Balancing On or Over the Edge of Non-Compliance?

Articles 9(3) and 9(4) of the Aarhus Convention and Access to Justice before EU Courts in Environmental Cases: Balancing On or Over the Edge of Non-Compliance?

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I. Introduction

By ratifying the Convention on Access to Information, Public Participation in Decision-making and Access in Environmental Matters (Aarhus Convention)1 in 2005, the European Union (EU) explicitly committed itself to guaranteeing general access to justice in environmental matters for environmental NGOs and the wider public.2 The European states signatory to the Aarhus Convention wished to encourage what they themselves described in the ministerial declaration of the Aarhus Conference as “responsible environmental citizenship”,3 acknowledging that “an engaged, critically aware public is essential to a healthy democracy”.4 In recent years, the quintessential “third pillar” of the Aarhus Convention, which provides the public with access to justice in environmental cases, has been increasingly utilized by environmental NGOs and the wider public to enforce environmental laws before courts. In particular, Article 9(3) of the Aarhus Convention, of which effective judicial protection and judicial review are intrinsic components, has gained relevance. It applies a so-called citizen-suit approach in the field of environmental litigation, thereby ensuring that standing in environmental cases would no longer be exceptional but rather the norm.

Whereas the EU relatively quickly implemented specific legislation pertaining to access to justice in relation to decisions which fall within the ambit of the second pillar of the Aarhus Convention,5 it has so far failed to adopt a specific directive containing general rules to ensure effective access to justice before national courts in the context of Article 9(3) of the Aarhus Convention.6 Likewise, the adaptation of the EU legislative framework in order to provide access to direct review of EU acts (action for annulment, action for failure to act) potentially violating environmental law has been particularly troublesome. As is widely known, the long-standing Plaumann-doctrine employed by the EU courts to assess the standing of private individuals and legal entities when directly challenging EU acts proved to be a formidable obstacle for public interest litigation before the Court of Justice of the EU (CJEU).7

With the adoption of the 2006 Aarhus Regulation,8 the EU legislator tried to remedy this well-known deficit. One hoped to reconcile the rigid Plaumann-doctrine with the requirements of Article 9(3) of the Aarhus Convention by offering the NGOs additional internal review options in the context of administrative acts issued by EU institutions in the field of environmental law. In spite of its ambitious goals, the Aarhus Regulation has been applied and interpreted so restrictively by the EU institutions that it offers no real “cure” to the current lack of access to direct judicial review against EU acts. This was confirmed by the General Court in 2012, when it held that at least part of the criticism vis-à-vis the Aarhus Regulation was warranted. In its rulings in Vereniging Milieudefensie and Stichting Natuur en Milieu it came to the conclusion that the limitation of the material scope of the internal review procedure to acts of an individual

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scope was incompatible with Article 9(3) of the Aarhus Convention.9

However, this rather liberal approach to the Aarhus Convention in the context of EU institutions was only short-lived. As is widely known, the CJEU finally overruled the General Court in appeal by holding that the Aarhus Convention could not be used as a benchmark for a legality review of the Aarhus Regulation.10 While the landmark rulings of 13 January 2015 are to a certain extent “procedural” by nature, since they do not address the substantive claims raised by the environmental NGOs vis-à-vis the compatibility of the Aarhus Regulation with the Aarhus Convention, they are still tagged as a major setback for access to justice in environmental cases at EU level. Some commentators even went as far as stating that the cases constituted a “lost opportunity for improving access to justice in environmental matters”.11 Even so, the EU courts did not refrain from reiterating this rather reluctant stance on access to justice in environmental cases in their more recent jurisprudence.12

Not unsurprisingly, the Aarhus Compliance Committee, a non-judicial body which oversees the application and implementation of the said Convention and had already concluded that the EU might be in breach with its obligation under Article 9(3) of the Aarhus Convention back in 2011,13 took a critical stance in response to these recent evolutions. In its recent draft findings and recommendations, which were published on 27th June 2016, it concluded that both the recent case-law developments as well as the existing regulatory framework fail to adequately implement the access to justice requirements laid down by Article 9(3) of the Aarhus Convention.14 In addition, the Committee pointed to the double standard used by the EU courts when interpreting the latter provision in the context of national courts.

Against the backdrop of the recent jurisprudential evolutions before the EU courts on environmental accountability, this paper discusses the complex legal arguments that are at play in the ongoing debate on access to justice against EU acts in light of the Aarhus Convention. In a first section, the sharp contrast between the liberalized standing requirements set out by Article 9(3) of the Aarhus Convention and the traditional case-law developments as regards standing in cases before the EU courts is sketched out. After a thorough analysis of the CJEU-rulings of 15 January 2015, which still remain the pivotal reference point in this respect, the most seminal points of criticism as to the current implementation of Article 9(3) of the Aarhus Convention at EU-level are outlined with reference to the recent draft findings and recommendations of the Aarhus Compliance Committee. In addition, this paper tries to propose alternative solutions for the existing deadlock within the current regulatory framework of the EU, tackling both procedural elements, such as the CJEU’s ambiguous take on the invocability of norms of international environmental law in the EU legal order, and more substantive issues, such as the inherent weaknesses related to the internal review mechanism, as set out by the Aarhus Regulation. It will turn out these two aspects are inextricably linked and thus require additional attention in light of the existing legal conundrum.

II. The Application of Article 9(3) of the Aarhus Convention at EU Level: Plau mann as a Perennial Obstacle?

2.1. Article 9(3) of the Aarhus Convention

Article 9(3) of the Aarhus Convention serves as a logical starting point for this analysis. Pursuant to the latter provision, the Contracting Parties have to ensure that “members of the public have access to administrative or judicial procedures to challenge acts and omissions by private parties and public authorities which contravene provisions of its national law relating to the environment”. While the purpose and objectives of this provision are relatively clear, the exact implications remain somehow vague, especially when measured up against the first two paragraphs of Article 9, which try to guarantee the procedural rights contained by the first two pillars of the convention (access to environmental information and public participation in decision-making). This should not come as a surprise bearing in mind the rather troublesome drafting process that preceded the adoption of the Aarhus Convention.15 However, it

10 Joined cases C-404/12 P and C-405/12 P Council and Others v Vereniging Stichting Natuur en Milieu and Pesticide Action Network Europe (CJEU, 13 January 2015); Joined cases C-401/12 P and C-403/12 P Council and Others v Vereniging Milieudiefense and Stichting Stop Luchtwegenbreiing Utrecht (CJEU, 13 January 2015).
12 See for instance Case T-535/14 European Environmental Bureau (EEB) v Commission (Order, General Court, 17 July 2015); Case T-685/14 European Environmental Bureau (EEB) v European Commission (Order, General Court, 17 July 2015).
14 Communication ACC/C/2008/32 (Part II) (European Union), Draft findings for parties’ comment.
should be pointed out that the material scope of Article 9(3) is very broad, entailing that any act or omission by private parties and/or public authorities that contravenes environmental law must be challengeable. Also, decisions that fall outside the scope of the first and second pillars of the Aarhus Convention because they do not relate to the information and public participation rights guaranteed under this framework are still challengeable under Article 9(3) of the Aarhus Convention. Only decisions enacted by bodies or institutions acting in their legislative or judicial capacity can be excluded.16

Pertaining to the nature of the review procedures that need to be provided, Article 9(3) of the Aarhus Convention stipulates that the public should have access to administrative or judicial proceedings, thereby leaving it open to the Contracting Parties to designate review bodies before which the acts and omissions can be challenged. While Article 9(3) of the Aarhus Convention does not spell out any specific quality requirements in this respect, the generally applicable quality standards laid down by Article 9(4) have to be taken into account. This entails that, irrespective of the specific nature of the available review procedures, the Contracting Parties need to ensure that the review options are “adequate and effective”. As noted in the 2014 Aarhus Convention Implementation Guide, adequacy requires the relief to ensure the intended effect of the review procedure.17 In this respect, it needs to be guaranteed that the review process is impartial and free from prejudice while also being expeditious.18

Lastly, Article 9(3) of the Aarhus Convention urges the Contracting Parties to provide for access to the aforementioned review procedures for “members of the public” where they meet the criteria, if any, laid down in national law. Given the broad definition of “the public”,19 it can be upheld that it effectively covers any natural or legal persons, including, amongst others, environmental organisations. On the other hand, the reference to “the criteria, if any, laid down in national law” seems to allow a great deal of flexibility to the Convention parties in delimiting the scope of the review procedures. Indeed, from the outset it was already clear that the Contracting Parties are not obliged to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. Nonetheless, as evidenced by later decisions of the Aarhus Compliance Committee, the Contracting Parties cannot use the clause “where they meet the criteria, if any, laid down in national law” as an excuse for introducing or maintaining criteria so strict that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment.20

In other words, to paraphrase the Aarhus Compliance Committee: access to judicial or administrative review procedures should be the presumption, not the exception.21

2.2. Traditional standing rules before the EU courts (Plaumann)

The relatively wide review options that have to be put in place in order to comply with Article 9(3) of the Aarhus Convention stand in stark contrast to the traditional rules of standing before the EU courts when directly challenging EU acts, for instance in the context of an action for annulment. In most cases, such actions are hindered by the prevailing interpretation of what is of “individual concern”, one of the two conditions that need to be fulfilled pursuant to Article 263(4) of the Treaty on the Functioning of the EU (TFEU) for private entities in order to be able to challenge in an admissible manner an act originating from an EU institution. This is what is generally known as the “Plaumann-doctrine”, referring back to the first lawsuit in which this line of argumentation had first been used by the EU judges.22 Since then, this interpretation has acquired a quasi-constitutional nature. According to this jurisprudence, a private party has only standing to directly challenge an EU act if it can be established that he or she is in a unique position with regard to the contested administrative or legislative act. In other words, the simple fact that an EU act might give rise to environmental degradation is not sufficient to grant either local inhabitants or environmental NGOs standing to challenge it before the EU courts. One could summarize this classical approach to the standing requirements by the following tag-line: an injury to all (e.g. the environment) is an injury to no-one and therefore does not grant standing to NGOs that have the promotion of the environment as their statutory goal.

It may be tempting to focus an analysis of the current struggles at EU level on the recent judgments of the EU courts. However, the path to the present-day situation was paved decades ago. Rather ironically, the Greenpeace rulings of the Court of First Instance (CFI) and, in appeal, the Court of Justice of

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16 See Article 2(2) d of the Aarhus Convention.
18 Id.
19 See Article 2 (4) of the Aarhus Convention: “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”.
20 Aarhus Convention Compliance Committee (2006), Report of the Meeting, Addendum Findings and Recommendations with Regard to Compliance by Belgium with its Obligations under the Aarhus Convention in Relation to the Rights of Environmental Organisations to have Access to Justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium)), ECE/MPP/C.1/2006/4/Add.2 (28 July), par. 35.
21 Id., par. 36.
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the EC (ECJ), dating back from the 1990s, still exemplify the lack of sufficient legal remedies in environmental cases at EU level anno 2016. Here, the CFI ultimately held that the Plaumann test remained good law regardless of “the nature, economic or otherwise, of those of the applicants’ interests which are affected”. Also, the actions of the environmental NGOs involved, which purported that they had standing because of the environmental degradation linked to the Commission’s decision, were declined. In the eyes of the EU judges environmental NGOs cannot claim that the mere likelihood of environmental harm amounts to an injury-in-fact, granting the former standing before the EU courts. In appeal a similar strict reasoning as to locus standi was upheld. In response to counter-claims pointing to a lack of legal remedies at national level, the CFI maintained that the necessary remedies were available at the level of the national courts. EU legislative acts and EU acts of a general nature which entail implementing measures can indeed be challenged indirectly. This implies that the CJEU can be asked to review their legality, but only by a national court before which this question was raised (via the so-called preliminary reference procedure laid down in Article 267 TFEU). At the time, some commentators challenged whether the so-called standard of a “complete” system of judicial remedies in the EU/EC legal order, which had been put forward by the ECJ itself in its landmark ruling in Les Verts, was actually achieved. For, assuming that environmental NGOs should take recourse to national legal proceedings, if available, would again confront the latter with different and often severely restrictive rules on standing which might prevent cases from getting through to the CFI. Moreover, it does not offer a solution for cases in which no implementing measures can be attacked at national level. This said, the 2005 decisions of the CFI in European Environmental Bureau again illustrated that access in environmental matters was still as remote in 2005 as it was in the mid-1990s. The mere fact that certain procedural requirements had not been followed throughout a decision-making procedure, and thus could give rise to a so-called “procedural injury” for certain environmental NGOs, was not able to lead to a more liberalized reading of the standing requirements.

Also, after the entry into force of the Aarhus Convention in 2005 direct actions against EU acts in environmental matters did not fare better. This was aptly underscored by the rulings in World Wildlife Fund UK, in which the annulment was sought of a regulation laying down quotas and total allowable catches for cod.

2.3. A first warning shot fired by the Aarhus Compliance Committee in 2011

Faced with the stubborn refusal on the part of the EU courts to rethink their traditional approach to the standing requirements in the context of direct actions against legislative and administrative EU acts, some environmental NGOs, amongst which Client Earth, and a private individual filed a complaint before the Aarhus Compliance Committee regarding the EU’s failure to comply with the requirements set out by Article 9(3) of the Aarhus Convention. This urged the latter to shed light on the specific nature of the EU commitments in this respect.

As is widely known, the Aarhus Compliance Committee decided to defer further consideration of the communication to a subsequent point in time. Even so, it did not refrain from openly criticising the reluctant stance of the EU courts on standing in environmental cases in its 2011 partial findings.

When reviewing the recent case-law developments, the Aarhus Compliance Committee held that the consistent application of the Plaumann test was tantamount to creating a situation in which no member of the public would ever be able to directly challenge a decision or a regulation in environmental cases before the EU courts. Reasserting its earlier stance, the Aarhus Compliance Committee pointed out that the clause “where they meet the criteria, if any, laid down in national law” cannot serve as an excuse for introducing or maintaining criteria so strict that they effectively bar all or almost all environmental


24 CFI Greenpeace (supra n 23), par. 38

25 ECJ Greenpeace (supra n 23).

26 Id. par. 32.


32 ACCC EU (Part I) (supra n 13).
organisations from challenging acts or omissions that contravene national law relating to the environment.\textsuperscript{33}

That said, the Aarhus Compliance Committee was hesitant to issue a clear-cut assessment of the EU system of legal remedies in environmental cases back in 2011.\textsuperscript{34} The reason for this is linked to the fact that, at the time of the promulgation of the first findings, several lawsuits were pending before the EU courts in which the adequacy of the internal review procedure was challenged in light of Article 9(3) of the Aarhus Convention. The Aarhus Compliance Committee was thus of the opinion that the 2006 Aarhus Regulation, which had been adopted to amend the limited standing for environmental NGOs at EU level, if interpreted in an Aarhus-friendly way, would offer ample review options, at least for environmental NGOs. And thus it concluded that if no adequate administrative review procedures are put in place in order to offset the rigid standing rules before the EU courts, a non-compliance scenario might still arise.\textsuperscript{35}

III. The Limited Added Value of the Aarhus Regulation: How (Almost) Everything Remains Exactly the Same?

3.1. The 2006 Aarhus Regulation: reconciling the irreconcilable?

By granting environmental NGOs the right to seek an internal review of EU administrative acts, the 2006 Aarhus Regulation aimed to cure the issue of the limited standing before EU courts while maintaining the well-established Plau mann-doctrine, as steadfastly put forward by the CJEU in its case-law. As a reform of the founding treaties of the EC/EU in order to allow for a more generous locus standi for environmental NGOs had to be ruled out as unrealistic from the beginning, the creation of a preliminary internal review procedure (Article 10) which could be followed up by a subsequent judicial review procedure (Article 12) was seen as a pragmatic solution for the apparent loophole in the EU system of legal remedies.\textsuperscript{36}

3.2. New admissibility hurdles: towards a restricted interpretation of “administrative act”

As hinted at in the introduction, the exact material scope of this internal review procedure is at the heart of the current debate on access to justice in environmental cases at EU level. A closer analysis of Article 10(1) of the Aarhus Regulation is therefore imperative in order to fully understand the current debate on access to justice in environmental matters at EU level. The provision delineates the material scope of the internal review procedure and therefore determines to a large extent its added value in the field of environmental governance. Article 10(1) stipulates that environmental NGOs meeting certain criteria are entitled to request an internal review to the EU institution or body that has adopted a certain administrative act under environmental law or, in case of an alleged administrative omission, that should have adopted such an act.\textsuperscript{37}

While the internal review procedure contains a myriad of obstacles in terms of environmental litigation, by far the most formidable constraint was created by the requirement which limits the substantive scope of the internal review procedure to “an administrative act adopted under environmental law, or an alleged administrative omission (to adopt such an act)”. In particular, Article 2 (1) \textit{litera} g of the Aarhus Regulation defines “administrative acts” as “any measure of individual scope under environmental law, taken by a Community institution or body, and having a legally binding and external effect”, which restricts the material scope of the internal review procedures in a significant manner.\textsuperscript{38} Indeed, by inserting the word “individual”, the majority of environmental decisions, such as implementing measures adopted by the European Commission in the field of the Common Fisheries Policy (CFP) or decisions directed towards Member States, for instance in the context of EU air quality programmes, seem to fall outside the scope of the internal review procedure.\textsuperscript{39} And this is exactly what happened in practice.\textsuperscript{40}

Of the more than 30 or so requests for internal review that have so far been submitted by environmental NGOs before the EU institutions, the bulk has been rejected because they did not amount to a “measure of individual scope”. For instance, in several decisions regarding national plans containing temporary exemptions from the obligations to comply with the emission ceiling set by Directive 2010/75 for certain pollutants, the Commission reached the conclusion that, since the authorisations did not approve specific individual obligations for the operators of

\textsuperscript{33} Communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, par. 31, 35 and 41.

\textsuperscript{34} Id., par. 97.

\textsuperscript{35} Id., par. 93.

\textsuperscript{36} Article12 Aarhus Regulation.

\textsuperscript{37} See more extensively: Marc Pallemaerts, Compliance by the European Community with its obligation on access to justice as a party to the Aarhus Convention (Institute for European Environmental Policy, 2009), pp. 26–27.


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combustion plants, they did not qualify as measures of individual scope.41 Only decisions to authorize the placing on the market of products of genetically modified organisms such as maize and potatoes under the scope of Regulation 1829/2003 could be qualified as “administrative acts” within the meaning of the Aarhus Regulation according to the European Commission.42 Such decisions can indeed be framed as typical examples of acts of individual scope involving the application of rules of EU environmental law to specific cases. Yet, in its more recent administrative practice, the European Commission indicated that decisions adopted under Regulation 1829/2003, relating to the health impacts of the consumption of GM food and feed, are not covered by Article 10 of the Aarhus Regulation, and thus cannot be challenged by environmental NGOs within this framework. According to the Commission, these types of decisions do not fall under the notion of “elements of the environment” as stipulated in Article 2(1)(d)(i) of the Aarhus Regulation.43 Other requests were declared inadmissible as they did not entail “legally binding and external effects”. For instance, the requests of several NGOs for internal review concerning a commission’s decision to adopt a list of candidates for the appointment of the Executive Director of the European Chemicals Agency by the Management Board thereof had been rejected because, obviously, such decisions have to be regarded as internal to the institution or body concerned and thus incapable of having “external effects” within the meaning of the Aarhus Regulation.44 On similar grounds, the European Commission also rejected a request for internal review of Commission Decision C(2007) approving the Operational Programme Transport 2007-2013 for the Czech Republic.45

In relation to a request of a Portuguese NGO, which had asked for a review of the Commission’s decision closing an infringement procedure concerning the Baixo Sabor dam project in Portugal, the European Commission noted that such decisions are, as mentioned earlier, excluded from the scope of application of the internal review procedure.46 Equally so, the European Commission rejected a request for internal review of a statement made by it upon the adoption of the amendments to the Emissions Trading Directive in April 2009 on the basis that it merely should be qualified as a statement of a political character, not entailing any legally binding effects.47

3.3. A surprise victory before the General Court in 2012: towards a more progressive interpretation of “administrative acts”

The recent case-law developments in relation to Article 9(3) of the Aarhus Convention all relate back to the limited success of the internal review procedures when approached from the viewpoint of environmental accountability. The many admissibility constraints surrounding the practical application of the internal review procedures put into place by the Aarhus Regulation became a matter for the EU judges in Luxembourg when several Dutch environmental NGOs decided to sue the European Commission over its restricted approach to the internal review procedure.

In order to better understand the recent case-law developments, it is interesting to succinctly summarize the factual background of the cases that led up to the CJEU-rulings of 13 January 2015. The Stichting Milieu case revolved around the request for internal review introduced by two Dutch environmental NGOs in the context of Regulation 149/2008 amending Regulation (EC) 396/2005 of the European Parliament and the Council by setting maximum residue levels for listed products. The second lawsuit, Vereniging Milieudfensie, related to the persisting unsatisfactory air quality in the Netherlands. Two Dutch environmental NGOs disagreed with the Dutch air quality policy, which they felt to be too lenient, and launch a request for internal review of a Commission Decision, made on the basis of a derogation clause enshrined in Air Quality Directive 2008/50. The factual background of both cases aptly illustrates the importance of having at least some review options available in environmental cases. Even so, the European Commission declined from reviewing the contested decisions on the merits because it held that both did not constitute “administrative acts” meeting the criteria of Article 2 (1) (g) of the Aarhus Regulation.48

In their legal actions before the General Court the environmental NGOs claimed that, if it turned out that the strict interpretation of the internal review procedure upheld by the European Commission was indeed compatible with the wording of the Aarhus Regulation, Article 10(1) of the Aarhus Regulation would contravene Article 9(3) of the Aarhus Convention. The General Court agreed with the central part of the argumentation submitted by the NGOs in its rulings of 14 June 2012.49

41 See for instance: Reply of the Commission services to European Environmental Bureau of 11 April 2014.
42 Reply of the Commission services to TestbioTech of 8 January 2013.
43 Reply of the Commission services to GeneWatch UK and Testbiotech of 16 November 2016.
44 Reply of the Commission services to (amongst others) EBB of 12 December 2007.
45 Reply of the Commission services to EPS of 6 August 2008.
46 Reply of the Commission services to LPN of 23 October 2008.
47 Reply of the Commission services to ClientEarth of 27 April 2009.
48 Reply of the Commission services of 1 July 2008 to Stichting Natuur en Milieu en Pesticide Action Network; Reply of the Commission services of 28 July 2009 to Vereniging Milieudfensie en Stichting Stop Luchtverontreiniging Utrecht.
49 Stichting Natuur en Milieu (supra n 10), par. 52; Vereniging Milieudfensie (supra n 10), par. 52.
The outcome of these lawsuits before the General Court caused a stir, especially bearing in mind that the Grand Chamber had previously held, in its 2009 landmark ruling in _Lesoochranárske zuskupenie_, that Article 9(3) of the Aarhus Convention was devoid of direct effect, which ostensibly precluded it from being used as an “international” standard for review of secondary EU legislation, such as the Aarhus Regulation.\(^{50}\) In order to bypass the apparent lack of direct effect linked to Article 9(3) of the Aarhus Convention, the General Court held that Article 10(1) explicitly aimed to implement a particular obligation under an international agreement. And thus it would still be possible to review the legality of the Aarhus Regulation in view of Article 9(3) of the Aarhus Convention. Interestingly, the Court based its reasoning on the so-called _Fedio\(^{51}\)_ and _Nakajima\(^{52}\) _exceptions. In both cases, the ECJ had decided to review the legality of EU legislation in light of international commercial law, despite of its apparent lack of direct effect. The General Court chose to apply this so-called “implementation exception” as an alternative approach _vis-à-vis_ the legality review sought after by the environmental NGOs. In its rulings of 14 June 2012, the General Court quickly reached the conclusion that the conditions to apply the latter exception had been complied with since the Aarhus Regulation explicitly referred to the Aarhus Convention and thus no doubts could persist as to whether this was a typical “implementation” case.\(^{53}\) While this reasoning was not totally immaculate,\(^{54}\) especially since the above-listed exceptions both related to WTO/GATT context, it still allowed the General Court to tackle the substantive arguments raised by the environmental NGOs.

As to the substance, the General Court held that the limitation of the concept of “acts” to “administrative acts” in the sense of Article 2 (1) (g) of the Aarhus Regulation was incompatible with Article 9(3) of the Aarhus Convention. While recognising that under Article 9(3) of the Aarhus Convention, the Contracting Parties retained a certain measure of discretion with regard to the definition of the persons who have a right of recourse to administrative or judicial procedure and as to the nature of the procedure (whether administrative or judicial), the General Court ultimately held that the Aarhus Convention does not offer the same discretion as regards the definition of “acts” which are open to challenge under Article 9(3) of the Aarhus Convention.\(^{55}\) The rationale used by the General Court when interpreting the concept of “administrative act” in light of Article 9(3) of the Aarhus Convention appears to be well-founded. Interestingly, the Court explicitly applied the interpretation rules that are contained by Article 31 of the Vienna Convention on the Law of Treaties. In view of the latter convention, it does indeed make sense to take into consideration the objective and purpose of a treaty when shedding light on the exact scope of a specific treaty obligation, such as Article 9(3) of the Aarhus Convention.

And while the General Court did not explicitly refer to the previous jurisprudence of the Aarhus Compliance Committee in this respect, its interpretation of “administrative acts” in light of Article 9(3) of the Aarhus Convention is in line with the latter institution’s recent practice in non-compliance findings. For instance, in its 2007 findings and recommendations on the limited access to the Belgian Council of State by environmental organisations in Belgium, where the scope of Article 9(3) of the Aarhus Convention needed to be clarified for the first time, the Committee stated that spatial plans, although not falling under the scope of the provisions on public participation, nevertheless were eligible as reviewable acts within the context of Article 9(3) of the Aarhus Convention.\(^{56}\)

Most interestingly, a similar rationale was also used by the Committee in its above-mentioned 2011 provisional findings as regards the EU, where it noted that both the EU act that was at issue in _Greenpeace_ and _WWF UK_, _i.e._ the decision to provide financial assistance to the Spanish authorities for the construction of two power stations and the decision to establish catch limits for the next fishing season, both fall within the ambit of Article 9(3) of the Aarhus Convention.\(^{57}\)

Therefore, at first sight, the rulings of the General Court are to be framed as a remarkable shift in the EU courts’ reluctant approach to Aarhus at EU level. For indeed, these ruling were the first in which EU judges decided to use Article 9(3) of the Aarhus Convention as a standard for review in the context of the review procedures that were available at EU level. Moreover, the General Court also vehemently rejected the reference to indirect legality review of the contested EU acts before the national courts as an argument to

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\(^{51}\) Case C-70/87 _Fédération de l’industrie de l’huilerie de la CEE (Fedio)_ v _Commission of the European Communities_ [1989] ECR 1781.

\(^{52}\) Case C-69/89 _Nakajima All Precision Co, Ltd v Council of the European Communities_ [1991] ECR I-2069, par. 31.

\(^{53}\) GC, Stichting Natuur en Milieu (supra n 10), par. 57–58; GC, Vereniging Milieufedensie (supra n 10), par. 57–58.

\(^{54}\) See more extensively: Schoekens (supra n 30), pp. 24–26.

\(^{55}\) GC, Stichting Natuur en Milieu (supra n 10), par. 77; GC, Vereniging Milieufedensie (supra n 10), par. 66.

\(^{56}\) ACCC Belgium (supra n 20), paras. 28–31.

\(^{57}\) ACCC EU (Part I) (supra n 13), paras. 69–75.
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justifying the limited access to the internal review procedure at EU level. By doing so, the judges of the General Court seemed to cautiously step away from the much-debated dual-track nature of the EU system of legal protection which was, as stated above, often used to justify the limited review options against EU acts before EU courts.

Yet, in spite of the General Court’s apparent willingness to scrutinize the internal review procedure in light of Article 9(3) of the Aarhus Convention, the rulings of 14 June 2012 still left many of the substantial loopholes relating to legal protection in environmental cases unaddressed. Leaving aside the limited practical effect of the rulings, which ultimately only addressed the admissibility questions at issue and thus not amounted to a substantive review of the underlying decisions, the General Court also implicitly struck down the hope of a more tangible shift towards more accountability at EU level. When rebutting the limited interpretation given to the notion of “administrative act”, the General Court reiterated that, regardless of the exact scope of the internal review procedure under the Aarhus Regulation, the conditions for admissibility laid down by Article 263(4) of the TFEU must always be observed if a subsequent action is brought before the EU courts pursuant to Article 12 of the Aarhus Regulation. This provision, as underlined above, allows the environmental NGOs to challenge the legality of the written replies. For the good listener, this obiter dictum served as an important reminder of the unwillfulness of the EU judges to reconsider their strict standing approach in the context of subsequent direct actions against EU acts. In other words, for decisions that fell outside the scope of the internal review procedure or in the context of subsequent proceedings on the basis of Article 12 of the Aarhus Regulation, no more liberalized standing requirements would be made applicable.

3.4. The rulings of the CJEU of 13 January 2015: back to square one?

As stated above, the Grand Chamber of the CJEU overturned the rulings of the General Court and refused to carry out a legality review of the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention. Returning to the basic legal principles underlying the invocability of provisions of an international agreement in the EU legal order, the CJEU stated that provisions of a treaty ratified by the EU can only be relied upon to review an act of EU secondary legislation where the nature and broad logic of that agreement did not preclude it and, additionally, the provisions at issue were, as regards their content, unconditional and sufficiently precise. With reference to its previous decision in Lesooehranárske zoskupenie, the CJEU stated that Article 9(3) of the Aarhus Convention does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. By explicitly allowing only members of the public who “meet the criteria, if any, laid down in (…) national law”, the latter provision is subject, in its implementation or effect, to the adoption of a subsequent measure. Consequently, the provision could not be relied upon to review the validity of the Aarhus Regulation.

Against the backdrop of the latter premises, the Grand Chamber ultimately decided to overrule the General Court’s reasoning. More specifically, it rejected the use of the so-called Fediol and Nakajima exceptions. In the Fediol exception the ECJ held that it would conduct a legality review of an EU act in the light of WTO-law where the EU act at issue explicitly referred to specific provisions of WTO-law, whereas the Nakajima exception referred to a case of a legality review where the EU intended to implement a particular obligation assumed under WTO law. Although the lawsuits filed by the environmental NGOs had no link with WTO-law, these “exceptions” were brought up by the General Court in its 2012 rulings in order for it to proceed with the legality review of the Aarhus Regulation in the light of the requirements set out by Article 9(3) of the Aarhus Convention. Still, as feared, the CJEU ultimately held that “those two exceptions were justified solely by the particularities of the agreements that led to their application”. In the CJEU’s view, the vague and ambiguous wording of Article 9(3) of the Aarhus Convention rendered it unsuitable as a reference criterion for the purpose of legality review of EU secondary legislation. Having rejected both vested exceptions, the CJEU concluded that the General Court had erred in law in both cases by reviewing the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention.

58 GC, Vereniging Milieudefensie (supra n 10), par. 76.
61 It could indeed be argued that the simple fact that no substantive review has taken place more than four years after the issuance of the underlying decisions clearly stood at odds with the timeliness requirement set out by Article 9(4) of the Aarhus Convention. See more extensively: Schoukens (supra n 30), pp. 33–34.
63 GC, Stichting Natuur en Milieu (supra n 10), par. 80; GC, Vereniging Milieudefensie (supra n 10), par. 72.
64 CJEU, Stichting Natuur en Milieu (supra n 10), par. 48; Vereniging Milieudefensie (supra n 10), par. 55.
65 Stichting Natuur en Milieu (supra n 10), par. 54; Vereniging Milieudefensie (supra n 10), par. 61.
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IV. Alternative Procedural Approaches within EU Law: Ensuring the Effectiveness of International Environmental Law in the EU Legal Order?

By dismissing the possibility to review the Aarhus Regulation against the backdrop of Article 9(3) of the Aarhus Convention, the CJEU did not have to pronounce itself on the substance of the arguments raised by the environmental NGOs in their original claims. Obviously, this lack of scrutiny might jeopardize the international obligations of the EU given the apparent shortcomings of the Aarhus Regulation, which are, as a result of the rulings, left unaddressed. However, before touching upon the immediate and long-term repercussions of the above-depicted caselaw developments in view of the EU’s international commitments, the question arises whether the CJEU’s approach towards the Aarhus Convention is well-founded in light of EU law.

At first sight, the rationale underpinning the rulings of 13 January 2015 appears plausible. Article 216(2) of the TFEU states that agreements concluded by the EU are binding for the institutions of the Union and its Member States. Still, as is widely known, the binding effect in itself is not sufficient to ensure review of the legality or validity of EU acts. Pursuant to the established caselaw of the ECJ/CJEU, EU courts may only review the legality of a regulation in the light of an international convention when the nature and the general logic of the convention do not preclude such an assessment and where, in addition, the provisions of the treaty appear, as regards their consent, to be unconditional and sufficiently precise. This case-law is described as a “two-tiered test” in legal literature. First, the EU courts examine the nature and general logic of an agreement as to whether it intends to accord direct effect to its provisions, or at least considers them capable of having self-executing character. Secondly, the EU courts check the wording of the provision concerned so as to determine whether it is sufficiently clear and precise and does not require the adoption of subsequent measures to be fully implemented.

Until now, the application of this test has never been really consistent in the jurisprudence of the EU courts. During the last years, this test has led to remarkable stringent jurisprudence as to reviewability of secondary EU legislation in view of international agreements. Only as recently as in 2008 this viewpoint was explicitly reiterated by the ECJ in its renowned decision in Intertanko, where it was held that the nature and the general logic of the United Nations Convention on the Law of the Sea (UNCLOS) prevented the ECJ from assessing the validity of a Community measure in its light. Given the fact that the CJEU had, as mentioned earlier, explicitly denied to accord direct effect to Article 9(3) of the Aarhus Convention in its Lesoochranárske zoskupenie decision, the CJEU’s refusal to proceed with the requested legality review should not come as a surprise.

Be that as it may, the relatively straightforward line of argumentation used by the CJEU is certainly not flawless. As such, the reliance on Lesoochranárske zoskupenie which centered on access to justice at national level seems to lay bare a certain ambiguity in the Court’s reasoning. Whereas the CJEU notoriously refused to accord direct effect to Article 9(3) of the Aarhus Convention in the 2009 Brown Bear case, it still went on noting that the latter provision, albeit drafted in broad terms, clearly aimed to ensure effective environmental protection at national level. This eventually prompted the EU judges to oblige national courts, which reference to the principle of effectiveness (“effet utile”), allowing them to interpret their own national procedural rules in light of Article 9(3) of the Aarhus Convention. It therefore remains difficult to understand why the EU judges do not reach a similar conclusion in the context of secondary EU legislation and accord indirect effect to Article 9(3) of the Aarhus Convention.

Sure enough, this “practice-what-you-preach-criticism” could be dismissed as policy-related remarks which matter little within a legal context. However, the 2016 draft findings and recommendations of the Aarhus Committee gave some extra weight to the remarks outlined above. Here, the Committee explicitly underlined that it “regrets that, while the ECJ has held that national courts are bound to interpret, to the fullest extent possible, procedural rules relating to the conditions to be met in order to bring administrative and judicial proceedings in accordance with the objectives of article 9, paragraph 3, it does not apply this principle to itself”.

Ultimately, it is useful to point out that the CJEU had two alternative lines of reasoning at its disposal, which might have helped it to sidestep its classical approach to the legal effects of international agreements in the EU legal order and still carry out a

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66 Case C-121/06 P FIAMM and Others v Council and Commission [2008] ECR I-6513, par. 110.
68 Case C-308/06 The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport (2008) ECR 1-04057, par. 45.
69 Lesoochranárske zoskupenie Vlk v Ministerstvo íivotného prostredia Slovenskej republiky (supra n 37), par. 49.
70 Schoukens (supra n 60), pp. 56–58.
71 ACCC EU (Part II) (supra n 14), par. 78.
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substantive legality review of EU secondary law in light of the Aarhus Convention. This topic has so far generated little scholarly attention, with most scholars focusing on the substantive issues at stake in the realm of environmental accountability. Even so, the alternative pathways that were available to the CJEU still merit closer analysis since, while essentially procedural in nature, they also touch upon more substantive issues, such as non-compliance with international environmental obligations and the enforceability of procedural environmental rights.

4.1. Nakajima revisited: towards more accountability in the context of the EU’s international commitments?

The first focal point when analysing the viability of CJEU’s rationale relates to the so-called “implementation exception”, which allows the EU judges to sidestep the classical direct-effect approach towards the legal effects of international agreements within the EU legal order. Whereas the subsequent analysis might be viewed as procedural by nature, it has an important bearing on the effectiveness of the Aarhus Convention within the EU legal order. The CJEU’s approach, as evidenced by its rulings of 13 January 2015, basically confines the application of the Fediol and Nakajima exceptions to the specific context of the GATT and WTO-agreements. More in particular, the CJEU pointed out that the factual background of both cases could not be compared to the cases that had led to rulings in Fediol and Nakajima. The simple fact that the GATT and WTO agreements are based on reciprocal and advantageous arrangements appears to hinder the application of the specifically tailored exceptions outside the scope of the EU’s international commercial commitments, such as the Aarhus Convention.

As such, the CJEU might have common sense at its side in opting for a restrictive application of the Fediol and Nakajima exceptions outside the context of international commercial policy. Even so, it remains unclear whether the Court’s take remains as convincing when approached from a broader perspective, especially within the context of international environmental law.

First, the CJEU’s strict reading of the Fediol and Nakajima exceptions, if not compensated by a more lenient approach towards direct effect as a precondition for international law to be used as a benchmark for the purpose of a legality review of secondary EU measures (see supra), could lead to major differences in the level of judicial protection for individuals in cases which relate to the EU’s international obligations. Commentators like Eeckhout rightly submitted that both Fediol and Nakajima reflect some type of compromise which was reached within the ECJ at the time, striking a balance between the lack of direct effect of some international agreements and respect for the EU’s international commitments. However, by confining both exceptions exclusively to the realm of the GATT and WTO agreements or, alternatively, by limiting the principle of EU law implementing international rules to scenarios in which the provision at stake explicitly refer to the international provision, the CJEU has raised the bar for legality review that high that one might wonder if the exceptions might ever be applied again.

Secondly, also when approached within the specific context of the Aarhus Regulation, the Court’s reasoning is not persuasive. In itself, it remains uncontested that the Aarhus Regulation intended to implement the EU’s obligations under the Aarhus Convention. This is illustrated by recital 18 and Article 1(1) (d) of the Aarhus Regulation among others, which explicitly acknowledge that the objective of that Regulation was to contribute to the implementation of the obligations arising under the Aarhus Convention by granting, inter alia, “access to justice in environmental matters at European level under the conditions laid down by this Regulation”. By opting for a rigid interpretation of the above-mentioned implementation principle essentially requiring a specific mentioning of the international agreement in the provision concerned the CJEU sends out the message that review of an EU act in the light of international environmental law will remain exceptional.

In a more recent ruling regarding Regulation 1429/2001 on Access to Public Documents, the CJEU adopted a seemingly similar strict stance. In its decision in appeal, the CJEU reasserted the General Court’s refusal to take into account Nakajima and Fediol as a means to carry out a legality review of the latter regulation in light of the Aarhus Convention. Still, in sharp contrast to the former cases, Regulation 1429/2001 did indeed not contain an express reference to the Aarhus Convention, neither in its preamble nor in its provisions. Thus the latter ruling is less questionable in this respect. As demonstrated, the Aarhus Regulation did however contain explicit references to the Aarhus Convention and therefore could still be used as a benchmark for legality review. Thirdly, the CJEU’s reluctant stance vis-à-vis an indirect legality review in light of the Aarhus Conven-

72 For a more extensive analysis however, see: Schoukens (supra n 60), pp. 56–61.
73 This reasoning was also confirmed by Advocate General Jääskinen, see: Opinion AG Jääskinen in Vereniging Milieudienst (supra n 10), paras. 52–57.
tion also gives rise to criticism on a more fundamental level. While it is certainly true that the context of WTO-related cases is to be distinguished from environmental cases, the sharp dichotomy between both policy spheres does not appear wholly justified. Critics might advance that most international environmental agreements are the result of hard and difficult negotiations, which are often compounded by the conflicting economic interests at stake.

Not unsurprisingly, given the major impact the adoption of stricter environmental rules might have on national economic policies, many provisions of international environmental agreements lack precise and unconditional wording. The 2015 Paris Agreement, which entered into force last October, might serve as a stark example of this trend. While it is legally binding as such, it does not contain clear-cut emission targets. Under the CJEU’s rigid approach, however, such conventions could almost never be used as a yardstick for the purpose of the legality review of the EU’s implementing measures.

As rightly held by Pirker, it might indeed be feared that, in the absence of any threat of legality review by EU courts, EU institutions will feel “virtually immobilised” from legal challenges when implementing international obligations. In addition, one might wonder why the CJEU decided to confine its reference to Lesoschranárske zoskupenie to the excerpt relating to the lack of direct effect of Article 9(3) of the Aarhus Convention, leaving the Convention-friendly interpretation which followed the Court’s findings on indirect effect and the duty of consistent interpretation in view of the EU’s international commitments unmentioned.

In two more recent orders of 17 July 2015, which again revolved around the rejection by the European Commission of several requests for internal review, the General Court acknowledged that the Aarhus Regulation should, as far as possible, be interpreted in conformity with the Aarhus Convention. Even so, the Court noted that that duty finds its limit in a so-called contra legem-interpretation, which would arise if one interpreted the concept “administrative acts” in such a manner that it also encompasses measures of a general application.

4.2. Different shades of grey: the lack of direct effects does not (necessarily) hinder legality review?

In addition to the implementation principle, the CJEU was presented with a possibly even more comprehensive option to take into consideration Article 9(3) of the Aarhus Convention in its assessment of the internal review procedure set out by the Aarhus Regulation. This alternative approach was presented by Advocate General Jääskinen in his Opinion of 8 May 2014 in Vereniging Milieudefensie.

Here, a more nuanced approach towards the invocability of norms of international law in the EU legal order was laid down. The Advocate General based his reasoning on earlier jurisprudence, in which the ECJ seemed to apply a less rigid approach and made a distinction between the situation in which an individual wishes to invoke an act of international law directly by relying on a right laid down in that law for his benefit, on the one hand, and that of the review of the discretion enjoyed by the institutions of the EU during the process of alignment of an act of EU law with an act of international law, on the other hand. Advocate General Jääskinen reasoned that, in order to avoid creating an area free of judicial review, the lack of direct effect of a provision of an international agreement should not rule out an examination of an EU act in the light of the former, provided that the characteristics of the said convention do not preclude this. For a provision of international law to serve as a yardstick for the purpose of legality review, it must necessarily include sufficiently clear, intelligible and precise elements. However, most importantly, the Advocate General underlined that such a provision does not need an exhaustive rule, allowing that such a provision may be also mixed in nature. Whenever it would remain possible to isolate parts of the contents of that provision which satisfy that requirement, it must be possible to use it in the specific context of a legality review.

Subsequently, the Advocate General found that Article 9(3) of the Aarhus Convention fulfils the said requirements and thus qualifies as a “mixed provision”. Whereas the Advocate General concedes that Article 9(3) requires the adoption of subsequent acts and that therefore individuals could not rely upon it, it does contain a clear-cut obligation on the part of the Contracting Parties to ensure that there is a clearly identifiable outcome. This ultimately led the Advocate General to come to the conclusion that, having regard to its objective and its general logic, Article 9(3) of the Aarhus Convention is in part a sufficiently clear rule which is capable of serving as the basis of a legality review of the Aarhus Regulation. Evidently, the Advocate General’s take would offer a more satisfactory solution for the detected loopholes to which the traditional case-law of the CJEU on the legal effects of international environmental conventions in the EU legal order has led.

Moreover, the latter approach also finds support in some case-law of the ECJ/CJEU itself. For instance, in
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its 2001 Biotechnology decision, the ECJ famously held that, even if the Convention on Biological Diversity did contain provisions which do not fulfil the requirements for direct effect, in the sense that they do not create any right which individuals might rely on directly before EU courts, this did not preclude a review by the courts of compliance with the obligations on the EC as a party to that agreement.85

Even more so, also in its other case-law the CJEU has shown more openness towards the legal effects of provisions of international agreements in the EU legal order.86 Reference can be made to the recent ruling of the CJEU in Air Transport Association of America and Others (ATA), in which it was asserted that the principles of customary international law “may be relied upon by an individual for the purpose of the CJEU’s examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act (…) and, second, the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in this regard”.87 Given the objective and purpose of the Aarhus Convention, which is precisely aimed at granting procedural environmental rights to the wider public, including environmental NGOs, one might state that a similar reasoning could also have been in order in the Vereniging Milieubescherming and Stichting Natuur en Milieu-cases.88 Along similar lines, one might also point to the CJEU’s previous case-law on the direct effect of provisions of EU regarding environmental impact assessment (EIA), where it gave precedence to the “effet utile” of the latter provisions over the traditional direct-effect approach.89

Be that as it may, in its rulings of 13 January 2015, the CJEU did not elaborate on why it did not take into account this more nuanced approach to the usage of norms of international law in the context of legality review.90 The Court might have had some procedural reasons not to delve into the solution presented by the Advocate-General. As such, the limited competences of the CJEU in appeal might have barred it from expressing its view on the additional observation provided to it by the Advocate General. That might have been different if the General Court had based its reasoning on different grounds in 2012. In the absence of any further motivation in this respect, it remains challenging to second-guess the motivation of the CJEU for not treating the alternative pathway suggested by the Advocate General.

Yet, in light of other recent rulings, such as the above-featured ruling of 16 July 2015, it remains questionable at best whether the CJEU is really willing to reconsider its rigid approach. While the latter case did not concern the Aarhus Regulation it related to Regulation 1049/2001 concerning Public Access to Documents the CJEU held that the Aarhus Convention, Article 4(4) (c) to be precise, was not sufficiently precise and unconditional to serve as a yardstick for legality control. In addition, it also held, albeit in the context of the specific wording of Article 4(1) of the Aarhus Convention (which relates to access to information), that “the convention was manifestly designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union, even where those institutions can sign and accede to the Aarhus Convention, under Articles 17 and 19 thereof”.91 The Court even went as far as interpreting the EU’s declaration made upon signing the Aarhus Convention as an argument that the Convention’s provisions do not meet the requirements of direct effect needed to use the latter as a yardstick in a legality review of EU secondary law. To a certain extent this is reminiscent of the rulings of 13 January 2015, in which the CJEU also underlined that most legal remedies in the context of EU environmental law fall within the competence of the Member States.

V. The Aarhus Compliance Committee Strikes Again: A More Detailed Analysis of the 2016 Draft Findings and Recommendations

In the wake of the rulings of 13 January 2015, Client Earth, supported by a number of entities and a private individual, urged the Aarhus Compliance Committee to resume discussions of the alleged non-compliance situation for the EU. As indicated above, the Compliance Committee issued its draft findings and recommendations on Part II, which serve as a follow-up to the findings of 2011, on 24th June 2016. In its draft findings and recommendations, which were subsequently forwarded to the EU institutions and the communicant for comments, the Committee corroborated the well-established criticism regarding the loopholes in the EU system of legal remedies in environmental cases. Below, I will succinctly address the most pivotal points in this respect and frame them in the wider context of EU law.

86 See more extensively: Schoukes (supra n 60), pp. 59–61.
87 Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change [2011] ECR I-13755, par. 110.
88 See more extensively: Schoukes (supra n 60), pp. 58–62.
90 See along similar lines: Pirker (supra n 67).
91 Client Earth (supra n 76), paras. 40–43.
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5.1. The outcome of the Stichting Milieu-case: a missed opportunity (bis)?

As indicated above, the Aarhus Compliance Committee explicitly refrained from examining whether the Aarhus Regulation or any other internal review procedure at EU level was in compliance with the Aarhus Convention in view of the pending procedures in Stichting Milieu. Now that these proceedings have been completed, it decided to first assess the outcome of the case in view of Article 9(3) and (4) of the Aarhus Convention.

In this respect, the Aarhus Compliance Committee agrees with the outcome of the Stichting Milieu case before the General Court. In particular, it noted that there is indeed no reason to construe the concept of “acts” in Article 9(3) of the Aarhus Convention as covering only acts of individual scope. As a consequence, the Committee is of the opinion that Article 10(1) of the Aarhus Regulation fails to correctly implement Article 9(3) of the Aarhus Convention in so far as the former covers merely acts of an individual scope. As to the outcome of the appeal proceedings before the CJEU, it is evidently not for the Committee to comment on the aspects of EU law and direct effect that were at stake there (see supra). Still, it noted that “by setting aside the judgment of the General Court in this way the ECJ left itself unable to mitigate the flaws correctly identified by the General Court. So it remains the case that Article 9, paragraph 3, of the Convention is not adequately implemented by Article 10(1) of the Aarhus Regulation”.

5.2. Access to justice at national level: no cure for limited access at EU level?

During the hearing, the representatives of the EU institutions pointed out a number of progressive rulings of the CJEU as regards access to justice at the national level. As highlighted in previous literature, this shift towards a very liberalized reading of national procedural rules in environmental cases must be acknowledged. As evidenced by its decision in Lesocchnarne zoskupenie, the CJEU did certainly not shy away from urging national courts to reconsider their traditional strict approach towards standing for environmental NGOs in its case-law. And indeed, the latter case was by no means exceptional. In its 2011 decision in Bund für Umwelt und Naturschutz Deutschland, the CJEU also compelled German courts to reconsider their well-rooted “Schutznormtheorie”, under which individuals and environmental NGOs only have standing to invoke legal proceedings that are designed to protect their specific interests, in light of the Aarhus Convention. Likewise, the decisions of the CJEU in Boxus and Solvay aptly illustrate that both the Aarhus Convention and the EIA Directive require national courts to trump national procedural law, whenever this would be necessary to review legislative acts in the light of the substantive requirements set out by the EU environmental directives.

Also, the Court underscored the effectiveness of the judicial review options, including the right to seek interim measures and barring courts from applying cost regimes which give rise to unreasonable outcomes for the applicant.

Yet, as it had done already in its 2011 findings and recommendations, the Aarhus Compliance Committee pointed out that judicial review in national courts cannot fully offset the lack of access to justice at EU level. The system of preliminary ruling does not in itself constitute a means of redress available to the parties with respect to a case pending before a national court or tribunal.

5.3. Recent jurisprudence on Article 263(4) of the TFEU: too little, too late?

Given the outcome of the Stichting Milieu case and the inability to compensate for the limited standing at EU level with reference to more progressive tendencies at national level, the Aarhus Compliance Committee was also forced to take into account the recent case-law developments as to Article 263(4) of the TFEU, as introduced by the Lisbon Treaty. For, indeed, the entry into force of the Aarhus Regulation does not stand alone. In order to be able to assess the full picture, as regards access to justice in environmental matters, the modifications introduced by the Treaty of Lisbon must be taken into account. When drafting the TFEU the Member States included, to a certain extent, the remarks pertaining to the limited standing rules before the EU courts that had been made by the CFI in its highly contested decision in Jégo-Quéré, back in 2002. And indeed, the TFEU did not limit...
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itself to merely copying the framework of remedies set out by the TEC, but also revised the *locus standi* requirements for private applicants. Hence, as of 2009, the provision on direct actions for annulment by natural or legal persons, which is now present in Art. 263 (4) of the TFEU, now allows: “Any natural or legal person (...) to institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.

By excluding the *Plaumann* test in the hypothesis of a regulatory act not entailing implementing measures, the Treaty of Lisbon clearly sought to remedy the lack of judicial review in situations such as those outlined in *Jégou-Quéré*. Due to the lack of a clear definition of the notion of “regulatory act” in the Treaty of Lisbon, the exact meaning remained until recently the subject of a lively debate amongst scholars, ever since it was included in the draft Treaty Establishing a Constitution for Europe.\(^4\)

Regrettably, Article 263(4) of the TFEU does not lay down any special provisions which would guarantee access to judicial review in environmental matters in accordance with Article 9(3) of the Aarhus Convention, either. Moreover, most commentators, such as Jans, questioned whether, regardless of the correct interpretation of the term “regulatory act”, it would not add much to the field of environmental law, since the overwhelming majority of EU acts require implementing measures.\(^5\) Jans even explicitly referred to the decision of the European Commission which was at stake in *Greenpeace*, stating that, in any event, this decision could not be qualified as a “regulatory act”.

As also implicitly acknowledged by the Aarhus Compliance Committee, the recent case-law developments before the EU courts have revealed that that “regulatory acts” must be understood as covering all acts of general application apart from legislative acts.\(^6\) In 2013, this view was confirmed by the CJEU in its highly anticipated ruling in the *Inuit* case.\(^7\) Notwithstanding the low expectations of some commentators, the recent case-law on Article 263(4) of the TFEU thus seems capable of lessening the burden of admissibility for annulment actions, at least to a certain extent. However, the Compliance Committee is still of the opinion that the CJEU’s interpretation remains too narrow in view of the broad scope of Article 9(3) of the Aarhus Convention.\(^8\) One might be tempted to qualify this assessment as rather harsh. Still, as rightly pointed out by the Aarhus Compliance Committee, other elements might undermine the effectiveness of Article 263(4) of the TFEU as a means to provide wider access to justice in environmental cases. One of the most obstructive issues in this respect is the requirement of “direct concern”, which is interpreted in a very stringent manner by the General Court in the *Microban* case of 2013. In the latter case, the General Court pointed out that only if the applicant’s economic situation is directly impacted by a measure, he or she will be considered “directly concerned” within the meaning of Article 263(4) of the TFEU.\(^9\)

In line with previous literature on this topic,\(^10\) the Aarhus Compliance Committee concluded that, if this line of interpretation were confirmed in subsequent case-law “a NGO promoting environmental protection would not be directly concerned with a contested measure unless the measure in question directly affected the organization’s legal position. Such an organization would always be excluded from instituting proceedings under the third limb of Article 263(4) when it acted purely for the purposes of promoting environmental protection”.\(^11\) Such outright exclusion is to be considered a clear violation of Article 9(3) of the Aarhus Convention.\(^12\)

As a last point, the Aarhus Compliance Committee highlighted that the jurisprudential interpretation of the third limb of Article 263(4), according to which the contested acts should not entail implementing measures, is also not in line with Article 9(3) of the Aarhus Convention. The latter provision does not allow the Contracting Parties any discretion in relation to the acts that might be excluded from its scope.\(^13\)

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\(^{6}\) *Id.*

\(^{7}\) See also: Opinion AG Jääskinen in Vereniging Milieu-defensie (supra n 10), par. 56.

\(^{8}\) See for instance Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* (CJEU, 3 October 2013), par. 60.

\(^{9}\) ACCC EU (Part II) (supra n 14), par. 65-66.

\(^{10}\) Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v European Commission* [2011] ECR II-07697, par. 22.

\(^{11}\) Schoukens (supra n 30), pp. 35-37.

\(^{12}\) ACCC EU (Part II) (supra n 14), par. 70.

\(^{13}\) *Id.*, par. 71.

\(^{14}\) *Id.*, paras. 72-76.
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5.4. The Aarhus Regulation: additional shortcomings in light of Aarhus?

Since the Aarhus Compliance Committee was not satisfied with the recent case-law developments in the field of Article 263(4) of the TFEU, it needed to consider whether the Aarhus Regulation in itself is capable of remedying the shortcomings of the EU system of legal remedies in view of Article 9(3) of the Aarhus Regulation. Not surprisingly, especially in light of its already critical appraisal of the outcome of the Stichting Milieu case, the Committee found the Aarhus Regulation to be incompatible with the wide access to justice requirements set out by Article 9(3) of the Aarhus Convention at several points.

Leaving aside the limited scope of the Aarhus Regulation, since it wrongly only covers acts of individual nature, the Aarhus Compliance Committee also pointed out the limited personal scope of the former. Article 10(1) of the Aarhus Regulation indeed only grants access to the internal review procedure to NGOs that meet particular criteria whereas Article 9(3) of the Aarhus Convention, as indicated above, requires “members of the public” to be given access to judicial or administrative review procedures. The latter concept is as such not limited to environmental NGOs. Yet, the requirements that the contested measure under the internal review procedures need to have “legally binding and external effects” as well as the automatic exemption of decisions taken by EU bodies in their capacity as administrative review bodies are also ruled to be incompatible with Article 9(3) of the Aarhus Convention. As to the former, the Committee notes that the concept of “acts” in Article 9(3) of the Aarhus Convention should not be construed as covering only acts that have legally binding and external effects, whereas the exemption provided for in Article 2(2) of the Aarhus Regulation does not find support in the explicit wording of the Aarhus Convention. Indeed, Article 2(2) of the Aarhus Convention merely excludes from the definition of “public authorities” “bodies acting in a judicial or legislative capacity” but not bodies acting in the capacity of an administrative review body.

More fundamentally, the environmental NGOs also claimed that the internal review procedure not be considered an review procedure meeting the requirements of Article 9(3) of the Aarhus Convention. In this respect, the Committee adopted a more nuanced stance. While it recognised that, if the internal review procedure had constituted the only available remedy, there might have been doubts as to its adequacy in light of Article 9(3) of the Aarhus Convention, still due regard needs to be given to the subsequent legal proceedings that can be instituted before the EU courts in accordance with Article 12 of the Aarhus Regulation, as has been discussed above.

In this respect, it had been submitted that legal proceedings pursuant to the latter provision might only relate to the written reply and thus would not touch upon the underlying substantive act of which the review had been sought. The view of the Committee, however, seems to differ from that of the communicants on this point. In light of recitals 20 and 21 of the Aarhus Regulation, in which the relevance of the subsequent judicial proceedings before the EU courts is highlighted, it does not rule out the possibility that EU courts would still be found ready to look into the substance of the underlying act. In any event, the Committee points out that new jurisprudence might shed light on this aspect.

VI. How to Deal with Non-Compliance: More Lasting Solutions?

The 2016 draft findings and recommendations of the Aarhus Compliance Committee have not exactly made things easier for the EU institutions. While especially the Committee’s take on Article 263(4) of the TFEU is particularly harsh, the simple fact that, as of today, not a single lawsuit in which the legality of an EU act is directly challenged has been able to pass the admissibility test, seems to justify this scrutiny.

Basically, the Committee leaves the EU with two options. If the EU intends to rely on current or new administrative review procedures, it is recommended to either come forward with an amended Aarhus Regulation, which addresses the current shortcomings, or set up legislation which faithfully transposes the obligations set out by Article 9(3) of the Aarhus Convention. If the EU institutions are going to rely on new case-law developments before the EU courts, the latter are asked to assess the legality of the EU’s implementing measures and to interpret EU law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention. While it is true that the findings are still open to comments, the chance that they will fundamentally be altered during the coming months is relatively small.

In this final section, I will address the more substantive solutions to the non-compliance situation which the EU is facing. For indeed, while the recent findings and recommendations of the Aarhus Compliance Committee are not binding, they still should be awarded some authoritative value. Thus it can be expected that at some point the EU institutions, **the last sentence needs to be handled carefully.**
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including the EU courts, might deem it appropriate to take into account the criticism in this respect.

6.1. A major shift in jurisprudence: the binding effect of the Aarhus Convention for the EU courts taken seriously?

As noted by Roger, among others, the 2015 rulings of the CJEU have laid bare the two different standards for access to justice at the EU and national levels. While national courts are increasingly forced by the CJEU to relinquish their well-vested traditional approaches to standing for environmental NGOs, the CJEU itself seems unwilling to reconsider its well-entrenched Plaumann doctrine for direct actions. And indeed, in light of the more recent case-law developments as regards the Aarhus Convention, including the CJEU ruling of 16 July 2015 in the case C-612/13 P, it seems very unlikely that the EU courts will adopt a more lenient interpretation of the standing requirements any time soon.

In the rulings of 13 January 2015, the CJEU again referred to the dual-track nature of the so-called “complete system of judicial protection” upon which the EU legal order is based. In particular, it held that the Aarhus Regulation concerns “only one of the remedies available to individuals for ensuring compliance with EU environmental law”. The reliance on the dual-track nature of the system of legal remedies is understandable in itself, especially when taking into account the entry into force of Article 19 (1) of the TEU, which intended to strengthen legal protection in the field covered by EU law before national courts. It can therefore be maintained that the coherence of the judicial system of the EU does indeed not rest solely on having direct access to EU courts, but rather on the interlocking system of jurisdiction of EU courts and national courts.

Yet, while national courts have a crucial role to play in filling gaps in the system of judicial protection, they will not be able to provide an all-encompassing solution for all the loopholes that are present at EU level, where a lot of barriers still prevent environmental NGOs and individuals from having general access to justice in conformity with the requirements set out in Article 9(3) of the Aarhus Convention.

Moreover, the preliminary ruling procedure under EU law is not available as a matter of right since it is up to the national courts to refer a question relating to the legality of a contested EU act to the CJEU, as also rightly pointed out by the Aarhus Compliance Committee. A similar criticism was also echoed by Advocate-General Jääskinen in his recent 2014 Opinion in the Stichting Milieu case. The latter criticism appears to be all the more relevant since there is no general directive on access to justice in environmental cases that fall within the scope of Article 9(3) of the Aarhus Convention. Such considerations, however, have not been withheld in appeal by the CJEU in its rulings of 13 January 2015.

By endorsing this rationale, the CJEU seems to ignore the many obstacles that have to be faced within national review procedures in environmental cases, especially in the context of preliminary proceedings. Such lawsuits often last several years and involve considerable delays and, not unimportantly, costs. As illustrated by recent studies, the implementation of Article 9 (3) and (4) of the Aarhus Convention can be tagged as “diverging, random and inconsistent”. In addition, exclusive reliance on national proceedings increases the risk of fait accompli scenarios, which, in turn, goes against the effectiveness requirements set out by Article 9 (4) of the Aarhus Convention. It thus remains highly questionable whether national proceedings can, in cases where national implementing measures are present, serve as a useful and practical fall-back option. Either way, even if available, such proceedings hardly qualify as adequate and effective remedies within the meaning of Article 9(4) of the Aarhus Convention.

Enhanced protection before national courts should thus be seen as a complement for the direct review options available at EU level rather than as a justification for the EU courts to uphold the well-vested Plaumann case-law.

Perhaps the recently adopted findings and recommendations are, in spite of their non-binding nature, still persuasive enough to urge the CJEU to reconsider its well-vested case-law. The limited amount of requests for internal review that have been introduced so far also seem to downplay the fear of the EU judges of being flooded by environmental cases if a more liberal approach to standing is adopted.

Also, from a legal perspective, arguments can be raised in order to force the EU courts to revise their strict standing interpretation in environmental cases. For, indeed, pursuant to Article 216 of the TFEU, the EU courts themselves are bound by the international agreements that are concluded by the EU.

In an Opinion of 30 June 2016 Advocate General Kokott, when assessing the position of environmental NGOs under national procedural law, highlighted that, in spite of the lack of direct effect that it attached to Article 9(3) of the Aarhus Convention, the CJEU also has the obligation to ensure effective environmental protection. In the Advocate General’s view, the very fact that the Aarhus Convention is an integral

123 See also: Roger (supra n 11).
124 Stichting Natuur en Milieu (supra n 10), par. 53; Vereniging Milieudefensie (supra n 10), par. 60.
126 Opinion AG Jääskinen in Vereniging Milieudefensie (supra n 10), par. 120.
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part of EU law entails that the EU courts are also bound to ensure legal protection.129

It therefore is not unlikely that sooner or later the CJEU will be found ready to rethink its well-vested Plaumann approach towards the admissibility requirements for direct actions or, as the case may be, at least adopt a more lenient line of interpretation as regards the “direct concern” requirement within the context of Article 263(4) of the TFEU. As recalled by the Aarhus Compliance Committee as early as in 2011, the relevant provisions of the TFEU are drafted in such a way that they can be interpreted in line with the standards enshrined in the Aarhus Convention.

6.2. Beyond the Aarhus Regulation: towards a new administrative review mechanism?

Generally speaking, a major shift in the case-law of the EU courts as to direct actions against EU acts would be preferable over limited changes to the Aarhus Regulation, which has many flaws in light of the Aarhus Convention. Still, it remains to be seen whether this paradigm shift in jurisprudence will materialize any time soon. With its 2016 draft findings and recommendations, the Aarhus Compliance Committee hinted at another potential solution to the non-compliance situation of the EU, consisting of either an amendment to the existing Regulation or the promulgation of a new administrative review mechanism. In my view, rather than focusing on the existing Regulation, it is preferable to start from scratch and establish a new administrative review mechanism which better meets the requirements set out by the Aarhus Convention.

In this respect, it should be noted that the internal review mechanism contained by the Aarhus Regulation, even if it covered acts of a general nature and was open to persons other than environmental NGOs, does not qualify as an adequate and effective legal remedy within the context of Article 9(4) of the Aarhus Convention.

First and foremost, the internal review procedure in itself merely allows environmental NGOs to request the EU bodies and institutions to reconsider the contested acts. In itself, an internal review does not offer a review track which can be qualified as impartial, adequate and fair. Obviously, EU institutions and bodies are somehow “biased” when asked to reconsider their own decisions. They will probably not easily be found prepared to review their own acts, which are often the result of hard and long negotiations and political compromises.130 This is also illustrated by the administrative practice of the internal review to date, as analysed above. So far not a single EU act has been reconsidered by the EU institutions under the internal review procedure.131

Moreover, the mere fact that environmental NGOs are capable of initiating proceedings before the EU courts, as hinted at in Article 12, does not appear to mitigate the above-mentioned concerns. Suffice it to take a closer look at the wording of Article 12 of the Aarhus Regulation, which “grants” the environmental NGO access to the EU courts in order to challenge the legality of the written replies issued by the EU institutions in the context of the internal review procedure.

As pointed out by Pallemærts, among others, the substantial drafting changes made by the Council appear designed to avoid or, at least, minimise the possibility of access to the EU Courts following an unsuccessful preliminary request for internal review.132 Indeed, the Council’s Legal Service feared that the proposed provisions included in Title IV of the Aarhus Regulation would give rise to serious problems because they allegedly were incompatible with the system of judicial review laid down in the TEC and interpreted by the established case-law of the CJEU.133 While the Council’s Legal Service advocated the deletion of the provisions on subsequent access to justice, the European Commission itself had already conceded that these provisions were indeed superfluous. Ultimately, the Member States clearly argued in favour of keeping said provisions. The final result led to a watered-down version of Article 11 of the European Commission’s proposal. Article 12 of the Regulation now, rather vaguely, stipulates that “the non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty”.

Even assuming that no additional admissibility issues arise, the question still remains whether proceedings pursuant to Article 12 of the Aarhus Regulation could also include a legality review of the underlying act of which an internal review is sought. Admittedly, as also hinted at by the Aarhus Compliance Committee, an eventual finding that a written reply is vitiated by an error of law could reflect back on the legality of the underlying decisions. In addition, environmental NGOs might also request an examination of the substance of matter by means of a plea of illegality.134

This being the case, it still remains doubtful at best whether such indirect legality review would amount to an effective legal remedy, as required by Article 9(4) of the Aarhus Convention. Either way, the possibilities to pursue an effective substantial legal review of an EU

129 Opinion AG Kokott in Case C-243/15, Lesoochranárské zoskupenie VLK v Obvodn úrad Trencín, par. 48.
130 See more extensively: Schoukens (supra n 30), pp. 34–36.
131 Schoukens (supra n 60), pp. 65–66.
134 Wenneräs (supra n 39), p. 234.
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act are further compounded by the important delays that come into play when the internal review procedure is followed up by a subsequent legal challenge. This is poignantly illustrated by the Vereni- ging Milieudefensie case, where it took a staggering five years of legal proceedings before a ruling was issued on the admissibility issues that had arisen in this respect. It took the CJEU two and a half more years to reach a verdict in appeal. In the meantime, the deadlines applicable to the underlying act had expired and hence the procedure had to a large extent lost its purpose.

VII. Conclusions and Outlook

As evidenced by the above analysis, the pursuit of better access to justice in environmental cases at EU level has given rise to a scenario with distinct Kafkaesque features, in which procedural arguments have, so far, succeeded in blocking access to EU courts for environmental NGOs and the wider public. Even with the application of the Aarhus Regulation, which was explicitly adopted to cure some of the deficiencies as to environmental accountability in the EU legal system, no fundamental progress towards more and wider review options in environmental cases has been achieved at EU level so far.

The 2016 draft findings and recommendations of the Aarhus Compliance Committee seem to buttress the well-established criticism in this respect. As has been demonstrated, the rulings of the CJEU of 13 January 2015 have taken away any prospects of tangible progress for the coming years. While the EU judges had several alternative options which would have allowed them to assess the compatibility of the internal review procedure contained in the Aarhus Regulation with Article 9(3) and (4) of the Aarhus Convention, they still opted for a more reluctant stance vis-à-vis the Aarhus Convention in the context of EU institutions, including, ultimately, their own jurisprudence. Yet the harsh criticism on the rulings of the CJEU needs to be nuanced. Contrary to what has been upheld by some commentators, a different outcome of the lawsuit before the CJEU would not necessarily have cured the current non-compliance situation of the EU.

This paper has demonstrated that, in the absence of a major shift in the jurisprudence of the EU courts, the EU legislator should reconsider the current internal review procedure included in the Aarhus Regulation. In itself, an internal review procedure, even when subsequently followed up by legal proceedings before EU courts, appears ill-suited to comply with the requirements set out by Article 9(3) and (4) of the Aarhus Convention. The 2016 findings and recommendations of the Aarhus Compliance Committee, even if they lack binding effects, might serve as an additional trigger for the EU legislator to come up with a new administrative review procedure that grants a timely and independent review of acts that fall under the scope of Article 9(3) of the Aarhus Convention. Eventually the Rubicon will have to be crossed at some point. To be continued?
The Paris Agreement in Logic of Multi-regulatory Governance: A Step Forward to a New Concept of “Global Progressive Adaptive-Mitigation”? 

Sandra Cassotta* 

1. Introduction

Climate change has proven to be an intractable problem for the past twenty years despite the numerous meetings in the global United Nations Framework Convention on Climate Change (UNFCCC). The primary cause is weak enforcement of its protocol, the Kyoto Protocol. Face with the impotence of the Kyoto Protocol to block cataclysmic scenarios, the UNFCCC COP 21 finally adopted the Paris Agreement on December 12, 2015 where international politics set the objective of limiting global warming to below two degrees whilst making efforts to limit the increase to 1.5 degrees. Reducing emissions by 40–70 per cent by 2050 is crucial in meeting this limit, set by scientists. It requires a new model of investment as well as a low carbon economy. In other words, Business As Usual (BAU) is no longer sustainable.¹

The new Paris Agreement acknowledges the important global character of climate change which cannot possibly be tackled by a group of countries alone, but rather requires the absolute commitment of the entire community together in contrast with the past vision differentiating between developed and developing countries. This time, it is the entire international political collectively. Such a new unitary collective body is called to face the challenges and to enable potentials to become reality in a new holistic multi-regulatory vision where the phenomenon of adaptation to climate change is no longer an overlooked issue but instead becomes a global concept encapsulated into mitigation in an “integrative- synergistic mutual benefit sharing- relationship”.

The present article traces a trajectory of the impact of the Paris Agreement on European Union (EU) regulatory and domestic level in a holistic global multi-regulatory governance perspective where both adaptation and mitigation strategies to climate change need to be perceived as “mutually beneficial” and anchored to a new pattern of circular economy which break the old concept of BAU.

Within the logic of multi-level climate governance, the research question of this article is to identify the challenges and potentials of the Paris Agreement in terms of effective enforcement. The main hypothesis consists of validating whether or not we are in the presence of a new concept of global adaptation definable as “global progressive adaptive-mitigation”, functioning as a tool of detection for effective enforcement and management. The article analyses crucial focal points of the regime starting from the legal form, core elements of the legal architecture of the agreement, and selected governance mechanisms such as transparency, accountability and facilitation.

The purpose of this article is to reflect on the meaning of effective implementation of the Paris Agreement in connection to adaptive-mitigation and its impact on the EU role. Next, it will reach, further down the domestic level with Italy’s commitments in the renewable energy sector as an example of “adaptive-mitigation” in the power sector. It is shown that effective compliance and enforcement regime takes note of the fact that several factors influence the behaviour of a regulated community. They include deterrence, economics, institutional credibility, the functioning of complex bureaucratic apparatus mechanisms, social factors, mentality which should be taken into account, even at the outset of international regime making. It is found that the Paris Agreement provides for a new concept of progressive adaptation which is global, strongly mutually interlinked with mitigation and closely enlaced with the concept of circular economy. Nevertheless, it is a problem that the provisions of the Paris Agreement are not effectively enforceable even though they are “legal binding” and that there are no mechanisms legally enforceable to support and eventually ensure implementation to take into account all the factors identified above.

This gap can be reflected on the other levels of governance, rendering the implementation of environmental international law difficult. This means that the Paris agreement via the EU level is hardly enforceable if at the domestic levels, changes in social behaviour, institutional reform and mentality do not come from the bottom-up. However, the Paris Agreement could be the new beginning for an impulse do to better, as the Italian case demonstrates.

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¹ The Organization for Economic Co-operation and Development (OECD) defines the concept of Business As Usual as a form of maladaptation to climate change and in particular, defines maladaptation as “business-as-usual” development which by overlooking climate change impacts, inadvertently increases exposure and/or vulnerability to climate change.
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II. The Paris Agreement – Convenient Compromise or Success?

The UNFCCC has long struggled to keep the world temperature within the limits set by the International Panel of Climate Change (IPCC). Ever since the failure of the Copenhagen Accord in 2009, which the Danish presidency literally made collapse, success would have been defined as reaching any agreement whatsoever. One reason is the enormous gap between the developed and developing nations in visions and identifying core issues regarding climate change. As a result, the crucial importance of adaptation often neglected in so many past negotiating texts, and the compromise between adaptation and mitigation, were both neglected. Cumbersome negotiations meant that any new text would have been a “miracle”.

Nevertheless, the Paris Agreement marks an interesting change, in that, apparently for the first time, there is a global environmental law agreement with no distinction between disparities in the various states’ contributions to climate change and furthermore it recognizes the need of international cooperation in a legally binding agreement. In doing so, countries recognize that they do not have to choose between economic development and tackling climate change but rather have to target their national climate commitments in unison to change their actions putting and achieving their national climate commitments at the unison with new concept of circular economy.

The Paris Agreement sends a clear signal that societal behaviour must shift to a low-carbon pathway and include twin goals: firstly, a goal to phase out greenhouse emissions by the middle of the century, and secondly, the goal of building up communities’ resilience to the impacts. The agreement sets a continuous cycle of improvement required to achieve these goals: firstly, countries should commit to strengthen their emission-reduction commitments every five years; secondly, countries should build their adaptation efforts over time with all nations, completing and submitting their National Determined Contributions (NDCs) on what they have achieved and what they intend to achieve in the future; and thirdly, developing countries will need strong and increasing financial, capacity-building and technological support from developed countries to implement their adaptation and mitigation plans.

The environmental protection goal achievements of the Paris Agreement depend also on the quality of the mechanisms of governance upon which the agreement has been built. Yet, the future success of the agreement relies on transparency, accountability and facilitation which all present governance challenges at their core.

For the first time, in the Paris Agreement, adaptation is integrated with mitigation. It places adaptation at the centre of the attention as the NDCs must include not only countries’ plans to reduce emissions but also descriptions of their adaptation goals, priorities, and actions. This means that all parties will have to be flexible and willing to coordinate. The Paris Agreement is therefore extremely innovative in term of adaptation especially establishing “cycles of action on adaptation” that are parallel to “cycles of action on mitigation” which will stimulate effective adaptive actions over time.

In the Paris Agreement, the potential of the mechanism, is regarded in terms of effectiveness and relies on ambitious mechanisms for “increasing ambitions” according to which every five years countries will look back to what they have achieved, and will look forward to what they will achieve according to the “Principle of progression and no back sliding” (hereinafter “the Principle of progression”). What will remain to be observed is if this mechanism will actually be implemented effectively, as will be examined in the next section of this article.

Investigating the meaning of “effectiveness” in the Paris Agreement is an issue which is undeniably linked to the inclusion of adaptation in its text. Any legal framework including adaptation marks a level of progression in terms of environmental effectiveness3 thus the Paris Agreement marks a progress in terms of effectiveness for having elevated adaptation highly in the legal text but most importantly for having integrated adaptation with mitigation in connection with the Principle of progression. Adaptation is of course understood in this article not only as response to physical impacts with regulatory measures (zoning, environmental, water and waste regulations to manage precipitations, flooding and storm water, sea level rise) but also in terms of laws and regulations of new power generation resources,4 such as for example, those enabling the development of new power generation

2 Often, in the literature, it is common to read the acronym “INDCs” which stands for “Indirect National Determined Contributions” rather than “NDCs” which stands for “National Determined Contributions”. Nevertheless, the concept of this mechanism is the same in both the expressions. What differs between INDCs and NDCs is that the INDCs become “NDCs” only when countries which are parties of the Paris Agreement submit them after they have signed and ratified the treaty. To date, 161 INDCs have been submitted and represents the national climate plans of 188 countries. It is expected that for many countries, their INDCs will be the same as the NDCs. At the time of writing this article, Papa New Guinea is the first country that finalize climate plan under the Paris Agreement. For the sake of simplification, in the following sections of this article, the acronyms NDCs and INDCs will be used indistinctly, along the text.


resources and encouraging siting of emergency power generators to supply energy or environmental impact assessments regulations, and thus to renewable energy issues.

An important question is to understand if the negotiators and drafters of the Paris Agreement have actually given sufficient attention to renewable energies in the text, especially as new power generations and as crucial tools to reach the goals of the Paris Agreement and thus, improve effectiveness in terms of environmental protection goal achievements.

The Paris Agreement presents for the first time, an example of integration between adaptation and mitigation measures interlinked in a “mutually beneficial sharing way”. This new suggested pattern proves that adaptation law cannot be conceived by ignoring mitigation, nor can it be detached from the legal architecture including mitigation, if the goal is to form a legal framework that enables the synergies of mutually shared benefits resulting from their interactions. By consequence, it is expected that such a new pattern-framework will be enforced correctly.

In the Kyoto Protocol, climate change policy has paid little attention to potential interaction between adaptation and mitigation. Whereas both adaptation and mitigation were considered conventional methods of dealing with climate change, no attention was given to their interactions therefore there were always considered separately. The Paris Agreement represents a turnover in adaptive-mitigation, demanding the evaluating mitigation options according to how they serve the needs of adaptation by adopting policy instruments promoting mitigations options that have adaptive benefits. In other words the Paris Agreement represent a step forward in “adaptively mitigate”.

For example, several mitigation options, particularly in the energy efficiency sector, have a wide variety of adaptation benefits. Such policies should ensure that information about climate change impacts is disseminated and the project’s review must consider adaptation, and that planning integrates both adaptation and mitigation.

One of the major sources of disjuncture between adaptation and mitigation was that mitigation policy was considered to be global and long-term while adaptation was viewed as more local and immediate. Conventional wisdom said that mitigation is a global issue while adaptation is a regional or local one. The Paris Agreement was able to challenge this common credo and has literally transformed the concept of adaptation into a global holistic one with many dimensions that will require international, regional, national and local levels of governance. This transforms adaptation into a global phenomenon with regional and local impact.

In other words, adaptation, after the Paris Agreement, is not just about building sea walls, or improving local communications systems or providing solutions for climate refugees, of agricultural and trade issues. Both adaptation and mitigation are multi-layer phenomena that cannot be analysed separately or dealt with on a single level of governance. The Paris Agreement suggests a new global holistic concept of “adaptive-mitigation” were the effectiveness of environmental law is also a consequence of mutual synergistic linkages and reverberations between adaptation and mitigation and where adaptation benefits are encapsulated into mitigation measures. This is happening in the case of the NDCs but also in other sectors level such as the power sector of the renewable energy resources. Just to mention an example, which will be followed along this article, mitigation alternatives in the power sector of the renewable energies are likely to have synergies with adaptation because they both reduce the vulnerability of the sector and enhance resilience.

More importantly, to avoid the risk of failure, adaptive-mitigation can also be strengthened and this is what the Paris Agreement actually ambitiously suggests. In order to have beneficial sharing effects between adaptation and mitigation, public policies should: 1) enable relevant information dissemination, 2) provide for projects reviews attentive to adaptation and 3) require planning processes which enable the integration of adaptation and mitigation.\(^5\) Needless to say, this discussion could also be valid in a multitude of sectors, not only for the renewable energy sector.

Unfortunately, despite the presence of elements of progression and potentials in terms of goals, innovations and new priorities, the Paris Agreement also presents several vague and uncertain provisions. On the one hand, there is finally an agreement on the table which is supposed to be “effective in terms of implementation” and contains new compliance mechanisms or better “commitments to set-up compliance mechanisms.”\(^6\) On the other hand, has the agreement elucidated the meaning of the terms “compliance mechanism” even once in the text? Do we know what happens in case countries are not in compliance? Do we know what “effective implementation” is, in the Paris Agreement? Most importantly, is the Paris Agreement really an “implementing agreement”? How is this issue linked to adaptation or better to a “global adaptive-mitigation”?

All these questions are related to the legal form and legal architecture of the Paris Agreement which has been called an “agreement” and not a “protocol.” Why did the negotiators call it an “agreement” instead of a “protocol”? This point is delicate. The question is whether the Paris Agreement is really an “implemen-


\(^6\) Obviously, the promise “to set-up new compliance mechanisms” is different compared to effective “set-up of new compliance mechanism”.
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ation agreement” or not. If not, chaos in terms of conceptualisation of the legal form of Paris Agreement, might well unfold, as will be explained in the next sections.

2.1 The Legal Form and Architecture
The Paris Agreement was adopted as an Agreement rather than a Protocol quite unexpectedly. It is a “last minute agreement” due to “the difficulty of negotiating a binding text the week previously. The Agreement is an 11 page treaty of 29 articles and 16 Preamble paragraphs, containing provisions for substantive issues covering several crucial aspects such as mitigation, adaptation, means of implementation through capacity – building, finance and technology transfer, procedural and institutional arrangements. The Paris Agreement achieves the objective of the UNFCCC Article 2 to set the limit for the global warming below 2 degrees.

The Paris Agreement gives a global response to this objective because it is applicable to all countries as it is a multilateral legally binding agreement binding not only developed countries but also developing countries. The Paris Agreement is a hybrid agreement containing some binding provisions (such as the preparation and implementation of NDCs, as well reporting), sometimes more soft and voluntary based provisions. The agreement avoids quantified targets for emissions reductions or financial flows, and does not provide for enforcement or sanctions. With the Paris Agreement the legal architecture has shifted from a “top-down” governance model of the Kyoto Protocol, which relied on “targets and timetables”, imposing reduction commitment only on some developed countries into new system of “bottom-up” model which is the “pledge and review system” in governing climate. The pledge and review system is aimed at generating collective action through NDCs and gives a central role to national plans and to an international system for reviewing the adequacy of the proposed actions to achieve the objective of Article 2 of the UNFCCC.

In that sense, the Paris Agreement has put emphasis on the effectiveness of environmental law, marking implementation as crucial to ensure that the parties deliver their contributions. In terms of adequacy, it ensures that aggregated individual contributions progressively achieve the long-term global goal. Nevertheless, in environmental law, it is sometimes puzzling to understand what exactly the difference between enforcement and compliance is, which is also the essence of the problem in the Paris Agreement.

What is crucial is thus to fully grasp the significance of effectiveness of environmental management strategies and the difference between effectiveness, compliance and enforcement. The goal here is to clarify once for all if the Paris Agreement is effective in terms of environmental protection goal achievements and effective management. In general, environmental management is composed of two steps: 1) setting legal requirements of effectiveness,8 and 2) legal compliance which means that regulated entities should be moved to fully implement the requirements of effectiveness that are set.

Compliance in environmental management and legal framework is often defined as the “full implementation of environmental requirements”.9 Compliance however, also refers to the meeting of obligations in terms of environmental law, which differs from “compliance behaviour” which is the behaviour that conforms to legal rules. Achieving compliance sometimes entails other efforts aimed at behavioural changes within a society. Compliance mechanism differs from compliance behaviour in a significant way.

A compliance mechanism is a provision in a legal instrument that has been designated to encourage compliance with the legal rules (often including positive incentives or technical assistance).10

Enforcement in environmental law seeks results and refers to the set of actions that governments or other entities at local governmental level can take to achieve legal compliance within a determined regulated community with the purpose to stop environmental threats, in our case, green gases emissions (GHG).

At this point, some crucial core questions emerge: is the Paris Agreement an “implementation agreement” or a “protocol” and does this implementation also include adaptive-mitigation? What is really meant by “compliance” in the Paris Agreement and why was the formula of “agreement” chosen instead a “Protocol” and, most importantly, what happen if the Parties do not comply?

The Paris Agreement presents some potential in terms of legal effectiveness as its design is an ambitious framework which promises a mechanism to review progress in achieving climate global goals as well as parties’ contributions to it as accorded under the UNFCCC. The mechanism provides that every five years, the Parties will submit their NDCs according to which the countries will “look back and look forward” in line with the Principle of progression which is

8 Examples of traditional requirements of effectiveness could be: command and control, prohibit and punish, threat and promises. There are also novel alternatives which are less traditional, such as: compliance assistance and incentives, self-regulations, negotiable rules making or common management systems.
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contained as a clause included in the operative part of the agreement in Article 4.3. This ambitious framework is not exempt from vague and unclear provisions but also presents the potential to set a framework for increasing the chance for the creation of an ambitions mechanism implementable through the NDCs. It is not certain how this mechanism will function but could be “expert-based”, as stated in Article 15. Without any doubt, this legal norm is binding but it is not because it is binding that it is “legally enforceable”, especially if there is not such a “promised” mechanism to support and “eventually” ensure implementation. Article 15 refers to a facilitation of compliance mechanism that has to be established under the Paris Agreement, but which is not saying the mechanism is legally enforceable.

So, is the Paris Agreement an “agreement” or a “protocol”? It is clear that some provisions in the Agreement seem to suggest that it is a protocol in everything but a name. The text contains obligations and compliance provisions which deem the text to be defined as an “agreement” or what is defined in international law as a “treaty” which is also much closer to a protocol. So why then it has been defined as an agreement and not protocol, and, in the light of what has been exposed previously in terms of environmental effectiveness, is the Paris Agreement really an implementation agreement?

During the drafting of the negotiating text, there were considerable difficulties in linking the text of the agreement with the UNFCCC. In international law, the term “protocol” is typically used, inter alia, to refer to treaties adopted to achieve the objective of a framework or an “umbrella convention” and in that sense, the Paris Agreement contains numerous cross references with the UNFCCC, such as for example, Articles 1 and 2.

Nevertheless, it has been quite hard for the drafters to establish such linkages and this also refers for example to the possibility (which has not been considered) of linking the Paris Agreement with Article 16 of the UNFCCC, which expressly outline the application and implementation of the UNFCCC. Thus, even though, Article 2 of the Paris Agreement links with the Convention (regrettably without linking expressively with Article 16 of the Convention), Article 2 only enhances the implementation of the Convention but not the implementation of the agreement. Hence, the legal argument explaining the reason why the drafters and negotiators of the Paris Agreement chose the term “agreement” rather than the term “protocol” is because choosing the term “protocol” would have made the Paris Agreement a real implementation agreement, legally speaking. The next step would have been drawing an explicit connection between Article 2 of the Paris Agreement and Article 16 of the UNFCCC. As things stand now, Article 16 only refers to the implementation of the “Convention” but not obligatory implementation of the Agreement as it ought to, weakening the effect of implementation by allowing greater flexibility.

Hence, the legal argument explaining the reason why the drafters and negotiators of the Paris Agreement chose the term “agreement” rather than the term “protocol” is because if they would have chosen the term “protocol” would have made the Paris Agreement a real implementation agreement, legally speaking. Hence, if the term Protocol would have been chosen, legally speaking, the Paris Agreement would have become a real implementation agreement once that a direct connection between Article 2 of the Paris Agreement and Article 16 of the UNFCCC would

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11 Article 4, paragraphs 3 states: “Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflects its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of the different national circumstances”.

12 Article 15 of the Paris Agreement will be reproduced in the last page of this section.


16 Article 2 state “This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2 degrees C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees C above preindustrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; (c) Making finance flows consistent with a path towards low greenhouse emissions and climate-resilient development. 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

17 Article 16 of the UNFCCC states “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, as soon as practicable consider the application to this Protocol of, and modify as appropriate, the multilateral consultative process referred to in Article 13 of the Convention, in this light of any relevant decisions that may be applied to this protocol shall operate without prejudice to the procedures and mechanisms established in accordance with Article 18”.
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have been established and once that Article 2 of the Paris Agreement would have specified in black and white, that the Agreement implements “the agreement” and not “the Convention” as it stand now.

The Paris Agreement is really based on a different approach of “pledge and review” based on generating collective action through NDCs where a central role is clearly given to national plans and to an international system for reviewing the adequacy of the propose action to keep the temperature below 2 degrees. In this process, the UNFCCC works as an immense international apparatus collecting and checking the parties’ actions and plans, which affords the parties some discretion on how to progress. In that sense, the Paris Agreement is closer to the national level’s civil society, which is reflected especially in Article 14 where the word “implementation” appears for the first time in connection to both adaptation and mitigation when stating that the “Parties shall periodically take stock of the implementation of the Agreement to assess the collective progress towards achieving the purpose of the Agreement and its long-terms goals.”

This Article 14, represent a strong potential of the Paris Agreement in terms of implementation as the provision could be legally binding and enforceable. If combined with the Principle of progression and the three mechanism of climate governance which are transparency, accountability and facilitation of the different parties’ actions, it could sort out a totally new concept of global adaptive-mitigation in environmental law more flexible and long-term goal oriented acknowledging the “point of no-return on differentiation” which was opposite to what characterized Kyoto and the architecture of the UNFCCC.

The UNFCCC is based on the difference between developed and developing countries while drawing on a neat distinction between these two groups of parties in terms of actions due to the fact that it was the developed countries which contributed the most to global warming and therefore had more responsibilities. This was expressed through the Principle of Common but Different Responsibilities and Respective Capabilities (CBDR-RC). It is clear that the Paris Agreement moves away from the rigid differentiation between developed (Annex I) and developing (non-Annex I) countries found in the Kyoto Protocol, toward a more global approach even if according to one author, Professor Daniel Bodansky, some vestiges of the Annex I-non-Annex dichotomy will still remain.

The Paris Agreement establishes that all parties aim to reach global peaking of GHGs as soon as possible, asking each and all to join in collective action aimed at these goals of the undertaken and communicated ambitious actions according collective action and the “Principle of progression”. This principle provides that countries that have previously pledged absolute economy wide targets should continue to do so over time. This formulation in effect differentiates between Annex I countries (which all pledge absolute, economy wide emissions targets in Copenhagen) and non-Annex I countries. Thus, preserving “differentiation” but at the same time moving toward a new pattern of progressive global adaptive-mitigation. The Principle of progression, enshrined in the Lima Call for Climate Action, requires each country’s nationally determined contribution “to represent a progression beyond the current undertaking of that Party”.

Thus, Article 14 has tremendous significance as it has the potential to ensure that the global climate regime as a whole is moving towards ever more ambitious and rigorous contributions from Parties – that there is a ‘direction of long-term travel of progressive non-return’ for the regime, as it were. The problem in now how this ambitious new environmental law pattern will be operationalised.

The Paris Agreement weakly suggests the promotion of a compliance mechanism in Article 15 and also facilitating implementation. Nevertheless, the challenge here consists in understanding how this will be done since the term “promotion” and “facilitation” used by the drafters in the formulation of this article, have a completely different significance compared to the terms “set-up” (terms which has been avoided).

18 Article 14 of the Paris Agreement, paragraph 1, states “…The Conference of the Parties serving as the meeting of the Parties to the Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress toward achieving the purpose of this Agreement and its long-term goals (referred to as the “global stocktake”). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, in the light of equity and the best available science…”
19 Daniel Bodansky is Professor of Law and Faculty Co-Director of the Centre for Law and Global Affairs at the Sandra Day O’Connor College of Law at Arizona State University.
20 Developed countries mostly argue that the concept of NDCs implies self-differentiation and that this self-differentiation is sufficient. But many developing countries would like some continuation of the categorical, annex-based approach found in the UNFCCC and the Kyoto Protocol. See for that point, Bodansky, D., “Crunch Issues in Paris”, Opinio Juris, 06.12.2015, p. 1.
21 For the Lima Call for Climate Action, see Outcome of the U.N. Climate Change Conference in Lima, 20th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 20) December 1–12, 2014.
22 Article 15 of the Paris Agreement, paragraph 1, 2 and 3 states “A mechanism to facilitate implementation of and promote compliance with the provision of this Agreement is hereby established. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of the Parties. The committee shall operate under the modalities
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2.2 The NDCs

One of the main points of contention amongst the Parties to find consensus during the Paris Agreement’s architecture was on the concept of NDCs which represent a new aspect of the climate regime whose implications are strictly connected with the legal form. This architecture is built up on the Parties’ NDCs rather than on a set of collectively negotiated targets enshrined in a treaty, such as was the case in the Kyoto Protocol.

The NDCs are to provide information on what each Party intends to do to tackle climate change. One of the most interesting aspects in these NDCs is that they also include adaptation components in their plans. Adaptation components outline goals, activities and needs for countries to cope with increased drought, stronger storms, or sea level rise. This means that adaptation is set high on the global agenda, becoming a “global concept”. The adaptation content of the NDCs provides a new insight into issues that are likely to be keys in finalizing and implementing the Paris Agreement. Thus for the first time, adaptation is strictly interconnected with effectiveness in term of implementation, which represents a mayor paradigmatic step in environmental law effectiveness. Nevertheless, it is difficult to understand the legal character NDCs in terms of their flexibility and how and to which extent they are binding.

While Party’s interpretation of the legal character of the NDCs will only become clearer with the implementation of the Paris Agreement, the provisions anchoring NDCs in the treaty can be helpful to understand the legal nature of the NDCs, especially Article 4.2 of the Paris Agreement.

A duty “to implement”, compared to a duty “to achieve”, is an obligation of conduct rather than result.

If the Paris Agreement had contained a straightforward obligation of the parties to implement their NDCs, then the difference between the two approaches would have appeared minor, whereby the test of whether a state had implemented its NDCs would have actually been whether it has achieved its NDCs.

This was a heatedly debate during the negotiations of the Paris Agreement too on how to formulate the commitments to implement the NDCs, for example, a commitment aimed to adopt a measure “aimed” or “intended” to implement country’s NDCs or a commitment “to adopt” implementing measures “related to” a country’s NDCs. The problem was to find a compromise in the formulation between EU countries claim that NDCs are not merely voluntary, and for the US to say that they are not legally binding.

At present, with the NDCs, the Parties choose their own commitments and tailor these to their national circumstances and capacities and indirectly they differentiate themselves from every other nation. The potential of this choice is to provide flexibility, and favour sovereign autonomy, encouraging collective universal participation. The challenge is that the NDCs do not provide any assurance or guarantee that countries contributions will add up to what is adequate to address the problem or that countries will do their fair share based on their past pollution and current responsibility for environmental harm.

Despite the challenges to the NDCs, the major potential remains the fact that they do represent a new paradigm against which Parties’ performance of their obligations will be assessed and are therefore a new instrument of adaptive-mitigation to be used as a tool for environmental law effectiveness.

In that sense, a step forward in terms of adaptive-mitigation would have been to find an appropriate place to introduce the importance of renewable energies and the role of the new power generations which could have been precisely the NDCs. This, in order to oblige states to inform on how much they are able to adaptive-mitigate by promoting and shifting towards renewable energy and make these renewable energy goals as part a different form of the existing forms of adaptation goals.

Most of NDCs adaptation components include precise sets of adaptation goals. These goals can take many different forms. The World Resource Institute identified three ways that countries frame their adaptation goals: 1) Outcomes (goals that articulate a particular adaptation outcome that a country aims to achieve, mostly quantitative goals such as deforestation’s goals, or maintenance of biodiversity services); 2) Processes (goals to set in motion or compete particular elements of long-term processes, for example mainstream adaptation of goals into a national development framework, integrating several sectorial policies such as employment, agriculture, forest, renewable, etc.); 3) Vision statements (such as, for example, to minimize the impacts of climate change cont.

and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session and report annually to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. (Emphasis added).

An important fact is that of the 121 countries which submitted NDCs, 86% included in their submission an adaptation component in their plans. Parties’ submission can be accessed at http://unfccc.int/focus/inde_portal/items/8766.php


Article 4.2 of the Paris Agreement states: “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”.

through concerted and proactive action at all levels of society). Without any doubt, the NDCs are part of a new vision for global climate governance including national approaches to climate policy relating to both the national capability to deal with climate change and to the incentives provided by international cooperation. The NDCs are actually mitigation instruments aimed at a collective objective but this time incorporating an equal role for adaptation interconnected to finance, and technology.

In that sense the Paris Agreement is a stable, universal and dynamic agreement that can progressively create a system of international incentives for countries to submit more ambitious action over time. Through “cycles of actions on adaptation” that are parallel to “cycles of action on mitigation”, the Paris Agreement will also stimulate and accelerate effective adaptation action over time as every five years countries will submit update information about their adaptation priorities, implementation and support needs to a public registry. Hence, the NDCs not only document national ambitions and represent a new instrument of adaptive-mitigation to reinforce global implementation but also crystallize each country’s vision of the transformation of its economy and society toward a low-carbon and more resilient system based on circular economy breaking with the concept of BAU, as it will be explained in the next section 2.4. For this reason, the role of renewable energies should have been outlined in the NDCs as part of the adaptation goals.

In addition, liking adaptation components with and into the NDCs means also linking adaptation to capacity, technology and finance, where adaptive-mitigation becomes a valuable tool of detection for existing gaps, barriers and resource needs that must be addressed to foster effective implementation. The challenges are that NDCs require good governance mechanisms, whereby the success of the Paris Agreement relies on important questions about accountability, participation transparency and effectiveness. All these questions have governance challenges at their core, as will be analysed in the next section.

2.3 Accountability, Transparency and Facilitation
Accountability, transparency and facilitation are the triadic vital combination of climate action needed for climate governance. The success of the Paris Agreement relies on how these governance factors will be tackled as they represent challenges of governmental nature, which are fundamental for the effectiveness of international environmental law, which in turn is also reflected in the implementation and subsequently in effective compliance.

This triadic combination is also a fundamental aspect of the legal form related to both substantive and procedural criteria that can be used to assess the legal force of an international instrument. In particular, the way the triadic combination will be tackled in the NDCs will be a key aspect in the implementation of the Paris Agreement.

The Paris Agreement holds parties accountable for their NDCs, through an “enhanced transparency framework for action and support, with built-in flexibility” for developing countries. Each Party must regularly provide in a transparent way a national inventory report of anthropogenic emissions and removal and information about progress made in implementing and achieving the NDCs which will facilitate compliance. The vital trilateral combination of climate governance, which is essential for the participation of the civil society in the climate decision-making and implementation process, is enshrined in the architecture of the Paris Agreement, outlining the relevance of the logical sequential relationship between the three factors of governance. It is more than evident that if there is no accountability, there will be no transparency and by consequence, less facilitation in the implementation and compliance of the Agreement.

Political accountability in general is important to ensure that the civil society, including public authorities or agencies, is exercising their authority in a way that is responsive to political influences and pressures. Sometimes, public authorities or agencies may not balance environmental risks and business opportunities under climate change effects, in a sustainable way. Political accountability confers democratic legitimacy, and transparency on the decision-making processes. These trilateral factors are thus very important for the enforcement of environmental law and they permit vertical implementation of international environmental law standards (including Best Available Practices and Best Available Technologies – BAP and BAT) at national levels and give a central role to the public. A country is politically accountable when the public has the possibility to participate to the decision-making process. The Paris Agreement made impressive commitments on national actions to tackle

29 Dubois, M., S., et al “Legal Form of the Paris Climate Agreement: A comprehensive Assessment of Options”, 1, CCLR, 2015, p. 78.
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climate change but now, the hardest part, is if the politicians will honour their commitments and how. It is now the politicians turn to be held accountable for their commitments and decisions by the electorate and it is the civil society that should hold their politicians accountable. Nevertheless, even if in certain countries the civil society participates greatly in climate decision-making or in climate projects, the laws may not allow for the existence of organizations to understand and advocate climate issues or may have a societal behaviour that impedes government accountability. For example, this is the problem characterizing Italy, as it will be shown in the regulation of the renewable energy sector by the Italian case were it is found the need to change societal behaviour, to fill the gap of lack of information and the lack of transparency in the dialogue in the civil society. Other examples can be found in many other countries in the world which have introduced restrictive legislations that limit the freedom of the civil society to campaign freely, and restrict or even censor media.\textsuperscript{32}

Transparency refers to the possibility given to the civil society to make its voice heard on accountability issues and to establish a dialogue among the relevant actors of the civil society in order to build commitments on climate and sustainable development.

In particular, transparency in the Paris Agreements has a triple meaning: 1) transparency of emissions, which relates to measurement, reporting and verification of accurate and timely emissions inventories; 2) transparency of NDCs, which relates to the provision of sufficient up-front information which the submission of NDCs entails; 3) transparency of implementation, which means the provision of information on and assessment of demonstrable progress towards the achievements of NDCs, and the multilateral determination of achievement subsequent to the end of the period.\textsuperscript{33}

Facilitation refers to the effective enablement of the governance dimension of climate action to achieve efficiency of governmental decision-making by facilitating countries in committing to more funding with a certain transparency of budgets to achieve adaptive-mitigation measures. Budgets should be opened to the public to facilitate the tracking of funds and enable the civil society to provide a control on the flows of funds as well as on the allocation of funds from different levels, international, national and local. Lastly, it can ensure that budgets are spent for the right purposes. It is, in other worlds, the facilitation of financial flow, which permits effectiveness in terms of environmental governance.

The vital trilateral combination of mechanisms of climate governance and climate action – accountability, transparency, and facilitation – is therefore crucial for the implementation of the climate commitments of the Paris Agreement. Improving the vital trilateral combination whether within the nations or worldwide, particularly in the weakest democracies of the world, will be vital to allow the effective compliance with and enforcement of law and for the effective implementation of environmental legislation. Nevertheless, the absence of formal legally binding mechanisms in the Paris Agreements presents limits on rendering a government accountable, transparent and facilitating climate actions. One consequence is that it does not adequately enable implementation and compliance or the transformation of the civil society into a circular economy.

2.4 The Concept of Circular Economy

The Paris Agreement set a stable, universal, dynamic treaty that provides adaptive-mitigation global goals to be reached progressively in line with Principle of progression. Not only does the agreement present progressive incentives for countries to submit more ambitious actions but it also contains a new economic global vision for all the countries defined as “circular economy”. The concept of circular economy comprises an important shift in the way of conceiving the classical economy, making BAU less plausible by crystallizing the need for a transformation and transition of each country’s economy and society toward a low-carbon and more resilient system of global economy. This is to be achieved by the whole international community in cooperation and not only at the level of the single national contributions based on the content of the NDCs.

The transition toward a new economy involves a multitude of sectors, for example, the energy sector. It envisions the transition to new energy systems both in the way energy is used and in the way it is produced. The message is to achieve a radical transformation which requires fundamental changes to the energy system in order to achieve a low carbon economy and society, therefore the role of new technologies is very important. The concept of circular economy as incorporated in the Paris Agreement is strongly influenced by the idea behind the Energy Road Map launched by the EU Commission in 2001.\textsuperscript{34}

This impressive document set a new mission, objectives and challenges to achieve low-carbon economy in Europe, in line with the energy security, environmental and economic goals of the EU minimum of 80 per cent reduction in GHGs emissions below 1990 levels by 2050, while maintaining or improving today’s levels of electricity supply reliability, energy security, economic growth and prosperity. Like the EU


\textsuperscript{33} Dubois, S.M., “The Legal Form of the Paris Agreement: a Comprehensive Assessment of Options”, 1, CCLR, 2015, p. 78.

\textsuperscript{34} Energy Road Map, Brussels, 15.12.2011 (COM2011), 885final.
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Commission Road Map of 2001, the Paris Agreement includes, energy efficiency measures (i.e., in building construction, industry, transport power generation, agriculture and a myriad of other sectors).\textsuperscript{35} The decarbonisation of the power sector achievable by relying on renewable, nuclear and carbon capture storage (CCS) is in the centre of attention. Decarbonisation of the power sector is also combined with a mix of energy resources rather than few technologies, and replacement of fossil fuels. In the building and transport sectors, for example, this is achieved by decarbonizing electricity and lowering CO2 fuels, incentivising afforestation and the creation of new green jobs. This conceptualizes the “circular idea” in the concept of circular economy which is also instilled in the new global shift toward a new economical pattern based on the Principle of progression.

The linkage between the Principle of progression and the concept of circular economy is that the progression is created to allow countries, like India for example, a certain degree of discretion in how to progress toward this circular economic transformation. Hence, de facto, this connection establishes a differentiation among countries. Some countries will progress more intensively, and others, will progress less intensively. For example, parties that have currently undertaken sectorial measures could be expected to take on economy wide emissions intensity or BAU deviation targets, and countries that have economy wide emissions intensity or BAU deviation targets, could be expected to take on economy wide absolute emission reduction targets. This leads to the existence of a differentiation between a “broader interpretation” and a “narrower interpretation” in terms of progression and requirements that the parties will have to achieve.\textsuperscript{36} This will, in other words, introduce a differentiation between how the progression is to be achieved. The challenge is the ambiguity as to who determines progression and leaves uncertainties as to how progression is determined and if progression is “self-determined”. The Paris Agreement needs more clarity on how to link progression with the concept of circular economy and which degree of rigour is needed to globalize the concept of circular economy. This differentiation could be problematic for certain countries that cannot be considered as “developing” anymore, such as Brazil or India that have made of the Principle of CBDR-RC their mantra in the past decade but that now may be faced with a narrow interpretation of the Principle of progression. For example, from the Indian perspective, it could be problematic to undertake an economy of wide absolute emission reduction targets and to translate it into clear breaks of BAU without it being a constraint to its development.

III. New Implications of the Paris Agreement for the EU and National Climate Law: Challenges and Potentials on Adaptive-Mitigation

The EU was one of the first Parties to announce its post-2020 ambitions. Based on the October 2014 European Council conclusions of the 2030 EU climate and energy framework, the EU’s NDC commits to a binding target of at least a 40 per cent domestic reduction in GHGs by 2030, compared to 1990.\textsuperscript{37} This target is in line with the EU Energy Road Map to meet an 80 per cent reduction by 2050 to achieve the transition to a new energy system, both in the way energy is used and in the way energy is produced.\textsuperscript{38} The transition toward a new circular economic pattern is to be implemented through the EU Emission Trading System in particular with the Emission Trading System Directive (ETD)\textsuperscript{39} and including, effort-sharing for the non-ETS sectors and regulation, support for renewable energy resources and greater energy efficiency.

The EU has therefore, to review all its policies to fit with 1.5 degree target whereby new implications of the Paris Agreement have to be assimilated for the EU and its national climate laws in order to enable global adaptive-mitigation to be implemented both at vertical

\textsuperscript{35} Report, “Circular Economy to have considerable benefits, but challenges remains“, 2016, Environmental Protection Agency”.

\textsuperscript{36} Article 4, paragraph 6 of the Paris Agreement, for example, clearly set the difference between the least developed countries and small island developing States, and the other countries, in terms of requirements which are broader or less stringent for the previous. In particular, the article states that “the least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances”.


\textsuperscript{38} See previous section 2.4.

\textsuperscript{39} The Emission Trading System Directive (ETS) 2003/87/ EC of the European Parliament and the Council of 13 October 2003 establishing a scheme for Green Gas Emission allowances trading within the Community and Amending Council Directive 96/61/EC (OJ L 275, 25.10.2003). The ETS is the creating a market for emission allowances at Community scale open to all. The directive is the cornerstone of the European Union’s policy to combat climate change and it is a key tool for reducing industrial emissions cost-effective. It represents the first and still the biggest international system for trading GHGs emissions allowances and the EU ETS covers more than 11,000 power stations. The ETS Directive has been modified several times by other directives. See more at: http://ec.europa.eu/clima/policies/ets/index_en.htm.
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and horizontal dimension. Once that the EU’s NDCs will be put into practice, the EU will have the possibility to ensure that all the EU legislation and policies match the ambitions of the Paris Agreement.

The EU’s NDCs are potential tools that both leave room for improvement and still represent an important potential that the EU could communicate at any time including in the context of the five-year review cycle. This implies that the EU’s NDCs have a strong potential to enhance both “vertical implementation” and “horizontal implementation.” At the vertical level, the EU will improve implementation by improving and communicating further information and details of the implementation of the NDCs goals at the EU level. At the horizontal level, the EU will improve implementation at national levels by providing information on activities and plans to be implemented at the EU domestic level. The vertical enhancement of the EU INDC relates to key policies and targets. Nevertheless, it seems that the EU’s NDCs include more mitigation policies rather than adaptation key strategies, which from the Paris Agreement.

The EU does not have a well-tested policy framework which is necessary to acknowledge the link between adaptation and mitigation and to commit with additional elements, especially in the area of innovation and infrastructures. The challenge at the EU level will thus consists of providing additional information internationally on the EU-wide 2030 targets on renewable energy and energy efficiency and the sub-sector mitigation strategy target connected to adaptation strategies, which seems disconnected from the EU Emission Trading System and the non-ETS sectors, which in turn implies that there are several key policy targets and initiatives that need to be revised.

The Paris Agreement entails a real “test” for the EU and its Member States to check the level of commitment to a cooperative and constructive commitment for solving global policy challenges. Therefore, it is fundamental that the EU regain credibility in the brief history of global climate change policy, for example by a fundamental reform of the Emission Trading System, or the introduction of carbon taxes. The NDCs are valid instruments of intervention or even the principal commitment for the EU, but are certainly not sufficient to combat global climate change.

3.1 The EU’s NDCs submission

The EU has been at the forefront of international efforts towards a global climate deal and despite the lack of strong participation of other countries in the Kyoto Protocol and the failure of the Copenhagen Agreement in Copenhagen in 2009, the EU has been trying to build a broad coalition between developed and developing countries to shape a successful outcome of the Paris Conference.

The EU was the major economy to submit its INDC on March 2015 to the UNFCCC (UNFCCC 2015a, 2015b), formally putting forward a binding, economy-wide target of at least 40 per cent domestic GHGs emission reductions below 1990 levels by 2030. Despite the attempts of the EU to act as a leadership power in the global climate deals and the numerous attempts to act as a real “global player” in the global climate arena the EU hardly succeeded in consolidating and establishing an effective “climate leadership” during the course of the numerous COPs. The EU did succeed in greening the economic pattern of development by developing a green economic strategy and grasping all the opportunities deriving from this green economy, transforming what was a theoretical option into a concrete strategy based on the circular economy. Nevertheless, the EU targets have been assessed and rated as “medium”.

The overall level of GHG emissions reductions proposed in the INDC is not yet sufficient to fall within the range of approaches for fair and equitable emission reductions for the EU 28.

The next step at an EU level is currently to project implemented policies of the EU’s NDCs, specifying that they include economy-wide emission reduction goals. One wonders why these NDCs do not include adaptation goals to implement adaptive-mitigation, in line with the Paris Agreement’s new holistic vision which does include adaptation goals into mitigation tools and also the interconnection of the different sectors in addressing adaptive-mitigation. The author of this article advocates the importance of this vision in order to meet the challenges in making mitigation and adaptation strategies “mutually beneficial” in line with the Paris Agreement.

41 The key policy target/initiatives that need to be revised are: 1) At least 27% share of renewable energy in final energy consumption by 2030; 2) At least 27% improvement of energy efficiency (relative to 2005) by 2030, 3) 43% GHG emission reduction in ETS sectors by 2030 (from 2005), including increased linear reduction of 2.2 per year, 4) 30% GHG emission reduction in non ETS sectors (from 2005). The implementing measure (estimated date of legislative proposal by the European Commission) are 1) Renewable Energy Package/new Renewable Energy Directive (2016–2017), 2) Review of Directives on Energy Efficiency (2016), Energy Performance of Buildings (2016), Energy Labelling and Eco-design (2015), and Regulations on CO2 and cars/ vans (2016–2017), 3) Revision of the EU ETS Directive, 4) Legislative proposals on Effort-Sharing Decision to allocate binding non-ETS targets to each Member State (2016).
43 EU Climate Action Tracker – Assessment EU. See more details at: http://climateactiontracker.org/countries/eu.html
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The potential of the EU’s NDCs is thus to include economy-wide emission reduction goals and land use, land use change and forestry (LULUCF) accounting into the 2030 GHG mitigation framework. However, it does not provide information on the accounting rules and potential magnitude of their impact on emission levels in 2030. These will be the challenging elements which will need to be clarified.

The EU should clarify to what degrees will the inclusion of the LULUCF influence emissions reduction in other sectors. According to the last update on 21 January 2016 from the EU Climate Action Tracker, the EU would need to guarantee that its “at least 40 per cent domestic emission reductions” target applies only to industrial greenhouse gas emissions (Kyoto Protocol Annex A sources and gases) which would be achieved irrespective of LULUCF accounting. In addition, given the length of commitment periods, the EU would also need to indicate an emission’s reduction target for 2025.

In relation to 2020, the EU has signed up to the second commitment period of the Kyoto Protocol (2013-2020) with a Quantified Emission Limitation or Reduction Objectives (QELROs) equivalent to a 20 per cent reduction from base year emissions, averaged over the second commitment period.

Currently implemented policies are estimated to lead to a 22–27 per cent reduction below 1990 levels by 2020, meaning that the EU is on track to significantly over-achieve its Kyoto second commitment period target. However, with current policies the EU is not on track to meet its more ambitious conditional Copenhagen pledge of reducing emissions by 30 per cent below 1990 levels by 2020.

3.2 Transparency in the Implementation of NDCs
The horizontal implementation dimension of the EU, which is the implementation by Member States of the EU policies and regulations on planned activities, could be improved by providing more exchange of information and cross-sectoral activities and strategies. One example could be incorporating adaptation strategies on ambitious targets and measures planned to be implemented at Member State levels. One sector that certainly deserves attention as to horizontal implementation is the energy power sector. The EU needs to improve its national renewable energy and energy targets, mitigation targets, such as the decarbonisation goals, or best-practices of national policies. It is by addressing these gaps that the EU will have the opportunity to improve transparency for the EU’s adaptive-mitigation contributions. It is thus highly recommended that the EU ensure accountability and transparency of the NDCs.

One way to accomplish this mission is by including adaptation into the NDCs to make it in line with the international standards newly contained in the NDCs of the Paris Agreement. In addition, not only adaptation components should be included but also finance, technology and capacity building. Including accountability and transparency in the EU’s NDCs would be a very important achievement, even though the challenges remains as how to implement these goals since there are at present no mechanisms to ensure the transparency of implementation.

Transparency is a key factor to ensure the effectiveness of national climate policy making. It is a crucial factor for environmental law effectiveness because it generates all the information needed, and data necessary, to understand each country’s progress toward the NDCs in line with the Principle of Progression enshrined in the Paris Agreement. Transparency is also important in order to look beyond mitigation, to look beyond decarbonisation and to start to accept the concept of adaptive-mitigation. Most importantly, it is essential to achieve the transformation of the economical pattern of BAU. In that sense, transparency of the EU’s NDCs would make possible the interconnections between the different sectors of the circular economy. This would represent an opportunity for the EU to act as a leader in climate governance by promoting a more solid and compact approach to transparency. This goes beyond mitigation and GHGs but rather promotes global adaptive-mitigation and sets up a detailed review system that combines the different sectors, not only at EU level but also at International Level, in line with the international dimension of the UNFCCC transparency system. The EU could thus design new datasets that intersect the horizontal and vertical dimension, including the civil society (stakeholders’, NGOs, associations, and both public and private sector’s actors).

An important first step would be to understand how the EU could consider including adaptation with an important position into the NDCs. For that reason, accountability and transparency should be enhanced because if they are weak, it will not be possible to implement adaptation. Adaptation actions are very dependent on local conditions and capacity-building and require the interactions of several actors and act of the civil society such as institutional arrangements, intervention form the public administrations, behaviour of local actors.

But often the international dimension, in our case the UNFCCC and the Paris Agreement, cannot provide for responses to these problems. There must be an interaction between bottom-up and top-down approaches as the international dimension cannot make it alone.

IV. The Role of Renewable Energies in COP21 and in the Paris Agreement: Challenges and Potentials on Adaptive-Mitigation

The overexploitation of fossil fuels determining excessive GHGs emissions in the atmosphere, especially as a
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case of thermoelectric power plant’s activities, has literally jeopardized the environmental sustain-
ability of the planet. Predicted increases on energy demand if not coupled with efficient sustainable
renewable energy policies to be integrated with implementation measures, will increase the quantity
of GHGs emissions in the air, which in turn will be accelerated by climate change effects already in
progress. These considerations are at the heart of COP 21 discussions and reflected in the Paris
Agreement placing renewable energies on the top agenda of the international institutions including both
the EU and national governments. The EU has already developed a very advanced policy and a
regulatory package in the energy sector both with policy documents and secondary sources of law
(regulations and directives). Nevertheless, this regulatory package need to be carefully revised to fit with
the new Paris Agreement’s target, as explained previously.\(^\text{44}\)

The problem is that the adaptive-mitigation’s long-
term goals, contained both in the Paris Agreement and
in the EU law, in what has been defined as “vertical
implementation”, risk remaining “dead letter” in the
absence of collaboration among member states. It is
not possible for member states’ legislations just to
transpose the Paris Agreement via the EU level in a
sterile way and achieve an effective implementation of
international environmental law. In order to have a
real implementation of the Paris Agreement and to
implement renewable energy goals in adaptive-mitiga-
tion terms, it is fundamental that renewable energy
economic incentive’s measures are coupled with a
process of adaptation of the complex bureaucratic
apparatus. The bureaucratic apparatus must be
adapted so that it facilitates the procedures of
installation of renewable energy power plants running
on renewable energies. Such procedures must be
simplified to be effective, resulting in changing law at
national level in order to make it adaptive to climate
change or “adaptive proofs”. This is the most difficult
challenge for each member state, a challenge that Italy
is currently undergoing right now.

In order to meet the objectives of COP 21, the role
of renewable energy is crucial. The principal barrier to
the development of these new green technologies on
the global scale appears to be a political nature
especially regarding the smooth functioning of the
mechanisms of governance. During the COP 21
meetings, the role of renewable energy was continu-
ously at the centre of attention, as demonstrated by
the commitments of more than a thousand mayors to
run their cities with renewable energies solely by
2050.\(^\text{45}\)

Nevertheless, there are no mandatory provisions on
the Paris Agreement that oblige states to control and
implement green renewable energy commitments. It is
more than evident that in the next decade, within a
context where developing countries’ economies will
grow consistently, there will be an increasing energy
demand.

If the goal is to couple the circular economy of
sustainable economic growth with GHGs emission
reductions, then a serious effort to promote and
sustain renewable energies at political level is necessary
as well. In that sense, the only tools of adaptive-
mitigation for an effective enforcement of such goals
are the renewable energies because they are able to
satisfy both the needs of circular economy and GHGs
emission reduction.

The problem is that there are no clear obligatory
provisions in the text of the Paris Agreement that
oblige states to utilize green energies. This would have
been not only auspicious but it is crucial as well,
especially for developing countries and the small
islands and developing states, where renewable ener-
gies could and should play the central role.

4.1 Impact of the Paris Agreement on Italy’s
Commitments in the Renewable Energies
The Italian case is thus very representative of this
challenge. Here, together with a rich range of
economic incentives coexisting with chronically ill
bureaucratic institutional mechanisms, confusing laws
and social factors of mentality are engendering a loss of
credibility for investors, thus rendering the func-
tioning of the concept of a circular economy difficult
and obstructing adaptive-mitigation goals. Adminis-
trative appellate court’s cases show the existence of a
subnational resistance against renewable energy,
which often blocks renewable energy development in
Italy.\(^\text{46}\) One aggravating factor is the persistence of the
“NIMBY syndrome, the acronym of “Not on my
Backyard”, which is the generalized behaviour of
opposing the installations and constructions of renew-
able energy infrastructures by the local population,
who are concerned about the negative consequences of
such installations.

The impact of the Paris Agreement on Italy’s
renewable energy future will certainly be positive as
it insists that Italy finally adopt a strategic and
coherent approach to decarbonize the Italian econ-
omy. Italy is the only member state that does not have
any normative instrument that sets fixed objectives to

\(^{44}\) See previous section number 3.

\(^{45}\) United Climate Action, “Paris City Hall Declaration – A
decisive contribution to COP 21, Climate Summit for Local
Leaders, December 4th 20015, Paris, see the document at:
http://www.uclg.org/sites/default/files/climate_summit_final_de-
claration.pdf and also at http://newsroom.unfccc.int/
lpaa/renewable-energy/press-release-lpaa-energy-renewable-
energy-and-energy-efficiency-can-unlock-climate-solution/.

\(^{46}\) Fanetti, S., Pozzo, B., “Subnational Resistance against
Renewable Energy: The Case of Italy”, in Renewable Energy
Law in the EU – Legal Perspectives on Bottom-up
Approaches, edited by Marjan Peeters and Thomas Schoe-
reduce GHGs emission. According to a document from the Italian Minister of the Environment (Ministero dell’Ambiente e della tutela del territorio), a strategy of adaptation to climate change was approved with a document titled “Elements for a National Strategy of Adaptation to Climate Change” (Elementi per una Strategia Nazionale di Adattamento ai Cambiamenti Climatici”) published on the 12th of September, 2013, and a “National Strategy of Adaptation to Climate Change” (“Strategia Nazionale di Adattamento ai Cambiamenti Climatici”). A chapter on energy is contained in both documents, where it is highlighted, weakly, that it is expected to enhance adaptation measures to increase the resilience of the energy system, thus reducing the vulnerability of the traditional sector using fossil fuels and of the electricity sector, where there are problems of security of supply.

It is also highlighted that the renewable energy sector has an uncertain degree of security of supply, explaining the need to improve the systems of energy stockage, and to diversify renewable energy systems energy efficiency and demand side management.

The need to have energy installations with a long medium life is also encouraged. What is missing is a clear concrete action plan for adaptation to climate change instead of documents labelled with generic terms as “elements” or “analysis” or “strategy” of adaptation to climate change.

In Italy, there is no such single comprehensive plan for all interested sectors making it absolutely necessary to reduce GHGs emissions (energy, industry, transport, agriculture, building sector, etc.) with corresponding specific objectives and precise responsibilities for each sector. Italy needs to make the decarbonisation objectives both integral and transversal parts of the economic objectives to be followed by the business sectors and the civil society if it is to encourage a system of circular economy, inform and educate the society on the need for a transformation of production and consumption of the energy sector to renewable energies. This would push the Italian society toward a behaviour change that instills a culture of sustainable development into the Italian mentality and prepares the country to invest the maximum profits from the impact of the Paris Agreement in future renewable energy challenges.

The main problem in Italy is not the level of incentives to the renewable energies, which have been extremely high in the past years, but rather the absence for a long time of a national energy policy and the absence of transparency as well as the existence of a certain confusion in the allocation of competences between the State and the Regions in the field of energy and environment as organized by the Italian Constitution.

The chaotic regulatory framework on what should be regulated by the state and what pertains to the Regions is the result of the lack of transparency in the distribution of competences between State and Regions. Despite the great potential of Italy in terms of renewable energy production and mitigating GHGs emissions in the air, especially with the photovoltaic systems, there is still a behavioural mentality and negative attitude indicating that the country is not ready to embrace the fundamental shift toward renewable green commitments. We still find local populations protesting against renewable energy installations. Often these protests are organized by politicians and local authorities in order to gain consensus during political campaigns. Such a situation is evidently disrupting the smooth functioning of the vertical implementation of the Paris Agreement. It can only be enforced if societal behaviour, deterrence economics, institutional credibility of the administrative apparatus and societal factors change.

Therefore all these factors are to be taken into account, at the very outset of the international environmental law formation, in order to prevent problems of implementation already at the source. Inserting mandatory green commitments in the text is the answer, a possibility which unfortunately has not been taken into consideration by the negotiators and drafters of the Paris Agreement. Such an option would have made the concept of global adaptive-mitigation contained in the Paris Agreement operational and implementable.

In addition, given the growing protests and ruling calls happening in Italy against renewable energy installations, a possible solution could be to create consensus around infrastructures of public interests.

In order to achieve consensus and to push the shift of mentality and behavioural consent, it is fundamental to enable exchanges of communication and transparent information between citizens and green business sector involved in renewable energy installations. It would be conducive to involve public participation in the decision-making process, as much as possible. For that reason, it is fundamental to make the correct information on the benefits of renewable energy infrastructures, easily available, also because

47 All this documentation on adaptation to climate change in Italy is available to the public at the official Italian webpage at: www.minambiente.it/pagina/adattamento-ai-cambiamenti-climatici
48 See document from the Ministero dell’Ambiente e della tutela del territorio e del Mare, 2013, “Elementi per una Strategia Nazionale di Adattamento ai Cambiamenti Climatici”, pp. 2-4.
49 See document from the Ministero dell’Ambiente e della tutela del territorio e del Mare, 2015, “Strategia Nazionale di Adattamento ai Cambiamenti Climatici”, p.44.
often, the benefits and functions of renewable energies are difficult to communicate due to the technical language employed. This could be why media transmission often appears distortive.

In Italy, the institution charged to provide correct information is the “Gestore del Servizio Elettrico” (GES), which implements Directive 2009/28/CE into Italian law by creating a website on renewable energies that publicize incentives, environmental benefits and good practices. Nevertheless, a good communication and transparent communication is not sufficient to tackle the problem of the increasing number of protests. Information must be accompanied by transparency in the decision-making process connected to the installation of renewable energy infrastructures in a way that makes it possible for the civil society to take part in decisions.

The Paris Agreement presents for the Italian case not only a historical, economical opportunity to push the Italian renewable energy sector forward at global level in adaptive-mitigation terms but also to stimulate the implementation of such conditions in Italy by facilitating its behavioural change.

4.2 The Current Regulatory and Institutional Panorama on Renewable Energy in the Italian Case

In the last decade, several Italian governments have dealt with various obstacles and barriers in the renewable energy sector due to the lack of coherence and precise rules applicable and regulating the sector. At the present time, the Italian regulatory framework is still chaotic. The recent measures that have been introduced by the Italian legislature and the government in charge have modified, with retroactive effect, the system of incentives underlying the economic interests of the renewable energy sector. This has resulted in an increase of uncertainty for the investors. Both domestic and foreign investors are reluctant to invest in the sector where new regulations are exactly the opposite of those that the Paris Agreement was supposed to generate. As mentioned before, the role of renewable energy is so undeniable at the centre of the attention in the Paris Agreement that none of the existing political and economic entities can ignore it any longer. This means that if the current Italian administrative and regulatory system does not change, not only will the concept of circular economy be left hanging in the air, but the installations in existence will be abandoned as soon as the period of incentives ends, because no renewable energy producers have yet adopted, the current system of incentives, which is called “Spalma Incentivi Volontario”.

Italy is the most “incentivized” country compared to other member states, such as Germany and Denmark. Italy has the most elevated amounts of incentives for renewable energies with a medium contribution rate amounting at more than 80 per cent for the small installations and 40-50 per cent for the largest installations. Compared to the other member states, Italy is the only country which utilizes three different types of incentives: 1) feed in-tariff (a unique comprehensive tariff); 2) feed-in premium (premium on the quantity of energy produced); 3) green certificates (quota system). A system of feed in-tariff ensures more certainty in monetary return for those willing to invest in new installations but represents a burden for citizens’ bills.

With the Romani Decree, the Italian legislator has attempted to establish order by replacing the green certificates with the system feed in-tariff, choosing auctioning for installations with a capacity higher than 5 Mega Wat (MW). Nevertheless, the introduction of this threshold let raises several doubts as to the possible cheating of some producers that could artificially keep the power of the installations a bit below the threshold of the 5 Mega Wat, in order to avoid auctioning and acceding to the system of feed in-tariff.

In 2014 three Italian laws (“decreti”) were signed by the ministers regulating the system of incentives of renewable energies: 1) decree MisE-MATT concerning voluntary incentives (so-called “spalma-incentivi volontario”, Art. 1, paragraphs 3-6 of the DL145/2013) for the power sector from sources other than photovoltaic; 2) decree MisE concerning rules on mandatory incentives for photovoltaic installations with power higher than 200 KiloWatt (KW) for a duration of 20 years (so-called “spalma incentiv obbligatorio” pursuant Art. 26, paragraph 3 of the DL 91/2014 for large photovoltaic installations); and 3) decree MisE on the methods of allocations for the incentives on the photovoltaic sector by the GSE.

53 See at www.gse.it.
54 A decree was enacted on July 11, 2012 as a Ministerial Decree regarding Renewable Energy Incentives and it implements the criteria indicated in so-called Romani Decree no. 28/2011. The Decree implements the criteria indicated in the so-called “Romani Decree “ (Decree no. 28/2011) and sets out a new incentive scheme for wind-farms, hydro-electrical plants, geo-thermal power plants, biomass, biogas, bio liquids, depuration gas, landfill gas plants, waste treatment plants and wave power plants, which: (i) are new, totally rebuilt, refurbished or enlarged; (ii) possess a minimum power capacity of 1kW; and (iii) will be operational by 1 January 2013. Incentives relating to solar photovoltaic plants are not covered by the Decree. For that point, see more at: http://www.nortonrosefullbright.com/knowledge/publications/69447/renewable-energy-update-italy.
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which reimburses to renewable energy producers, each year, with 90 per cent calculated on the basis of the effective production of the previous year.

This system should be in force until December 31 of the current year except if costs exceed of 5,8 billion € on the costs of citizens’ electricity bills. With these new laws, the Italian renewable energy power sector market appears deadlocked and will remain as such unless a new dress is adopted the day after the 31 December 2016 (which is the date of expiration of the decree). Therefore, in the Italian case, the future will depend of which kind of laws regulating incentives for renewable energy installations are adopted: whether an improvement of the system of division of competences between states and regions with the need to re-centralize the competences to the State is adopted, and whether the costs of bureaucracy render the new laws inoperable. The need to overcome this deadlocked situation in the field of legislative competence is also strongly supported by the Renzi Cabinet. The current situation in the renewable energy sector is certainly not attracting foreign investors, as already pointed out by the Wall Street Journal in a popular article of 2014 titled “Renzi Tilts at the Windmills”.

If the general law on the total abolition of the current legislative competence in all fields, reserving for the state the power to legislate in matters of clear national relevance, such as national production, transport and energy, passes this year, and if local behavioural changes, there is a good chance that the Paris Agreement will be implemented correctly and with a positive impact in Italy. Hence, it will be auspicious that the Renzi Cabinet simply stop approving laws such as those mentioned above and instead start to approve new “decreti” which do not respond to the requests of some lobbies that are clearly against the interests of the citizens and the environment.

V. Conclusion

This article has identified key challenges and potentials of the Paris Agreement in a multi-level regulatory contextual analysis, assessing the effective enforcement of this international environmental law treaty. Within this contextual analysis, the relevance of both adaptation and mitigation interacting in a “mutual-benefit” way is stressed. The finding is that that adaptation is encapsulated in the mitigation components of the NDCs, for the first time.

Thus, it is demonstrated that the Paris Agreement is actually a carrier of a new concept of global progressive adaptation, functioning as a tool of detection for future environmental law effectiveness: theoretically a new pattern in the effectiveness of implementation of environmental law.

The analysis cannot be detached from the focal points of the climate change regime, as law and policy needed to be analysed in “context”, which is to say, taking into consideration the concept of circular economy, core elements the legal architecture of the agreement, selected governance mechanisms – accountability, transparency, and facilitation-, defined as “trilateral vital combination for climate governance”.

Starting from the International level of the Paris Agreement moving down to the EU regulatory level reaching, further down the national level with Italy as an empirical case study in its commitments in the renewable energy sector, it is has been shown that effective compliance and enforcement regime takes note that multiple factors influence the behaviour of a regulated community. These factors include deterrence economics, institutional credibility and complex bureaucratic apparatus that need to be simplified and most importantly, changes in societal behaviour. The Paris Agreement via the EU level will hardly be enforceable if changes in societal behaviour, institutional reform and mentality do not come from the bottom-up.

One of the key sectors that certainly deserve attention is the renewable energy sector at all the levels.

To recapitulate, the challenges and potentials in a multi-regulatory contextual analysis are:

At an International Level of the Paris Agreement:
– To understand the relevance of the synergistic linkages and reverberation between adaptation-mitigation as “mutual benefit sharing approach”
– To make a connection between Article 2 of the Paris Agreement and Article 16 of the UNFCCC to enhance the legal force of the Agreement in terms of implementation;
– To valuate the crucial importance of Article 14 of the Paris Agreement as a strong potential in terms of long-term-journey of progressive non-return for the regime and understand how to operationalise this ambitious new environmental pattern;
– To give more attention to the renewable energy sector, this should have had more attention in the text of the Paris Agreement because it represents the only tool to reach adaptive-mitigation goals of the Agreement. In that sense, this potential could be realized by including in the NDCs of the text, mandatory actions to promote renewable energies as part of the various existing forms of adaptation goals.

At a Regional Level of the EU:
– The EU’s NDCs have a strong potential to enhance “vertical level implementation” and the “horizontal level of implementation”, especially by improving information and transparency,

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- Providing information on activities and plans to be implemented at national level;
- The EU still needs to include more adaptation policies rather than mitigations. As it stands right now the EU’s NDCs include more mitigation policies in contrast to the Paris Agreement, which precisely deals with the issue by placing adaptation at a higher level of priority, thus avoiding disconnecting adaptation from mitigation;
- The EU needs to improve its national renewable energy and energy targets in adaptive-mitigation by following the point suggested above;
- The EU has a strong potential to act as a global leader in climate governance by promoting a more solid and compact approach to transparency. It could promote global adaptive-mitigation by taking advantage of its unique and privileged position as a “global adaptive-mitigator intermediary” between the vertical dimension and the horizontal dimension. It should promote intersection, reverberations and synergistic linkages between these two dimensions, including the civil society.

At the National level of Italy:
- Italy needs to undergo important changes in societal behaviour, institutional reforms and mentality to permit a correct implementation of the Paris Agreement;
- For Italy, the goals of the Paris Agreement represent a formidable opportunity to launch concrete, sustainable development in line with the concept of circular economy and to re-launch a new economy able to guarantee energy security. The Paris Agreement represents a new impulse to do better.

Globally, as denoted in the logic of multi-regulatory approach examined above, the Paris Agreement via the EU level is hardly enforceable, if changes in societal behaviour, institutional reform and mentality do not come from the bottom-up at the national level. The Paris Agreement cannot provide solutions and responses to climate global problem without interactions between the other levels of governance: the EU and the national, since the interactions, synergistic linkages and reverberations between bottom-up and top down approaches are essential. The new concept of global, progressive adaptive-mitigation, which the Paris Agreement espouses, can function as a ring of conjunction between vertical and horizontal implementation and between bottom-up and top-down approaches, thereby improving effectiveness in terms of fulfilling the environmental protection goals of international environmental law. This might well be a new, ambitious, environmental law pattern, just waiting to be operationalized provided that it, hopefully, is understood correctly by politicians.
Book Review

Advanced introduction to International Environmental Law by Ellen Hey

Reviewed by Chelcie Henry-Robertson*

Being a student at Imperial College London studying Biological Sciences, I can say with certainty as a non-law student that this book is a comprehensive introduction to environmental law and is a very worthwhile read. I wanted to read this book to learn about international environmental law, as my ambition is to become a barrister specialising in environmental law.

Elgar Advanced Introductions states that the books in their series serve “as accessible introductions for undergraduate and graduate students coming to the subject for the very first time” by “distilling the vast and often technical corpus of information on the subject into a concise and meaningful form” which is evident from the book being a slim 179 pages long. The length and size of the book is very appealing through the eyes of a novice to the subject or of someone wanting to quickly get up to speed.

The request from the publisher to remove some references with details of the sources and the choice to omit the majority of references from the text with the exception of some deemed important by Ellen Hey makes for a refined book. Whilst this may not have been the appropriate choice for a more substantial textbook, the introductory nature of this book allows for these measures to be taken. It adds to the streamlined effect of this book, making it more desirable to those who are new to the subject area. Ellen Hey has a wealth of experience. She has taught in the fields of public international law, human rights law, law of the sea and international dispute settlement. She has also taught and researched in the fields of international natural resources law, international environmental law and the law of international organisations. Ellen Hey has also been involved with some of the references made in her own book, demonstrating the high level of her career. Examples of this include how until 2014 she was a member of the Aarhus Convention Compliance Committee and she has also advised the Netherlands as a consultant regarding the compliance regime for the Kyoto protocol. Regarding her vast knowledge and experience in law, the references included in the text are of high value due to the fact that they deemed important to Ellen Hey. In the current age of learning, Internet searches far too often bring up a vast number of results that can be daunting to someone unfamiliar with law. Hey relieves that intimidation through her work by selecting the most relevant resources for her book and mentioning them in the text. All the references used are found in the table of cases and the table of instruments at the back of the book, with both the shortened and full title.

References to the more challenging texts to find outside of the book are present in the text, with the aim of decreasing the effort required to locate the source. This is ideal for those new to the study of law (and more so, environmental law) as not only does it aid the reader, but also it helps to familiarise non-law students with the law style of referencing. The references footnoted at the bottom of some pages also provide good resources for additional reading. It gives the reader the free will to explore further areas they find interesting making this text increasingly useful. The footnotes also add context by giving background information on the resources selected.

Additionally, the aims of the series outline that their “critiques of the field will challenge and extend the understanding of advanced students, scholars and policy-makers”. The author’s critiques of areas of the field throughout the book are crucial to making this book not only an advanced, but also a valuable introduction to international environmental law.

The book contents page with subheadings shows a high level of organisation and consideration into the logical order of the book, which is only reaffirmed after reading the book. The choice to include a table of abbreviations at the beginning of the book is extremely useful, and can be revisited on occasions whilst reading the book if the reader is unfamiliar with any terms mentioned.

The author clearly sets out her aims of each chapter with an introduction, which provides a useful framework to consider whilst reading. The introduction to chapter one is extremely gentle and encouraging to someone who is new to environmental law or law entirely, as is this reviewer. At the end of each chapter there is a summary section entitled ‘assessment’ which brings the chapter concisely together. Through this, the author adds clarity as well as re-familiarising the reader with what they have read.

It is easy to see through reading this book that the importance of environmental law through time has shifted and is shifting dramatically, and in a positive way. Ellen Hey guides you through history recounting the most important and relevant cases, protocols, and instruments from 1885 (Treaty of Salmon Fishing in the Rhine) to modern day events such as the 2014 Hamilton Declaration on Collaboration of the Conservation of the Sargasso Sea. The examples are clearly carefully selected. This recount of important events in the history of international environmental law is predominantly featured in chapter 1 ‘Setting the

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Scene’ and in chapter 2 ‘Origins and Development’. This also continues throughout the book where other chapters build on this initial timeline with the examples chosen. Consequently the modern aspect of the book is less displayed during the first two chapters than the rest of the book. In contrast the author, with certain cases, highlights modern advances in relation to the older references where able. This feature adds to the up-to-date aspect of the book, which in the field of international environmental law is not only appreciated but is a necessity.

When the author thoroughly references the past and explains the extent of the impact that those advances have had in the development of international environmental law (such as the 1941 Trail Smelter arbitration and the 1885 Treaty on Salmon Fishing in the Rhine), the book serves as a stark reminder of how fast the progression of environmental problems has occurred and how fast the field of environmental law is growing. With this growing field, chapter two highlights the adaptability that old agreements can have to remain relevant. This is found with the example of the 1972 Great Lakes Agreement being regularly updated after first being based on the 1909 Boundary Waters Treaty.

In chapter three, the seriousness of the importance of maintaining the environment is stressed. This is particularly prominent when the author presents a concern with the wording in the 2005 Millennium Ecosystem Assessment, presenting the controversy surrounding the anthropocentric view. The concern with the wording is that it suggests that ecosystem services to humans are the most valuable and worthwhile reason to conserve ecosystems rather than (for the intrinsic benefit of) the “ecosystem themselves” (p. 46). This exploration of the anthropocentric view in this book allows readers to reach their own opinion on the matter, and also highlights some of the broader challenges faced by international environmental law. The author notes where the anthropocentric viewpoint is also seen (in the 2010 Strategic Plan for Biodiversity 2011-2020), further emphasizing the current focus of ecosystem services in certain areas of environmental law. The author at the end of chapter three carefully reminds the reader that environmental law has not currently incorporated the information that we are in the Anthropocene. Highlighting the flaws of environmental law is another reminder that this is a valuable modern book.

Hey explores several controversies in environmental law throughout her book. For instance in relation to the Watercourses Convention (the 1997 Convention on the Law of Non-Navigable Uses of International Watercourses) the author writes of potential political motives behind countries not being more involved. It is put forward to the reader that certain states which share watercourses (and are not found as states parties in the Watercourses Convention) may experience an undesired effect on their sovereignty if they become parties to the Watercourse Convention, thus providing a potential reason as to their lack of involvement.

The majority of chapter 4 consists of Rio Declaration principles. These principles aim for sustainable development within countries and over 170 countries signed the 1992 Rio Declaration. At times when discussing principles the author will quote directly from the declaration, ensuring an accurate depiction and avoiding misconstruction. As explained by the author in the book, the Rio Declaration was chosen to feature as the main example for this chapter due to the amount of support given by states. Ellen Hey regards this as meaning the principles are both “authoritative” and “reflect significant compromise” (p. 53) which adds a personal touch to the book aside from those lined out in the preface. However, when introducing the choice of the Rio Declaration the author states how the debate of the legal status of principles is ‘thriving’, yet decides to not explore this topic in detail and only “when in order”. Whilst this may be an additional feature to shorten the book and whilst the non-lawyer can appreciate the mention of it here as inspiration for further reading, it would have been useful to include a brief explanation as to why it was not selected to be a bigger feature in the book. The use of the Rio Declaration as the example of a fundamental multilateral environmental agreement throughout chapter four adds consistency throughout the chapter as well as allowing the reader to explore a topic in more depth than the book size suggests. Prior to this, the book often does not delve into a matter at this level of depth, which provides a refreshing change to the structure of the book. The Rio Declaration is referred to many times outside of this chapter, which also adds consistency to the book.

Gradually, the amount that links in the book increases as the reader progresses through the chapters. These links are often discussed, like in the case of multilateral environmental agreements in chapter five in the section of ‘Institutional linkages’. The author includes the example of how preserving forests will not only aid in the protection of biodiversity but will further help in the reduction of greenhouse gases and in reducing “the effects of climate change by preventing flooding and landslides” (p. 100).

When certain topics are met in the book, the author does not refrain from mentioning the shortcomings of international environmental law. With regards to plastic ending up in the sea, the author clearly states that whilst the regional seas conventions have begun to discuss the problems that plastic causes in a “marine environment”, environmental law has not yet provided “a regulatory regime that addresses their removal” (p. 64). This demonstrates the balanced nature of this book when describing the current benefits of international environmental law and where it needs to be improved. The law of the sea is a particular area of expertise of Ellen Hey’s.

Where appropriate, the author will use the same
example more than once, such as using the Kyoto protocol to illustrate how some multilateral environmental agreements “exempt developing states from certain obligations” (p. 70) after being discussed on previous occasions in the book. Also the author mentions The Stockholm Convention and the Cartagena Protocol when discussing Principle 15 in chapter four. Principle 15 states “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation” (p. 72). Both the Stockholm Convention and the Cartagena Protocol are mentioned previously and subsequently in the book. The author, when referring to a matter that will feature in more detail later, or has done in the past, will inform the reader of the chapter that it is in. This all provides a comforting sense of familiarity for the reader, which adds to the quality of the introductory design of this book.

In chapter seven the author explores the connections with international environmental law and other areas of law: the law of armed conflict, the human rights law, trade law and investment law. The author makes comparisons between different examples such as the Stockholm and Rio Declaration when discussing how human rights and international environmental law compare. When it comes to discussing a clean environment as a human right Principle 1 of the Stockholm Declaration covers that the environment has to be of a quality to permit a “life of dignity and well-being” (p. 124), where as Principle 1 of the Rio Declaration mentions that humans are “entitled to a healthy and productive life in harmony with nature” (p. 125). She uses this comparison and the fact that having a healthy environment or clean air was not adopted as a human right at the Rio + 20 Conference or the World Summit on Sustainable Development to illustrate the controversy of the matter.

Some of the main topics that the author discusses are: the 1997 Kyoto Protocol, the 1992 Rio Declaraton, the 1972 Stockholm Conference, the 1992 Biodiversity Convention, North-South relations, the 1989 Basel Convention and the 2000 Cartagena Protocol.

Overall, from the perspective of a non-law undergraduate student the book can be hard to re-pick up if put down for a short while. It is best to read this book consistently due to the fact that the book reads like a “long essay”, as set out in the preface. Individuals with previous experience of law may not find this to be the case.

To conclude, the book can act as a reliable and valuable resource to students (non-lawyer and lawyer alike) who are learning about international environmental law for the first time, and also individuals who are generally interested in the topic. The educational value of this book is very high, with the large number of references and themes discussed being a testament to that. The author’s style of referencing, careful selection and order of themes and the notes at the bottom of page all equate to a personal feel about the book. It allows the book to act as a platform to delve further into the field. The author’s ‘Final remarks’ section was insightful, with her own suggestions as to where improvement in environmental law can occur. All in all, these elements of guidance presented by Ellen Hey make the book a beneficial introduction to read.
The following books are available for review for suitably qualified readers. Please email Karen Makuch at k.e.makuch@imperial.ac.uk for further details.

**Decision Making in Environmental Law Edited by Lee Paddock, Robert L. Glicksman and Nicholas S. Bryner**

The Elgar Encyclopedia of Environmental Law is a landmark reference work, providing definitive and comprehensive coverage of this dynamic field. Each volume probes the key elements of law, the essential concepts, and the latest research through concise, structured entries written by international experts. Each entry includes an extensive bibliography as a starting point for further reading. The mix of authoritative commentary and insightful discussion will make this an essential tool for research and teaching, as well as a valuable resource for professionals and policymakers.

Environmental issues are at the heart of some of the most complex and consequential decisions that society must face in pursuit of a more sustainable future. They encompass the international, national, and local levels and engage all branches of government. Decision Making in Environmental Law, one of the constituent volumes in the Elgar Encyclopedia of Environmental Law, brings together some of the leading experts in the field and provides a structured overview of the various dimensions of decision making from an environmental law perspective.

The concise and accessible chapters provide an international scope and detailed bibliographies that allow readers to explore issues in depth. Topics include: the role of treaties, common law tools, rulemaking, access to information, regulatory structures, market-based and trading mechanisms, monitoring and reporting, voluntary programs and private regulation, environmental impact analysis, public engagement and environmental justice, administrative and judicial review, and the role of environmental courts and tribunals.

This volume offers a complete exploration of the complicated issue of environmental decision making. It is ideal as an introduction for students, as a reference point for scholars, and as a comprehensive guide for practitioners.

**Environmental and Energy Law Edited by Karen Makuch and Ricardo Pereira**

Despite bringing prosperity, industrialisation generally leads to increasing levels of pollution which has a detrimental impact on the environment. In response, legislation which seeks to control or prevent such impact has become common. Similarly, climate change and energy security have become major drivers for the regulatory regimes that have emerged in the energy field. Given the global or regional scope of many environmental problems, international cooperation is often necessary to ensure such legislation is effective. The EU and the UK have contributed to the development of the environmental and energy law regimes currently in force, spanning across international, transnational and national levels. At the same time, practical responses to environmental and energy problems have largely been the focus of engineers, scientists and other technical experts.

*Environmental & Energy Law* attempts to bridge the knowledge gap between legal developments designed to achieve environmental and/or energy-related objectives and the practical, scientific and technical considerations applicable to the same environmental problems. In particular, it attempts to convey a broad range of topical issues in environmental and energy law, from climate and energy regulation, technology innovation and transfer, to pollution control, environmental governance and enforcement. In addition the book outlines key sector specific legal regimes (including water, waste and air quality management), focusing on issues or topics that are particularly relevant to both environmental and energy lawyers, and engineering, science and technology-oriented professionals and students. In this vein, the book guides the reader on some basic practical applications of the law within scientific, engineering and other practical settings.

The book will be useful to all those working or studying in the environmental or energy arena, including law students, legal professionals, engineering and science students and professionals. By adopting a multi-disciplinary approach to environmental and energy law, the book embraces all readerships and helps to address the often thorny problem of communication between scientists, engineers, lawyers and policy-makers.