prévues dans la Constitution fédérale brésilienne et dans la Convention no. 169 de l'Organisation internationale du travail, ratifiée par le Brésil. Le document est disponible sur <https://www.in.gov.br/>.

<sup>22</sup> Voir le Décret n. 9.759 du 11 avril 2019 qui supprime les instances collégiales de l'administration publique fédérale et le Décret n. 10.142 du 28 novembre 2019 qui établit le comité exécutif pour le contrôle de la déforestation illégale, disponibles sur [www.planalto.gov.br](http://www.planalto.gov.br). En 2019, le nombre total de constats d'infraction était de 10.892, alors qu'en 2020 il était de 6.099, soit une réduction de presque 50%. Les données sont disponibles dans <https://servicos.ibama.gov.br/>.

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L'inaction du gouvernement fédéral brésilien face notamment aux dégâts causés par l'incendie de la forêt amazonienne a conduit certains États européens à réévaluer leur soutien à l'Accord. À cet effet, une commission d'experts, commandée par le Premier ministre français pour évaluer les effets de l'Accord sur le développement durable, a indiqué, entre autres, que les dispositions de l'Accord concernant le respect des engagements pris dans le cadre de l'Accord de Paris « offrent des garanties relativement fragiles »<sup>23</sup>. Sur la base de ce rapport, la France a pris la position de ne pas ratifier l'Accord « en l'état »<sup>24</sup> et a été suivie par d'autres États européens<sup>25</sup>. C'est ainsi, qu'à l'heure actuelle, certains États européens, dont la France, ont conditionné la ratification de l'Accord d'association au respect d'un certain nombre d'engagements supplémentaires visant à rendre effectifs notamment les dispositions climatiques du chapitre développement durable de l'Accord<sup>26</sup>. Ce moyen de pression est particulièrement efficace en raison du caractère mixte de l'Accord UE-Mercosur, qui exige l'approbation de l'Accord par l'ensemble des États membres de l'UE selon leurs règles constitutionnelles internes<sup>27</sup>. Cette conditionnalité peut empêcher, pour une durée conséquente, la ratification de l'Accord, notamment face aux maigres efforts du Brésil en matière de développement durable. C'est en ce sens que l'analyse de la conduite de l'État brésilien à la lumière des dispositions de l'Accord d'association semble indispensable pour comprendre l'étendue des engagements supplémentaires nécessaires pour la ratification de l'Accord d'association UE-Mercosur par les États membres de l'UE.

À ce sujet, suivant l'article 6 du chapitre développement durable de l'Accord d'association intitulé « commerce et changement climatique », les Parties reconnaissent l'importance de poursuivre l'objectif ultime de la Convention-cadre des Nations Unies sur le changement climatique (ci-après la

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<sup>23</sup> Rapport au premier ministre de la commission d'évaluation du projet d'accord UE-Mercosur, *Dispositions et effets potentiels de la partie commerciale de l'Accord d'association entre l'Union européenne et le Mercosur en matière de développement durable*, 18 septembre 2020, disponible sur [www.gouvernement.fr](http://www.gouvernement.fr).

<sup>24</sup> Communiqué du gouvernement français, *Remise du rapport de la commission d'évaluation du projet d'accord UE-Mercosur*, publié le 18 septembre 2020, disponible sur [www.gouvernement.fr](http://www.gouvernement.fr).

<sup>25</sup> Voir à ce sujet les différents échanges au sein du Parlement européen, disponibles sur <https://www.europarl.europa.eu/delegations/en/dmer/documents/eu-texts>.

<sup>26</sup> Voir, à ce sujet, K. Cremers, Y. Laurans et T. Voituriez, « The Future of EU Free Trade Agreements : European Dialogue in Light of the EU – Mercosur Association Agreement, *Study – IDDRI*, février 2020, 20 p., disponible sur <https://www.iddri.org>.

<sup>27</sup> Si les Traités européens ne font aucune référence explicite aux « accords mixtes », une décision du conseil des affaires étrangères a clairement indiqué l'Accord UE-Mercosur doit être inclus dans cette catégorie. Décision du conseil des affaires étrangères – questions commerciales du 22 mai 2018, *Questions relatives au commerce et au développement*, 3618<sup>e</sup> session du Conseil, 9102/18, qui a adopté le *Projet de conclusions du Conseil sur la négociation et la conclusion d'accords commerciaux de l'UE*, 8622/18, du 8 mai 2018.

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CCNUCC) et indiquent que chaque partie doit (« shall », du texte en anglais) mettre en œuvre, de manière effective, la CCNUNC et l'Accord de Paris et promouvoir la contribution positive du commerce dans la réduction des émissions de gaz à effet de serre et dans l'adaptation des effets néfastes du changement climatique. Les politiques publiques environnementales brésiliennes s'opposent à la mise en œuvre des engagements climatiques prévus dans l'Accord de Paris, d'une part, parce qu'elles opèrent un démantèlement de la structure de gouvernance climatique brésilienne (I) et, d'autre part, parce qu'elles organisent la régression du contenu de la nouvelle contribution déterminée au niveau national brésilienne par rapport à la contribution antérieure (II).

### **I. Le démantèlement de la structure de gouvernance climatique brésilienne**

Les institutions nationales sont des composantes indispensables à la mise en œuvre des engagements climatiques des États, en ce qu'elles influencent la manière dont les différents acteurs de l'action climatique locale accèdent et utilisent les ressources et servent de médiateur entre les réponses individuelles et collectives aux impacts climatiques<sup>28</sup>. En ce sens, l'absence de structure institutionnelle capable de mettre en œuvre des politiques climatiques rend ces dernières inopérantes<sup>29</sup>. Les engagements climatiques du Brésil, et notamment ceux liés à la réduction des émissions, sont ainsi logiquement subordonnés à l'existence d'une structure institutionnelle nationale capable d'appliquer et de coordonner les différentes politiques publiques, ainsi que de sanctionner toute violation à ces dernières. Cette structure est actuellement secouée par le gel des fonds environnementaux (A) et par l'instrumentalisation des organes environnementaux (B).

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<sup>28</sup> Voir notamment à ce sujet A. Bauer, J. Feichtinger, R. Steurer, "The Governance of Climate Change Adaptation in Ten Organisation for Economic Co-operation and Development (OECD) Countries: Challenges and Approaches", *Journal of Environmental Policy and Planning*, 2012, pp. 1-26. et A. Agrawal, *The Role of Local Institutions in Adaptation to Climate Change*. Working paper, Banque mondiale, 03 mai 2008, disponible sur <https://openknowledge.worldbank.org>.

<sup>29</sup> Voir la contribution présentée par E. L. Ampaire lors de la réunion du groupe d'experts inter-agences sur la mise en œuvre de la troisième décennie des Nations Unies pour l'élimination de la pauvreté (2018-2027), « Challenges ahead : climate change in the context of weak institutions », Rome, 6 mars 2020, disponible sur <https://www.un.org>.

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### A. Le gel des fonds de financement des politiques publiques environnementales

Le démantèlement de la structure de gouvernance climatique brésilienne est certain, par l'action ou par l'inaction du gouvernement fédéral à plusieurs niveaux. D'abord, par la réduction des principaux budgets liés à la lutte contre la déforestation<sup>30</sup>, dont le Fonds pour le climat<sup>31</sup> et le Fonds Amazonie<sup>32</sup>. Le premier est un instrument majeur de la politique nationale du changement climatique et a pour objectif principal de garantir des ressources financières pour soutenir des politiques publiques environnementales et la recherche scientifique associée. Le deuxième, plus spécifique, recueille des dons afin de mettre en œuvre des actions de prévention, de surveillance et de réparation de la déforestation de la forêt amazonienne et de promouvoir la conservation et l'utilisation durable de l'Amazonie légale<sup>33</sup>. En ce qui concerne particulièrement le Fonds Amazonie, le ministère de l'Environnement brésilien, depuis 2019, l'a d'abord sous-utilisé et ensuite l'a détourné, pour enfin décider de son gel<sup>34</sup>. Suite à l'augmentation des incendies dans la forêt amazonienne, sans aucun contrôle de la part du gouvernement brésilien, la Norvège et l'Allemagne, qui contribuaient ensemble à la hauteur de 90% de budget de ce Fonds, ont décidé de suspendre leurs contributions<sup>35</sup>. Le gel de ces fonds empêche le Brésil de mettre en œuvre ses engagements de l'Accord de Paris : la dernière contribution déterminée au niveau national brésilienne indique à ce sujet que le Brésil nécessite 10 milliards de dollars par an pour faire face aux différents défis climatiques<sup>36</sup>. Le Fonds avait pour objectif de recueillir ces financements ; il est désormais inopérant en pratique. La réorganisation du financement climatique brésilien doit, ainsi, faire partie des négociations de l'Accord UE-Mercosur, afin de permettre à l'État brésilien de respecter les dispositions de l'Accord de Paris.

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<sup>30</sup> Voir Projet de Loi Budgétaire annuelle 2021, Projet de loi n. 28/2020, disponible sur [www.camara.leg.br](http://www.camara.leg.br).

<sup>31</sup> Loi n. 12.114 du 9 décembre 2009, établissant le Fonds national pour le changement climatique. Disponible sur [www.planalto.gov.br](http://www.planalto.gov.br).

<sup>32</sup> Décret n. 6.527 du 1<sup>er</sup> août 2008, instituant le Fonds Amazonie, disponible sur [www.planalto.gov.br](http://www.planalto.gov.br).

<sup>33</sup> Voir l'article 1<sup>er</sup> du Décret n. 6.527 du 1<sup>er</sup> août 2008, *op. cit.* 24.

<sup>34</sup> Voir à ce sujet l'interview du Ministre de l'environnement brésilien disponible sur <https://g1.globo.com/politica/noticia/2019/05/25/governo-estuda-usar-fundo-amazonia-para-indenizar-desapropriacoes-de-terra.ghtml>.

<sup>35</sup> Voir à ce sujet <http://www.fundoamazonia.gov.br/en/donations/>.

<sup>36</sup> La dernière CDN du Brésil, en date de décembre 2020, est disponible sur [www.unfccc.int](http://www.unfccc.int).

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## B. L'instrumentalisation des organes environnementaux brésiliens

Les agences environnementales brésiliennes ont également été touchées par le projet politique du président brésilien. D'abord, le gouvernement fédéral brésilien a organisé l'exclusion de la participation de la société civile dans la prise de décision des agences environnementales fédérales, comme le Conseil National de l'environnement (CONAMA)<sup>37</sup>. Or, la participation de la population est indispensable pour l'exécution de l'Accord de Paris, ce qui est rappelé à la fois par l'Accord de Paris et par l'Accord UE-Mercosur<sup>38</sup>, et leur exclusion semble aller à l'encontre de l'ensemble des engagements pris à cet effet. Ensuite, un décret adopté par le pouvoir exécutif brésilien a promu la militarisation des organes environnementaux, comme le Conseil de l'Amazonie, auparavant dirigé par les principales agences environnementales du Brésil (IBAMA et FUNAI) et désormais dirigé par 19 militaires dont le vice-président de la République<sup>39</sup>. Cette démarche, qui s'appuie sur des thèses du milieu du siècle dernier concernant la « convoitise internationale » de l'Amazonie, vise à jeter les bases de la militarisation de l'Amazonie, au nom de la souveraineté sur la région et au détriment des populations locales<sup>40</sup>.

Des affaires portées devant la Cour Suprême brésilienne mettent en lumière ce démantèlement. Les partis politiques d'opposition ont soulevé, devant la plus haute instance judiciaire brésilienne, la non-exécution des obligations de protection de l'Amazonie, la non-allocation des ressources du Fonds Amazonie et du Fonds pour le climat et ont demandé le dégel des Fonds et leur réutilisation immédiate<sup>41</sup>. Le ministère public fédéral, de son côté, s'est attaché à contester le Décret n. 9.806 du 28 mai 2019 qui réduit profondément la participation de la société civile dans le CONAMA<sup>42</sup>. Ces instances, toujours en cours, sont cruciales face à la déforestation croissante en Amazonie, mais ne remettront pas en cause le projet politique du gouvernement brésilien. En ce sens, les États membres

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<sup>37</sup>Décret n. 9.806 de 28 de mai de 2019 qui prévoit la composition et le fonctionnement du Conseil national de l'environnement – Conama, accessible à l'adresse [www.planalto.gov.br](http://www.planalto.gov.br).

<sup>38</sup> Voir l'article 6 § 4 b) de l'Accord de Paris (*Accord de Paris*, Paris, 12 décembre 2015, *Recueil des Traités*, vol. 54113 accessible à l'adresse <https://treaties.un.org/>).

<sup>39</sup> Décret n. 10.239 de 11 février 2020 qui prévoit la création du Conseil national de l'Amazonie légale, disponible sur [www.planalto.gov.br](http://www.planalto.gov.br).

<sup>40</sup> Observatorio do clima, *O "plano Mourão": um rascunho para a militarização da Amazônia*, 16 novembre 2020, 14 p., disponible sur [www.observatoriodoclima.eco.br](http://www.observatoriodoclima.eco.br).

<sup>41</sup> L'Action Directe du Précepte fondamental (ADPF) n° 708) est accessible à l'adresse [www.planalto.gov](http://www.planalto.gov) et l'Action Directe de l'inconstitutionnalité par défaut (ADO) n° 59 est accessible à l'adresse <http://portal.stf.jus.br>.

<sup>42</sup>Décret n. 9.806 de 28 de mai de 2019, *op. cit.* 29.

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de l'UE doivent, lors des négociations de l'Accord d'association, proposer des engagements supplémentaires pour éviter ou atténuer le démantèlement des structures institutionnelles brésiliennes. La suspension d'obligations ou le recours à des sanctions commerciales peuvent être des outils appropriés à cet effet.

À côté du démantèlement institutionnel avéré, la dernière contribution déterminée au niveau national brésilienne participe aussi au renforcement des craintes des États européens quant à la mise en œuvre des engagements climatiques brésiliens.

## **II. L'atteinte des politiques publiques environnementales au contenu et à l'obligation de progression de la contribution déterminée au niveau national**

Les dispositions de l'Accord de Paris doivent être effectivement mises en œuvre par les États parties à l'Accord d'association UE-Mercosur<sup>43</sup>. À cet effet, tant le contenu de ma contribution déterminée au niveau national (A) que l'obligation de progression (B) des engagements climatiques du Brésil semblent mise en cause par les politiques publiques brésiliennes actuelles.

### *A. L'atteinte au contenu de la CDN brésilienne*

Suivant l'article 3 de l'Accord de Paris, les parties s'engagent à communiquer « des efforts ambitieux » en vue de réaliser les objectifs climatiques prévus à l'article 2 du même Accord. Ces efforts, en pratique, prennent la forme d'un plan, établi par chaque partie à l'Accord de Paris, pour répondre aux objectifs climatiques prévus dans le traité (la « contribution déterminée au niveau national », ci-après la « CDN »)<sup>44</sup>. Les parties, d'ailleurs, « prennent des mesures internes pour l'atténuation en vue de réaliser les objectifs desdites contributions »<sup>45</sup>. Les États doivent ainsi adopter un document ambitieux et doivent prendre des mesures internes pour réaliser leurs engagements. Le Brésil a par ailleurs pris une position ferme à ce sujet, en indiquant que ce document a force obligatoire<sup>46</sup>.

La première CDN brésilienne, présentée en 2015, avait pour objectif principal la réduction des émissions de gaz à effet de serre de 37% en dessous des niveaux de 2005 à l'horizon 2025, puis d'une

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<sup>43</sup> Article 6 § 2 (a) du chapitre développement durable du projet d'Accord d'association UE-Mercosur.

<sup>44</sup> Article 3 de l'Accord de Paris, *op. cit.* 30.

<sup>45</sup> *Idem*, article 4 §2.

<sup>46</sup> Voir la CDN du Brésil de 2015, disponible sur [www.unfccc.int](http://www.unfccc.int).

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réduction ultérieure des émissions de 43% en dessous des niveaux de 2005 à l'horizon 2030<sup>47</sup>. Ces objectifs n'ont pas été atteints et l'augmentation vertigineuse de la déforestation en Amazonie, qui n'est plus remise en cause<sup>48</sup>, n'a fait que contribuer à cet échec. L'État brésilien viole ainsi l'Accord de Paris, et plus particulièrement ses engagements dans le cadre de sa CDN, par son inaction face aux incendies et par son action de démantèlement des institutions capables de faire face à ce défi.

### B. La violation de l'obligation de progression

De même, suivant l'Accord de Paris, les États doivent adopter, tous les cinq ans, de nouvelles CDN<sup>49</sup>. L'Accord prévoit également que la CDN suivante de chaque État représentera une progression par rapport à la CDN antérieure, et correspondra « à son niveau d'ambition le plus élevée possible », en tant compte des capacités et de la situation de chaque État<sup>50</sup>. Les efforts de toutes les Parties représenteront donc une progression dans le temps<sup>51</sup>.

La nouvelle CDN brésilienne – d'une longueur d'une seule page - présentée en décembre 2020 par l'État brésilien, ne fait que reprendre les engagements de réduction des émissions déjà pris dans la CDN précédente en ce qui concerne l'année 2025. Elle rend aussi « officiels » - alors qu'auparavant, selon le Brésil, ils étaient de nature « indicative » - les niveaux de réduction de 43% en 2030. L'idée de progression peut, ici, être amplement remise en question, en ce qu'il n'y pas d'engagement plus ambitieux, ni quantitativement ni qualitativement. Sur ce dernier point, le Brésil soutient, dans le texte de sa CDN de 2020 que « *the country decided to increase its targets, demonstrating through concrete actions its commitments to the collective effort to address climate change* »<sup>52</sup>. Néanmoins, à l'heure actuelle, l'État brésilien n'a pas encore précisé ses cibles et n'a pas indiqué les mesures législatives et réglementaires internes qui traduiront ses engagements au niveau interne. En d'autres termes, le document ne fait aucune référence aux politiques publiques liées à la lutte contre le changement climatique, contrairement à la CDN de 2015, qui souligne l'importance du Plan National

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<sup>47</sup> *Ibidem*.

<sup>48</sup> En 2019, la superficie totale de l'Amazonie détruite par les incendies est estimée à 72.501 km<sup>2</sup>. Sur la même période, en 2018, 43.171 km<sup>2</sup> de la forêt ont été brûlés, soit une augmentation de 67% sur une année. En 2020, les incendies ont atteint 77.396 km<sup>2</sup>. Voir site du Institut National de Recherche Spatiale: <http://queimadas.dgi.inpe.br/queimadas/aq1km/>

<sup>49</sup> Aux termes de l'article 4.9 de l'Accord de Paris, *op. cit.* 30.

<sup>50</sup> *Idem*, article 4.3.

<sup>51</sup> *Idem*, article 4.1. Voir à ce sujet S. Maljean-Dubois et R. Lavanya. « L'Accord de Paris sur les changements climatiques du 12 décembre 2015 », *Annuaire Français de Droit International*, 2017, disponible sur <https://halshs.archives-ouvertes.fr/>.

<sup>52</sup> La nouvelle CDN du Brésil, en date de décembre 2020, est disponible sur [www.unfccc.int](http://www.unfccc.int).

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de Sécurité Hydrique, du Plan Stratégique National des Aires Protégées et du Plan National d'Adaptation<sup>53</sup>. D'ailleurs, la nouvelle CDN brésilienne conditionne ses engagements de long terme (ses émissions d'ici l'année 2060) au bon fonctionnement du mécanisme de marché de l'Accord de Paris, en cours de négociation. Ceci atteste, encore une fois, de l'absence de bonne foi dans la définition de la nouvelle CDN brésilienne.

La nouvelle CDN présentée par le Brésil, en comparaison avec celle de 2015, présente plusieurs problèmes de forme et de contenu. Le principal obstacle lié à la ratification de l'Accord d'association semble être le maintien du *statu quo* en ce qui concerne le contenu de la CDN brésilienne, qui va à l'encontre des engagements de l'Accord de Paris<sup>54</sup>. En ce sens, les États européens doivent proposer des engagements supplémentaires pour faire en sorte que le Brésil respecte l'obligation de progression et que ses engagements prévus dans la CDN soient traduits par des politiques publiques efficaces.

Les politiques publiques brésiliennes adoptées depuis l'arrivée au pouvoir du président Jair Bolsonaro sont particulièrement néfastes pour la mise en œuvre des engagements environnementaux multilatéraux et sont manifestement contraires aux dispositions de l'Accord UE-Mercosur, qui exige la mise en œuvre de l'Accord de Paris. Cette constatation devient d'autant plus importante face à l'inefficacité du mécanisme de règlement des différends prévu dans le chapitre « développement durable » de l'Accord<sup>55</sup>. L'ajout d'un certain nombre de documents contenant des engagements concrets de la part de l'État brésilien semble ainsi indispensable pour permettre la poursuite et la conclusion de l'Accord d'association UE-Mercosur.

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<sup>53</sup> Voir la CDN de 2015, *op. cit.* 38.

<sup>54</sup> L. Rajamani et J. Brunne, "The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement", *Journal of Environmental Law*, vol. 29, n.3, 2017, pp. 537-551 et B. Mayer; "International Law Obligations Arising in relation to Nationally Determined Contributions", *Transnational Environmental Law*, vol. 7, n. 2, 2018, pp. 251-275.

<sup>55</sup> Voir à ce sujet Rapport au premier ministre de la commission d'évaluation du projet d'accord UE-Mercosur, *Dispositions et effets potentiels de la partie commerciale de l'Accord d'association entre l'Union européenne et le Mercosur en matière de développement durable*, 18 septembre 2020, disponible sur [www.gouvernement.fr](http://www.gouvernement.fr) et K. Hradilova et O. Svoboda, « Sustainable Development Chapters in the EU Free Trade Agreements : Searching for Effectiveness », *Journal of World Trade*, 2018, vol. 52, no. 6, pp. 1019-1042.

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## COUNTRY REPORT: CANADA

### Bill C-12: A commentary of the proposed *Canadian Net-Zero Emissions Accountability Act*

*Géraud de Lassus St-Geniès*

#### **Introduction**

On November 19, 2020, the Canadian government tabled a bill in the House of Commons entitled *Canadian Net-Zero Emissions Accountability Act* (hereinafter Bill C-12)<sup>1</sup>. After the 2018 *Greenhouse Gas Pollution Pricing Act*<sup>2</sup> (that established minimum national standards of price stringency for greenhouse gas emissions) and the 2019 *Impact Assessment Act*<sup>3</sup> (which requires to consider the climate impacts of any project that undergoes a federal impact assessment), the introduction of Bill C-12 represents the latest major development in Canadian (i.e. federal) climate law.

If passed, the proposed legislation would enshrine in a formal Act of Parliament that the national greenhouse gas (GHG) emissions target of Canada for 2050 is net-zero emissions. It would also require the federal Minister of the Environment to: 1) set a series of successive GHG emissions reduction targets for predetermined milestone years (2030, 2035, 2040 and 2045), with the aim of achieving net-zero emissions by 2050, and; 2) establish GHG emissions reduction plans for achieving each of those targets. In addition, Bill C-12 contains different reporting requirements designed to promote *ex-ante* and *ex-post* transparency of the actions taken by the federal government to achieve its net-zero emissions goal, as well as accountability mechanisms.

With Bill C-12, Canada could join a growing list of countries that have enshrined a carbon neutrality goal for the mid-century in their domestic legislation. The United Kingdom, Denmark, Aotearoa/New Zealand and France are among those who have already done so. Other States, such as South Korea

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<sup>1</sup> C-12, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*, 2<sup>nd</sup> sess, 43<sup>rd</sup> Parl, 2020, <<https://parl.ca/DocumentViewer/en/43-2/bill/C-12/first-reading>> accessed 31<sup>st</sup> January 2021.

<sup>2</sup> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186.

<sup>3</sup> *Impact Assessment Act*, SC 2019, c. 28, s. 1.

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and Spain, have recently announced their intention to pass similar legislations in the near future<sup>4</sup>. From the broader perspective of the evolution of climate law, one could thus wonder whether rules establishing a roadmap to reach carbon neutrality around 2050 are not gradually emerging as a fifth essential component that every legal climate framework should have to be deemed credible (the four others being: 1) rules to account for the domestic GHG emissions, with obligations to report for the private sector and obligations to disclose GHG emissions-related information for public authorities; 2) targeted sectoral regulations; 3) environmental assessment procedures that allow for the consideration of the climate impacts of proposed projects; 4) GHG emissions pricing mechanisms).

This country report gives an overview of the main features of Bill C-12 and discusses the significance of this proposed legislation in the Canadian context, as well as its potential legal and practical implications. The reader should however bear in mind that, at the time this report was written, Bill C-12 was at the very first step of the legislative process and that changes to the text introduced in the House of Commons for first reading may have since occurred.

### **Overview of Bill C-12**

Bill C-12 is a relatively short text composed of 29 sections. Its purpose is to “require the setting of national targets for the reduction of [GHG] emissions based on the best scientific information available and to promote transparency and accountability in relation to achieving those targets, in support of achieving net-zero emissions in Canada by 2050 and Canada’s international commitments in respect of mitigating climate change” (Section 4). Aside from section 6, which provides that “[t]he national [GHG] emissions target for 2050 is net-zero emissions”, Bill C-12 establishes a framework that is essentially procedural in nature. It contains a set of different procedural requirements, most of which must be carried out by the Minister of the Environment. The main requirements are presented below.

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<sup>4</sup> Morgan Brazilian, Dolf Gielsen, ‘5 years after Paris: How countries’ climate policies match up to their promises, and who’s aiming for net zero emissions’ (*The Conversation*, 10 December 2020) <<https://theconversation.com/5-years-after-paris-how-countries-climate-policies-match-up-to-their-promises-and-whos-aiming-for-net-zero-emissions-151722>> accessed 31<sup>st</sup> January 2021.

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### *Targets*

The Minister of the Environment “must set a national [GHG] emissions target for each milestone year [2030, 2035, 2040 and 2045] with a view to achieving” the 2050 carbon neutrality target (subsection 7(1)). When setting those targets, the bill specifies that the Minister “must take into account the best scientific information available as well as Canada’s international commitments with respect to climate change” (section 8). The current target of Canada for 2030 is a reduction of its GHG emissions by 30 percent below 2005 levels. While this target has been included in Canada’s National Determined Contribution (NDC), in December 2020 the government announced its commitment to exceeding it<sup>5</sup>.

### *Emissions reduction plans*

For each milestone year and the year 2050, the Minister of the Environment “must establish a [GHG] emissions reduction plan” (subsection 9(1)), to be tabled in each House of Parliament (subsection 18(1)) and to be made available to the public (subsection 19(1)). This plan “must contain”, *inter alia*, “a description of the key emissions reduction measures the Government of Canada intends to take to achieve” the target for the year to which the plan relates (subsection 10(1)(b)). The plan must also explain how the chosen target and the plan “will contribute to Canada achieving net-zero emissions by 2050” (subsection 10(2)).

### *Reports of the Minister of the Environment*

In addition, the Minister of the Environment must prepare two reports. The first is the “progress report”. Intended to give an update on the progress made towards achieving the target and in the implementation of the plan, this report must be established no later than two years before the beginning of each milestone year as well as the year 2050 (subsection 14(1)). The second document is the “assessment report”. It can be inferred from the text that this report must be prepared between the 16<sup>th</sup> and the 17<sup>th</sup> month following the end of a milestone year (subsection 15(1)). This report “must contain”, *inter alia*, a summary of the GHG emissions inventory for the relevant milestone year, a “statement on whether Canada has achieved its national [GHG] emissions target” for that year, and a description of the effects that the plan prepared by the Minister of the Environment had on the emissions of Canada (subsection 15(2)(a), (b) and (c)). Here again, progress reports and assessment reports must be tabled in both Houses of Parliament (subsection 18(3)) and made available to the public (subsection 19(3)).

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### *Other reports*

To promote transparency and accountability, Bill C-12 also provides for the preparation of three other reports from other entities than the Minister of the Environment.

Bill C-12 establishes an advisory body (15 members) to provide the Minister of the Environment with advice with respect to achieving the 2050 carbon neutrality target. This advisory body “must submit an annual report to the Minister with respect to its advice and activities” (subsection 22(1)).

The Minister of Finance must also prepare an “annual report respecting key measures that the federal public administration has taken to manage its financial risks and opportunities related to climate change” (section 23). This report must be made available to the public but does not need to be tabled in each House of Parliament.

Lastly, Bill C-12 mandates the Commissioner of the Environment and Sustainable Development (CESD), which is the federal officer responsible for auditing the government management of environmental and sustainable issues, to report on the federal climate policy at least once every five years. This report is to be submitted to the Parliament as part of the general report of the CESD (section 24).

### **Significance of the bill in the Canadian context**

By establishing a legal framework for achieving carbon neutrality in 2050, Bill C-12 represents an unprecedented attempt to use the law to set a clear path to the Canadian climate policy on the long-run. Defining a legal framework to promote predictability, transparency and accountability in this area is not, however, a new thing in Canada. This approach had already been used before with the now defunct 2007 *Kyoto Protocol Implementation Act*<sup>6</sup> (hereinafter the KPIA).

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<sup>5</sup> Environment and Climate Change Canada, *A healthy environment and a healthy economy. Canada's strengthened climate plan to create jobs and support people, communities and the planet*, Government of Canada, 2020, p. 60 <[https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy\\_environment\\_healthy\\_economy\\_plan.pdf](https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf)> accessed 31<sup>st</sup> January 2020. According to this document, the proposed actions outlined in this “strengthened climate plan” would enable Canada to reduce its emissions between 32 and 40 percent below 2005 levels in 2030.

<sup>6</sup> *Kyoto Protocol Implementation Act*, SC. 2007, c. 30 [repealed, 2012, C. 19, s. 699].

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Under the KPIA, repealed in 2012, the Minister of the Environment was required to prepare an annual Climate Change Plan until 2013 containing “a description of the measures to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol” (section 5(1)(a)). Moreover, “[a]t all times”, the government had to “ensure” that Canada was fully meeting its obligation under Article 3, paragraph 1, of the Kyoto Protocol “by making, amending or repealing the necessary regulation under this or any other Act” (section 7(2)). The Act also provided accountability mechanisms by requiring the Minister to table the annual climate plan to the House of Commons and by mandating the CESD to prepare every two years a progress report. As can be seen, Bill C-12 does share some similarities with the former KPIA. That said, this proposed legislation goes in fact much further than what the KPIA did.

For instance, the Kyoto target of Canada (a 6 percent reduction from the 1990 levels between 2008 and 2012) was not included in the KPIA and was therefore not part of Canadian law. Conversely, if Bill C-12 becomes law, it would be the first time that a GHG emissions reduction target is enshrined in a formal Act of Parliament and not in a governmental policy document, as it always has been the case so far. And despite the issue of what would be the legal implications of this (discussed below), using the law to define a climate target remains in Canada the most formal way by which a government can express its intention to combat climate change<sup>7</sup>.

Another difference is that, unlike the Canadian Kyoto target (whose choice had mostly been driven by political considerations), the 2050 net-zero emissions goal is based on the current best scientific knowledge and corresponds to what the Intergovernmental Panel on Climate Change recommends States to do in order to limit the rise of the temperature below 1,5° C. Also, whereas the framework established by the KPIA was only applicable for 6 years (2007-2012), Bill C-12 would set a clear path for the Canadian climate policy for the next 30 years.

In addition, the transparency and accountability mechanisms of Bill C-12 are more sophisticated than those of the KPIA. Under the proposed framework, the government will have to explain how the target chosen for each milestone year and the measures outlined in the emissions reduction plan will

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<sup>7</sup> In Canada, changing the constitution is, for both legal and political reasons, an extremely difficult task. Thus, including the carbon neutrality target in the constitution does not appear as an option that a government could realistically consider. Richard Albert, ‘The difficulty of constitutional amendment in Canada’ (2015) 53 *Alberta Law Review* 1.

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contribute to achieving the 2050 carbon neutrality target. Besides, as the calendar established by Bill C-12 is closely aligned with the NDCs cycle of the *Paris Agreement*, it will become easier to compare the targets and strategies chosen by Canada with what other countries (especially those with a 2050 carbon neutrality goal) have pledged to do. If the Canadian targets and the emissions reduction plan are not well grounded and not likely to make the achievement of the 2050 target possible, it will then be more difficult for Canada to hide or justify the fact that it is lagging behind.

This would actually be even more difficult with the assessment report that the Minister of the Environment has to prepare. This document, which must contain a statement on whether the target for the milestone year has been achieved, will offer the opportunity to see whether the Minister has done what he had promised to do in the emissions reduction plan. Lastly, requiring the Minister of Finance to prepare an annual report respecting the measures taken by the federal administration to manage financial risk and opportunities related to climate change will enable the population to see how serious the government is about building a performing and resilient low-carbon economy. In sum, as one commentator noted about Bill C-12, “[n]o previous federal government has so explicitly committed to a long-term emissions reduction pathway and milestones, let alone one with numerous accountability and transparency mechanisms”<sup>8</sup>.

In the light of the above, a parallel could certainly be drawn between the approach underlying Bill C-12 and the ethos of the *Paris Agreement*. In both cases, the logic seems to be the same; that is to say, promoting transparency and accountability through procedural requirements, with the idea that by increasing the risk of facing reputational damages governments will be encouraged to strengthen their climate action.

The significance of Bill C-12 also stems from the history of the Canadian climate policy. Canada has a rather bad record in terms of staying on track to achieve its climate targets. In fact, none of the targets that Canada has put forward to date has ever been achieved, and most of them have been

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<sup>8</sup> David V. Wright, ‘Bill C-12, *Canadian Net-Zero Emissions Accountability Act*: A Preliminary Review’ (*ABlawg.ca*, 23 November 2020) <<https://ablawg.ca/2020/11/23/bill-c-12-canadian-net-zero-emissions-accountability-act-a-preliminary-review>> accessed 31<sup>st</sup> January 2021.

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abandoned along the way<sup>9</sup>. As Bill C-12 represents the first and only credible effort ever made so far from a government to try to prevent this pattern from continuing, this proposed legislation – which has generally been welcomed by civil society<sup>10</sup> – can be viewed as an important milestone.

### **Legal and practical implications of the bill**

Despite its significance, the potential legal and practical implications that could arise from Bill C-12 must nevertheless be put into perspective. Indeed, if Bill C-12 is passed, the government will still have a lot of flexibility to conduct its climate policy as it sees fit. Of course, all the procedural requirements of the bill (the setting of the targets for the milestone years, the preparation of the emissions reduction plans and the reports) would become mandatory. However, the government would keep a very extended discretionary power to choose the reduction targets for the milestone years and the content of the emissions reduction plans, given that Bill C-12 contains no provision to steer the substance of the federal climate policy. In that regard, it is to be hoped that some safeguards – like predetermined targets or minimum thresholds for the targets to be chosen for each milestone year, an obligation to follow a progression principle in the determination of the targets, and a list of the main sources of GHG emissions that need to be addressed by the reduction plans – will be included in the bill during the next step of the legislative process.

Furthermore, it seems that under the proposed legislation the government would also still be allowed to decide whether or not to achieve the 2050 carbon neutrality target. In other words, if Bill C-12 becomes law, the carbon neutrality target, as well as the milestone year targets, will not be as “legally binding” as one might think.

When Section 6 states that “[t]he national [GHG] emissions target for 2050 is net-zero emissions”, this provision does not specify that it is the duty of the Governor in Council, or the Minister of the Environment, to achieve it (or to ensure that Canada does). Also, when subsection 7(1) provides that

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<sup>9</sup> Silvia Maciunas, Géraud de Lassus St-Geniès, ‘The evolution of Canada’s international and domestic climate policy: from divergence to consistency’ in Oonagh Fitzgerald, Valerie Hughes, Mark Jewett (eds), *Reflections on Canada’s past, present and future in international law* (CIGI Press, McGill-Queen’s University Press, 2018).

<sup>10</sup> Ecojustice, ‘Federal climate bill is significant first step on the path to net-zero’ (Ecojustice, 19 November 2020) <<https://ecojustice.ca/pressrelease/federal-climate-bill-is-significant-first-step-on-the-path-to-net-zero>> accessed 31<sup>st</sup> January 2021.

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the Minister must set a national target for each milestone year “with a view to achieving” the 2050 target, this does not mean that it is mandatory for the Minister to set a target that will actually make the achievement of the 2050 target possible (assessing the fulfillment of such an obligation would in any case be impossible, and most likely but considered by courts as a non-justiciable issue). In that respect, it is worth mentioning that in the *Paris Agreement* (which here is a relevant source of international law for interpretation purposes<sup>11</sup>), the expression “with the aim of achieving” (article 4.2) has been interpreted as meaning that Parties are not under an obligation to achieve the target included in their NDC. In a similar way, subsection 9(1) of Bill C-12 states that the Minister must establish a reduction plan for achieving the 2050 target and the target of each of the milestone years, but does not make the achievement of those targets compulsory. In addition, one must keep in mind the purpose of the bill, which is to “require the setting of national targets for the reduction of [GHG] emissions”, and not to ensure that those targets are achieved.

Thus, it appears from the language used in the bill that none of the provisions imposes a clear binding obligation on the government to achieve carbon neutrality in 2050 or to achieve the targets that will be chosen for each of the milestone years. Besides, once chosen, a target can always be amended pursuant section 11 of the bill (although “in a manner that is consistent with [its] purpose”). And more importantly, if Bill C-12 becomes law, any government would still have the power at any time to amend or repeal the legislation, since a government is never bound by the legislation enacted by the previous government<sup>12</sup>.

Surely, repealing such a legislation would come at a political cost. By enshrining the carbon neutrality target in a formal Act of Parliament, this target would likely acquire a strong symbolic value in Canada. When numbers are put on the table in the political debate, it is hard to just remove them from the conversation. However, as the history of the KPIA has shown, repealing a climate law has been done in the past and it could very well be done again in the future.

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<sup>11</sup> According to the Supreme Court of Canada [*B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58], when a legislation has been enacted with a view towards implementing a specific treaty, this treaty should be taken into account to interpret the legislation. As Bill C-12 refers to the *Paris Agreement* and to the international climate commitments of Canada, considering the *Paris Agreement* to interpret the provisions of this bill seems particularly relevant.

<sup>12</sup> *Interpretation Act*, SC 1985, c. I-21, article 42(1).

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The practical implications of the accountability mechanisms set forth in Bill C-12 also raise some questions. In particular, if a government fails to achieve a target, the only sanction that is foreseen is political. According to section 16 of the bill, in such a case the Minister will have to explain in the assessment report the reasons why Canada failed to meet its target and provide a description of the measures that will be taken to address that failure. Of course, it is difficult to imagine other forms of sanctions than political ones. However, the loophole is that the first assessment report will not be due before 2032. Thus, the chances to see the current political leaders being held accountable for their climate action/inaction in more than ten years are very slim. Yet, it is now a known fact that what will be done, or not done, during those next ten years will be crucial for our climate.

Last but certainly not least, it is interesting to note that Bill C-12 is almost entirely silent on the issue of the federal-provincial cooperation, whereas this cooperation is key to achieve success in the fight against climate change. Canada is a federation where climate change is an area of shared jurisdiction between the federal and provincial governments. The federal does have some power to regulate GHG emissions, but it “has limited constitutional basis to bind provinces to specific climate change plans and measures”<sup>13</sup>. Thus, achieving the 2050 carbon neutrality without the cooperation of the provinces seems impossible. Yet, the only provision of the bill dealing with the provinces is section 13, which mandates the Minister of the Environment to provide the provinces with the opportunity to “make submissions” when the national targets are set and the emissions reduction plans established. However, a real cooperation on those topics might require more than just “submissions” from the provinces. Therefore, one of the biggest unknown at this stage is the implication that Bill C-12 could have on the federal-provincial cooperation in the field of climate change.

## **Conclusion**

Overall, Bill C-12 represents an important tool for achieving carbon neutrality in 2050. If passed, this legislation would be a very welcome addition to the current federal climate legal framework, as it would set a clear direction to the Canadian climate policy and put stronger political pressure on all governments to do more to reduce Canada’s GHG emissions. Although much needed, the bill is

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<sup>13</sup> David V. Wright, ‘Bill C-12, *Canadian Net-Zero Emissions Accountability Act: A Preliminary Review*’ *op. cit.*

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however not flawless and it is to be hoped that its content will be improved as it moves through the legislative process.

That being said, passing such a bill will not be enough. What Canada desperately needs is more coherence between its climate policy and its energy policy. As proof, at the time of this report, the federal government has just approved new licenses for deepwater oil and gas exploration in marine areas off the coast of Newfoundland-and-Labrador<sup>14</sup>.

Enshrining a 2050 carbon neutrality goal in its legislation is good; but doing it while leaving fossil fuels in the ground is actually better.

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<sup>14</sup> Alexandre Shields, 'Ottawa met la table pour un boom pétrolier en milieu marin' (*Le Devoir*, 26 January 2021) <<https://www.ledevoir.com/societe/environnement/593982/le-gouvernement-trudeau-met-la-table-pour-un-boom-petrolier-en-milieu-marin>> accessed 31<sup>st</sup> January 2021.

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**COUNTRY REPORT: CHINA**  
***Sturm und Drang of Ecological Civilization***

*Mingzhe Zhu\**

Despite the ongoing pandemic, China has invested a great deal of effort into implementing the idea of Ecological Civilization in legislative texts and judicial functions. There have been many developments on this front, but many mechanisms are still waiting to be rationalized.

**Yangtze River Protection Law**

The most significant development in 2020 in Chinese environmental law was the *Yangtze River Protection Law (YTPL)* that was passed in December and will take effect in March 2021.<sup>1</sup> Composed of nine chapters and 96 articles, this law aimed at creating a mechanism for coordination at the level of the central government, systematizing otherwise fragmented measures in protecting the Yangtze River. In the sense that it is intended to overcome the inconvenience of sectoral legislation and regional distribution of power, and prioritize conservation over economic development,<sup>2</sup> this text can be considered and admired as an attempt to introduce the ecosystem approach into management of environmental issues.<sup>3</sup> The National People's Congress, the legislative body of China, is also considering drafting a *Huanghe River Protection Law*, and we can expect that *YRPL* will serve as a model text.

*YRPL* provides that “the state shall institute a coordination mechanism of Yangtze drainage basin that supervises and coordinates the protection of Yangtze River, examines and deliberates important policy and planning concerning Yangtze River protection, coordinates interregional and interdepartmental issues, and promotes and oversees the implementation of important measures.”<sup>4</sup>

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<sup>1</sup> The official text (in Chinese) is available at [http://www.xinhuanet.com/2020-12/27/c\\_1126911654.htm](http://www.xinhuanet.com/2020-12/27/c_1126911654.htm).

<sup>2</sup> Article 3 of *YRPL*.

<sup>3</sup> On the ecosystem approach in international environmental law, see Guillaume Futhazar, ‘The Normative Nature of the Ecosystem Approach: A Mediterranean Case Study’ [2020] *Transnational Environmental Law* 1; Vito De Lucia, ‘Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law’ (2015) 27 *Journal of Environmental Law* 91.

<sup>4</sup> Article 4 of *YRPL*.

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Moreover, the coordination mechanism shall develop a system that monitors and shares information about the environment, resources, hydrology, climate, and natural disasters.<sup>5</sup> The decisions of this body shall be implemented by ministries of the State Council and the concerned provincial governments.<sup>6</sup> However, it is not clear which governmental organ will play the role of such a mechanism, which leaves a clear gap to be completed by following decree-law. Indeed, this law, like many other environmental laws in China, though proscribing numerous powers and duties, is not always clear as to who shall take responsibility in case of inaction. For the governance of some smaller drainages, the captains of the river have been appointed and the jurisdiction has been designated to the environmental courts.<sup>7</sup> At the lower level of the jurisdiction, some experiments have been made to affiliate the regional environmental courts to the captains' offices. Similar institutional design may also be applied to the protection of Yangtze River.

Among all measures aimed at assuring the priority of conservation and reparation, *YRPL* envisages an ambitious spatial rearrangement of the drainage basin. Take its Chapter 2, *Planning, Management, and Control*, as an example; it states that spatial planning shall be the foundation of the whole system of planning.<sup>8</sup> The relevant departments of the State Council shall divide the river basin territory into ecological, agricultural, and urban areas and decide the proper function of each.<sup>9</sup> The concerned provincial governments can only plan the use of territory and industrial development according to the plan decided by the central government, and heavily-polluting industries are strictly forbidden in areas whose function is ecological conservation.<sup>10</sup> Furthermore, the state shall construct national parks around the headstreams of the rivers.<sup>11</sup>

However, the drainage basin that covers approximately 19% of China's land area is not empty space to be surveyed and ruled over by the iron hands of ecological civilizer. Each territory has its own inhabitants and their ways of living. According to the Guidelines of Natural Conservation System,<sup>12</sup> "towns, villages or other forms of community with low value of protection" shall be removed from

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<sup>5</sup> Article 9 of *YRPL*.

<sup>6</sup> Article 5 of *YRPL*.

<sup>7</sup> See Jennifer McKay and Jin Zheng, 'Water Security, Governance and Sustainable Development Goals in China—Radical Laws, Institutions and Courts' in Xinting Jia and Roman Tomasic (eds), *Resource Security and Governance* (Routledge 2017).

<sup>8</sup> Article 17 of *YRPL*.

<sup>9</sup> Article 19 of *YRPL*.

<sup>10</sup> Article 22 of *YRPL*.

<sup>11</sup> Article 24 of *YRPL*.

<sup>12</sup> Available (in Chinese) at [http://www.gov.cn/zhengce/2019-06/26/content\\_5403497.htm](http://www.gov.cn/zhengce/2019-06/26/content_5403497.htm). It is not a law, but a policy jointly issued by the State Council and the Central Committee of the Chinese Communist Party (CCP).

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national parks. For example, the construction of Sanjiangyuan National Park of 120,000 square km that covers the head of Yangtze River mandates the gradual removal of 64,000 herders. The administrative and financial burden of migration and other measures lands on the shoulders of local authorities.

I cannot help imagining how the author of *Security, Territory, Population* would react to the idea of reshaping the landscape professed by the spatial planner, the contemporary counterpart of Alexandre le Maitre, but for the moment, two features of *YRPL* are worth emphasizing here, because they may shed light on the particularities of Chinese environmental governance. First, rather than entrusting local authorities with decision-making power, the law follows the logic of centralization and leaves municipal and county governments with a limited capacity to influence the centralized plans according to local realities but a heavy burden of implementation. Maybe the drafters believe that the central authority is the only actor that can resist the temptation of seeking economic and industrial prosperity at the expense of the environmental goods. Second, Article 3 expresses “prioritizing conservation and preventing bold development” in a very vulgar form. This expression first appeared in Xi Jinping’s discourse on the protection of Yangtze River in 2016 and is copied by the drafters. In face-to-face communication, employing informal terms is acceptable, sometimes even encouraged. Yet to insert the same informal language in a legislative text goes way too far, even in an age when eloquence is no longer considered to be only a quality of lawyers. This makes one wonder about the mechanism that ensures the implementation of this law.

## **Ecologization of the Legal System**

### *Ecological Provisions of the Civil Code*

China’s Civil Code, adopted in 2020, contains several provisions related to environmental protection.<sup>13</sup> The Code stipulates that as a general principle, “when undertaking civil activities, the subjects of the law shall take into consideration the necessity of resource conservation and environmental protection.”<sup>14</sup> The integration of ecological considerations is sometimes resented by

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<sup>13</sup> The text (in Chinese) is available at <http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml>.

<sup>14</sup> Article 9 of Civil Code.

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civil lawyers in the way it disrupts the purity of the civil law system.<sup>15</sup> However, this principle also offers an opportunity for the ecologization of civil law, that is, a rejection of the artificial boundaries that modernization has created between law, politics, and science and a recognition of the relationship between people and the environment.<sup>16</sup>

To adapt to this ecological principle, Chinese legislators also modified numerous previously-existing rules. Article 286 requires apartments or condominium owners to “act in accordance with the necessity of resource conservation and environmental protection.” Similarly, Article 326, one of the general provisions governing usufruct, stipulates that usufruct shall be exercised in accordance with the laws and regulations concerning “environmental protection and the reasonable exploitation and use of resources.” This provision instructs the judge to refer to regulatory laws whose general applicability in civil actions remains subject to debate. More specifically, Article 346 imposes a requirement, when granting the right to use land for construction, to consider the need to conserve resources and ensure the protection of ecology and the environment. The Book on Contract Law makes sustainability a basic principle of contractual execution, on par with good faith. Article 509 (3) requires that all parties shall avoid resource waste, environmental pollution, and ecological degradation in executing the terms of a contract.

Article 1229 adds ecological degradation as a cause of civil liability, independent of environmental pollution. Article 1232 further institutes punitive damages for environmental liability. Another development is the installation, inspired by French law, of pure ecological harms. Article 1234 stipulates that where remediable ecological degradation is caused by a violation of national provisions but no personal harm is identifiable, the state or other organizations specified by law can demand that the responsible person proceed with remediation in due time. The final clause of this same chapter, Article 1235, details the reparations that the state or organizations can demand from the tortfeasor.<sup>17</sup>

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<sup>15</sup> 苏永钦：《现代民法典的体系定位与建构规则》，载《交大法学》（第1卷），上海交通大学出版社2011年版，第59-93页。[Yongqing Su, *The Systematization and Rules of Construction of Modern Civil Codes*, *Shanghai Jiaotong University Law Review*, no.1 (January 2010): 59-93. (in Chinese)]

<sup>16</sup> Bruno Latour, ‘To Modernize or to Ecologize? That’s the Question’, *Remaking Reality: Nature at the Millenium* (Routledge 1998).

<sup>17</sup> Those are: “(1) The losses resulting from the loss of functions from the time when damage is caused to the ecology and environment to the completion of remediation. (2) The losses resulting from permanent damage to ecological and environmental functions. (3) Expenses of investigation, authentication, and assessment of ecological and environmental damage. (4) Expenses of pollution removal and ecological and environmental remediation. (5) Reasonable expenses incurred to prevent the occurrence and aggravation of damage.” In practice, although it is not provided by the text, the

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*Forest: From Production to Conservation*

In 2019, the NPC also adopted a new *Forest Law* that took effect in July 2020. As opposed to the old law enacted in 2009, primarily a law on economic exploitation of forest, the new law promotes biosecurity, ecological civilization, and harmony between human beings and nature.<sup>18</sup> This difference is perhaps most visible in the classification of forests. While the old text adopted a classification system mainly according to the economic value of the forest (protection forest, timber forest, profit crop forest, forest for fuel, and special function forest), the new law differentiates between only “forest of public interests” and “commercial use forest”. Though this classification does not prohibit commercial exploitation, it stresses the state’s responsibility of strict protection of the forests of public interests.<sup>19</sup> Further, the new law specifies the geographical and location features of those forests that shall be classified as forests of public interests,<sup>20</sup> which echoes the logics of landscape design that we have mentioned above.

Another significant development of the newer and more detailed *Forest Law* is the better-defined separation between ownership and the right to use. A forest belongs to the state, unless the law stipulates collective ownership of a particular forest.<sup>21</sup> The owner of a forest, be it the state or a collectivity, has the duty of protection and rational use.<sup>22</sup> The right to use of a forest can be contracted to a private or public operator, who then bears the duty of increasing forestation and its ecological function.<sup>23</sup> These and other relevant provisions build a framework upon which the commercial development of forest resources is marketed. It is also the requirement of the Guideline of Unifying and Promoting Reforms on Property Rights of Natural Resources (2019). One can expect similar institutions in future environmental law reforms. From the point of view of conservation, it will be interesting to see how the state acts as both the supervisor and protector.

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prosecutors demand punitive damages when filing public interest litigation on the ground of Art. 1234. See 江西省浮梁县人民检察院诉浙江海蓝化工集团有限公司浮梁县人民法院（2020）赣民初795号民事判决书。

<sup>18</sup> Article 1 of Forest Law (2020). The text (in Chinese) is available at [http://www.xinhuanet.com/2019-12/28/c\\_1125399379.htm](http://www.xinhuanet.com/2019-12/28/c_1125399379.htm).

<sup>19</sup> Article 49 of Forest Law (2020).

<sup>20</sup> Article 48 of Forest Law (2020).

<sup>21</sup> Article 14 of Forest Law (2020).

<sup>22</sup> Article 15 of Forest Law (2020).

<sup>23</sup> Article 16 of Forest Law (2020).

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## The Shadow of the State

### *Biosecurity Law*

While provisions concerning biodiversity are scattered across a dozen laws and regulations, the drafting of a unified *Biosecurity Law* has preoccupied the NPC and the Ministry of Ecology and Environment since 2018. The genome edition scandal in 2018 and the ongoing COVID-19 pandemic have both impacted the drafting of the text. In October 2020, the *Biosecurity Law* was enacted.<sup>24</sup> Although not environmental legislation *per se*, this law will have significant effects on China's biodiversity conservation. In its circular to the NPC, the MEE states that *Biosecurity Law* shall be consistent with the *Convention on Biological Diversity* and the *Cartagena Protocol*.<sup>25</sup> In addition, this law applies to the prevention of alien species invasion and biodiversity conservation,<sup>26</sup> and instructs the state to improve the mechanism on the prevention of and reaction to alien invasive species. It also states that no one shall introduce, release, or abandon alien species.<sup>27</sup> For the first time, the precautionary principle is explicitly recognized as one of the leading principles in a Chinese legislative text. Despite this, the *Biosecurity Law*, like other laws related to biodiversity, puts emphasis on state sovereignty. Its Article 53 stipulates that the state shall optimize management and surveillance on the uses of human genetic and biological resources, and solemnly declare its sovereignty on said resources. Likewise, the provisions on the uses of biological resources provides that foreign individuals and institutions can only have access to the said resources in collaborating with Chinese nationals.

### *Guideline on Establishment of the Modern Environmental Governance Systems*

In March 2020, the State Council and the CCP jointly released *Guideline on Establishment of the Modern Environmental Governance Systems*.<sup>28</sup> It announced that the government and the ruling party shall establish 7 “systems” of environmental governance: (1) adjust the responsibility for officials at all levels, (2) consolidate the responsibility of business entities, (3) mobilize greater public support, (4) enhance supervision, (5) incentivize market mechanisms, (6) set up environmental credits, and (7) improve laws, regulations, and policy. Despite the slightly surprising structure of these systems that leaves one wondering if the other six can be established without improving law and policy, this document sheds light on how top policymakers understand modern environmental governance. The Guideline states as its objective to construct a multicentric mechanism that involves the CCP, government, corporations, civil society, and the general public. The participation of private or

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nongovernmental entities, or a larger form of a public-private partnership, is further stipulated as one of the guiding principles of this mechanism. The abovementioned entities are referred to as “subjects” of their own agency, not as “objects” to be governed and administrated, which can signify an important ontological shift. We can expect that market mechanism and incentive measures will replace direct intervention and planning of the executive branch in some environmental management. Still, the proper roles and functions of these subjects are different. While the ruling party’s leadership will be strengthened and the directing function of government enhanced, the public authority will improve the participation of business entities and mobilize the support of society. Therefore, within the proposed modern governance hierarchy, the roles of all actors are incentivized, orchestrated, regulated, and most importantly, led from the top by the state.

### **Difficult Trade-offs in the Courtroom**

#### *Habitat Protection and Energy Transition*

On March 20, 2020, the Municipal Court of Kunming halted construction of a hydropower station in Yunnan Province, on the grounds of insufficient environmental impact assessment (EIA).<sup>29</sup> The case was brought to the court by the Friends of Nature Institute, an environmental NGO, through the channel of public interest litigation. The plaintiff argued that the project will destroy the country’s most important green peafowl habitat and result in regional extinction of the bird. It also claimed that the EIA did not consider the loss of biodiversity.

It was not the first time that conservationists managed to tackle clean energy projects. A few months earlier, through the mediation of the court, the Friends of Nature Institute and two grid companies reached an agreement that a wind farm built in a forest park would be removed and the local ecology restored. Places rich in hydropower are usually also rich in biodiversity. Wind turbines can interrupt the migration of seabirds. And solar panels kill countless birds every year. Reported by China Central Television, the high-profile Green Peafowl lawsuit has brought massive attention to the topic. A

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<sup>24</sup> Available at <http://www.npc.gov.cn/npc/c30834/202010/bb3bee5122854893a69acf4005a66059.shtml>

<sup>25</sup> Available at [https://www.mee.gov.cn/gkml/sthjbgw/jytafw\\_new/201809/t20180926\\_629621.htm](https://www.mee.gov.cn/gkml/sthjbgw/jytafw_new/201809/t20180926_629621.htm)

<sup>26</sup> Article 2 of Biodiversity Law.

<sup>27</sup> Article 60 of Biodiversity Law.

<sup>28</sup> Available at [http://www.gov.cn/zhengce/2020-03/03/content\\_5486380.htm](http://www.gov.cn/zhengce/2020-03/03/content_5486380.htm)

<sup>29</sup> 自然之友环境研究所诉中国水电顾问集团新平开发有限公司，昆明市中级人民法院（2017）云01民初2299号民事判决书。

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species with a high aesthetic value, in a place known for its rich biodiversity and mysterious rainforest, threatened by a giant monopoly, televised by an investigation program that enjoys high credibility among an educated audience: the Green Peafowl case has a perfect combination that helps visualize and localize habitat loss. In contrast, the global and complex efforts of climate change can hardly find delegates in “real life”. Handling the tricky competition between two equally justified demands seems to be an art that an ecological judge must master.

### *Biodiversity and Rule of Law*

Chinese justice also witnessed a trend of holistic thinking in criminal cases concerning illicit hunting and wildlife trafficking. In the context of the outbreak of COVID-19, the judge of an illicit hunting case in March 2020 spent half of the very concise decision discussing the ecological significance of weasels and squirrels, as well as the enormous threat poaching poses to public health.<sup>30</sup> After it was reported that the COVID-19 pandemic allegedly originated from a wet market in Wuhan and was related to the alimentary consumption of wildlife,<sup>31</sup> the Standing Committee of the National People’s Congress enacted the *Decision on Full Prohibition of Wildlife Trade and Alimentary Use for the Sake of People’s Life and Health Security*.<sup>32</sup> This text of eight articles relates the necessity of wildlife protection with biosecurity, ecological security, and public health. Though this decision made by the legislative body is not a legal text *per se*, given the gravity of the pandemic and the dramatic quarantine in China, the linking of biodiversity with hunting and eating that the decision conveys will dominate the revision of the Law on Wildlife Protection.

Chinese judges, as most of their counterparts in the continental tradition, have a professional formation in law and, therefore, must seek scientific expertise if they want to go beyond the purview of statutory law. In some circumstances, scientists testify on the importance of an unendangered species to the conservation of local ecosystem. While the Penal Code specifically prohibits the hunting and trafficking of endangered wildlife, the courts sometimes give guilty sentences to people

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<sup>30</sup> 王杰非法狩猎罪一审刑事判决书，苏州市姑苏区人民法院（2020）苏0508刑初91号。

<sup>31</sup> For a broader account on wildlife consumption of wildlife and epidemic, see John Vidal, “‘Tip of the Iceberg’: Is Our Destruction of Nature Responsible for Covid-19?” *The Guardian* (18 March 2020) <<https://www.theguardian.com/environment/2020/mar/18/tip-of-the-iceberg-is-our-destruction-of-nature-responsible-for-covid-19-aoe>> accessed 29 March 2020.

<sup>32</sup> 《全国人民代表大会常务委员会关于全面禁止非法野生动物交易、革除滥食野生动物陋习、切实保障人民群众生命健康安全的决定》，available at <http://www.npc.gov.cn/npc/c30834/202002/c56b129850aa42acb584cf01ebb68ea4.shtml>.

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who hunt unendangered species or trade domestic animals which are also endangered species. This draconic judicial policy raises questions about the rule of law.

### **Conclusion**

In sum, China's environmental law and policy has seen many interesting developments in last year.. Inspired by the political determination of the CCP, considerable efforts have been invested in exploring the paradigm of "ecological conservation" that must distinguish from that of "environmental protection". However, it is far too early to say that the decisionmakers and the policy-implementors have reached a univocal comprehension of the nature and extension of this eco-paradigm. So far, Chinese environmental governance is characterized by its state-centrism and anthropocentrism

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## COUNTRY REPORT: FRANCE

### The French Citizens' Convention on Climate Change

*Christian Dadomo*

Following the French President's speech of 25 April 2019 in which Emmanuel Macron announced a change in the decision-making process regarding the ecological transition agenda, a Citizens' Convention for climate change was set up in October 2019.

Unprecedented democratic experiment in France and inspired from the Irish citizens' assemblies<sup>1</sup> and slightly different from the classic "*Grenelle de l'environnement*" of the previous decade<sup>2</sup>, the mandate and the objective of this Convention were to rethink all concrete and practical measures designed to help French citizens cope better with climatic change in the fields of transports, housing insulation and home energy-efficiency improvements with the view to rendering them more efficient; to design complementary incentives or restricting measures and their financing.

Made up of 150 chosen at random citizens representing the French society's diversity, the good working of the Convention is guaranteed by a tripartite institutional structure comprising:

- A governance committee in charge of drawing up the work programme and lead the workings of the Convention;
- A guarantors' committee ensuring that the principles of impartiality, independence and deontology are complied with
- A technical and legal support to ensure the legal transcription of the its proposals.

Following 8 months of discussion and debate, the Citizens' Convention on climate made public its 150 proposals on 18 June 2020, which are grouped into 6 clusters namely housing, food, consumer behaviour, means of transport, and means of production. The proposals which also include constitutional amendments have been communicated to the government and Parliament.

This country report provides an overview of this new form of citizens' engagement in climate change policies, of some of the proposals made by the Convention and of their legislative follow-up.

#### **Mandate and objective of the Convention**

The organisation of the Convention, the independent governance of its committee and its terms of reference were specified in a letter (*lettre de mission*) addressed by the then Prime Minister Edouard Philippe to Patrick Bernasconi, the Chair of the French economic, social and environmental

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committee (ESEC)<sup>3</sup>, a constitutional assembly composed of representatives of employers, trade unions and associations, which has a consultative role in the French legislative process.

The terms of reference of the convention were to define a series of measures to achieve a reduction of at least 40% of greenhouse gas emissions by 2030 compared to 1990. Further, the convention was requested to draw up and send to the Government and the President of the Republic a report summarising its debates and presenting proposed legislative and regulatory measures that it deemed necessary to achieve the said objective. The convention was also allowed to select amongst the proposed legislative measures, those that it deemed should be subject to a referendum.

It was intended that the proposed legislative and regulatory measures be implemented either by referendum, by primary and secondary legislation.

Overall, the Convention was invited to make proposals to fight global warming, its remit notably covering energy efficiency, housing insulation and their financing; and the basic principle of its action was that each of its proposals were to be costed and fully funded.

### **The institutional structure and decision-making process of the Convention**

- **An institutional structure that reflected and represented the diversity of the French society**

According to the PM letter, the Convention was intended to “engage the whole society in the ecological transition, through a representative sample of the population, and to mobilise the collective intelligence to move from consensus on the diagnosis to compromise on the solutions, and start a deep transformation of our lifestyles.”<sup>4</sup> 150 citizens were drawn by lot from the electoral roll and phone directories from 26 August 2019 according to methods used by polling institutes to ensure greater representativity. In order to reflect fully and accurately the French society, the Convention was made up of 51% of women and 49% of men from across 6 age groups reflecting the age structure

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<sup>1</sup> C. de Perthuis, ‘Débat : La Convention citoyenne pour le climat... et après?’ The Conversation 6 July 2020 available at <https://theconversation.com/debat-la-convention-citoyenne-pour-le-climat-et-apres-141891>

<sup>2</sup> First of its kind at the time, the 2007 “Grenelle de l’Environnement” brought together the government, local authorities, trade unions, businesses and voluntary sectors. Over the Summer of 2007, its six working groups produced 265 commitments articulated around 4 major objectives: fight against climate change; conservation and management of biodiversity and natural environment; protection of health and the environment, while stimulating the economy; creation of a real ecologically-responsible democracy. Those commitments led to the adoption in 2009 and 2010 of two major environmental Acts called “Grenelle I” (*Loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l’environnement*) and “Grenelle II” (*Loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l’environnement*) Acts.

<sup>3</sup> <https://www.conventioncitoyennepourleclimat.fr/wp-content/uploads/2019/09/lettre-de-mission.pdf>

<sup>4</sup> <https://www.conventioncitoyennepourleclimat.fr/wp-content/uploads/2019/09/lettre-de-mission.pdf>

at 2 (author’s translation).

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of the French population. It was also representative of socio-professional categories and of the diverse types of French territories (it notably included 5 representatives of the French overseas territories).

- **An independent body with autonomous decision-making powers**

The Prime Minister further indicated that he wanted the ESEC to organise the works of the Convention by setting up a governance committee bringing together two experts on climate change and participatory processes from the Ministry for ecological transition, three experts on climate change, three experts on participatory democracy and four experts from the economic and social sector. Three guarantors were also appointed by the president of the Senate, the president of the National Assembly and the president of the ESEC to ensure the neutrality and sincerity of the debates.

The Convention was also supported by a technical and legal support group made up of 14 experts whose role was to advise the members of the Convention on the drafting of proposals the legal transcription of which was ensured by a group of six legal experts.

- **Thematic groups**

The members of the Convention were divided up in the following five thematic clusters to reflect the societal changes necessary to achieve the objective of the Convention:

- Food and agriculture
- Housing and accommodation
- Employment and industry
- National and regional development and transport policy
- Lifestyles and consumer behaviour

**The working calendar of the Convention**

Originally scheduled to start in July 2019, the works of the Convention commenced on 4 October 2019 following an 8 month-calendar comprising 7 working week-end sessions. During that period, the member of the Convention auditioned climate experts, economists, professionals from the economic and social sectors and associations.

The last working session took place on 19-21 June 2020. On 21 June, the members of the Convention voted on each of the proposals, rejecting only one of them, and on which of those should be submitted to referendum.

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## The outcome of the convention

On 26 June 2020, the Convention published on its website its final 460-page report entitled “*Les Propositions de la Convention citoyenne pour le climat*” (The Citizens’ Convention’s Proposals on Climate Change)<sup>5</sup>.

As the report puts it, “in order to reduce by at least 40% GHGs before 2030, it seems inevitable to review our lifestyles, our ways to consume, produce and work, move around, our housing and eating habits: in 2019, the average carbon footprint of French citizens was 11,2 tonnes whereas it should be 2 tonnes per annum in order to attain the objectives of the Paris Agreement.”<sup>6</sup>.

149 proposals were put forward which were divided into 5 headings (consuming, producing and working, moving around, housing and food) and, within each heading, subdivided into objectives<sup>7</sup>.

The following are examples of the most salient objectives and proposals:

1. Making it compulsory to display the carbon impact of products and services

1.a Developing and then implementing a carbon score for all consumer products and services

1.b Make it compulsory to display greenhouse gas emissions in shops and places of consumption as well as in brand

2. Transforming the production tool: promoting more responsible production; developing repair, recycling and waste management channels

2.a Increasing product longevity and reduce pollution at design

2.b Enforcing the law on the prohibition of planned obsolescence

3. Changing the use of the private car: Develop other modes of transport

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<sup>5</sup> available in French at <https://propositions.conventioncitoyennepourleclimat.fr/pdf/ccc-rapport-final.pdf> <accessed 30 July 2020>

<sup>6</sup> See Report at page 9 available in French at <https://propositions.conventioncitoyennepourleclimat.fr/pdf/ccc-rapport-final.pdf> (author’s translation) <accessed 30 July 2020>

<sup>7</sup> E. Borne, ‘La convention citoyenne pour le climat souhaite un référendum sur la Constitution et le crime d’« écocide »’ le Monde 21 June 2020 available in French at [https://www.lemonde.fr/planete/article/2020/06/21/la-convention-citoyenne-pour-le-climat-doit-rendre-ses-propositions-cet-apres-midi\\_6043625\\_3244.html](https://www.lemonde.fr/planete/article/2020/06/21/la-convention-citoyenne-pour-le-climat-doit-rendre-ses-propositions-cet-apres-midi_6043625_3244.html) <accessed 29 October 2020>

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3.a Encouraging the use of soft or shared means of transport, in particular for home-work journeys, by extending the sustainable mobility package

3.b Reducing incentives for car use by reforming the income tax kilometer allowance system

3.c Encouraging the use of soft or shared means of transport

4. Making energy renovation compulsory by 2040

4.a Making it compulsory for owner-occupiers and landlords to renovate comprehensively by 2040

4.b Making it compulsory to replace oil and coal boilers by 2030 in new and renovated houses

5. Guaranteeing a system allowing a healthy, sustainable, more plant-based diet: encouraging more virtuous practices in the collective catering sector

5.a Offering a bonus to help establishments to achieve the objectives of the *EGalim* Act (2018 Act for a balance of commercial relations in the agricultural and food sector and healthy, sustainable and accessible food)

5.b Offering a bonus of 10 cents per meal for small organic and local canteens to help them go through the first three years of the climate transition

5.c Creating a "collective catering observatory"

Two other headings concern constitutional amendments and the financing of the proposed measures.

With regard to the Constitution heading, the objective is to amend the 1958 French Constitution by adding a second paragraph to the Preamble ("The reconciliation of rights, freedoms and principles resulting from them [the Declaration of 1789, the Preamble to the 1946 Constitution and the Charter for the Environment of 2004 referred to in the first paragraph] shall not jeopardise environment protection and the common heritage of mankind")<sup>8</sup> and a third paragraph to Article 1 ("The Republic guarantees the protection of biodiversity, of the environment and the fight against climate change"<sup>9</sup>).

Two proposals for further consideration were also mentioned: reinforcing control over environmental policies and reforming the Economic, social and environmental Committee.

With regard to the financing of the climate transition, taking account of the economic uncertainty caused by Covid-19, the Convention opted for a variety of forms of financing from taxation, use of

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<sup>8</sup> Author's translation.

<sup>9</sup> Author's translation.

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current financing tools, public and private financing, public borrowing, time-limited and more innovative sources of financing to measures ensuring greater financial transparency. Those forms of financing will operate according to two basic principles: preference for a diversity of financing over a single source, and social justice to prevent the most vulnerable section of the population from being hard hit by the climate transition.

### **The follow-up of the outcome of the convention**

In his response to the members of the Convention of 29 June 2020<sup>10</sup>, the President of the Republic declared that he:

- accepted all but three proposals
- rejected the proposal to amend the preamble to the Constitution
- rejected the proposal to limit speed on motorway to 110 km/h
- rejected the 4% tax on corporate dividends exceeding 10 million euros to "participate in the collective financing effort of the ecological transition"<sup>11</sup>

He further announced:

- the monthly review of the situation by the Government with the members of the Convention;
- the setting up of working groups on the proposals of the "conventional" which, together with parliamentarians and the Government, will allow them to be fully involved in the transformations into laws, into concrete rules;
- to give the members of the Convention a right of alert

More recently, during a meeting with members of the Convention on 14 December 2020, President Macron announced finally his intention to propose a referendum on an amendment of Article 1 of the Constitution to include the "concepts of biodiversity, environment and fight against climate change"<sup>12</sup> following approval by both chambers of Parliament<sup>13</sup>. On 20 January 2021, the

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<sup>10</sup> Elysée Palace, 'Emmanuel Macron dit oui à 146 propositions de la Convention citoyenne pour le climat !' 29 June 2020 <https://www.elysee.fr/emmanuel-macron/2020/06/29/le-president-emmanuel-macron-repond-aux-150-citoyens-de-la-convention-citoyenne-pour-le-climat> <accessed 30 July 2020>

<sup>11</sup> Author's translation.

<sup>12</sup> Author's translation.

<sup>13</sup> see Editorial, 'Climat : le pari du référendum.' Le Monde 15 Decembre 2020 available at [https://www.lemonde.fr/idees/article/2020/12/15/climat-le-pari-du-referendum\\_6063436\\_3232.html](https://www.lemonde.fr/idees/article/2020/12/15/climat-le-pari-du-referendum_6063436_3232.html) <accessed 25 January 2021>

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Government tabled a Constitutional Bill aimed at including in Article 1 of the Constitution the phrase “[France] guarantees the protection of the environment and biological diversity and the fight against climate change”<sup>14</sup>.

However, some of the Convention proposals had already been rejected by the Government or Parliament before they had been made public. For instance,

- during the debates on the Bill on the fight against waste and circular economy (*Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*), a number of amendments supporting the Convention proposed prohibition on advertising of products with a very high carbon footprint, notably those relating internal flights, were simply rejected;
- a number of amendments to the same Bill and the Energy-climate Bill aimed at prohibiting advertising digital screens in public spaces were equally rejected by members of parliament; and
- during the parliamentary debates on the 2018 Act for a balance of commercial relations in the agricultural and food sector and healthy, sustainable and accessible food, the Agriculture minister was opposed to the idea of an experimental daily vegetarian menu being launched in 2022 in local canteens and collective catering premises.

These are only a few among many other examples.

Finally, on 8 January 2021, the Government drew up a Bill on the fight against climate change and resilience strengthening in the face of its effects (*Projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*). The bill is to be discussed by the Government on 10 February 2021 before being tabled in the two parliamentary chambers and discussed from the end of March under the expedited procedure (*procédure accélérée*) with one reading in each chamber. It contains five titles which reflect the above-mentioned Convention thematic groups, and a sixth one on the reinforcement of judicial environmental protection. Based on the Convention proposals, the 65-article text is aimed at accelerating the ecological transition in France. Yet, it already seems to mark a step back from the Convention proposals, notably those that

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<sup>14</sup> Author's translation.

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form the backbones of the Convention report and are aimed at reducing GHGs by 40% before 2030 within a spirit of social justice<sup>15</sup>.

### **Concluding remarks**

A direct response from Macron and his government to the “Gilets Jaunes” (Yellow vests) movement, the Citizens’ Convention on climate change was a new experimental form of participatory democracy in the field of environmental protection with a clear objective, yet whose legal/institutional status that was a source of a controversy<sup>16</sup>. While the report of the Convention offers a comprehensive range of proposals to reach its set overall objective, it is yet too early to assess its full impact on the legislative process and on the economy and society since the 2021 Bill on the fight against climate change and resilience strengthening in the face of its effects is still to be discussed by Parliament. However, one might feel optimistic in light of the legislative outcome of the 2007 “*Grenelle de l’environnement*” experiment.

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<sup>15</sup> See A. Garric & R. Barroux ‘Transport aérien, passoires thermiques, régulation de la publicité : ce que contient le projet de loi pour le climat’ Le Monde 8 January 2021 available at [https://www.lemonde.fr/planete/article/2021/01/08/transport-aerien-passoires-thermiques-regulation-de-la-publicite-le-gouvernement-rend-sa-copie-sur-les-propositions-de-la-convention-citoyenne-pour-le-climat\\_6065673\\_3244.html#xtor=AL-32280270](https://www.lemonde.fr/planete/article/2021/01/08/transport-aerien-passoires-thermiques-regulation-de-la-publicite-le-gouvernement-rend-sa-copie-sur-les-propositions-de-la-convention-citoyenne-pour-le-climat_6065673_3244.html#xtor=AL-32280270) <accessed 8 January 2021>

<sup>16</sup> S. Treyer, ‘Convention citoyenne pour le climat : réussir l’atterrissage périlleux d’un objet institutionnel non identifié’ Billet de blog 7 December 2020 available at <https://www.iddri.org/fr/publications-et-evenements/billet-de-blog/convention-citoyenne-pour-le-climat-reussir-latterrissage> <accessed 29 January 2021>

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## COUNTRY REPORT: MEXICO

### Lessons learned from a constitutional controversy on the Mexican water management

*Gabriel Lopez Porras & Jakub Ciesielczuk*

#### ABSTRACT

Between March and May 2020, fourteen municipalities in Chihuahua, Mexico, initiated a jurisdictional process called ‘constitutional controversy’ at Mexico's Supreme Court of Justice, against the Congress, the President, the Commander of the National Guard, and the National Water Commission. These municipalities sued for the unconstitutionality of the Federal Government's actions regarding the water extraction in the "La Boquilla" dam, in the light of water legislation unsuitable to foster public participation in water management. Moreover, the lack of public participation in the 'La Boquilla' dam water management have resulted in several clashes between water users and the National Guard. Amid the current drafting process of the General Water Law for Mexico, it is important to understand how the Mexican water legal framework has failed as an institutional tool to achieve sustainable water management. This report discusses the “La Boquilla” dam case to highlight the inability of the current Mexican water legal framework to address water-related problems. In doing so, some of the main problems in Mexican water laws’ structure are analysed to show why those laws are hardly complied with and weakly enforced, which has resulted in conflicts and water mismanagement. Finally, it discusses the potential of stakeholder engagement and local water policies for strengthening the rule of law with respect to water for the upcoming General Water Law for Mexico.

#### Introduction

The Mexican water law framework is mainly composed of three laws: the National Water Law, the Regulation of the National Water Law, and the Interior Regulation of the National Water Commission published.<sup>1</sup> The National Water Law establishes all the guidelines for national water

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<sup>1</sup> The National Water Law, published on 1st December 1992, the Regulation of the National Water Law published on 12th January 1994, and the Interior Regulation of the National Water Commission published in 30th November 2006. Also, there are other instruments related to water management, such as Mexican official standards related to water quality, water quantity and water exploitation, watershed management programmes, restricted-access decrees, and water plans that make

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management to achieve water sustainability. Its effectiveness in conserving and protecting water quantity and quality, as well as the human right to water access has always been questionable.<sup>2</sup> The main criticism of the National Water Law refers to its ineffective institutional setting for enabling public participation in water management, hindering democratic decision-making processes.<sup>3</sup> As a result (and regardless of government water mismanagement) state and non-state actors have identified the law's inability to foster stakeholder engagement<sup>4</sup> in water management, as the main

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up the water legal framework in Mexico. Research Fellow in Earth System Law, Lincoln Centre for Ecological Justice, University of Lincoln, Brayford Way, Brayford Pool, Lincoln LN6 7TS, UK ([glopezporras@lincoln.ac.uk](mailto:glopezporras@lincoln.ac.uk)). Postgraduate Researcher, Lincoln Centre for Ecological Justice, University of Lincoln, Brayford Way, Brayford Pool, Lincoln LN6 7TS, UK ([jciesielczuk@lincoln.ac.uk](mailto:jciesielczuk@lincoln.ac.uk))

<sup>2</sup> OECD, 'Making Water Reform Happen in Mexico, OECD Studies on Water, OECD Publishing' (OECD, 2013) <<http://dx.doi.org/10.1787/9789264187894-en>> accessed 10 November 2018; Daniel Murillo-Licea and Denise Soares-Moraes, 'El Péndulo de La Gobernabilidad Y La Gobernanza Del Agua En México' (2013) 4 *Tecnología y Ciencias del Agua* 149 <[http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S2007-24222013000300009](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S2007-24222013000300009)> accessed 7 November 2018; Kamel Athie, *El Agua, Ayer Y Hoy* (Centro de Estudios Sociales y de Opinion Publica ed, Camara de Diputados LXIII Legislatura 2016) <<http://www5.diputados.gob.mx/index.php/camara/Centros-de-Estudio/CESOP/Estudios-e-Investigaciones/Libros/El-Agua-Ayer-y-Hoy>> accessed 3 December 2018. For practical examples see Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, 'Corruption and Conflicts as Barriers to Adaptive Governance: Water Governance in Dryland Systems in the Rio Del Carmen Watershed' (2019) 660 *Science of The Total Environment* 519 <<https://www.sciencedirect.com/science/article/pii/S0048969719300361>> accessed 11 January 2019; José Luis Martínez Ruiz, Daniel Murillo Licea and Luisa Paré, *Conflictos Por El Agua Y Alternativas En Los Territorios Indígenas de México* (Instituto Mexicano de Tecnología del Agua 2017) <[www.imta.gob.mx](http://www.imta.gob.mx)> accessed 1 February 2020.

<sup>3</sup> Paula Mussetta, 'Participación Y Gobernanza . El Modelo de Gobierno Del Agua En México' (2009) 12 *Espacios Públicos* 66 <<http://www.redalyc.org/html/676/67611350005/>> accessed 7 November 2018; Victor Manuel Quintana, 'Nuevo Orden Alimentario Y Disputa Por El Agua En El Norte de México' (2013) 40 *Apuntes: Revista de Ciencias Sociales* 175.

<sup>4</sup> Here, public participation is defined as any of formal mechanisms intentionally instituted to involve public or their representatives in the environmental decision-making process. Definition obtained from: Mark S Reed, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 *Biological Conservation* 2417. On the other hand, stakeholder engagement is defined as "The process by which any person or group who has an interest or stake in a water-related topic is involved in the related activities and decision-making and implementation processes", stakeholder engagement includes public participation in water management and decision-making, therefore, this concept is used throughout the report since is more comprehensive. Definition of stakeholder engagement was obtained from: Aziza

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barrier to address water overexploitation and avoid conflicts over its access.<sup>5</sup> For this reason, the need for a new legislation (a General Water Law for Mexico)<sup>6</sup> has been discussed for a long time.<sup>7</sup> Nevertheless, because we are still in the development process of the General Water Law for Mexico, reporting about one of the main legal disputes related to the law's failure to foster stakeholder engagement in water management is important. This country report discusses the 'La Boquilla' case to explore how the General Water Law should overcome this legal flaw.

### **'La Boquilla' case**

In 2020 at least three violent conflicts occurred between farmers from various municipalities of Chihuahua, Mexico on the one hand, and the National Guard<sup>8</sup> and government officials from the National Water Commission (CONAGUA)<sup>9</sup> on the other. Those conflicts erupted when the National Guard and CONAGUA opened the sluice gates of the 'La Boquilla' dam. This was done to comply with the 1944 International Treaty for the “Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande” between Mexico and the United States of America.<sup>10</sup> However, farmers argued that, given climate conditions and the dam's high silt levels, transferring water from the dam was a threat to this year's agricultural cycle, and there were other ways to comply with that treaty without affecting local agricultural livelihoods.<sup>11</sup> Considering the negative impacts that this situation could have on the economic activity of the area, mayors from different municipalities in the region defended the farmers' rights to water access from the Federal government and its National Guard. The main (non-violent) action of this water conflict, consisted of a constitutional controversy that fourteen municipalities initiated between March and May 2020, at the Supreme Court of Justice of

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Akhmouch and Delphine Clavreul, 'Stakeholder Engagement for Inclusive Water Governance: "Practicing What We Preach" with the OECD Water Governance Initiative' (2016) 8 *Water (Switzerland)* 1, 4 <<http://www.mdpi.com/2073-4441/8/5/204>> accessed 7 November 2018.

<sup>5</sup> Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, 'Seeking Common Ground in Dryland Systems: Steps Towards Adaptive Water Governance' (2020) 12 *Water* 2020, Vol. 12, Page 498 498; Athie (n 2).

<sup>6</sup> The main difference between a national and a general law, is that a general law focuses on distributing competences (in this case regarding water) between the federation, states and municipalities, while the national law establishes guidelines only at the federal level.

<sup>7</sup> Athie (n 2).

<sup>8</sup> The National Guard is Mexican military police that the current Federal government created to combat organised crime.

<sup>9</sup> CONAGUA is the acronym in Spanish for the National Water Commission.

<sup>10</sup> "United States-Mexico Treaty on Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande" (adopted 3 February 1944, entered into force 8 November 1945), 59 Stat. 1219 (1946), T.S. No. 994.

<sup>11</sup> J Estrada and R Villalpando, 'Agricultores de Chihuahua "Toman" La Presa La Boquilla; Rechazan Traspase' (*La Jornada*, 5 February 2020) <<https://www.jornada.com.mx/ultimas/estados/2020/02/05/agricultores-de-chihuahua-toman-la-presa-la-boquilla-rechazan-traspase-9067.html>> accessed 27 July 2020.

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the Nation (SCJN) against the Federal government and the Congress. That legal action against Mexican government was premised on the lack of participation (especially of the municipal authorities and farmers) in the decision-making processes regarding the water management in the ‘La Boquilla’ dam.

### **The constitutional controversy**

A constitutional controversy is a process that local, state or federal governments can initiate at the SCJN in order to resolve whether some acts of authority are being carried out according to what the Mexican Constitution has established.<sup>12</sup> Unlike other judicial processes from other legal systems that could be considered similar, such as the ‘judicial review’ process, the constitutional controversy can only be initiated by a governmental body, whose sphere of competence is being affected by another government body, in light of what is established by the Constitution. Consequently, this jurisdictional process is a tool for solving potential controversy related to the actions and omissions of one sphere of government with respect to another, in order to respect the provisions embedded in the Constitution. According to the recent agreement issued by the SCJN,<sup>13</sup> the main argument challenging the federal government’s actions (and omissions) in the ‘La Boquilla’ case, is the violation of the principle of democratic deliberation that must be guaranteed as a part of the human right of water access foreseen in the Mexican Constitution. From there, other arguments were derived, such as:

- The legislative and administrative omission to properly regulate the participation of municipalities and farmers in the dam’s water management.
- The issuance of orders to transfer water from ‘La Boquilla’ dam without any water planning that has considered the participation of municipal authorities and farmers.
- The use of public force to evacuate the water from the ‘La Boquilla’ dam without a democratic and participatory decision-making process over the dam’s water.<sup>14</sup>

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<sup>12</sup> José Ovalle Favela, ‘Las Controversias Constitucionales Y Los Órganos Autónomos’ (2011) 25 Cuestiones Constitucionales <[http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S1405-91932011000200004](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-91932011000200004)> accessed 27 July 2020.

<sup>13</sup> Presidente de la Suprema Corte de Justicia de la Nación, ‘Acuerdo Que Establece La Conexidad de Las Controversias Constitucionales 47/2020, 48/2020, 49/2020, 50/2020, 56/2020, 59/2020, 60/2020, 61/2020, 62/2020, 67/2020, 68/2020, 70/2020, 77/2020, 78/2020 Y 79/2020 de Fecha 18 de Mayo de 2020’ 3.

<sup>14</sup> *ibid.*

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## The National Water Law and public participation

The National Water Law and its regulation establish the river basin councils as the public spaces for coordination, collaboration and participation between the three governmental levels (federal, state and municipal) and the citizens in water decision-making. Yet, collaboration and public participation has not been achieved, principally, because these councils do not match with the required scale for water management (e.g. watershed, dam, or aquifer level), where most water problems arise.<sup>15</sup> In the ‘La Boquilla’ case, farmers and municipal authorities would need to travel almost 700 km<sup>2</sup> to be able to participate in any council session.<sup>16</sup> Moreover, the Mexican water legal framework<sup>17</sup> does not define very clearly what the regulatory functions are for CONAGUA's administrative units (including the river basin councils). Responsibilities within CONAGUA's structure<sup>18</sup> tend to overlap and many times it is not clear who is responsible for regulated activities.<sup>19</sup> Given this lack of clarity, water management and all decision-making processes are highly centralised, hindering CONAGUA's ability to achieve stakeholder engagement.<sup>20</sup> As a result of this centralised water management, the lack of coordination and cooperation between the CONAGUA and water users has created an “unmanageability” context, especially in northern drylands<sup>21</sup> where the ‘La Boquilla dam’ is located. This has created several water-related problems, such as illegal water access and conflicts over its access, leading to poor law compliance since water users (farmers in this case) are not involved or engaged in any water planning or management process. As a result, the constant conflicts, centralised water management, and lack of stakeholder engagement hinder water law enforcement and the CONAGUA's presence in the area.

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<sup>15</sup> Murillo-Licea and Soares-Moraes (n 2).

<sup>16</sup> There is no information about if other alternatives of participation have been explored, such as online meetings; yet, since literature and reports suggest that farmers do not participate in council sessions, it is understood that there is no participation of any kind.

<sup>17</sup> The National Water Law and the other regulations.

<sup>18</sup> Established in the Regulation of the National Water Commission, which has been identified as part of the Mexican water legal framework.

<sup>19</sup> OECD (n 2).

<sup>20</sup> Athie (n 2); Mussetta; Murillo-Licea and Soares-Moraes (n2).

<sup>21</sup> Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, ‘Unravelling Stakeholder Perceptions to Enable Adaptive Water Governance in Dryland Systems’ (2018) 32 *Water Resources Management* 1 <<http://link.springer.com/10.1007/s11269-018-1991-8>> accessed 17 May 2018; Quintana (n 3).

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## The constitutional controversies and the Mexican water legal framework

The article 105 of the Mexican Constitution establishes the cases in which the SCJN rulings will have general effects.<sup>22</sup> These fourteen constitutional controversies are not within those cases, so the SCJN rulings will only have effects with respect to these municipalities. The controversies' main claims are the lack of participation of the municipal authorities and farmers in water management and decision-making processes on water transfer. Therefore, if the SCJN issues the ruling in favour of the fourteen constitutional controversies, the administrative and legislative authorities should issue, at minimum, a comprehensive water programme for the "La Boquilla" dam, where farmers and municipal authorities could engage in water management. Hence, although the impact on the Mexican water legal framework is likely to be limited due to the rulings' implications being local rather than national (and reform the National Water Law would be out of the scope), these constitutional controversies can establish a significant precedent. Afterwards, other municipalities in Mexico could follow the same path to strengthen their participation in water management, until a new law, for instance, the General Water Law, establishes an institutional setting that can effectively achieve stakeholder engagement in water management.

### Lessons for a General Water Law

It is currently understood that public–private coordination and stakeholder engagement is key for improving water management, achieving water sustainability and strengthening the rule of water law.<sup>23</sup> In Mexico, it has been highlighted through several case studies that, even though there are some spaces for public participation, they are not suitable for achieving stakeholder engagement.<sup>24</sup> In the 'La Boquilla' case, decisions made by the federal government without consideration and participation of local stakeholders are negatively impacting the livelihoods of citizens in fourteen

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<sup>22</sup> General effects mean that the court ruling aims to rectify the unconstitutionality so that the act or omission of authority regarding law enforcement does not happen again. Conversely, the effects of the court ruling can also solve only the particular issue involving the parties.

<sup>23</sup> Peter Rogers and others, *Effective Water Governance Global Water Partnership Technical Committee (TEC)*, vol 21 (2003) <<http://dx.doi.org/10.1016/j.gloenvcha.2011.04.003%5Cnwww.gwpforum.org>>; Gabriel Lopez Porras, Lindsay C Stringer and Claire H Quinn, 'Building Dryland Resilience: Three Principles to Support Adaptive Water Governance' (2020) 177 *Ecological Economics* 106770; Akhmouch and Clavreul (n 4).

<sup>24</sup> Martínez Ruiz, Murillo Licea and Paré (n 2); Lopez Porras, Stringer and Quinn, 'Unravelling Stakeholder Perceptions to Enable Adaptive Water Governance in Dryland Systems' (n 21); Quintana (n 3).

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municipalities.<sup>25</sup> This has resulted in armed clashes between farmers and soldiers from the National Guard (some encounters have resulted in fatalities) as well as the destruction of public buildings.<sup>26</sup>

Stakeholder engagement is key for not only improving sustainable water management, but also for overcoming the societal stressors<sup>27</sup> that hinder collaboration and increase the enmity between local authorities, farmers and the federal government.<sup>28</sup> A General Water Law cannot overlook the key role that public participation plays in addressing water-related problems, such as overexploitation and social conflicts. Accordingly, creating suitable institutional conditions for successfully enabling stakeholder engagement should be of paramount importance in the current law's developing stage<sup>29</sup>. From what is observed in the 'La Boquilla' case, there are some aspects in terms of public participation that the General Water Law should consider. First, local water users need to actively engage in water decision-making processes, since they can provide useful insights and knowledge of local conditions and dynamics that will be affected in any water-related decision. Moreover, local authorities should also be engaged in any water-related decision and implementation process so they can provide institutional support to CONAGUA at the local level. This will facilitate cross-level coordination, increase the government's presence regarding water-related issues at the local level, and strength water democratisation. Finally, to ensure the sustainability of stakeholder engagement, the General Water Law must foresee peacebuilding tools (e.g. mediation, negotiation or conflict resolution) to manage opposing and conflictive perceptions on water decisions.<sup>30</sup> If the General Water Law integrates these considerations, then a sustainable stakeholder engagement can potentially be achieved.

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<sup>25</sup> According to municipal authorities and farmers; please see Salud Ochoa, 'La Boquilla No Puede Usarse Para Pagar Deuda' *El Diario de Chihuahua* (Chihuahua, 7 February 2020) <<https://diario.mx/estado/la-boquilla-no-puede-usarse-para-pagar-deuda-20200206-1624739.html>> accessed 4 March 2020; Estrada and Villalpando.

<sup>26</sup> Emma Alejandra, 'Caen 17 Por Disturbios Tras Protesta de Agricultores En Chihuahua' *El Herald de Mexico* (Chihuahua, 31 July 2020) <<https://heraldodemexico.com.mx/estados/detenidos-disturbios-chihuahua-quema-camionetas-agricultores-protestas-tratado-aguas-conagua-desinformacion-javier-corrall-declaraciones/>> accessed 4 August 2020.

<sup>27</sup> Societal stressors are trends or disturbances, such as human rights violations, conflicts and social inequalities, which affect social conditions, undermine human well-being and fragment the social function of governance of natural resources. In the 'La Boquilla' case, the societal stressors are the constant conflicts between farmers and soldiers, as well as the transgression of farmers' rights regarding public participation. For more information on societal stressors see Lopez Porras, Stringer and Quinn, 'Building Dryland Resilience: Three Principles to Support Adaptive Water Governance' (n 23).

<sup>28</sup> Akhmouch and Clavreul (n 4).

<sup>29</sup> An official version of the National Water Law's draft still pending.

<sup>30</sup> For more information on peacebuilding processes within water management see Lopez Porras, Stringer and Quinn, 'Seeking Common Ground in Dryland Systems: Steps Towards Adaptive Water Governance' (n 5).

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## **Conclusion**

Fostering public participation is more than just creating an institutional construct where state and non-state actors should gather and discuss. That has been observed in the ‘La Boquilla’ case, where the Mexican water legal framework establishes the river basin councils as the spaces for participation, yet, problems in their operation (e.g. their inability to reach local stakeholders) hinder the required coordination and collaboration between water users and the CONAGUA. As a result, local perceptions and needs are not considered in water management. In effect, the decisions regarding the water management in the region (e.g. decision on a water transfer from the dam) very often lead to violent conflicts between farmers and the federal government. Public participation requires a stakeholder engagement to avoid centralised water management, strength its democratisation, and move towards water sustainability. Hopefully, lessons learned from those constitutional controversies will improve the provisions established by the new General Water Law for Mexico on public participation in water management.

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## COUNTRY REPORT: NEW ZEALAND

### A year in climate change emergency

*Trevor Daya-Winterbottom\**

This country report provides an overview of recent case law and legislative amendments regarding climate change mitigation, and the declaration of a climate emergency by the New Zealand Parliament.

#### **Novel torts and climate declarations**

Notwithstanding the potential impact of the *Climate Change Response (Zero Carbon) Amendment Act 2019* on the judicial review of greenhouse gas (GHG) emissions targets and emissions reduction budgets and plans (noted below in relation to eroding the rule of law), the Senior Courts remain active in climate change litigation that continues to morph into other permissible avenues for challenge.

#### *Novel torts*

In *Smith v Fonterra Co-operative Group Ltd*,<sup>1</sup> the New Zealand High Court (NZHC) was required to consider tort-based claims in public nuisance, negligence, and the breach of a novel duty of care against Fonterra and other New Zealand companies alleging that GHG emissions by them “is human activity that has contributed, and will continue to contribute, to dangerous anthropogenic interference with the climate system and to the adverse effects of climate change”.<sup>2</sup> Smith sought declarations that the tortious activities of the defendants are unlawful, together with injunctions requiring the defendants activities to be “net zero” by 2030. The claims in public nuisance and negligence were struck out by the NZHC because Smith failed to establish particular or direct damage beyond that suffered by the public generally, and because any damage caused to natural and physical resources by

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<sup>1</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419.

<sup>2</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [8].

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the defendants GHG emissions was considered to be too remote and because allowing negligence claims regarding climate change could compromise the effectiveness of the *Climate Change Response Act 2002* (CCRA).<sup>3</sup>

However, the NZHC refused to strike out the claim based on the novel duty of care that would require the defendants to “cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and the adverse effects of climate change”.<sup>4</sup> Without deciding the substantive issue, the NZHC observed:

It was common ground that the law, on appropriate occasion, evolves, and that the common law is an important source of law. It is capable of creating new principles and causes of action, and from time to time does so – for example, a new tort of intrusion into seclusion has recently been recognised in New Zealand. The common law however proceeds through the methodological consideration of the law that has been applied in the past and the use of analogy. The common law method brings stability, but it can also allow for the injection of new ideas and for the creation of new responses as required.<sup>5</sup>

For example, the NZHC noted that the special damage rule from public nuisance could be adapted to provide a potential remedy for such novel claims, or that modelling techniques may develop to map the adverse effects of particular GHG emissions.<sup>6</sup> The importance of the NZHC strike out application decision in *Smith* is the acceptance of the latest scientific consensus from the Intergovernmental Panel on Climate Change and the recognition (based on the extrajudicial writing of Winkelmann CJ, and Glazebrook and France JJ)<sup>7</sup> that the common law may need to look at existing litigation frameworks “from different angles” because “climate change issues require a rapid response”.<sup>8</sup> The substantive judgment in *Smith* has not yet been given by the NZHC at the time of writing.

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<sup>3</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [67]-[69], [82], [93]-[96], [98].

<sup>4</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15] and [103].

<sup>5</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [101].

<sup>6</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [15], [98], [102]-[103].

<sup>7</sup> Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand, “Climate Change and the Law” (paper presented to Asia Pacific Judicial Colloquium, Singapore, May 2019), [131]-[136].

<sup>8</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [27]-[31], [55], [103].

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## *Climate declarations*

In *Hauraki Coromandel Climate Action v Thames-Coromandel District Council*,<sup>9</sup> the NZHC quashed the decision by the Council not to approve the signing of the Local Government Leader's Climate Change Declaration by the Mayor on the grounds that the decision was inconsistent with the consultation and decision-making requirements in the *Local Government Act 2002*<sup>10</sup> (LGA) and the significance and engagement policy adopted by the Council.

The NZHC decision in *Hauraki Coromandel Climate Action* is significant because (like the NZHC decision in *Thomson v Minister for Climate Change Issues*)<sup>11</sup> it accepted the scientific consensus about climate change generally and the likely impacts on the Thames-Coromandel district in particular, because it confirmed the public interest in local authority decisions pertaining to climate change being amenable to judicial review, and more significantly because it established a link between protecting the lives and welfare of people from the effects of climate change and fundamental human rights.

For example, in relation to the reviewability of the decision, Palmer J stated:

The evidence, including the Council's own documents, establishes that the potential and likely effects of climate change, and the measures required to mitigate those effects, are of the highest public importance. As the Declaration states, they are likely to implicate a wide range of dimensions of social, economic and environmental well-being in the district. The decision could have legal implications. But even if it did not, the political and policy issues for the Council are of the highest order. The existence of a policy dimension to a decision does not immunise it from judicial review, as *Thomson v Minister for Climate Change Issues* held in relation to climate change. Rather, the reverse. There is a strong public interest in decision-making by the Council on such issues being subject to judicial review. Given the nature, effects and significance of the decision, it is reviewable.<sup>12</sup>

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<sup>9</sup> *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228.

<sup>10</sup> LGA, s 14, s 76, s 77, s 78, s 79, s 80, s 82.

<sup>11</sup> *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160.

<sup>12</sup> *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [40].

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When addressing the question of the appropriate level of intensity of review in relation to whether the decision by the Council not to approve the signing of the Declaration by the Mayor was unreasonable, Palmer J established an important link between protecting the lives and welfare of people from the effects of climate change and fundamental human rights based on comparative legal analysis of the decision of The Netherlands Supreme Court in *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*.<sup>13</sup> Palmer J stated:

There is no doubt that climate change gives rise to vitally important environmental, economic, social, cultural and political issues in 2020. It can also give rise to important legal issues. In *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, the Supreme Court of the Netherlands examined the obligations imposed on states by articles 2 and 8 of the European Convention on Human Rights regarding the right to life and the right to private and family life. It held that climate change threatens human rights. It held those human rights, in conjunction with the United Nations Framework Convention on Climate Change, oblige the Netherlands to reduce greenhouse gas emissions in its territory in proportion to its share of responsibility because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands. Here ... the inhabitants and environment in the Thames-Coromandel District, and the cost of Council infrastructure, are likely to be significantly impacted by the effects of anthropogenic climate change.<sup>14</sup>

Palmer J therefore concluded:

I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental rights. Depending on their context, decisions about climate change deserve heightened scrutiny. That is so here.<sup>15</sup>

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<sup>13</sup> *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, ECLI:NL:HR:2019:2007.

<sup>14</sup> *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [50].

<sup>15</sup> *Hauraki Coromandel Climate Action v Thames-Coromandel District Council* [2020] NZHC 3228 at [51].

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## Legislative amendments and climate change

The *Resource Management Amendment Act 2020* attempted to reform the law relating to climate change by repealing previous amendments to the *Resource Management Act 1991* (RMA) that (inter alia) precluded local authorities from having regard to the effects of GHG discharges on climate change when deciding applications for discharge permits.<sup>16</sup> While these amendments will enable interested members of the public (when consent applications are publicly notified) to make submissions about non-renewable energy developments arguing that such applications should be declined or that GHG discharges should be mitigated by planting forest sinks,<sup>17</sup> climate change mitigation will remain piecemeal as a result of the focus on specific projects. More importantly, these amendments will be unlikely to influence government policy on climate change mitigation because the *Climate Change Response (Zero Carbon) Amendment Act 2019* reversed the High Court decision in *Thomson* (noted above) by providing that any failure to meet GHG emissions reduction targets or budgets is merely a permissive consideration that decision-makers are free to ignore “if they think fit”, and by restricting judicial review by limiting public law remedies to the discretion to make declarations only, thereby precluding the Senior Courts from making any of the prerogative orders (e.g. mandamus).<sup>18</sup>

Most recently, the *COVID-19 Recovery (Fast-track Consenting) Act 2020* that is designed to urgently promote employment, support recovery from the economic and social impacts of COVID-19, and support investment certainty across New Zealand, provides for consent applications for nominated projects to be decided by expert consenting panels appointed by the Minister for the Environment and limits appeals by providing for appeals to the High Court and beyond that to the Court of Appeal on questions of law only (bypassing the specialist Environment Court). These appeals are “final” and appeal to the Supreme Court is precluded. While judicial review is preserved, any application for judicial review must be lodged concurrently with any statutory appeal, unless the High Court grants leave for the proceedings to be lodged separately.

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<sup>16</sup> RMA, s 104E inserted by the *Resource Management (Energy and Climate Change) Amendment Act 2004*, s 7.

<sup>17</sup> *Resource Management Amendment Act 2020*, s 35 in force by Order in Council made between 31 December 2021 and 30 November 2022.

<sup>18</sup> CCRA, s 5ZM and s 5ZN inserted by *Climate Change Response (Zero Carbon) Amendment Act 2019*, s 8.

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## *Eroding the rule of law?*

The Senior Courts in New Zealand have adopted a consistent approach to privative or ouster clauses following the Court of Appeal decision in *Bulk Gas Users Group v Attorney General*<sup>19</sup> where the Court (when dealing with an exclusive alternative remedy provision) held that ouster clauses only protect decisions on questions of law that the relevant statute allows the decision-maker to decide “conclusively”. This approach applies to both inferior courts and tribunals, and has effectively deprived ouster clauses of any practical effect. The approach in *Bulk Gas* is also strengthened by the *New Zealand Bill of Rights Act 1990* (NZBORA) that affirms the right to judicial review, and that requires that statutory provisions should be interpreted in a way that is consistent with the rights and freedoms affirmed by the NZBORA.<sup>20</sup> Effectively, the NZBORA requires ouster clauses to be interpreted as permitting judicial review, unless the only meaning that could be given to the relevant statutory provision is one that excludes judicial review.

Various types of ouster clauses are found in New Zealand statute law, including, limitation of the scope of review clauses (e.g. *Climate Change Response (Zero Carbon) Amendment Act 2019*) and finality clauses (e.g. *Resource Management Amendment Act 2020* and *COVID-19 Recovery (Fast-track Consenting) Act 2020*). Limitations on the scope of review appear to be justified on the basis that an effective public law remedy is available, but it is unclear how the restrictions on relevant considerations and remedies in the *Climate Change Response (Zero Carbon) Amendment Act 2019* could be “demonstrably justified in a free and democratic society”.<sup>21</sup> It is also for note that, following *Bulk Gas*, finality clauses do not prevent judicial review for any error of law, within or without jurisdiction.

Restricted appeal rights are, however, problematic because an appeal against a decision of the High Court is necessary before an application for judicial review can be heard by the Supreme Court, and because it remains unclear whether the provisions in the *COVID-19 Recovery (Fast-track Consenting) Act 2020* are intended to oust the jurisdiction of the Supreme Court completely. It is therefore likely that these provisions will be tested before the Senior Courts, and that such litigation

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<sup>19</sup> *Bulk Gas Users Group v Attorney General* [1983] NZLR 129.

<sup>20</sup> NZBORA, s 6.

<sup>21</sup> NZBORA, s 5.

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could expose political fault lines between the government and the courts (similar to *R (Miller) v Prime Minister*)<sup>22</sup> that should preferably be avoided.

Putting aside the need to justify prohibiting a statutory right of appeal to the Supreme Court, it is unclear whether the right to judicial review could be constrained in the same way. For example, the majority of the United Kingdom Supreme Court (UKSC) in *R (Privacy International) v Investigatory Powers Tribunal*<sup>23</sup> expressed doubt as to whether Parliament could oust the judicial review jurisdiction of apex courts. Beyond that, the UKSC majority in *Privacy International* also drew attention to the practical difficulty inherent in any attempt to craft an ouster clause that could effectively prohibit an apex court from exercising inherent judicial review jurisdiction. Viewed in this way, prohibiting statutory rights of appeal to the Supreme Court would likely be pyrrhic, because the Court's inherent judicial review jurisdiction would remain intact.

#### *RMA review*

The report of the Resource Management Review Panel, *New Directions for Resource Management in New Zealand*<sup>24</sup> also noted that New Zealand is already experiencing the impact of climate change but found that the current legislative framework under the RMA and the CCRA does not in reality focus on reducing GHG emissions or addressing increased natural hazard risks resulting from climate in a coherent or consistent way. The report therefore recommended that regional planning under the RMA should play a part in reducing GHG emissions and managed coastal retreat.<sup>25</sup> These recommendations are consistent with the reforms under the *Resource Management Amendment Act 2020* (noted above).

#### **Climate change emergency**

Most recently, the New Zealand Parliament declared a climate change emergency on 2 December 2020 that emphasises the steps taken to date by the New Zealand Government to address climate change mitigation and reduce GHG emissions across all sectors of the economy, and introduces a

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<sup>22</sup> *R (Miller) v Prime Minister* [2019] UKSC 41.

<sup>23</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

<sup>24</sup> Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (Wellington, 2020).

<sup>25</sup> Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (Wellington, 2020), 191.

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new commitment to “show leadership and demonstrate what is possible to other sectors of the New Zealand economy by reducing the Government’s own emissions and becoming a carbon-neutral Government by 2025”.<sup>26</sup> This will be achieved through building management and public procurement by applying the NABERSNZ scheme adapted by the Energy Efficiency and Conservation Authority (EECA) and the New Zealand Green Building Council (NZGBC) from the National Australian Building Environmental Rating System (NABERS) in 2013 to all buildings over 2,000 square metres in floor area owned or leased by New Zealand Government Departments and Departmental Agencies, the New Zealand Defence Force, the New Zealand Police, and 25 Crown Entities. This will include minimum requirements to meet a 4-star rating when entering into new building leases and a 5-star rating when commissioning new buildings. These organisations will also be required to phase out coal boilers, purchase electric vehicles where practicable, and reduce their vehicle fleet size. Additionally, these organisations together with 16 Crown Entity subsidiaries, 2,416 School Boards of Trustees, and 8 Universities will be required to measure, verify and report on their GHG emissions. In particular, this will entail setting gross GHG emissions reduction targets, introducing work plans to reduce their emissions, and offsetting their emissions to achieve carbon neutrality.<sup>27</sup>

While these are real commitments for the public sector, they will only have a persuasive effect on other sectors of the New Zealand economy. But the lessons from COVID-19 lockdowns have demonstrated (as noted by Gerd Winter) that “in urgent situations society is much more prepared than assumed to accept strict regulation entailing deep interferences with basic personal and economic rights”.<sup>28</sup> This observation is important in light of the findings by the Oxford Smith School of Enterprise and the Environment on the effect of COVID-19 economic recovery packages on climate change, that annual GHG emissions reductions (7.6 per cent per year) similar to those experienced

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<sup>26</sup>Notice of motion, House of Representatives, Order Paper, 2 December 2020, 9.

<sup>27</sup> Media Release by Rt Hon Jacinda Ardern, Prime Minister; Hon James Shaw, Minister for Climate Change; and Hon Stuart Nash, Minister for Economic and Regional Development, 2 December 2020; Table of Organisations included in the Carbon Neutral Government Programme <Beehive.govt.nz>

<sup>28</sup> Gerd Winter, “Lessons of the Corona pandemic learning for environmental policy” (The 2020 Journal of Environmental Law Workshop, Environmental Law in the Time of COVID, Webinar, 25 November 2020).

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during lockdowns will be required each year during 2021-2030 to prevent global temperature rise above 1.5°C.<sup>29</sup>

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<sup>29</sup> Cameron Hepburn, Brian O’Callaghan, Nicholas Stern, Joseph Stiglitz and Dimitri Zenghelis, *Will Covid-19 fiscal recovery packages accelerate or retard progress on climate change?* (Oxford Smith School of Enterprise and the Environment, Working Paper No 20-02, 8 May 2020), 5-6.

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## COUNTRY REPORT: NORWAY

### Developments in climate law and policy: Norway

*Dr. Christina Voigt and Sofie Van Canegem*

#### 1. Nationally Determined Contribution (NDC)

The Paris Agreement (PA) requires each state party to communicate a Nationally Determined Contribution (NDC) every five years (article 4, paragraphs 2 and 9 PA). The NDC will represent progression in comparison to the party's last NDC and reflect its highest possible ambition. In 2020, Parties were requested to communicate a new or updated NDC.<sup>1</sup> Until now, 190 Parties to the PA have submitted their first NDC and 8 parties, among which Norway, have submitted their second and/or updated first NDC to the UNFCCC Secretariat.<sup>2</sup>

In its first NDC, Norway aimed for at least 40% greenhouse gas (GHG) emission reduction compared to 1990 levels by 2030.<sup>3</sup> Norway established the target by law in the 2017 Climate Change Act.<sup>4</sup> The Act moreover includes Norway's long-term goal of becoming a low-emission society by 2050 (Section 4). It more specifically targets a GHG emission reduction of 80% up to 95% below 1990 levels. In its updated NDC of 7 February 2020, Norway strengthened its target to reduce GHG emissions by at least 50% and up to 55% compared to 1990 levels by 2030.<sup>5</sup> The target is economy-wide and covers all sectors and GHGs.

To fulfil the NDC targets, Norway, the European Union and Iceland formally agreed in 2019 to extend their climate cooperation for the 2021-2030 period.<sup>6</sup> The parties agreed to reduce GHG

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<sup>1</sup> Parties with an initial INDC with a 5 year timeframe were requested to communicate in 2020 a new NDC, while Parties with a 10 year time frame (like Norway) were requested to communicate an updated NDC. See Decision 1/CP.21, paragraphs 23 and 24.

<sup>2</sup> NDC Registry (interim) 2021. "All NDCs." Accessed January 29, 2021.

<https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>.

<sup>3</sup> Norway's First NDC was communicated simultaneously with the ratification of the Paris Agreement (and corresponds to Norway's INDC) on 20 June 2016:

[https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/NorwayINDC%20\(Archived\).pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/NorwayINDC%20(Archived).pdf)

<sup>4</sup> Act relating to Norway's climate targets (Climate Change Act), LOV-2017-06-16-60, Ministry of Climate and Environment. Into force from 1 January 2018 according to the Royal Decree of 16 June 2017 No. 790.

<sup>5</sup> "Update of Norway's nationally determined contribution."

[https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/Norway\\_updatedNDC\\_2020%20\(Updated%20submission\).pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/Norway_updatedNDC_2020%20(Updated%20submission).pdf)

<sup>6</sup> Decision of the EEA Joint Committee No 269/2019 of 25 October 2019, amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms. <https://ec.europa.eu/clima/sites/clima/files/news/20191025.pdf>

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emissions by at least 40% compared to 1990 levels by 2030. In case Norway's updated target would exceed the renewed target of the EU, Norway would use voluntary cooperation under article 6 PA for the excess. In the meantime, the EU has submitted its update on its first NDC, committing the EU and its member states to a binding target of "*a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990.*" Requiring at least 55% GHG emission reductions and covering the same gases and sectors as Norway's updated NDC, the EU target exceeds Norway's updated target, rendering Norway's reliance on cooperative approaches unnecessary.

The climate cooperation between Norway and the EU led to Norway's implementation of EU climate legislation, which consists of three legislation pieces that cover all sectors and GHGs. First, the EU Emission Trading System (ETS) regulates emissions from industrial plants and power plants, the petroleum industry and commercial aviation within the European Economic Area. It covers approximately half of the Norwegian GHG emissions. Second, the Efforts Sharing Regulation (ESR) manages the emissions from industry and petroleum that are not covered by the ETS and emissions from the transport, agriculture, waste management and building sectors. It sets binding national targets with Norway aiming to reduce emissions from the non-ETS-sectors by 40% compared to 2005 levels by 2030. Lastly, the Land Use, Land-Use Change and Forestry Regulation (LULUCF) regulates emissions and removals from the LULUCF sector. Under its LULUCF ambitions, Norway ensures that emissions do not exceed removals in this sector.

Norway claims that its climate targets and policies are developed in accordance with the best available science, such as the Intergovernmental Panel on Climate Change's fifth Assessment Report<sup>7</sup> and Special Report on 1.5 degrees warming<sup>8</sup>. Economic measures such as CO<sub>2</sub>-taxes and emission trading, as well as support for the development and adoption of low emission technologies, like Carbon Capture and Storage (CCS) technologies, renewable energy policies and electric vehicles are central to Norway's climate policy.

Regarding public participation in the decision-making process of environmental-related matters, Norway refers to its Environmental Information Act which implements the 1998 Convention on access to information, public participation in decision-making and access to justice in environmental

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<sup>7</sup> IPCC. 2014. *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. IPCC, Geneva, Switzerland, 151 pp.

<sup>8</sup> IPCC. 2018. *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, IPCC, Geneva, Switzerland.

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matters (Aarhus Convention). It moreover deems the consultation process between the national government and the Sámi parliament crucial to ensure the international law rights of the Sámi to participate in decision-making processes that may affect them.

Although Norway claims its NDC to be ambitious and fair, the Climate Action Tracker scores Norway's updated NDC as insufficient.<sup>9</sup> For instance, whereas the Climate Change Act contained the long-term goal to reduce GHG emissions by 2050, the updated NDC merely reiterates the aim to transform to a low-emission society by 2050 without restating or enhancing the specific GHG emission reduction target for that period.

## **2. Climate case “People v. Arctic Oil”**

In 2016, Greenpeace Nordic Association and Nature and Youth initiated the Norwegian climate case, “People v. Arctic Oil”.<sup>10</sup> They challenged the validity of 13 petroleum exploration licenses on the Norwegian continental shelf in the Barents Sea, which the Norwegian State granted to oil and gas companies in the 23<sup>rd</sup> licensing round in 2016. The claimants' argument was that exploration of new oil and gas resources, if found and extracted, would cause more GHG emissions and would contradict Norway's commitments under the PA.

The environmental organisations claimed that the awarded licenses violate the human right to life and the right to respect for private and family life, as enshrined in articles 2 and 8 of the European Convention on Human Rights (ECHR) and in articles 93 and 102 of the Norwegian Constitution. They furthermore claimed that the licenses violate the right to a healthy environment, as stated in article 112 of the Constitution and are a violation of article 3.1 of the Petroleum Act, which describes the duty to carry out an environmental impact assessment when opening new areas. The claimants additionally drew on, among others, the Urgenda case of the Netherlands.

In January 2018 and 2020, Oslo District Court and Bogarting Court of Appeal respectively dismissed the claims and rendered the awarded licenses valid. Later that year, the Supreme Court took up the case in plenary session and rejected the appeal with a majority of 11 judges. 4 judges dissented and deemed the licenses invalid.

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<sup>9</sup> Climate Action Tracker. 2020. "Norway." Accessed January 29, 2021, <https://climateactiontracker.org/countries/norway/>

<sup>10</sup> *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy* Case no. 16-166674TVI-OTIR/06 January 4, 2018 (Oslo District Court); Case no. 18-060499ASD-BORG/03 January 23, 2020 (Court of Appeal); Case no. 20-051052SIV-HRET December 22, 2020 (Supreme Court).

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Article 112, originally Article 110b, was included in the Constitution in 2014 and tested before court for the first time in the climate case. Article 112, §1 entails the right to a healthy environment and states that “*natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.*” The second paragraph includes the right to information on “*the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.*” The third paragraph requires the state authorities to take measures to implement these principles.

On the one hand, the Supreme Court unanimously found that article 112 on “environment” also covers climate change and combustion emissions; an argument that the Advocate General had rejected. Article 112 gives rights to individuals and imposes a positive duty on the government to refrain from environmentally destructive activities. On the other hand, the Supreme Court deemed it is up to the state authorities, rather than the courts, to decide upon the implementation of environmental measures. The courts may apply article 112 in cases concerning environmental problems in which the legislator has not taken a position or gravely neglected its duty under article 112, paragraph 3. The Court hereby sets a very high threshold for courts to set aside legislative and other decisions that the parliament has taken or has consented on based upon article 112. If the parliament was not involved in the decision-making, the threshold is lower. Moreover, in its assessment of article 112, the Court did not mention the precautionary principle or future generations. According to the Supreme Court, the granted licenses did not violate the right to life and the right to respect for private and family life as enshrined in the ECHR and in the Constitution. Whether and to which extent the decision to grant oil production licenses will lead to GHG emissions, is too uncertain to constitute a “real and immediate” threat to the aforementioned rights. Hence, the decision does not violate the rights. The Court furthermore found that the Urgenda case, in which the Dutch Supreme Court ruled that the Netherlands must reduce its GHG emissions by 25% compared with 1990 by 2020, had little transferable value to the case at hand.

The dissenting opinion drafted by Judge Weber and supported by three other judges concerns procedural errors made in the administrative process to grant the licenses and open the Barents Sea for oil companies.<sup>11</sup> Following the Petroleum Act, Petroleum Regulations and the EU Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the

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<sup>11</sup> *Greenpeace Nordic Ass’n and Nature and Youth v. Ministry of Petroleum and Energy* Case no. 20-051052SIV-HRET December 22, 2020 (Supreme Court) (Webster, B. dissenting).

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effects of certain plans and programmes on the environment, both production and combustion GHG emissions must be covered by the environmental impact assessment. That possible future GHG combustion emissions were not evaluated in the environmental impact assessment that was used for the decision constitutes a procedural error. Nonetheless, this in itself does not render the licenses invalid. The requirement for an environmental impact assessment under the Petroleum Regulations must be seen in light of article 112 of the Constitution. To ensure that people can protect their right to a healthy environment under the first paragraph, the second paragraph ensures the right to information of effects of planned infringements on nature. In light hereof and of Norway's international obligations under the EU Directive 2001/42/EC, Judge Weber rendered the decision to grant petroleum production licenses invalid.

### **3. Climate Plan/Klimameldingen**

On 8 January 2021, the Norwegian Government presented its Climate Plan for 2021-2030.<sup>12</sup> The Plan describes how the Norwegian emission reduction targets for 2030 will be achieved and the Norwegian society transitioned to a low-carbon society. The Plan involves ETS and non-ETS emissions, as well as CO<sub>2</sub> emissions and removals in the LULUCF sector. The Plan contains sector-specific emission targets and the measures needed to achieve these targets. The Plan's primary policy instruments are GHG emission taxation, regulatory measures, climate-related conditions in the public procurement processes, providing information on climate-friendly options and financially supporting the development of new technology and initiatives to encourage research and innovation.

In accordance with the polluter pays principle, the Plan states that the CO<sub>2</sub> tax will gradually increase over all sectors, raising from 590 NOK to 2,000 NOK per tonne by 2030. This includes the oil and gas industry and will lead to higher fuel costs, being an incentive to phase out fossil fuels. Since the government does not wish to increase the overall taxation level, any CO<sub>2</sub> tax increase will be offset by corresponding tax reductions.

Fossil fuel use for energy purposes in industries outside the ETS system will be phased out by 2030. Gas usage for temporary building heating and drying will be phased out by 2025. On the contrary,

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<sup>12</sup> Det Kongelige Klima- og Miljødepartementet, *Klimaplan for 2021-2030*, Meld.St.13 (2020-2021)

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biofuels for road traffic will be maintained to assure emission cuts from fossil fuel vehicles in use. From 2022, biofuel quota obligations will be introduced for off-road diesel and fuel for shipping. Car taxes and other measures, such as benefits from the Norwegian government enterprise Enova<sup>13</sup>, will continue to accelerate the phase-in of zero-emission cars. Public authority purchases will be restricted to zero-emission passenger cars and light vans from 2022 onwards and zero-emission city buses from 2025. Exceptions may be given to for instance purchases of emergency vehicles. Additionally, low- or zero-emission ferries and high-speed passenger vessel services will be required from 2023 and 2025 onwards where feasible. Furthermore, zero or low-emission service vessels will be gradually phased in from 2024. To maintain the incentives to choose zero-emission vehicles, vehicle taxes and other policy instruments will be designed. In 2019, the government and agricultural organisations agreed upon a letter of intent to reduce GHG emissions from and to increase the uptake of carbon equivalents in agriculture. In the upcoming years, the agreement will form the basis of the government's climate work in the sector.

#### **4. Other aspects**

With regards to the Government Pension Fund Global, also known as the Oil Fund, the government updated the criterion for product-based observation and exclusion of companies, as enshrined in article 2 of the Guidelines for observation and exclusion from the Government Pension Fund Global in 2019.<sup>14</sup> Paragraph 2 states that a mining company and power producer which either (a) receive 30% or more of its income from thermal coal, (b) base 30% or more of its activities on thermal coal, (c) extract more than 20 million tonnes of thermal coal per year or (d) has a power capacity of more than 10,000 MW of power from thermal coal, can be excluded or observed. When assessing the companies, their future plans are taken into account, for instance plans that reduce the income from or extraction of thermal coal or increase the income from renewable energy. The Executive Board of the Norwegian Bank applied the new threshold for the first time in 2020, deciding that five

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<sup>13</sup> Enova is a government enterprise that is responsible for the promotion of environmentally friendly energy production and consumption. In order to increase Enova's contribution towards Norway's non-ETS emission reduction commitment, as well as towards Norway's aim to transition to a low-emission society, the Climate Plan grants Enova a clearer climate profile.

<sup>14</sup> Finansdepartementet, *Vedtak om endring i retningslinjer for observasjon og utelukkelse fra Statens pensjonsfond utland.*

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companies must be excluded from the Government Pension Fund Global and four companies put up for observation.<sup>15</sup>

On the contrary, in response to covid-19, the government created an economic recovery package, containing tax relief for oil and gas companies.<sup>16</sup> This could lead to more oil and gas extraction. For instance, due to covid-19, oil company Aker BP stopped building the Hod-platform, yet resumed the building activities thanks to the economic recovery package.<sup>17</sup> Additionally, the aviation industry received economic support without requiring an improvement of the industry's climate impact.

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<sup>15</sup> The excluded companies are: Sasol Ltd, RWE AG, Glencore PLC, AGL Energy Ltd and Anglo American PLC. The companies placed under observation are: BHP Group Ltd/BHP Group Plc, Vistra Energy Corp, Enel SpA and Uniper SE. Cf. Norges Bank Investment Management. 2020. "Utelukkelse og observasjon av kullselskaper." Accessed February 2, 2021. <https://www.nbim.no/no/oljefondet/nyheter/2020/utelukkelse-og-observasjon-av-kullselskaper/>

<sup>16</sup> Ministry of Finance. 2020. "Economic measures in Norway in response to Covid-19." *Government.no*. Accessed February 2, 2021. <https://www.regjeringen.no/en/topics/the-economy/economic-policy/economic-measures-in-norway-in-response-to-covid-19/id2703484/>

<sup>17</sup> Kleven, Rita. 2020. "Aker BP avventer utbygging på Hodfeltet – mener redningspakke ikke er god nok." *NRK*. Accessed February 2, 2021. <https://www.nrk.no/trondelag/aker-bp-avventer-utbygging-pa-hodfeltet-mener-redningspakke-ikke-er-god-nok-1.15016489>; Sørenes, Kjetil Magne *et al.* 2020. "Oljepakken koster skattebetalerne åtte milliarder kroner." *Aftenposten*. Accessed February 2, 2021. <https://www.aftenposten.no/norge/politikk/i/qLjWGo/oljepakken-koster-skattebetalerne-aatte-milliarder-kroner>.

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## COUNTRY REPORT: UNITED STATES

### **President Biden Moves Swiftly to Reverse Trump Administration's Relentless Rollbacks of Environmental Regulations**

*Robert V. Percival*

#### **Introduction**

In his final year in office President Donald Trump continued his relentless campaign to roll back federal environmental regulations and to encourage greater production and use of fossil fuels. But after taking office on January 20, 2021, President Biden quickly issued several executive orders to countermand the Trump rollbacks. He rejoined the Paris Climate Agreement, canceled the Keystone XL Pipeline, and directed federal agencies to reconsider the more than 100 Trump administration actions to relax or repeal environmental regulations during the previous four years. Pledging “to deliver a whole-of-government approach to the climate crisis,” President Biden created a White House Office of Domestic Climate Policy led by former EPA Administrator Gina McCarthy as well as a National Climate Task Force to coordinate government action. He also has placed unprecedented emphasis on promoting environmental justice.

#### **Air Pollution and Climate Change**

##### *EPA Regulation of GHG Emissions from Power Plants*

In 2019, the Trump administration EPA repealed the Obama administration's “Clean Power Plan” (CPP), which had been projected to reduce greenhouse gas (GHG) emissions from existing power plants by 32 percent over 2005 levels by 2030 due largely to phasing out coal-fired power plants. The CPP, promulgated in 2015, 80 Fed. Reg. 64,662 (2015), was replaced by the Affordable Clean Energy (ACE) Rule, 84 Fed. Reg. 32,520 (2019), that largely left emissions reductions up to the states. The Trump EPA concluded that the CPP was illegal and had to be repealed because the “best system of emission reduction” mandated by §111 of the Clean Air Act (CAA) only allowed measures that individual power plants could implement themselves and not generation-shifting measures prioritizing the use of the cleanest energy sources. On January 19, 2021, the U.S. Court of Appeals for the D.C. Circuit ruled that the ACE Rule and the repeal of the CPP were illegal because they

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fundamentally misconstrued §111 of the Clean Power Plan and were arbitrary and capricious. *American Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). The court confirmed that the Clean Air Act does authorize EPA to issue generation-shifting regulations like the CPP. It rejected claims that EPA had to make individual significant contribution findings (SCFs) before it could regulate each source of GHG emissions. Thus, the court vacated the ACE Rule and remanded it to EPA, providing a clean slate for the Biden administration to issue new regulations controlling GHG emission from power plants. President Biden has pledged to make the power sector carbon neutral by 2035 and the entire US economy by 2050.

#### *New Source Performance Standard for Stationary Sources of GHG*

A week before President Trump left office, EPA promulgated a last minute regulation designed to restrict the agency’s ability to regulate GHG emissions from new or modified stationary sources in the future. EPA ruled that no industrial category of sources could be regulated with a new source performance standard for GHG emissions unless it contributed more than 3 percent of U.S. GHG emissions. This rule, which the Biden administration has acted to block from taking effect, would make it impossible to regulate GHG emissions from oil and gas production and processing facilities and industrial boilers. 86 Fed. Reg. 2542 (2021). On April 5, 2021, this rule was vacated by the US Court of Appeals for the DC Circuit at the request of the Biden administration.

#### *Reconsideration of Fuel Economy Standards*

One of the signature environmental initiatives of the Obama administration was a substantial strengthening of corporate average fuel economy (CAFÉ) standards. In August 2012 EPA and the National Highway Transportation Safety Administration (NHTSA) adopted regulations requiring new cars and light-duty trucks to meet an average of 54.5 miles per gallon (mpg) by model year 2025. This was designed to achieve a substantial reduction in GHG emissions to help meet the US pledge in the Paris Agreement. After performing a midterm evaluation (MTE) of the feasibility of meeting the new standard, outgoing EPA Administrator Gina McCarthy reaffirmed the 54.5 mpg goal for 2025 on 12 January 2017, eight days before the Trump administration took office.

In 2018 President Trump’s EPA withdrew the MTE and replaced it with a new determination indicating that the standards should be relaxed. 83 Fed. Reg. 16,077 (2018). In April 2020 EPA and

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the National Highway Traffic Safety Administration (NHTSA) promulgated what they called the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule. 85 Fed. Reg. 24174 (2020). The rule first rescinded California's waiver to set its own, more stringent emissions standards and it then set less-stringent national fuel economy standards. A coalition of environmental groups and state governments are challenging the rule in the U.S. Court of Appeals for the D.C. Circuit.

Because Trump political appointees at EPA sidelined the agency's technical staff, the analysis supporting the final rule is widely believed to be riddled with errors, including basic mathematical ones. BMW, Ford, Volkswagen and Honda signed an agreement with California, agreeing to abide by California's stricter standards. In November 2020 General Motors announced that it no longer would support the Trump rules and that it now supports California. On his first day in office, President Biden signed Executive Order 13990, 86 Fed. Reg. 7037 (2021), directing EPA and NHTSA to consider "whether to propose suspending, revising or rescinding" the California waiver denial and preemption by April 2021, and the national fuel economy standards by July 2021. The agencies have asked the DC Circuit to postpone scheduling oral argument on legal challenges to the Trump administration rules.

### *Climate Change Litigation*

In November 2016 a federal district court in Oregon rejected a motion to dismiss a "future generations" climate change lawsuit against the U.S. government. *Juliana v. U.S.*, 217 F.Supp.3d 1224 (D. Ore. 2016). The plaintiffs, who include 21 people between the ages of eight and nineteen, alleged that the federal government violated their substantive due process rights and its public trust obligations by failing to protect them from the adverse effects of climate change. After the U.S. Supreme Court intervened to prevent the case from going to trial in October 2018, an interlocutory appeal of the denial of the motion to dismiss was argued before the Ninth Circuit in June 2019. In January 2019, a divided panel of the Ninth Circuit, despite acknowledging the extreme seriousness of the climate change problem, held that the plaintiffs did not have standing because they had not made a claim that the judiciary was capable of redressing. *Juliana v. United States*, 947 F.3d 1159 (9<sup>th</sup> Cir. 2020). The two judges in the majority stated that courts were not capable of fashioning effective remedies for climate change, which must be left to Congress and the executive branch of government. The *Juliana* plaintiffs then petitioned the Ninth Circuit for a rehearing *en banc*. After taking an unusually long time to respond, the court denied the petition on February 10, 2021. Fearing

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that review by a highly conservative Supreme Court could invite a decision catastrophic to future climate litigation, the *Juliana* plaintiffs on remand are seeking leave to amend their complaint to seek only symbolic declaratory judgment that the government needs to ensure a healthy climate in the future.

More than 20 lawsuits have been brought against oil companies in state courts by cities, counties and states to recover damages caused by climate change using state tort law. The plaintiffs claim that the oil companies engaged in consumer fraud by denying that their products contributed to climate change and funding climate denialists. The companies' efforts to remove the cases to federal court have been almost uniformly rejected, but the US Supreme Court agreed to hear one of the appeals in *BP PLC v. Mayor and City of Baltimore*. Before the Supreme Court, the companies and the Trump administration maintained that the cases belonged exclusively in federal court and should be dismissed. However, based on the January 19, 2021 oral argument, the Court seems unlikely to make such a broad holding because it is seeking only to resolve a split among the federal appellate courts over what appellate courts may consider when reviewing remand decisions by federal district courts.

## **Protection of Water Quality**

### *“Waters of the United States” and “Navigable Waters Protection” Rules*

In May 2015, the EPA issued a final rule clarifying its interpretation of the meaning of ‘waters of the United States,’ (WOTUS) the jurisdictional trigger for federal regulation under the CWA. The WOTUS rule was a response to the Supreme Court’s sharply divided ruling (four to one to four) in *Rapanos v United States* (547 US 715 (2006)). In response to President Trump’s Executive Order 13778, the WOTUS rule was repealed on October 22, 2019. On January 23, 2020 the Trump administration announced a narrower Navigable Waters Protection Rule (NWPR), which was published in the Federal Register on April 21, 2020. 85 Fed. Reg. 22250 (2020). The rule lists four categories of waters that may be federally regulated: (1) territorial seas and traditional navigable waters, (2) perennial and intermittent tributaries, (3) certain lakes, ponds, and impoundments, and (4) wetlands that are adjacent to jurisdictional waters. The NWPR also lists 12 categories of exclusions that will not be considered waters of the U.S. “such as features that only contain water in direct response to rainfall (e.g., ephemeral features); groundwater; many ditches; prior converted cropland; and waste treatment systems. Importantly, the NWPR defines “adjacent wetlands” as wetlands that

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are “meaningfully connected to other jurisdictional waters, for example, by directly abutting or having regular surface water communication with jurisdictional waters.” A coalition of 17 states and two cities are challenging the NWPR’s rollback of water standards in the United States District Court for the Northern District of California. President Biden has repealed Executive Order 13778 and directed EPA to reconsider the NWPR.

### *CWA Permit Requirements and Discharges that Pass through Groundwater*

In *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020), the U.S. Supreme Court rejected EPA’s argument that pollutant discharges that pass through groundwater before reaching waters subject to federal jurisdiction under the Clean Water Act (CWA) are exempt from permit requirements. Noting that EPA’s position could create a major loophole in the CWA’s comprehensive scheme to control water pollution, the Court held that if the discharge was the “functional equivalent” of a direct discharge to jurisdictional waters a permit was required. The Court articulated factors relevant for determining whether the “functional equivalent” test is met, including “(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.” It noted that “[t]ime and distance will be the most important factors in most cases, but not necessarily every case.”

## **Environmental Impact Assessment**

### *New CEQ NEPA Regulations*

In July 2020 the Council on Environmental Quality (CEQ) issued new regulations interpreting the National Environmental Policy Act (NEPA). The new regulations narrow the scope of “major Federal actions” that trigger preparation of environmental impact statements by carving out an exception to NEPA review for actions that have “minimal Federal funding or minimal Federal involvement.” The regulations seek to speed up environmental reviews and approvals for “major infrastructure projects” (defined to include those for which an agency has determined it will prepare an EIS) so that they will take no more than two years on average. The regulations also curtail evaluation of “cumulative” and “indirect” effects from proposed actions, implementing a single definition of

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“effects.” This new definition includes effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. Critics of this change worry that the failure to consider cumulative and indirect impacts will hinder efforts to incorporate climate-change concerns into NEPA review. The regulations specify that a “but-for” causal relationship between agency action and an outcome is not sufficient to establish “significant” effects. The updated regulations also state that remote effects should not be considered, nor effects that an agency has “no ability to prevent.”

## **Public Lands**

### *Alaska National Wildlife Refuge (ANWR) and Offshore Oil Leasing*

In pursuit of an “energy dominance” strategy, President Trump sought to expand dramatically oil drilling on public lands including millions of offshore acres of waters in the Atlantic and Arctic Oceans. In December 2017, President Trump signed legislation opening the Alaska National Wildlife Refuge (ANWR) to oil drilling as part of the Tax Cut and Jobs Act of 2017. After decades of gridlock, the bill passed the Senate by a vote of 51-48 under a “budget reconciliation” procedure. This avoided the need to obtain 60 votes to overcome a filibuster because it was projected that ANWR would produce \$1 billion in revenue from oil royalties, making it germane to the tax legislation to which it was attached. The need to conduct environmental reviews delayed the auction of leases to drill in ANWR until the last weeks of the Trump administration in January 2021. When the auction finally was conducted on January 6, 2021, only two small companies and Alaska’s state development agency placed winning bids for a combined total of \$14.4 million for only half the acreage offered for lease. Major oil companies declined to bid and six of the leading investment banks in the US pledged not to finance any drilling projects in ANWR.

Immediately upon taking office, President Biden imposed what he called a temporary “pause” on implementation of the Coastal Plain Oil and Gas Leasing Program in the Arctic National Wildlife Refuge pending legal and policy review. President Biden is strongly opposed to drilling in ANWR and has pledged to do whatever he legally can to block implementation of leases already issued by the Trump administration. Pursuant to section 12(a) of the Outer Continental Shelf Lands Act, the president also has restored President Obama’s withdrawal of certain offshore areas in Arctic waters and the Bering Sea from oil and gas drilling.

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### *Congress Enacts Historic Legislation to Fund and Protect Public Lands*

On August 4, 2020, President Trump signed into law the Great American Outdoors Act that provides permanent authorization for the Land and Water Conservation Fund (LWCF). The legislation passed both houses of Congress with broad bipartisan support. It provides \$900 million per year in annual funding for the LWCF that is used to make grants to state and local governments to improve and maintain public lands. The Act also creates the National Parks Public Lands Legacy Fund, a five-year trust fund to address the huge backlog of deferred maintenance projects at national parks and other public lands.

### *National Monuments*

President Trump sought to shrink the size of National Monuments created by President Obama, raising questions concerning the limits of presidential authority under the Antiquities Act. That Act allows the president to create protected areas on public lands without the enactment of legislation. Upon taking office, President Biden issued Executive Order 13,990, 86 Fed. Reg. 7037 (2021), which announced an “abiding commitment . . . to restore and expand our national treasures and monuments”. On January 27, 2021, President Biden issued Executive Order 14,008, 86 Fed. Reg. 7619, which promises “to put a new generation of Americans to work conserving our public lands and waters” and commits the nation to the goal of conserving at least 30 percent of public lands and oceans by the year 2030. It also directs the Secretary of Interior to develop a plan for creating a Civilian Climate Corps, modeled on the Civilian Conservation Corps used during the Great Depression.

## **Protection of Species**

### *Elimination of Criminal Penalties for Incidental Takes of Migratory Birds*

On January 10, 2017 the Obama administration’s outgoing Solicitor of Interior issued an opinion reaffirming long-standing policy that the “take” prohibition in the Migratory Bird Treaty Act (MBTA) criminalizes “incidental takes” of birds protected by the Act. Incidental takes occur when birds are killed by oil spills and other activities that do not intentionally and directly apply physical

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force to the birds. On December 22, 2017 the Trump administration’s Solicitor of Interior revoked the January 2017 opinion and issued a new opinion declaring that only affirmative actions intended to kill birds are prohibited by the MBTA. On April 11, 2020, a federal district court in New York vacated the Trump administration’s Solicitor’s opinion as contrary to the MBTA. Nevertheless, the Department of Interior adopted new regulations attempting to codify this policy in December 2020. In March 2021, the Biden administration rescinded the December 2017 Solicitor’s opinion and dropped the government’s appeal of the district court opinion holding that it violated the MBTA. The new administration has indicated that it will start the process of developing a new regulation that prohibits incidental takes of migratory birds.

### *Endangered Species Act Regulations*

On Sept. 26, 2019, revised regulations issued by the Trump administration for the Endangered Species Act went into effect. Prior to the changes, any species deemed threatened by the Fish and Wildlife Service would automatically receive the same protections against “takes” as an endangered species. Now, protection against “takes” for threatened species will be determined on a case-by-case basis. The changes remove language prohibiting the consideration of economic impacts from listing a species. The old regulations prohibited the consideration of economic impacts of listing a species as endangered; now, the government may factor economic impact into its analysis of whether a species should be protected. The changes also provide that habitat that is not currently occupied by an endangered species may not be listed as critical habitat of the species.

## **Environmental Enforcement**

### *COVID-Related Enforcement Suspension*

As the COVID-19 pandemic hit the U.S, on March 26, 2020, EPA announced that retroactive to March 13, it would not take enforcement action against facilities where COVID-related measures jeopardized compliance activities. The policy created a firestorm of opposition, particularly with revelations that COVID disproportionately afflicted people exposed to higher levels of pollution. EPA ended this policy on August 31, 2020. Data released in January 2021 showed that in federal fiscal year 2020 EPA had the lowest number of civil judicial environmental cases concluded and

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referred for prosecution in 20 years. Environmental Integrity Project, New EPA Enforcement Data Show Continued Downward Trend During Trump Administration (Jan. 14, 2021).

### *Elimination of Supplemental Environmental Projects*

On March 12, 2020, Jeffrey Bossert Clark, assistant attorney general for the U.S. Department of Justice’s Environment and Natural Resources Division, announced a new policy prohibiting EPA from including Supplemental Environmental Projects (SEPs) that benefit the environment in settlements of EPA enforcement actions. Despite widespread support for SEPs, Clark claimed that SEPs were illegal because they diverted away funds that ultimately belonged to the U.S. Treasury. On February 4, 2021, Deputy Assistant Attorney General Jean E. Williams formally withdrew the Clark memorandum barring SEPs. Citing President Biden’s Executive Order 13,990, Williams declared that the memorandum was “inconsistent with long-standing Division policy and practice” and “impede[d] the full exercise of enforcement discretion in the Division’s cases.”

## **EPA Budget**

### *EPA Budget*

In his first budget request to Congress in 2017, President Trump proposed to slash funding for EPA by 31% to \$5.7 billion, the deepest cut he proposed for any federal agency. Congress rejected this proposal and actually increased EPA’s budget every year until it reached \$9.057 in Fiscal Year 2020. The number of EPA employees declined from 15,400 employees at the start of the Trump administration (down from 17,000 at the start of the Obama administration in 2009) to 14,172 at the end of the administration.

## **International Environmental Law**

### *Paris Climate Agreement*

On June 1, 2017, President Trump announced that he intended to withdraw the US from the Paris Agreement on climate change. Under the terms of the Paris Agreement, the US had to wait three years from its entry into force before depositing instruments of withdrawal on 4 November 2019. Because parties then must wait one year before the withdrawal can become effective, the US withdrawal became effective on 4 November 2020, the day after Trump was defeated in the US

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presidential election. Within hours of becoming President on January 20, 2021, President Biden fulfilled a campaign pledge by announcing that the U.S. was rejoining the Paris Climate Accord. On February 19, 2021, after the 30-day waiting period for rejoining the agreement was completed, the U.S. once again became a party to the Paris agreement.

#### *US Foreign Policy to Prioritize Enhanced Climate Ambition*

On January 27, 2021, President Biden issued Executive Order 14,008, 86 Fed. Register 7619, declaring that “climate considerations shall be an essential element of United States foreign policy and national security.” The order pledges that “the United States will exercise its leadership to promote a significant increase in global climate ambition to meet the climate challenge.” President Biden appointed former Secretary of State John Kerry to serve as Special Presidential Envoy on Climate to press for “enhanced climate ambition and integration of climate considerations across a wide range of international fora” including the G7 and G20.

#### *US Legislation to Implement the Kigali Amendment to the Montreal Protocol*

In October 2016 nearly 200 countries adopted the Kigali Amendment to the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol). This landmark agreement expanded the list of ozone-depleting substances subject to phase down to include hydrofluorocarbons (HFCs), which are potent GHGs. Because HFCs are widely used in refrigerators and air conditioners, this is the single most significant measure the world has undertaken to combat climate change. Under the Kigali Amendment, developed countries, including the United States, are required to achieve an 85 percent reduction in the use of HFCs by 2036 over the levels used in 2011–13.

However, in August 2017 a U.S. court ruled that, although EPA can move HFCs to the prohibited list because they are GHGs, EPA cannot require companies who previously replaced ozone-depleting chemicals with HFCs to discontinue their use under the Clean Air Act. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017). Bipartisan legislation adopted by Congress on December 27, 2020, known as the American Innovation and Manufacturing (AIM) Act corrected this problem. The AIM Act mandates that HFC production and use be reduced by 85 percent over the next 15 year. This alone will reduce US emissions of greenhouse gases by 900 million tons of CO<sub>2</sub>, more than all emissions in the country of Germany. The Kigali Agreement has strong support from major US

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companies that produce HFC-free refrigerant products, who successfully lobbied on behalf of the AIM Act. President Biden has announced that he will submit the Kigali Amendment to the U.S. Senate for ratification.

### *President Biden Reverses Trump Approval of Canada's Keystone XL Pipeline Project*

On March 24, 2017 President Trump announced that he had approved a permit for construction of the controversial Keystone XL pipeline to transport oil from Canada's tar sands in Alberta to oil refineries in Texas. This action reversed President Obama's November 2015 decision to reject TransCanada's application to build the pipeline. As one of his first official acts after assuming office on January 20, 2021, President Biden announced that he was revoking approval for the Keystone XL Pipeline. "The Keystone XL pipeline disserves our national interest" and is not consistent with the new administration's "climate imperatives," declared the President.

### **The Supreme Court and the Environment**

Environmentalists lost a true champion on the U.S. Supreme Court with the untimely death of Justice Ruth Bader Ginsburg on September 18, 2020. With the Senate's swift confirmation of Justice Amy Coney Barrett, the Court now has a solidly conservative 6-3 majority highly skeptical of environmental regulation. During his four years in office President Trump made it his mission to pack the federal courts with young, highly conservative judges. By December 22, 2020, a total of 234 judges nominated by President Trump had been confirmed by the U.S. Senate. Three of these judges were added to the U.S. Supreme Court and 54 of them joined the U.S. Courts of Appeals, usually on close, nearly party-line votes. This more solidly conservative judiciary may make it more difficult for the incoming Biden administration to repeal regulatory rollbacks undertaken by the Trump administration by declining to defer to administrative agencies, increasing requirements for achieving standing to sue, strengthening private property rights, and questioning congressional power to protect the environment and the ability of Congress to delegate regulatory decisions to agencies.

### **Conclusion**

During his four years in office, President Trump conducted a relentless campaign to roll back environmental regulations even in circumstances where the regulations had won substantial industry support. However, because Congress did not relax the underlying environmental statutes, virtually

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everything Trump did was an executive action that could, and is, being swiftly countermanded by President Biden. In his first weeks in office, President Biden demonstrated enormous determination to combat the climate crisis and to promote environmental justice. The rule of law in America was tested in unprecedented ways by President Trump's refusal to accept the results of the November 2020 presidential election. However, it survived this severe test and U.S. environmental law and policy now are rapidly and dramatically recovering.

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### Part 3. Insight Pieces and Book Reviews

#### Water Permits: Do they enhance or hinder water governance?

*H.J. Bosch & J. Gupta*

Global water use grows exponentially with economic development and its associated production and consumption patterns, and population growth. At the same time, while water demand is increasing, water availability is fluctuating, not least because of the impacts of climate change. Already river basins are closing, meaning there is no water left to be allocated. Moreover, it is becoming increasingly difficult to satisfy existing, new, and emerging demands. Hence, the need to carefully govern increases in water allocations which requires flexibility in water allocations. Water use permits are a key instrument to sustainably govern water, because permits are used to allocate water between different uses and users within a country. Against this background, we investigate the question: What trends do we see in Asia and Africa and why do these trends possibly challenge our ability to govern water?

Based on an analysis of water laws and policies in 60 countries in Asia and Africa, we see the following trends in how water governance is organized around permits. Following independence, most countries have put water in the public domain. With this, states have tried to expropriate existing water rights and ownership systems including customary rights and the rights of former colonists owning land. States then allocate their fresh water resources in five ways: they allow people to use water for domestic purposes, or to withdraw water up to a certain threshold above domestic use without requiring a permit; they allow for the continuation of existing water use and rights that originated in the pre-independence period by bringing it in conformity with a water permit system; they allocate water through contracts, leases, concessions. And lastly, they allocate water through a modern permit system which is considered the main instrument available to states.

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Generally speaking, by granting a water use permit, states allocate several rights,<sup>1</sup> including: the right to use the water for a specific purpose during a fixed period of time; the possibility to renew the permit when the period expires; the possibility to change permit conditions during the period; the possibility to transfer the permit to others; and the possibility of appeal to and/or compensation by the state if the permit is withdrawn or the conditions changed prematurely, leading to financial loss to the permit holder.

There are some key challenges in the governance process of allocating permits. First, in many developing countries there is inadequate information about how much water is available for allocation for human uses, after deducting for the maintenance of ecosystems. Second, this implies that permits are being allocated to uses and users without a good understanding of what the state can actually allocate. Third, there are existing systems of water ownership that were dismantled following independence, but many of these systems continue to exist – because of customary practices or because water owners have gone to court to protest against such expropriation and demand compensation for lost income. Fourth, in order to promote stable and predictable water supply to farmers and industrialists, many of these permits are for a long period – ranging from 5 to 75 years. This tends to reduce the flexibility of the authority to redistribute the water when needed. Fifth, however, states do have the authority to revoke, modify, limit and/or suspend permits if certain conditions arise although, these tools are more reactive than proactive. Moreover, the conditions are generally quite limited – including that the permit holder has violated the law and/or permit conditions, because there is imminent likelihood of water shortage/drought, or if this is in the public interest. But a key question is – who determines what is in the public interest? Sixth, such withdrawal and revocation are not without consequences. In many countries, permit holders can appeal against this decision and possibly claim compensation. Seventh, water authorities in most parts of the developing world are not rich bodies and the fear of having to pay compensation to large users may influence how they decide whose permits to cancel. Permits enable countries to allocate water, but also constrain their flexibility in reallocating water.

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<sup>1</sup> J.W. Dellapenna and J. Gupta. 'Fundamental Concepts of Property in Water and the Role of Markets in Water Governance.' In J.J. Bogardi and others (eds.), *Handbook of Water Resources Management: Discourses, Concepts and Examples*. (Forthcoming).

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A case study of water permits in South Africa (SA) reveals that by promulgating its first post-independence water law in 1998, it put fresh water resources in the public domain.<sup>2</sup> Under this law, all water use must be licenced unless such use is considered as domestic use (Schedule 1), an Existing Lawful Use (ELU), or is exempted under a General Authorisation.<sup>3</sup>

The new water law abolished the existing riparian right system, while trying to recognize the existing rights. In other words, it tried to state that landowners would lose their right to water based on the former colonial laws, but could continue to use this water during a transition phase under the ELU provision, which would then lead to a conversion to licensed water use through the process of compulsory licensing. However, the process of converting ELUs into licenses is failing for a number of reasons. It appears that the state may be afraid to proactively push this as this may affect food production and food security; and the accompanying land reform programme is generally considered to be unsuccessful. A big challenge is that most ELU holders will go to court to protest against this expropriation of what they see as their water rights, and if approved by the court, they are demanding compensation for existing and potential economic damage. Such litigation, especially by rich farmers, puts a heavy burden on an authority with limited resources. Although the law states that if water is needed for the Reserve, to correct an over-allocation, or to rectify an unfair or disproportionate water use, no compensation can be paid. These provisions may be inadequate to enable South Africa cope with the problem of addressing existing legal uses, twenty years after the new law was adopted.

Beyond the problem of ELUs, the permit system also raises some governance challenges. Permits come with clearly defined conditions, subject to a periodic review which must be at intervals of no more than five years. Licences can only be amended through this review process, which requires considerable resources and capacity. Since the authority has limited resources, no permits were reviewed 17 years after the promulgation of the Act. Another challenge is that licence holders enjoy a certain degree of legal protection and financial security, which while enabling them to produce goods and services and contribute to national development, also implies that they are reluctant to give up their entitlement. Permit holders can appeal against an amendment of permit conditions, and can

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<sup>2</sup> H.J. Bosch and J. Gupta, 'Access to and Ownership of Water in Anglophone Africa and a Case Study in South Africa' (2020) 13 *Water Alternatives* 205.

<sup>3</sup> National Water Act 1998 (South Africa), Art 4.

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claim compensation when experiencing economic damage. This further puts a strain on the ability of authorities to govern the water in the public interest.

These trends lead to the following governance challenges. First, it is difficult for states to set up a fair and flexible water governance system. On the one hand, the state wants to allocate water and provide enough security to encourage long-term investment. On the other hand, states struggle to do this in a way that allows them to keep control of the water, and the possibility to reallocate water when needed. Second, the current tools in place to govern permits do not allow for the reallocation of water to provide for growing demand for water use, to facilitate social and economic development, to promote equitable access to water, or to respond to changing environmental conditions. Third, as seen in SA, which is ostensibly trying to take control of its water resources, it can be difficult for a postcolonial state to set up a fair and equitable system for effective and sustainable water governance. Fourth, it seems that states do not fully understand the implications of their policies. Understanding the implication of granting permits, and the governance of these permits is of critical importance in the development of legitimate, equitable, and effective governance systems.<sup>4</sup> Fifth, while most papers discuss adaptive and integrated water governance, they overlook the key challenge that states face in gaining and retaining control of a country's water. This is the case with permit systems and is even more relevant in regions where a full-scale process of commercialisation is underway.

We conclude that developing countries and emerging economies in Asia and Africa face critical challenges in governing their water. On the one hand, expropriating water resources whether from poor farmers who had customary rights to water or from former colonial landowners with some form of riparian rights comes with challenges – as both groups protest. The former often protest through social movements, the latter by going to court. Moreover, while the new water laws have been designed in a way to avoid any mention of private property in connection to water, they often end up de facto privatizing the water through granting clearly defined property like rights through permits, many of which are valid for decades.<sup>5</sup> Permit holders then make their investments based on the expectation of an assured supply of water of a certain quality for a considerable period of time, and

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<sup>4</sup> J. Gupta, C. Pahl-Wostl and R. Zondervan, "Glocal" water governance: A multi-level challenge in the Anthropocene.' (2013) 5(6) *Current Opinion in Environmental Sustainability* 573.

<sup>5</sup> HJ Bosch, J. Gupta, & H. Verrest, 'A water property right inventory of 60 countries.' (2021) *Review of European, Comparative and International Environmental Law*. (Forthcoming)

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will resist any effort by the state authorities to redistribute the water based on new considerations whether as a consequence of climate change or because of reasons to protect ecosystems, or even to ensure a more equitable distribution of water in a country. Finding a way out of this conundrum is a challenge for these water institutions.

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## Sentencing Climate Change Activists in Australia: Issues and lessons from the early jurisprudence in Queensland

Jennifer McKay UniSA Justice and Society

### Summary

Rolles pleaded the necessity or emergency defence and in this case despite his genuine belief, it was held that climate change is not an emergency that required immediate action that Rolles took of blocking the train line. The court did acknowledge that an emergency may be a creeping one like a flood. So that is a positive extension. In the UK, the emergency defence has operated and detailed calculations were made of CO2 emissions saved by shutting down a mine. Even if these small, it was still a contribution and the defence prevailed. The UK court also looked at IPCC reports as engendering emergency whereas in Queensland scientific evidence was not admitted. The sentencing did consider motive and the appeal court reduced the fines by more than 50%. Hence, Rolles is a precedent for looking at the motive.

It will be important to see how the human rights instruments are used in subsequent cases and also to suggest that each State achieve public participation in environmental decision making. This last outcome would reduce the need for climate change activists. The norms for this were set out in Rio principle 10 many years ago.

Climate change has been contested in political discourse for many and the social discord has been manifested in protests at mining and forestry sites especially around the times of releases of Intergovernmental Panel on Climate Change ( IPCC) reports notably in the last 5 years.

Environmental activism has a proud social and legal history in Australia with the 1983 Tasmanian Dams engaging many citizens<sup>1</sup> and inaugurating the use of the external affairs power to enable national legislation on environmental issues.

Other forms of civil dissent have been reported such as by Victorian artist Arthur Streeton who in 1940 protested commercial interests for denuding the forests in a painting called *Donna Buang AD 2000 which showed a denuded hill*<sup>2</sup>.

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<sup>1</sup> See for example <http://cat2.lib.unimelb.edu.au/record=b6650578~S30> The Tasmanian Dams case 30 years on: an enduring legacy : edited by Michael Coper, Heather Roberts and James Stellios, Federation Press 2017

<sup>2</sup> Streeton in correspondence with Tom Roberts, 14 February 1902, and Frederick Delmer, 17 April 1902, quoted in Smith, G., Arthur Streeton 1867-1943, National Gallery of Victoria, Melbourne, 1995, p.140

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The recent climate change activism in Australia has seen blockades of major cities and/or roads leading to mining or forestry sites. There are many homegrown and international groups with climate change activism as a core value. The Climate Action Network Australia (CANA) is an umbrella organisation that links over 50 protest and non-protest environmental groups and organizations, including The Wilderness Society, Greenpeace Australia, Friends of the Earth, the Australian Conservation Foundation and World Wildlife Fund. CANA was formed in 1998 ‘to increase the understanding of climate change, and to encourage governments, businesses and individuals to undertake actions to reduce greenhouse gas emissions, and their climate change impacts’.<sup>3</sup> Climate change activism is subject to several laws and is a subset of cases known political offences<sup>4</sup> and a review of such cases in the UK described the decisions there as ad hoc.<sup>5</sup> Sociological research has shown that members of protest orientated groups tend to be leftwing and younger.<sup>6</sup>

#### The right of Peaceful assembly in Australia

The common law recognizes a right of peaceful assembly<sup>7</sup> and Human rights instruments in Victoria<sup>8</sup>, ACT<sup>9</sup> and Queensland<sup>10</sup> all have exactly the same wording and recognize a right of peaceful assembly. As the Federal Court of Australia said in the Melbourne Occupy case of *Muldoon v Melbourne City Council*,<sup>11</sup> the right of freedom of assembly provided for by s 16(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) is, under s 7(2), “subject to such reasonable limits as can be demonstrably justified in a free and democratic society”. International Covenant of Civil and Political Rights (ICCPR) Article 21 and General comment 37, released in 2020, suggest a right of peaceful assembly. The Australian Commonwealth has not enacted ICCPR so no domestic protection is provided, and the State can legally pass laws that are not in conformity with ICCPR.<sup>12</sup>

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<sup>3</sup> Climate Action Network Australia 2009). SEE <http://www.climatechange protests.net.au/>

<sup>4</sup> J Walvisch, *Lone anarchists and peace pilgrims: the relevance of political motivations to sentencing* (2018) 44(2) Monash University Law Review 428.

<sup>5</sup> Roger Douglas, ‘Sentencing Political Offenders’ (1994) 1(1) Australian Journal of Human Rights 86, 88.

<sup>6</sup> Bruce Tranter (2010) Environmental activists and non-active environmentalists in Australia, *Environmental Politics*, 19:3, 413-429, DOI: 10.1080/09644011003690898

<sup>7</sup> *South Australia v Totari* [2010] HCA 39 per French J

<sup>8</sup> Charter of Human Rights and Responsibilities Act 2006(vic) <https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/014> Clause 16 Peaceful assembly and freedom of association

(1) Every person has the right of peaceful assembly.

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

<sup>9</sup> Human Rights Act 2004 <https://www.legislation.act.gov.au/a/2004-5>

<sup>10</sup> Human Rights Act 2019 operated from 1 Jan 2020

<sup>11</sup> *Muldoon v Melbourne City Council* [2013] FCA 994

<sup>12</sup> *The Commonwealth of Australia v Tasmania (The Tasmanian Dams Case)*( 1983) 158 CLR 168 per Mason.

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The Australian States have indeed passed protest suppressing laws in the last few years. Protesters do not have immunity for civil actions and indeed some enterprises have threatened civil damages to silence opposition. This is analogous to the the US Strategic Lawsuit Against Public Participation (SLAPPS) suits.

Climate change protesting decisions in Queensland – most advanced to date

The development of a jurisprudence will be hampered by fact that Magistrates Courts often hear these matters and such cases are often not reported.<sup>13</sup> The pattern throughout Australia, seems to be that the severity of the sentence is appealed and then reports are available. As in many other jurisdictions in Australia and in other common law jurisdictions, codification of the aims of sentencing forms part of a push towards greater transparency and accountability in sentencing.<sup>14</sup> As the aims are derived from conflicting theories about the reasons for punishment (utilitarianism as opposed to retributivism), they are expressed in broad philosophical terms with an absence of guidance as to how these disparate and vague outcomes can be achieved.

*Rolles v Commissioner of Police* [2020] QDC 331- emergency defence

The appellant Rolles is a recidivist protestor, who attached himself to a tripod suspended over a rail line to protest against the impact of climate change and the lack of action being taken to address it. He pleaded the emergency defence under the *Criminal Code* 1899 (Qld) section 25 “Extraordinary emergencies” but this was rejected by the Magistrate and the appeal judge. Section 25 restates the common law and says, *A person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise.* Rolles argued that climate change is an emergency and the Magistrate found he held this as a genuine belief as to the state of emergency. The Magistrate also held that section 25 did not apply because climate change is not an emergency that requires require immediate action. The Magistrate and the appeal judge agreed that the word “extraordinary” does support the fact the emergency may develop over time, for example rising flood waters, but “there must be an emergency of such a scale that it requires immediate action, commensurate with the consideration of self-control.” The Magistrate quoted another Queensland case, and agreed that the section is

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<sup>13</sup> [https://www.judcom.nsw.gov.au/wp-content/uploads/2014/03/judge\\_for\\_yourself.pdf](https://www.judcom.nsw.gov.au/wp-content/uploads/2014/03/judge_for_yourself.pdf) viewed 5 Jan 2021

<sup>14</sup> Justice Peter Johnson and [https://www.judcom.nsw.gov.au/wp-content/uploads/2014/03/judge\\_for\\_yourself.pdf](https://www.judcom.nsw.gov.au/wp-content/uploads/2014/03/judge_for_yourself.pdf)

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directed to a person reacting to imminent danger”.<sup>15</sup> The appeal judge agreed that section 25 was never open to Rolles and he was convicted.

*Rolles v Commissioner of Police* [2020] QDC 331-sentencing

In Queensland, sentencing principles applicable to protesting and the amount of any fine are well established.<sup>16</sup> I note in particular the comments of Fantin DCJ in *GS v QPS* at [71] to [72]:<sup>17</sup>

I also respectfully agree with his observations in *Avery* at [81] that whilst offending committed in the course of a peaceful protest would not generally impute a high level of culpability, and while the conscientious motives of protestors are to be taken into account, whether the protestors have behaved with a sense of proportion by not causing excessive loss, damage or inconvenience by their protest actions will be an important consideration in assessing the objective seriousness of the offending and the culpability of the offenders involved. I would add to that whether the disruption caused was the intended aim of the protest, rather than merely a side effect or consequence of a protest held in a public place, may also be relevant.

The appeal court convicted but reduced the fine of the Acting Magistrate from \$7000 to \$3000. Rolles pleaded not guilty but was found to be guilty of 3 offences:- Trespass on a railway – 1 November 2018; Unauthorized Interfere with a railway – 22 November 2018 and the associated rectification penalty and Contravention of a police direction – 21 November 2018. The sentence of the Acting Magistrate consisted of total fines of \$7,000 and compensation in the sum of \$2,233.40. The appeal court reduced these to approximately \$3000 was appropriate with \$2,361.60 and Aurizon compensation in the sum of \$638.40. The sentencing remarks were that the genuine belief in climate emergency was the motive for the offence and is relevant to the moral culpability of the offender, and the weight to given to personal deterrence and it may affect the weight to be given to general deterrence. Compensation was given for the cost of hiring the cherry picker to dismantle the tripod was a reasonable foreseeable consequence of the Appellant’s unlawful interference with the railway. The cost for the wages of the crew was not recoverable with the comment that Aurizon should not experience a windfall gain. No evidence was presented

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<sup>15</sup> *R v Dimitropoulos* [2020] QCA 75, [62], per Atkinson J

<sup>16</sup> *Avery & Ors v Queensland Police Service* [2019] QDC 21; *Nolin v Commissioner of Police* [2019] QDC 171; *GS v QPS* [2020] QDC 205.

<sup>17</sup> *GS v QPS* [2020] QDC 205, [71]-[72]

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on whether the crew utilised were already working on the date of offence or were brought in specifically for the purposes of removing the protestor.

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## Book Reviews

**Book Review by: Nicholas A. Robinson, Pace University, Joseph Chun and Lye Lin Heng,**  
*Environmental Law In Singapore*

Singapore ranks today among the world's most advanced and sustainable states. It was not always so. After World War II, its port was much diminished, it lacked sewage treatment, its urban infrastructure was run-down, and civil unrest was rife. Yet within the three decades following independence, Singapore's greatest resource, its people had built schools and a world-class university system, hospitals, public housing. They renewed the port to be a hub for global and regional shipping, and complemented that by building Changi international airport. It cleaned up decades of soil and water pollution, without creating new pollution. The air is clear and trees line the streets. Singapore had progressed from "3<sup>rd</sup> world" to "1<sup>st</sup> world" status in one generation.

Singapore's developmental history combined the three pillars of sustainable development from its beginning in 1965: economic, social and environmental. The three pillars of sustainable development would later be formally endorsed only in 2002, at the Johannesburg Summit on Sustainable Development. Singapore's patterns of sustainable development began with the vision of Lee Kuan Yew, the city-state's prime minister from 1959-1990. He envisioned a garden city, in which commerce, education, industry, and public health could advance in tandem. Singapore invested in education and capacity building, because its people were its greatest asset. Other than its natural port, Singapore lacked natural resources. At this time foreign aid did not exist. Singapore had to be self-reliant.

Providing public housing, health care and education, with a clean and green urban setting, inspired its citizens to accept working a six-day week and paying high taxes. Citizens understood that their hard work was improving their quality of life. Rigorous adherence to the rule of law and providing a skilled, domestic labor force, attracted overseas investment. Gradually, successively, Singapore's legal framework confirmed and consolidated these gains.

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*Environmental Law In Singapore* describes the legal framework that resulted from the past 50 years of planning and progressive development. This book offers an outstanding analysis of how law today sustains Singapore's accomplishments. Its authors combine their deep understanding of Singapore's environmental legal system. Dr. Joseph Chun is a practicing attorney and adjunct professor at the National University of Singapore (NUS). Prof. Lye Lin Heng is well known to the IUCN Academy of Environmental Law as one of its founders and the former Director of the Asia-Pacific Centre for Environmental law at NUS (APCEL). Their book is a definitive and comprehensive study of the ways that environmental law underpins sustainability. It is, simply, an essential book for collections of both environmental law and comparative law. Each Member of the IUCN Academy of Environmental law should make this unique book available to its faculty and students. The proposal for creating the IUCN Academy was born in Singapore in 1998, making publication of this book especially welcome.

This tome offers insights into how Singapore's skilled administrative agencies have designed and implemented what some say is a miracle of sustainable development. It does not so much reveal directorial workings, but rather explains how law now confirms their salutary results. It also thoughtfully notes instances where the administrative state has stumbled in the environmental context. The authors' commentaries enable readers to learn what environmental legal tools might be applied to correct such short-comings, and further enhance successful measures. The book is richly annotated, providing the reader with abundant and focused references to other authorities.

With its clear exposition of both Common Law and Administrative Law in Singapore, the book provides a valuable foundation for comparative environmental legal analysis. The authors open with a short history of both environmental laws and sustainable development, shared by most countries. But Singapore branches off, charting its own unique path. Both developed and developing nations alike will find much to stimulate innovations in their own environmental legal regimes. For example, variable fees for accessing segments of roadways, along with other economic tools, determine use and ownership of automobiles. The result is that Singapore's roads are largely without congestion or pollution. Four chapters on Singapore's potable water supplies explain the legal framework for ingenious harvest of rain water and purification of waste water. For a jurisdiction, surrounded by salt water on all sides, to become virtually self-sufficient in its freshwater supplies is remarkable. In like vein, while densely populated, Singapore designed its growth to be a quiet city, which its Noise

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Pollution Control regime maintains. As a changing climate augments the volume of storm water, Singapore aims to keep pace; the authors describe the critical environmental infrastructure, for drainage, sewage, potable water distribution, as well as for solid waste collection and ecosystem services.

The authors cautiously describe the formal constitutional system of legislation and judicial review, which provides the foundation for the executive agencies within which the socio-economic and ecological interests interact via administrative decision-making. Unlike some jurisdictions, environmental litigation is not a feature of Singapore's environmental legal practice. Common Law rules, such as reliance on strict liability norms of *Rylands v Fletcher* {(1886) LR 1 Exch. 265}, encourage robust respect for tort law. This minimizes private nuisance, and Singapore's administrative planning designs anticipate and avert public nuisance. "If environmental law is concerned with the resolution of conflicting uses of our natural resources, then planning law is the principal approach to resolving such conflicts" (Chapter 10, p. 281). Planning seeks to optimize Singapore's limited land, coastal and sea space. This includes importing sand and repurposing solid wastes to create "new" land, to marginally increase terrestrial space. One wished to read more about "coastal and marine spatial planning." Singapore has expanded its land mass by almost 25% since 1965, but examining the associated environmental aspects awaits another study, which will need to examine a regional approach to sand mining in the ASEAN region.

Like most rapidly developing urban centers, Singapore was late to protect its architectural heritage. Cultural heritage of the built environment is not covered in this book, but it does usefully explain protection of heritage trees and heritage roadways. Green buildings rules, to mitigate climate change, are covered, but the book would do well also to have examined adaptive reuse of the buildings for conserving cultural heritage. Singapore offers another forum for debating whether historic preservation is part of environmental stewardship.

The authors are most insightful when discussing how Singapore might enhance its planning processes by more thorough use of environmental impacts assessment (EIA) procedures. Some planning excesses, such as an early plan to convert forest watershed for the Peirce Reservoir into a golf course, was abandoned after the venerable Nature Society prepared its own public impact assessment documenting unintended adverse environmental consequences. More recently plans to build a

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highway into part of the historic Bukit Brown cemetery triggered acute political opposition. EIA could have averted this controversy. Similarly proposed development plans were deferred at Chek Jawa, a rich ecosystem where six habitats meet around an off-shore wild island. The deferment came, however, only after public education by media and naturalists had rebuffed plans to fill-in this coastal area for “land reclamation.” In countries with strong EIA procedures, either strategic EIA (e.g. for the Master Plan under Singapore’s Planning Act), or a project EIA for the land fill proposals, would have flagged this important ecosystem for protection, not possible destruction. The authors note support for EIA reforms, including four Parliamentary proposals, thirteen academic studies and eight other published proposals. Since Singapore acknowledges that international law requires EIA in the transboundary context, and under the UN Convention on the Law of the Sea, it may be only a matter of time before Singapore adopts an EIA law. This book nicely sets out contours of the debate.

Singapore, like all countries, pioneers ways to cope with climate change. Readers will be interested in Singapore’s carbon pricing. Many environmental issues will need regional solutions, which are being pursued through the Association of South East Asian Nations (ASEAN). Some bilateral problems, such as the transboundary air pollution, the “Haze” from fires clearing forests for commercial agriculture in nearby Indonesia and Malaysia, will require more robust international cooperation. In the meantime, readers will be interested in Singapore’s “Transboundary Haze Pollution Act 2014,” a unique criminal sanction to deter economic profiteering from activities causing the Haze. This domestic law has extraterritorial effect.

Altogether, *Environmental Law in Singapore* is a fine legal study that is sure to excite new ideas both in Singapore and in other countries. The Singapore Academy of Law has done a great service in publishing this book in cooperation with the APCEL.

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**Book review by : Dr. Amy Lawton, Lancaster University, Marta villar ezcurra et al. (eds),  
*Environmental fiscal challenges for cities and transport* (Cheltenham: Edward Elgar 2019)**

Around 55% of the world's population now live in cities, which equates to roughly 4.2 billion people.<sup>1</sup> Future population growth is expected to be absorbed by cities, and such rapid growth creates important challenges in relation to sustainable development and the environment.<sup>2</sup> Transport is no different. In the UK alone, there were 38.9 million licensed vehicles in September 2019, of which 32 million are cars.<sup>3</sup> With such stark figures, an insight into the ways in which we can regulate our growing networks of cities and transport is needed. The general movement away from a reliance on traditional regulation opens the doors for us to consider more novel options.<sup>4</sup> *Environmental Fiscal Challenges for Cities and Transport* provides such an insight into one particular, and important, field: fiscal measures. Bear with me (and the book!), environmental taxes are an intriguing mode of regulation - using additional costs to change environmentally harmful behaviour, whilst also raising revenue for public services.<sup>5</sup> This duality of purpose and nature mean that they are largely untouched in legal scholarship.

The book (that forms part of a wider series on environmental taxation) is an edited collection and so benefits from a wide range of problems and solutions being discussed. It brings together 18 papers in four overarching parts: impacts of the emerging twenty-first century economy; fiscal environmental policies for urban concentration; challenging issues for transport taxes; and the evaluation of cross-cutting policies.<sup>6</sup> The parts work, and readily enable the reader to dip into the book at a place of their choosing. Overall, the number of papers ensures a broad range of topics are covered but also means that the reader is left wanting more depth in places.

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<sup>1</sup> United Nations, 'World Urbanization Prospects: The 2018 Revision' (2018), 56; United Nations, 'World Population Prospects 2019: Highlights' (2019), 1.

<sup>2</sup> United Nations, 'World Population Prospects 2019: Highlights' (2019), 37.

<sup>3</sup> Department for Transport, 'Vehicle Licensing Statistics: 2019 Quarter 3' (19 December 2019), 2.

<sup>4</sup> See Neil Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21 *Journal of Environmental Law* 179-212 for an overview of changing regulatory approaches.

<sup>5</sup> The OECD defines an environmental tax as: "A tax whose tax base is a physical unit (or a proxy of it) that has a proven specific negative impact on the environment" available at < <https://stats.oecd.org/glossary/detail.asp?ID=6437>> accessed 7 April 2020.

<sup>6</sup> Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), v.

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That being said, the book engages in a critical discussion of key potential, fiscal policies to help in the fight against climate change. The digital nature of the world we live in should not be underestimated, with Milne calling for “meaningful prices on carbon dioxide emissions around the globe” that reflect the carbon cost of the world.<sup>7</sup> The emergence of a greater number of digital services (and indeed, the rise of online purchases) makes life easier in some ways, but creates significant environmental challenges in our potential “increased levels of consumption and therefore transport packaging waste”.<sup>8</sup> The book initially explores the complexities of navigating the murky waters of the digital world, and its falsely greener appearance.<sup>9</sup> Not only could we be overconsuming because of the hidden carbon footprint of online purchases, but the “ease of digital payment [could] make consumers less aware of tax burdens”,<sup>10</sup> making it doubly hard to tackle from an environmental (and fiscal) point of view. The age of our international tax frameworks does not help matters, with old tax principles unable to accurately account for the increasingly e-commerce world we live in.<sup>11</sup>

Looking towards the issues surrounding ever increasing urbanization, the authors touch upon a wide range of policies: BIDs,<sup>12</sup> WEEE,<sup>13</sup> taxes and levies on energy,<sup>14</sup> and agricultural tax exemptions.<sup>15</sup> The underlying messages from these chapters are clear: “the polluter pays principle should apply”.<sup>16</sup>

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<sup>7</sup> Janet Milne, ‘Environmental taxation in the digital world’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), 5.

<sup>8</sup> Milne (n 7)6.

<sup>9</sup> Milne (n 7) 5; Marta Villar Ezcurra, ‘Is the low level of tax on e-commerce contributing to an environmentally unfriendly increase in transport?’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), 21.

<sup>10</sup> Milne (n 7) 11.

<sup>11</sup> Villar Ezcurra (n 9) 25.

<sup>12</sup> Helena Galende et al., ‘Smart cities: can business improvement districts reduce the environmental footprint of urban areas?’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019).

<sup>13</sup> Edoardo Croci and Francesco Colelli, ‘The costs and benefits of extended producer responsibility: an evaluation of the Italian waste electrical and electronic equipment (WEEE) management system’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019).

<sup>14</sup> David Robinson et al., ‘Fiscal Policy for decarbonization of energy in Europe, with a focus on urban transport: case study and proposal for Spain’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019); Theodoros Zachariadis, ‘A proposed green tax reform for Cyprus and its co-benefits for urban sustainability’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019).

<sup>15</sup> Emma Akrawi, ‘The agricultural conundrum: encouraging climate-friendly agriculture through economic instruments in North America’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019).

<sup>16</sup> Robinson et al. (n 14) 80.

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In particular, benefits could be provided through BIDs to “provide a platform where innovative and ‘smart’ solutions can be developed” to decrease environmental harm in the world of increasing e-commerce.<sup>17</sup> In terms of taxing energy, no stone should be left unturned. Transport fuel duties (which, interestingly, have remained frozen in the UK since 2011)<sup>18</sup> are often neglected:

*while taxes and levies on electricity have risen quickly to fund various public policies, notably decarbonization, the trend in transport fuel taxation has been different [...] Taxes on transport fuels are significant as a share of the final price in Europe. However, the European Environmental Agency has argued that current taxation of road fuels has not been used as an environmental policy measure, and that if it were, this could reduce the attendant environmental damage.*<sup>19</sup>

By not effectively taxing negative environmental activities, one author argues this is “a hidden environmentally harmful subsidy”.<sup>20</sup> The subsidization of agriculture through tax exemptions, likewise, is “inferior to other support mechanisms that governments can use.”<sup>21</sup>

As the book title suggests, the theme of using environmental taxes is also present within the transport sector. In addition to considering specific transport tax schemes, authors engage in wider debates on, for example, how environmental transport taxes can be used to reduce “the tax pressure on labour and increasing alternative revenues from the taxation of polluting activities” to produce a double dividend.<sup>22</sup> Indeed, the concept of the ‘double dividends’ in environmental taxation is an established concept in environmental taxation,<sup>23</sup> and can be spotted throughout the book.<sup>24</sup> Consideration is given

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<sup>17</sup> Galende et al. (n 12) 56.

<sup>18</sup> Hydrocarbon Oil Duties Act 1979, s.6.

<sup>19</sup> Robinson et al. (n 14) 78.

<sup>20</sup> Zachariadis (n 14) 91.

<sup>21</sup> Akrawi (n 15)109 citing Nicholas Rivers and Brandon Shaufele, ‘The effect of British Columbia’s Carbon Tax on Agricultural Trade 4’ (2014), 14.

<sup>22</sup> Andrea Molocchi, ‘External costs and environmental taxation: the role of transport sectors within the Italian economy’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), 134.

<sup>23</sup> See, for example, Lawrence Goulder, ‘Environmental taxation and the double dividend: A reader’s guide’ (1995) 2 *International Tax and Public Finance* 157-183.

<sup>24</sup> Robinson et al. (n 14) 80; Vanessa Johnston, ‘An environmental take on Australia’s traffic congestion ‘crisis’: using road pricing to achieve sustainable transport’ in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), 146; Claudia Kettner et al., ‘Designing carbon taxes: economic

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to the use of revenues from environmental taxes,<sup>25</sup> and their disconnection to the wider externalities.<sup>26</sup> The focus here is predominantly on how to tax personal transport vehicles, but does touch on wider transport issues.<sup>27</sup> Beyond taxes, there is also a consideration of green subsidies and the importance of transparency.<sup>28</sup>

The final part takes a step back from the issues of urbanization and transport, to take a look at environmental fiscal policy more broadly. For policymakers, the section delves into important questions of how to design environmental taxes. Kettner et al. engage in an interesting discussion surrounding the nomenclature of taxes:

*Besides taxes and fees, the term 'levy' is also frequently employed in the legal domain. Levies are temporary measures to raise revenue and provide for a social purpose or mitigate a crisis which is generally supported. They are understood as 'soft' charges that usually escape the age-old negative view of taxes.*<sup>29</sup>

A frank discussion on the distinction between taxes, levies and fees is sorely lacking from tax scholarship to date and is welcomed, albeit briefly, in *Environmental Fiscal Challenges for Cities and Transport*. The underlying politics and stigma that is associated with taxes is well documented,<sup>30</sup> and this could create, without a doubt, obstacles for introducing and reforming environmental tax

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and legal considerations' in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), 217.

<sup>25</sup> Johnston (n 24)148.

<sup>26</sup> Alberto Gago, Xavier Labandeira and Xiral Lopez-Otero, 'Taxing vehicle use to overcome the problems of conventional transport taxes' in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019), 154.

<sup>27</sup> Johnston (n 25); Gago, Labandeira and Lopez-Otero (n 26); Fanny Vanrykel, Bruno de Borger and Marc Bourgeois, 'Sharing cars: a legal and economic analysis of the taxation of B2C car-sharing models' in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019); and Elena Aydos et al., 'Renewable energy, smart grids and hybrid vehicles: a Brazilian case study' in Marta Villar Ezcurra et al (eds.), *Environmental Fiscal Challenges for Cities and Transport* (Cheltenham: Edward Elgar 2019).

<sup>28</sup> Aydos et al., *ibid*.

<sup>29</sup> Kettner et al. (n 24)219.

<sup>30</sup> See, for example: Eben Albert-Knopp, 'The California Gas Charge and Beyond: Taxes and Fees in a Changing Climate' (2007) 32 Vermont Law Review 217; Andrew Norwood, 'To Fee or Not to Fee: Alfonso v Diamondhead Fire Protection District and Mississippi's Need for a Fee-Tax Delineation' (2015) 34 Mississippi College Law Review 63; Laurie Reynolds and Carlos Ball, 'Exactions and the Privatization of the Public Sphere' (2005) 21 Journal of Law Politics 451.

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policy in jurisdictions.<sup>31</sup> It would be interesting to see this debate engaged in, in future editions of this well-established green tax book series.

*Environmental Fiscal Challenges for Cities and Transport* provides another exciting edition for the *Critical Issues in Environmental Taxation* series. The breadth of issues covered within the book allows the reader to dip in and out of the areas that are of personal interest. Overall, it provides inspiration for new, green fiscal policies and an insight into some of the associated challenges.

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<sup>31</sup> Eben Albert-Knopp, 'The California Gas Charge and Beyond: Taxes and Fees in a Changing Climate' (2007) 32 Vermont Law Review 217, 222.

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**Book Review by: Sean Stephenson, University of Amsterdam, Kate Miles, Research Handbook on Environment and Investment Law**

With the rise of investor-state dispute settlement foreign investment protection and the environment have been increasingly entangled. This entanglement has translated into an increasing amount of environmentally related investment disputes, or at least disputes that have some nexus with the environment and international environmental law. In this light, the Research Handbook on Environment and Investment Law (“the Handbook”), edited by the formidable Kate Miles, provides a much needed analysis on the relationship between investment law and some of the core sub-fields of environmental law, along with sections on disputes, regional developments and critique.

The Handbook is structured in four parts. Part I addresses the relationship between international investment and environmental law. It includes chapters on sustainable development, water, climate change, biodiversity, and human rights. Part II relates to disputes, with chapters on arbitral procedure, investment protections and the environment, the use of science in dispute settlement, the new mega-regionals and the green economy. Part III provides a select analysis of regional perspectives on investment and environment, covering India’s model BITs, stabilization clauses in African energy contracts, environmental concerns in China’s investment treaties, balancing investment and environment in the EU, and how investment tribunals have balanced environmental claims in Latin America. Part IV offers a more expansive analysis of the investment-environment relationship based on the themes of identity, critique, and conceptualization. It covers gender, local and indigenous communities, and socially and environmentally responsible investment.

The Handbook forms part of a growing body of academic literature on the topic on investment law and the environment,<sup>1</sup> which also includes a number of papers<sup>2</sup> and blog posts. The Handbook is the first edited book on the topic. As such, it provides varying perspectives on the interaction and

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<sup>1</sup> See e.g. Jorge Vinuales, *Foreign Investment and the Environment in International Law*, CUP 2010; Saverio Di Benedetto, *International Investment Law and the Environment*, Elgar 2013; Yulia Levashova, Tineke Lambooy, Ige Dekker, eds, *Bridging the Gap Between International Investment Law and the Environment*, Eleven, 2016.

<sup>2</sup> See e.g. *Journal of World Investment and Trade*, Special Issue, Adjudicating Environmental Disputes Through Investment Treaty Arbitration 18(1), 2017.

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intersections on the relationship between investment law and the environment. This includes several of the same investment awards being looked at from differing perspectives.

From the outset, Miles frames the Handbook in the context of fragmentation, bringing two silos of international law together. The discussion and analysis between the investment and environmental law regimes in Part I is the Handbook's most important contribution to the current literature. While the literature on the relationship on investment and environmental law has generally increased, for example relating to climate change, the Handbook's chapters on sustainable development, climate and biodiversity offer a succinct analysis of the interaction between investment and these sub-regimes of international environmental law that is frequently overlooked. These chapters provide a strong base for further research in these areas. It should be noted that it appears the Handbook's chapters are largely written by investment law scholars, with the analysis stemming from an investment law perspective, i.e., how environmental law has been interpreted in the context of trade and investment agreements or investment treaty disputes. One questions whether the analysis may differ if not approached by investment based thinkers. Further, the Handbook is not a general reference for all investment and environment issues. Key areas such as oceans or the atmosphere are not covered by the Handbook.

On disputes, despite having commentary on relevant investment treaty awards in many chapters, the Handbook only formally addresses substantive protections and procedure in two chapters. Minimizing the focus on investment disputes may have been a specific editorial choice given the above mentioned existing literature on the topic. That being said, the Handbook does focus on other often overlooked areas such as the role of science and cutting edge analysis on how investment-environment has been incorporated into mega-regional agreements.

The regional perspectives section provides interesting accounts on differing regional investment developments. The section highlights some key divergences between regions, although the chapters substantially differ in scope. For example, for Africa, the Handbook's chapter is focussed on energy related contracts, and stabilization clauses, rather than any African investment disputes or international instruments, or common policy. Comparatively, the Latin American chapter analyzes investment claims throughout entire the region, and the chapter on the EU provides an EU focused analysis. The Handbook structure is notable in this part as the Handbook provides no greater analysis

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on the implications or divisions in regional positions on investment. Such a lacunae demonstrate the challenges of the Handbook model.

The Handbook's thematic part addresses an expanded view of what constitutes the environment. Generally, connections between investment disputes and the environment may be made more readily with certain chapters such as the chapters on local communities and aboriginal groups or cultural heritage. Other chapters focus on more elusive topics such as gender or social and environmental responsible investment. Nevertheless, the Handbook usefully highlights these frequent environmentally related or adjacent issues.

Overall, the Handbook is a valuable resource. It provides a detailed and probing analysis of various facets of the investment-environment relationship, despite some chapters being slightly editorial. The Handbook's key added value is its analysis on investment and environmental law regimes. More generally, while the Handbook provides certain analysis focussed on reconciling investment and environmental law protections it is largely limited to a *lex lata* analysis, rather than providing a *lex ferenda* vision for how investment and environmental norms, principles, and treaties may be harmoniously applied or interpreted. In this regard, scholars and academics searching for strong base material in these areas will find the Handbook useful, but the Handbook, for the most part, does not go on to chart new territory on investment and environment. Given the rapid acceleration of investment into environmentally sensitive or environment adjacent projects the investment-environment nexus will surely continue to grow and the Handbook provides an overall solid starting place for those seeking understand the legal relationship between the two regimes.