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BELÉN OLMOS GIUPPONI

Setting the stepping stones for environmental democracy in Latin America and the Caribbean (LAC): An analysis of the Draft Regional Agreement on environmental access rights

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BELÉN OLMOS GIUPPONI [*]

Setting the stepping stones for environmental democracy in Latin America and the Caribbean (LAC): An analysis of the Draft Regional Agreement on environmental access rights

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1. *Introduction*

Principle 10 of the 1992 UN Rio Declaration laid the groundwork for the implementation of access to environmental information, public participation in decision making, and access to environmental justice, which constitute the three pillars of environmental democracy[1]. Ever since the adoption of the Declaration, the protection of environmental rights in Latin America and the Caribbean has been on the agenda. However, proposals for an international legally binding instrument have been delayed.

The 2012 United Nations Conference on Sustainable Development (Rio +20) marked a turning point in this evolution as nine Latin American and Caribbean (LAC) countries launched the proposal for a regional convention embodying the three sets of environmental rights[2]. In this declaration the signatory countries made the commitment to draft a regional agreement on environmental access rights with the support of the Economic Commission for Latin America and the Caribbean (ECLAC), acting as technical secretariat with

[*] Senior Lecturer in EU and International Law at Liverpool Hope University (United Kingdom).

[1] The term "access rights", as used herein, refers to access to environmental information, access to decision-making in environmental matters and access to environmental justice. On compliance with access rights, see Environmental Democracy Index, available at http://www.environmentaldemocracyindex.org/ accessed 5 October 2017.

[2] Economic Commission for Latin America and the Caribbean (ECLAC), Resolution 686 (XXXV) Application of Principle 10 in Latin America and the Caribbean, <http://www.cepal.org/sites/default/files/pages/files/686xxxv-principle_10-ing.pdf> accessed 5 October 2017.

the aim of concluding the negotiations by December 2017[3].

The roadmap set by the ECLAC for the adoption of this regional agreement on principle 10 foresees an ambitious agenda[4]. From the outset, the participation of stakeholders has been crucial for drafting and agreeing on a text. To illustrate this, the international network of hundreds of civil society groups called The Access Initiative (TAI) pledged to campaign for the adoption of the text in Chile, Costa Rica, Dominican Republic, Jamaica, Mexico, Panama, Paraguay, Peru, and Uruguay[5].

Environmental access rights are gaining momentum as the negotiations for a regional convention in LAC unfold. This represents a unique opportunity to reflect not only on the agreed text but also, more broadly, on the implementation of environmental rights in international environmental law (IEL). Thus, the article first addresses the question of the delayed implementation of environmental democracy rights in LAC, examining the progress achieved so far. It then turns the attention to the Draft Agreement (DA) with a brief account of the negotiations, presentation of its legal basis and main features and an analysis of the compliance mechanism, underlining outstanding challenges and lessons to be learned from the negotiations. Finally, it discusses the possibility of reaching a universal consensus on environmental rights through multilateral environmental agreements (MEAs) in a contribution to the consolidation of certain customary IEL provisions.

2. *The current legal landscape of environmental access rights in LAC*

Notably, Principle 10has been the driver of legislative change in various regions. Since the 1990s there has been a growing trend in IEL towards the adoption of multilateral environmental agreements (MEAs) embodying

[3] From 2012 until the present, six meetings of the focal points of the signatory countries and fourteen meetings of working groups were held. The negotiations of the regional agreement were opened in November 2014, with the creation of an ad hoc Committee. While two authentic texts in Spanish and English are being negotiated, a third (non-authentic text) in Portuguese is available as well. References made in the text correspond to the sixth version of the Preliminary Document on the Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean (referred to as draft agreement) <http://www.cepal.org/en/publications/41601-report-sixth-meeting-negotiating-committee-regional-agreement-access-information> accessed 5 October 2017.

[4] At the moment of writing, 33 states have joined the negotiations.

[5] The Access Initiative available at <http://www.accessinitiative.org/> accessed 5 October 2017.

environmental access rights[6].

In Europe, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted under the auspices of the United Nations Economic Commission for Europe (UNECE) crystalized the three core environmental rights[7]. Other MEAs include public participation: for instance, the Convention of Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC)[8].

Public interest litigation before regional human rights courts has introduced principle 10 in various ways and with regional differences[9]. In Europe, the European Court of Human Rights (ECtHR) has relied on the principle to protect the right to a private and family life in line with article 8 of the European Convention of Human Rights[10]. In Latin America, the Inter-American Court of Human Rights has integrated the principle in the context of the protection of indigenous rights: essentially, the right to indigenous property under article 21 of the American Convention on Human Rights[11].

Notwithstanding this, the reception and implementation of environmental democracy rights in other regions, like LAC, has been hindered due to several factors[12]. Although legal developments have taken place, environmental protection in LAC is still unfledged. Specific constraints and obstacles to implementation that stem from institutional and political settings in LAC countries bring further complications which go beyond the mere enactment of

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[6] J. VIÑUALES, *The Rio Declaration on Environment and Development. Preliminary Study*, in J. VIÑUALES, (ed.), *The Rio Declaration on Environment and Development: A commentary* (Oxford University Press, Oxford, 2015) p. 32; J. EBBENSON, *'Principle 10'* in J. VIÑUALES, (ed.), *The Rio Declaration on Environment and Development: A commentary* (Oxford University Press, Oxford, 2015) pp. 287-309.

[7] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 and entered into force on 30 October 2001.

[8] The Convention on Biological Diversity (CBD), opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development entered into force on 29 December 1993, art 14.

[9] C. SCHALL, *Public Interest Litigation Concerning Environmental Matters before Human Rights*, in *Journal of Environmental Law,* 2008, 20:3, pp. 417–453.

[10] See, for instance, *Guerra and Others v Italy,* ECHR1998-I, (1998) 26 EHRR 357.

[11] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, I/A Court H.R.-2001-79.

[12] See ECLAC, "Observatory on Principle 10", at <http://observatoriop10.cepal.org/es> accessed 7 October 2017.

legal obligations that thwart full implementation. The current scenario reveals several conflicts over natural resources generated by mining and new infrastructure projects such as the construction of highways and dams[13]. Given the complexity of the legal landscape, international environmental regulations are the outcome of the different layers that intersect on the international, national and local levels.

According to the International Network for Environmental Compliance and Enforcement (INECE), several pressing challenges can be observed in the region. One of the most acute problems in LAC is air pollution due to densely populated urban areas with limited waste treatment facilities which expose the population to considerable health risks and lack of access to safe drinking water. In terms of biodiversity, the region is the reservoir of many endangered species that suffered as a consequence of unrestrained deforestation. Natural resources-driven development results in uncontrolled mining and unsustainable agricultural practices (mainly related to soya-farming), which in turn cause enormous discharges of runoff, pesticides and other toxic chemicals, thus polluting water bodies and coastal areas[14]. Legal development has operated as a result of both exogenous and endogenous factors. As regards the first set of factors, the influence of IEL through MEAs and the active role of international and regional organisations have contributed to a new regional environmental governance and induced legislative change. In terms of endogenous factors, environmental constitutionalism and activism and mobilization for environmental justice have brought demands for more transparency in decision making and increasing awareness of the negative impacts of environmental degradation. Specifically regarding access rights, in a closer analysis, different trends have been decisive for the recognition of these: in particular the impact of global and regional environmental governance, the progressive adoption of environmental legislation, and the emergence of environmental litigation.

The first trend concerns global and regional environmental governance. On the global level, there is UNEP's work on assisting states with compliance through the UNEP Guidelines for the Development of National Legislation on

[13] For an overall analysis of compliance with environmental legislation in LAC, see amongst others: ECLAC, *Environmental SDG indicators: progress and challenges* (Santiago de Chile, 2009), <http://www.oas.org/usde/fida/laws/database.htm>. On an appraisal of current environmental conflicts, see R. SEXTON, *Environment and conflict in Latin America* (URD 2012).
[14] INECE, <https://www.inece.org/regions/region/1>.

Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines)[15]. In addition to that, the Organisation of American States (OAS) has played a regional role on the promotion of sustainable development with the adoption of the 2002 Latin American and Caribbean Strategy for Sustainable Development, addressing inequalities in the region. A more supportive regional agenda on sustainable development has decisively raised the protection of access rights as expressed in various regional instruments such as: the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development; the 2006 Declaration of Santa Cruz+10; the 2010 Declaration of Santo Domingo for the Sustainable Development of the Americas; the 2012 Principle 10 Declaration (previously referred to) and the 2013 Declaration of Santiago of the Community of Latin American and Caribbean States (CELAC)[16].

At the subregional level, integration organisations such as the Central American Integration System (SICA), the Community of Caribbean States (CARICOM), the Andean Community and the Common Market of the South (MERCOSUR) have been active in adopting legal instruments such as the 2001 MERCOSUR Environmental Agreement[17] and the several Central-American agreements in environmental matters. This subregional environmental governance has also produced subregional policy documents and strategies to implement MEAs, as discussed in a later section[18]. Networks specializing in environmental compliance which bring about cooperation and are focused on capacity-building have also emerged, such as the Central American Commission on Environment and Development (Comisión Centroamericana de Ambiente y Desarrollo – CCAD).

Quite outside the environmental law realm, access rights (albeit in a broader sense) have been enshrined in different formulations (ranging from a mere acknowledgement to more stringent provisions) in Free Trade Agreements concluded between LAC countries and other external partners, namely the US

[15] Adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A of 26 February 2010.
[16] M.B. OLMOS GIUPPONI, *Rethinking Free Trade, Economic Integration and Human Rights in the Americas*, Bloomsbury, 2016.
[17] A. FRANCA FILHO, in M. FRANCA FILHO, L. LIXINSKI, M.B. OLMOS GIUPPONI, *The Law of Mercosur* (Hart Publishing, London, 2010).
[18] F. DE CASTRO, *Subregional environmental governance in Latin America*, in B. HOGENBOOM, M. BAUD (eds.), *Environmental Governance in Latin America*, Palgrave, 2016.

and the EU, which has been eager to export some of the environmental standards applicable in Europe in these treaties (under the political dialogue pillar)[19]. The nature of these different provisions is heterogeneous and the practical enforcement of them is non-existent or scarce. Furthermore, some of these FTAs have been heavily criticised by civil society organisations because of environmental concerns[20].

Regional environmental legal frameworks have undergone several changes over the last thirty years, with national environmental legislation adopted in various sectors covering a time span from 1980 to the present. Hence, environmental legislation in Central America, South America, and the Caribbean is quite recent, with comprehensive environmental laws adopted or reformed between 1981 (Brazil) and 2012 (Dominica)[21]. Environmental impact assessment legislation (although in a non-homogenous manner) has paved the way for a new era in public participation and environmental compliance. Slow-motion progress is observed in certain key areas such as environmental crime, which is the elephant in the room.

There has been development, albeit it is incipient. While natural resources are abundant in the region, environmental conflicts over access or control of natural resources are recurrent. In some countries there are no clear provisions in terms of deforestation, tipping and pollution. IEL has harnessed legislative change in LAC, particularly concerning vital areas such as those falling under the Convention on Biological Diversity regime that empowers indigenous peoples providing for benefit-sharing agreements. Yet, the implementation deficit in sectoral environmental legislation is still significant. Some possible reasons slowing down implementation are related to the lack of appropriate infrastructure.

Looking on the bright side, the basic foundations for environmental protection and access rights have been laid down, but LAC states will definitely need to enact further legislation regulating each of the different pillars in order to adjust themselves to the proposed agreement.

Environmental litigation has advanced the cause of access rights in LAC.

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[19] UNECLAC, 22. The working of the FTAs acknowledging the significance of access rights varies from treaty to treaty. An example of a more stringent provision is found, for instance, in the 2003 US-Chile FTA.
[20] K. TIENHAARA, *The Expropriation of Environmental Governance*, CUP, 2009.
[21] UNECLAC, 21.

Three different strands of environmental litigation on the national, regional and international levels have harnessed this evolution. On the national level, procedural avenues provided for in the various constitutions to protect human rights (*amparo*, *recurso de proteccion*, *tutela*) have been relied upon to protect the environment even in the absence of a specific provision enshrining the right to a healthy environment on the basis of safeguarding the right to life. Further procedural developments have made it possible to start a class action or an *actio popularis* to defend the environment, recognized now in public law and case law. To illustrate, in Colombia citizens can protect the environment through the '*accion popular'*, in Argentina, for instance, the Supreme Court ruled in 2009 that class action suits are admitted to protect the environment. Another procedural tool is the organisation of public hearing in environmental cases. On the regional level, the Inter-American Human Rights System (IAHRS) comprising the Inter-American Commission and the Court of Human Rights have given rise to a significant body of jurisprudence on relate dissues. In terms of the recognition of the right to access to information, in *Huenteao Beroiza*, a case relating to the construction of a dam in Chile, the Commission was confronted with a conflict of rights between investors and indigenous communities that finally resulted in an amicable settlement[22]. After conducting the EIA for the project, the National Environment Commission (CONAMA in Spanish) approved the construction of the hydroelectric plant without providing access to the petitioners even though the Indigenous Peoples Act (Law 19.253) required that the relocation of the indigenous population should only proceed with the consent and willingness of those affected.

The IACtHR in the application of the ILO Convention 169 has protected indigenous property rights by referring to principle 10 to up hold the participation in decision-making in the process leading to obtaining the free, prior and informed consent (FPIC) of indigenous peoples and the intrinsic relation with

[22] IACHR, Report n. 30/04, Petition 4617/02, *Friendly Settlement, Mercedes Julia Huenteao Beroiza et al. v. Chile* (11th March 2004).

environmental rights, as in *Awas Tingni*[23], *Sarayaku*[24], *Saramaka*[25] and *Kaliña and Lokono peoples*[26], just to mention a few of the most relevant cases. The first cases, considered pivotal to the protection of indigenous peoples' rights, were *Aleoeboetoe* regarding reparations for the violation of tribal people in Suriname (settled by acknowledgment of the State) in light of art. 63.1 of the ACHR and *Awas Tingni* concerning indigenous property rights[27]. As for environmental protection, the Court reminded litigants in a recent case, *Kaliña and Lokono*, of the separate obligation of the state to conduct an environmental and social impact assessment performed by «independent and technically-qualified entities, under the State's supervision, [who] have made a prior assessment of the social and environmental impact», respecting and ensuring the effective participation of the indigenous people[28].

Alongside the regional court, other subregional judicial and quasi-judicial bodies created in the framework of regional integration processes (such as the Central American Court of Justice, the Andean Court of Justice or MERCOSUR arbitral tribunals) may offer another forum for the implementation of access rights. However, these courts have rarely referred to environmental concerns, with the exception of some aspects of sustainable development. In contrast, the Caribbean Court of Justice (CCJ) could constitute a landmark in the protection of environmental rights. This is because Caribbean states have not accepted the jurisdiction of the IACtHR. An example of the CCJ incipient role in the protection of human rights is the case of Mayan communities in Belize, whose lands rights were upheld in a 2015 judgment[29]. The CCJ submitted that the right to protection of the law had been breached, defined as «a multi-dimensional,

[23]Awas Tingni (n.11).
[24] I/A Court H.R., *Matter of Pueblo indigena de Sarayaku regarding Ecuador*, Provisional measures order of I/A Court H.R., 6 July 2004 (only in Spanish); *Matter of Pueblo indigena de Saravaku regarding Ecuador*, Provisional measures order of I/A Court H.R., 6 June 2005 (only in Spanish).
[25] I/A Court H.R., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 Nov. 2007, Series C No. 172, p. 93. L. Brunner, 'The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights', 7 CHINESE J. INT'L L. 699, 708 (2008) pp. 99-711.
[26] I/A Court H.R., *Kaliña and Lokono Peoples v. Suriname*, Judgment of November 25, 2015.
[27] M.B. OLMOS GIUPPONI, *La protección de los derechos de los afrodescendientes en el espacio euro-latinoamericano*, in *REIB: Revista Electrónica Iberoamericana,* 2007, 1:I, pp. 75-88.
[28] *Kaliña and Lokono,* n. 27, p. 214.
[29] CCJ, [2015] CCJ 15 (AJ) Maya Leaders Alliance <https://www.elaw.org/system/files/2015-CCJ-15AJ.pdf> accessed 7 October 2017.

broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law»[30]. The Court emphasised that «the right to protection of the law can be engaged by the failure of the State to secure and ensure the enjoyment of constitutional rights»[31].

More generally, in recent inter-state disputes brought before the International Court of Justice (ICJ) relating to environmental issues, fundamental environmental law principles were upheld which, interpreted together, further foster the evolution of access rights in IEL. In *Pulp Mills,* the ICJ determined that the preventative principle as an emanation of the due diligence constitutes a customary norm and pillar in EIA processes[32]. In the respective cases concerning the San Juan River brought by Costa Rica and Nicaragua, in analysing the parties' pleadings the ICJ incidentally mentioned the Convention on Biological Diversity which provides for public participation in the EIA process[33].

Against this background, the proposed text has the potential to have a positive impact on the protection of environmental rights in a variety of ways. What is distinctive about the proposed agreement is the approach to environmental access rights. It seems that the main goal behind it is to reinforce the implementation of environmental rights through regional human rights law and the case law of the Inter-American Court of Human Rights (IACtHR). Therefore, across the text environmental rights are entrenched with the protection of human rights. Notably, the preamble states that the protection of environmental rights is conceived within the general framework of international human rights law. This denotes a particular stance on environmental rights, since they are conceived in its substantive and procedural dimension as human rights[34]. Hence, the text permeates this close relation, indicating that environmental rights are

[30] *Ibid.*, para 7.
[31] *Ibid.*, the CCJ cited the decision of the Constitutional Court of South Africa in *President of South Africa v Modderklip Boerdery* (Pty) Ltd.
[32] ICJ, *Pulp mills,* «The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory» (Para 110).
[33] ICJ, *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica V. Nicaragua) Construction of a Road in Costa Rica along the San Juan River (Nicaragua V. Costa Rica). Sentencia de 16 de diciembre de 2015, paras 163 and 164. The ICJ, nonetheless, concluded that «the CBD does not create an obligation to carry out an environmental impact assessment before undertaking an activity that may have significant adverse effects on biological diversity» at para 164.
[34] D.L. SHELTON, *Developing Substantive Environmental Rights*, in *J. Hum. Rts. & Env't*, 2010, 1, p. 89.

ripe for codification in LAC. In a parallel evolution, the IACtHR is about to issue an Advisory Opinion upon the request by Colombia on the interaction between international environmental law and international human rights law by interpreting the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and the American Convention of Human Rights[35]. According to the request the Court shall interpret the right to life and the right to personal integrity as well as the obligations of the state to respect human rights in the light of international environmental law[36]. Substantially, the aim of the request (in what is relevant for the purposes of this article) is to clarify «the scope of the obligations under the Pact in relation to environmental protection and, in particular, the importance that should be accorded to environmental and social impact assessments, to projects that prevent and mitigate environmental damage, and to cooperation between the States that may be affected by harm to the environment in the context of the construction and operation of mega projects that, once commenced, may have an irreversible negative impact on the marine environment»[37]. In short, the IACtHR is called upon to look at human rights through the lenses of international environmental law.

In terms of international legal sources of environmental law, the draft agreement alludes to the interactions with other international legal instruments, and to the achievement of environmental policy goals, particularly the 2030 Sustainable Development Goals (SDG)[38]. A regional approach is presented in the draft text, as it addresses specific regional interests such as climate change-related aspects and the protection of indigenous peoples.

The negotiations leading to the adoption of the draft text have shown regional divergences concerning the definition of the specific terms of the agreement. As a result of different historical paths, the main legal divide is represented by two different legal systems that coexist in LAC: civil law and

[35] I/A Court H.R., Request of advisory opinion submitted by the Republic of Colombia before the Inter-American Court of Human Rights of March 14, 2016. After the public hearing held in Guatemala in March, the IACtHR will hand down the Advisory Opinion in the coming months.
[36] American Convention on Human Rights,1(1) (Obligation to Respect Rights), 4(1) (Right to Life), 5(1) (Right to Humane Treatment/Personal Integrity), and 4(1) and 5(1) of the Pact of San Jose, in relation to Article 1(1).
[37] Request, para 5.
[38] United Nations, A/RES/70/1 - *Transforming our world: the 2030 Agenda for Sustainable Development*, 25 October 2015.

common law (English law). These different legal approaches to environmental law were made evident during the inter-sessional meeting on access to justice held by ECLAC[39]. Although there is a consensus on general issues (agreed provisions), disagreement on specific terms arises: after all, the devil is in the details.

Upon successful conclusion of the negotiations and once the text is adopted, the process of ratification will open. Purposely, the number of instruments expressing consent is quite low to expedite the process, as agreement will enter into force on the ninetieth day after the date on which the fifth instrument of ratification, acceptance, approval or accession has been deposited[40]. Largely, the DA aims at taking stock of the developments previously explained, setting the tone for a new era in the protection of access rights, addressing at the same time the challenges faced by LAC countries. A legally binding international agreement on environmental access rights could boost the development of national legislation, giving rise to best practices.

3. *Unpacking environmental core principles and obligations in light of the Draft Agreement*

At first sight, the text seems to embody analogous provisions to those contained in the Aarhus Convention. However, the peculiarities concerning the LAC region are addressed in the text containing, for instance, specific provisions on the protection of environmentalists and indigenous peoples.

Core concepts for the protection of environmental rights are expressed in the preamble as essential elements for the full implementation of the rights contained therein. Interdependency of the access rights is considered key to achieving the promotion and implementation of environmental legislation in an «integrated and balanced manner»[41].

Several environmental principles are enshrined in the draft: *a.* Principle of equality and non-discrimination; *b.* Principle of transparency and

[39] UNECLAC, Inter-sessional meeting (virtual) of the Negotiating Committee of the Regional Agreement on Access to Information, Public Participation and Access to Justice in Latin America and the Caribbean (Principle 10), 31 January 2017 <http://www.cepal.org/en/events/intersessional-meeting-virtual-negotiating-committee-regional-agreement-access-information-1> accessed 5 October 2017.
[40] *Draft agreement*, art. 21.
[41] *Draft agreement*, Preamble, numeral 11.

accountability; *c.* Principle of cooperation; *d.* Principle of non-regression and progressive realization; *e.* Principle of good faith; *f.* Preventive principle (sic); *g.* Precautionary principle; *h.* Principle of intergenerational equity and *i.* Principle of disclosure of public information. There is no pre-established hierarchy among the different principles, but the measures adopted to fulfil the Convention's objectives and the application of its provisions shall be guided, *inter alia*, by these principles.

Throughout the draft it is made clear that the right to information, the right to participate in public affairs and the right of access to justice are rooted in everyone's right to «a healthy environment in harmony with nature»[42]. In turn, this right is aimed at the achievement of sustainable development «comprising three dimensions (social, economic and environmental) in a balanced manner»[43]. The text portrays sustainable development as an overarching principle with several dimensions[44]. As Sands et al point out, sustainable development implies four closely related principles: intergenerational equity, the sustainable use principle, the principle of equitable development and the principle of integration[45]. Paradigmatically, all these nuances of the sustainable development principle appear in the DA.

In addressing the specific needs and peculiarities of the region, the text recognizes the connection between environmental protection and equality. At the heart of the protection, there is the link between environmental rights and cultural rights, acknowledging the «diverse natural and cultural heritage of our peoples, in order to advance social inclusion, enhance solidarity, eradicate poverty and inequality»[46]. The cultural dimension of environmental rights reverberates also in par. 19 which appeals to «the multiculturalism of the Latin America and the Caribbean region and the cosmovisions of its peoples»[47]. Nevertheless, the text omits specific references to land, cultural rights or free, prior and informed consent (FPIC), the ILO 169 Convention or the 2007 UN Declaration on Indigenous Rights or the 2016 American Declaration on the Rights of Indigenous

[42] *Draft agreement*, Preamble, numeral 8.
[43] *Ibid.*
[44] UN 1992 Rio Conference. UN 2012 Rio + Conference final document, A/RES/66/288 - *The Future We Want*, par. 49.
[45] P. SANDS, J. PEEL, R. MACKENZIE, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2012, pp. 206-217.
[46] *Draft agreement*, Preamble, numeral 13.
[47] *Draft agreement*, Preamble, numeral 19.

Peoples[48]. This is a missed opportunity to incorporate more direct references to the legal framework and the IACtHR jurisprudence on indigenous rights which has emphasized the significant role of indigenous peoples in the preservation of the environment and sustainability, as underlined in the previous section[49].

The main drivers behind the recognition of rights are the ideas of "*sustainability"* and "*right to have rights*"[50]. In terms of sustainability, the texts relies upon the idea of the sustainable use of natural resources. In turn, it emphasizes that constraints on or the lack of suitable means relating to access to justice in environmental matters deprives people of the "*right to have rights*" by denying its exercise. The text further calls on states to promote environmental education.

Equally, the draft agreement guarantees a level playing field in terms of environmental protection, leaving intact the states' freedom to further regulate access rights as «nothing shall preclude, and the Parties shall be encouraged to adopt additional measures to ensure even broader access to information, participation and justice in environmental matters»»[51].

Each pillar is developed in detail in the text, following a rights-based approach. The three limbs of the protection are further developed in specific articles which are intertwined. Essentially, access to environmental information is perceived as a basic right that enables citizens to effectively exercise public participation in environmental decision making and access to environmental justice.

3.1. *Access to environmental information*

Articles 6 and 7 are devoted to access to environmental information and generation and dissemination of environmental information, respectively. Not surprisingly, the definition of environmental information laid down in article 2 resembles what is provided for in the Aarhus Convention. Likewise, the non-exhaustive list of the environmental information that could be accessed comprises different elements of the environment: the classification is broader in scope. Hence, environmental information means «any information that is written, visual,

[48] Ecuador suggested the inclusion of a reference to the ILO Convention 169.
[49] Awas Tigni (n. 11).
[50] *Draft agreement*, art. 7.
[51] *Draft agreement*, Preamble, p.18.

audio, electronic or recorded in any other form, concerning the state of the environment and natural resources», including also «information on possible adverse impacts associated with the environment and human health»[52].

Under this pillar, the DA conveys the obligation of the states in active and passive roles. Three active dimensions of access to environmental information are contemplated therein: the collection and production of information, access to environmental information and the active dissemination of environmental information. Parties should collect and disseminate environmental information *motu proprio* as a condition for transparency. In the passive dimension, states are obliged to provide environmental information when requested. The object of the obligations concerns environmental information even if it is not labelled as such.

As regards the conditions applicable to the delivery of environmental information there is consensus amongst the negotiating parties on a specific time frame to provide access to the information, as competent authorities shall respond to requests for environmental information as quickly as possible, but «within a period not longer than thirty business days from the date of receipt of the request, or less if so stipulated in the domestic legislation of any of the States parties»[53]. At present, the process regulated therein is considerably more bureaucratic than that contained in the Aarhus Convention. Several grounds for refusing access to environmental information along similar lines to those of Aarhus are laid down in the draft agreement[54]. Evidently, the grounds to refuse the environmental information are interpreted restrictively and, in any case, remedies against the decision so providing should be made available to the petitioners.

In terms of the generation and dissemination of environmental information, the draft agreement provides for the active role of each party to guarantee «that the competent authorities generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner, and periodically update this information»[55].

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[52] During the negotiations, some states like Costa Rica and El Salvador have suggested that the final text should comprise cultural and genetic resources, as well as traditional knowledge.
[53] *Draft agreement*, art. 6, numeral 11.
[54] *Draft agreement*, art. 6, numeral 4.
[55] *Draft agreement*, art. 7.1.

Several references to specific areas of environmental protection, such as those related to information on environmental impact assessment processes and on other environmental management instruments[56], are flagged up in the DA as crucial as well as the proposed dissemination of «information from research and studies on climate change prepared by competent authorities, including inventories of anthropogenic greenhouse gas emissions»[57].

The DA also contemplates inter-state obligations in the dissemination of environmental information arising from due diligence, such as the obligation to notify other states as follows: «Each Party shall guarantee that in the case of an imminent threat to public health or the environment, it shall immediately disclose and disseminate through the most effective means all pertinent information in the possession of the competent authority that could help the public take measures to prevent or limit potential damage. Each Party shall use the mechanisms available to develop and implement an early warning system»[58].

While the current wording of the articles seems to be flawless, in practice the implementation of treaty provisions is often not straightforward. Disagreement has already arisen during the negotiations as to the inclusion of public, private and public-private enterprises 'with functions of a public nature' amongst public authorities[59]. The Aarhus Convention Compliance Committee (ACCC) has established that states are under the obligation to provide detailed regulation of public bodies' nature and functions in the fulfilment of the obligations[60]. In the application of the Aarhus Convention, as observed in cases concerned with the issue, national judges have interpreted whether a certain entity is a public authority and therefore subject to national legislation giving effect to the Convention and the European Union Directive 2003/4/EC on access to environmental information[61]. There is the need to define the concept of 'public authority' as happened in the case of Europe, as argued below. Certainly, the future 'Facilitation and Follow-up Committee' will need to develop case law in order to clarify what can be considered or defined as a public authority.

In light of the ACCC's case law, a golden rule observed in the compliance

[56] *Draft agreement*, par. *f.*
[57] *Draft agreement*, Proposal by Trinidad and Tobago.
[58] *Draft agreement*, art. 7.5.
[59] Different proposals presented by the negotiating states contemplate various options.
[60] See ACCC, Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, par. 19.
[61] See, for instance, *National Asset Management Agency v. Commissioner for Environmental Information.*

with the obligations arising out under this pillar is that there must be a clear, transparent and consistent legal framework in order to make environmental information available to the public[62]. To implement the Convention, the state must provide «clear instructions on the status and obligations of bodies performing functions of public authorities, or regulating the issue of standing in cases on access to information in procedural legislation»[63]. In order to avoid the "*information hurdle*" in LAC, environmental information must be made available in indigenous languages, which is a requirement for both access to environmental information and for public participation[64].

In the Caribbean, many countries have appointed an Information Commissioner under the respective Freedom of Information Act, who will have an essential function in access to information. As an example of good practice, in the United Kingdom guidelines for the Information Commissioner were issued for each jurisdiction[65]. In a landmark case, *Smartsource v Information Commissioner*(and the sequel) the question at issue concerned exactly whether private water utilities companies could be deemed public authorities in terms of access to environmental information[66]. The final decision rejected the argument that these water and sewerage undertakings in the context of privatisations are not public authorities, and so are under no obligation to disclose environmental information[67]. In spite of the regional differences the case law in this matter could throw light on the functions and interpretation of the legal texts or, at least, anticipate the possible controversial issues.

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[62] ACCC, Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/ 2005/2/Add.3, 14 March 2005, para. 34 and European Community ACCC/C/2006/17; ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 58.

[63] Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23.

[64] Peru has recommended the inclusion of the Convention concerning Indigenous and Tribal Peoples, 1989 (No. 169) of the International Labour Organization, the United Nations Declaration on the Rights of Indigenous Peoples.

[65] Scottish Information Commissioner. Environmental Information (Scotland) Regulations 2004. Available at <http://www.itspublicknowledge.info/Law/EIRs/EIR s.aspx>.

[66] *Smartsource v Information Commissioner* [2011] 1 Info LR 1498.

[67] See also Judgment of the Court (Grand Chamber) of 19 December 2013, *Fish Legal and Emily Shirley v Information Commissioner and Others*. Reference for a preliminary ruling: Upper Tribunal (Administrative Appeals Chamber) - United Kingdom. Reference for a preliminary ruling - Aarhus Convention - Directive 2003/4/EC - Public access to environmental information - Scope - Concept of 'public authority' - Water and sewerage undertakers - Privatization of the water industry in England and Wales, Case C-279/12.

3.2. *Public participation in environmental decision-making*

Accountability in the implementation of environmental law and transparency in environmental decision making are two burning questions in LAC. The DA has availed of the previous work of the OAS in freedom of expression and the 2010 Inter-American Model Law on Access to Public Information[68]. The right to public participation as mandated by the DA brings a challenge to the present regulatory regimes.

Article 8 tackles public participation in decision-making in environmental matters by stating first in a general manner that «[t]he Parties shall ensure the public's right to participation and for that purpose shall commit to implement open and inclusive participation in mechanisms for environmental decision-making based on domestic and international normative frameworks»[69]. The text goes on to detail the various domains for public participation which comprise decision-making processes «with respect to projects and activities (…) that may potentially have a significant impact on (…) the environment or the conservation, use and management of natural resources, and particularly those subject to environmental impact assessment and, as appropriate, in other environmental permitting processes»[70]. A more tenuous commitment is expressed by the parties then «to implementing all necessary measures to facilitate participation in environmental matters of public interest such as environmental land-use planning, policies, strategies, plans, programmes and regulations»[71]. In a joint reading of the text, one notes that whereas art 8.1 contains core elements of this principle, a subset of rules is set out in art 8.2 and 8.3.

Certainly, the wording of the article could have been improved and followed a more logical order. To start with, public participation takes place essentially in three realms: decision-making concerning EIAs and permitting

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[68] E. LANZA, *The Right to Access to Public Information in the Americas: Specialized Supervisory and Enforcement Bodies. Thematic report included in the 2014 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights,* Special Rapporteur for Freedom of Expression. AG/RES. 2607 (XL-O/10) Model Inter-American Law on Access to Public Information(Adopted at the fourth plenary session, held on June 8, 2010) (Provisional version pending revision by the Style Committee).
[69] *Draft agreement*, art. 8.1.
[70] *Draft agreement*, art. 8.2.
[71] *Draft agreement*, art. 8.3.

processes, the adoption of plans and programmes and law-making. Even if these elements are somewhere in the text, the terms are not straightforward. A long list with specifications concerning the implementation of the right is attached. The drafters had a keen eye for detail and it seems that there is the pretension to set in stone the essentials of the process in the implementation by both national authorities and the specific committee created by the DA.

Public participation in environmental decision-making is scattered across different regimes, such as permitting processes. Thus, the specific content of the right will depend on each state's national legislation. Participation in decision-making turns out to be crucial in some sectors, such as environmental impact assessment. In relation to participation in environmental law-making in particular: according to the text it shall take place through various forms of institutionalized participation that involve stakeholders and include on line participation.

The text contains no specific provisions on participation in law-making, but attempts to guarantee a level playing field for public participation in a series of decision-making processes. The DA covers broadly the participation in legislative making (including proposals and legislative initiatives, such as with regard to the right to water) and in other permitting processes (scattered throughout national legislation) and in EIA. Mapping out the means for participation in different administrative processes will be a task for each state in accordance with their respective public law systems. The ECLAC has chosen the pollutants regime as a blueprint. Better regulation and clear language have been at the centre of compliance with this right[72]. Internet access is considered as the main means to widen participation in LAC, however, gaps in access to connectivity are observed across the different countries.

Specific standards for effective participation are set out, namely: previous dissemination of relevant information in a timely, clear and comprehensive manner; participation at an early stage; the possibility of attending hearings and presenting observations; reasonable timeframes; and notification of the grounds and reasons underlying the decision once it has been made, amongst others[73].

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[72] E.A. KIRK, K.L. BLACKSTOCK, *Enhanced Decision Making: Balancing Public Participation against 'Better Regulation' in British Environmental Permitting Regimes* in *J. Environmental Law*, 2011, No 23 (1), pp. 97-116.
[73] DA, art. 8, numerals 5-18.

Guaranteeing public participation in decision making in environmental matters has as a premise the definition of its scope. The ACCC has determined that the environmental character of the decision making has to be interpreted in the specific context, «taking into account the particular needs of a given country and the subject matter of the decision-making»[74]. Environmental decision making could consist of several different acts taking place at different stages. Therefore, public participation should be respected on all occasions, as the ACCC has established «[w]ithin each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place»[75]. Again, states should make explicit what the remedies are that are available in domestic law to protect the right.

If correctly implemented this right can project a wide influence over the drafting of new provisions, regulating domestic procedures for the granting of permits and the current architecture of specialized governmental bodies.

3.3. *Access to justice in environmental matters*

This is a particularly relevant pillar in view of the difficulties experienced in practice in LAC. Debates surrounding access to environmental justice have been closely followed by stakeholders[76]. Access to justice is defined in the text as «the removal of barriers, inter alia, legal, social, and financial, to allow persons to seek redress on environmental matters through any institution of justice, while affording equal treatment for all parties»[77]. Article 9 delineates the scope of access to justice which means «any judicial process through which an expeditious and comprehensive resolution to a legal conflict of an environmental nature is sought»[78].

The substantive nature of access to environmental justice is a trait that stands out in the proposed text. So far, the definition of environmental justice put forward in the draft relates to «the possibility that legal conflicts of an

[74] ACCC, *Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6*, 4 April 2008, para. 71
[75] *Ibid.*
[76] Virtual inter-sessional meeting held on 31st January 2017. Discussion of the article on access to environmental justice with experts and stakeholders.
[77] *Draft agreement*, art. 2, I *bis*.
[78] *Draft agreement*, art. 9.

environmental nature receive from the jurisdictional bodies expeditious and full settlement, which, to the degree that it can be achieved by the courts of justice, will contribute to environmental protection and the promotion of sustainable development»[79]. Acknowledging the fact that judicial review is often difficult to obtain, the draft agreement attempts to guarantee equal conditions to the parties, with a view to «obtaining an individually and socially fair outcome»[80].

This right is intrinsically connected to access to information, as this is the prior step to exercise a right or to initiate a lawsuit. At the heart of this principle lies the effectiveness of all access rights. Article 9.2 regulates the right to challenge «any decision, action or omission related to the access to environmental information» or «any decision, action or omission related to public participation in the decision-making process regarding environmental matters»[81]. More generally the article refers to the possibility of seeking judicial review of «any decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment»[82]. In any case, the Parties «shall ensure the right of appeal to a higher administrative and/or judicial body»[83].

As previously noted, states may provide clear indications of the remedies available wherever the exercise of rights to access to environmental information or to public participation are denied. Some LAC countries are more prone to introducing changes in the legislation on access to environmental justice.

Several improvements in access to environmental justice have occurred in recent years, but even so, many shortcomings subsist. In relation to access to justice, right-based actions and procedures have advanced the case for environmental justice in LAC.As a result, different procedural channels can be articulated before the courts to protect rights at stake with the aim of obtaining orders requiring action or ordering abstention (staying certain harmful actions). The specialization and the existence of environmental courts or tribunals may

[79] However, some negotiating states (Argentina, Uruguay, Paraguay, Saint Lucia and Colombia) have suggested deleting this definition.
[80] *Draft agreement*, art. 9.
[81] DA, art. 9.2, *a)* and *b)*.
[82] DA, art. 9.2, *c)*.
[83] DA, art. 9.3.

help in advancing the cause of environmental justice[84]. It appears that these courts or tribunals are in a better position to adjudicate environmental claims as they focus on environmental law, therefore they rely on a specialized legal framework, including the environmental law principles previously alluded to. Furthermore, environmental courts and tribunals are assisted by scientific experts who may contribute evidence of environmental harm.

Mobilisation around environmental justice has also aided recognition of the rights of indigenous peoples and mobilization in environmental conflicts, as sectors traditionally marginalized from the participation in decision making. This is also true with regard to other vulnerable sectors, such as women. The gender dimension of access rights deserves a particular attention, yet in the text it is referred to as a condition of vulnerability in art 8.10 but is not considered a cross-cutting issue or tackled adequately[85].

Nonetheless, the main barriers or obstacles concerning access to environmental justice faced in LAC relate to the weakness of the rule of law, costs, the language of the information, the complexity of the procedures, a proper status for Non-Governmental Organisations (NGOs) and the accountability of corporations for environmental damages.

Access to environmental justice at domestic level requires the fulfilment of certain requirements concerning respect for the rule of law, such as a proper checks and balances system. This may be difficult to achieve in some LAC countries. The importance of the concept of "public interest" for environmental litigation before human rights in the region resides indeed in the possibility to obtain an international oversight. As the ACCC noted, «judicial independence, both individual and institutional, is one of the preconditions in ensuring fairness in the access to justice process»[86]. In the implementation of the Aarhus Convention, NGOs have indicated some of the problems encountered in getting access to justice relating to standing conditions, scope of the court, review of act

[84] Regional Judicial Colloquium for Latin America and the Caribbean at <https://wedocs.unep.org/bitstream/handle/20.500.11822/20772/final_programme_regional_colloquium_human_rights_brasilia.pdf?sequence=1&isAllowed=y> accessed 5 October 2017.
[85] DA, definition of persons in a vulnerable situation, Chile has proposed to introduce "*gender parity*" in art. 8.13 and a "*gender approach*" in art. 10.8.
[86] ACCC, *Kazakhstan ACCC/C/2004/6*; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 24.

and omissions in environmental matters, and the effectiveness of timeliness of a court review[87].

In relation to the costs, socio-economic inequalities in the region are stark and are also observed in access to environmental justice[88]. The DA foresees the commitment of the parties to create mechanisms to ensure the production of evidence, «even when the Parties do not have the necessary funds to do so» and to establish «financial mechanisms, such as funds to assist in redress»[89]. The ACCC has determined that «[w]hen assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner»[90]. In Europe, states have drawn the attention to the circumstance that in the injunctions it is necessary to submit cross-undertakings[91]. Costs have been regarded as an obstacle to environmental justice: the ACCC has considered that «injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest [s]uch effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4»[92].

The removal of language barriers to access to justice is a requirement that has been underlined by the IACHR in several environmental cases, as in the *Belo Monte Dam* case affecting several indigenous peoples in the Amazon. On that occasion the IACHR made an order to stay the construction of the dam until information about the project and the social and environmental impact assessment were made available in an accessible format, «including translation into the respective indigenous languages»[93]. To ensure appropriate access to

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[87] P. CERNÝ, *Environmental Law Service, Practical application of Article 9 of the Aarhus Convention in some EU countries – comparative remarks based on experience and court practice of NGOs in 7 EU countries*, April 2009.
[88] D. NEGRO, *Poverty, Inequality, Vulnerable Groups and Access to Justice*, p. 91, and C. SPRINGER, *Addressing inequalities through Sustainable Development*, p. 135, in OAS, *Inequality and Social Inclusion in the Americas*, 2011..
[89] DA, art. 8.4, *e*) and *g*).
[90] United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 128.
[91] Court of Justice - European Union. Judgement of the Court (Second Chamber). C 530/11, 13 February 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=34589> accessed 5 October 2017>.
[92] United Kingdom ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 133.
[93] IACH, Precautionary Measures PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil.

relevant environmental information, the DA further provides for «the use of interpreters or translators when the petitioners or defendants speak indigenous languages»[94].

The complexity of environmental proceedings is a common feature in different regions. Litigating an environmental case usually requires expert knowledge and evidence of environmental harm. Environmental conflicts are frequent in the region, but only those which have received support by non-governmental organisations have become more visible. Procedural entanglements make difficult to get effective access to redress. To alleviate this the DA includes some commitments as regards procedural aspects.

The role of NGOs in seeking environmental justice in LAC is essential, particularly in trans-boundary pollution cases. The DA includes them within the "public concern", defining them as NGOs «promoting environmental protection and meeting any requirements under national law *which* shall be deemed to have an interest» and encouraging cooperation[95]. Nevertheless the current wording does not settle the issue of NGOs operating in a different country. In Europe, in some cases (such as in *Sattelberg*) concerning access to justice of NGOs in a different country (where their legal standing was initially denied) it has been clarified that according to the principle of non-discrimination on the grounds of nationality, those NGOs should have legal standing[96].

Another pending issue is the possibility of also involving corporations in the procedure for compliance with access rights. Quasi-judicial forums for environmental justice, such as the Latin American Water Tribunal, are regarded by individuals and associations as fairer means to achieve justice, mainly because there is the possibility of calling corporations and not only states to the hearings[97].

On the plus side, the DA reflects the commitment of the parties to adhere to principles of due process, such as effectiveness, publicity and impartiality and to guarantee broad active legal standing in defence of the environment. Apart from the judicial procedures, access to administrative bodies such as ombudsmen

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[94] DA, art. 9.5.*d.*
[95] DA, Preamble and art.10.6.
[96] Italian Ministry for the Environment and the Sea, "*Sattelberg wind plant and support to energy production from renewable resources*", Fourth Update of the National Report by Italy on the Implementation of the Aarhus Convention (2017) at 32.
[97] M.B. OLMOS GIUPPONI, *Transnational Environmental Law and Grass-Root Initiatives: The Case of the Latin American Water Tribunal*, in *Transnational Environmental Law*, 2016, Vol. 5, Issue 1, pp. 145-174.

and alternative dispute resolution is encouraged. Divergent opinions arose during the negotiations as to whether this access should comprise only jurisdictional bodies or, also, administrative bodies[98]. More interestingly, the DA shows the parties' commitment to advance on several procedural issues such as mechanisms to execute and enforce judicial and/or administrative rulings and decisions; mechanisms for redress, including restitution, restoration, compensation, assistance for affected persons; precautionary, interim and oversight measures to safeguard, prevent, halt and rehabilitate or mitigate damage to the environment; and measures to facilitate the production of evidence of environmental damage, including, where appropriate, strict liability[99].

To provide further legal protection to environmentalists who quite frequently face persecution putting their lives at risk, Article 9 *bis* mandates governments to adopt measures to «prevent, investigate and prosecute attacks, threats, coercions or intimidations that any person or group may suffer while exercising the rights guaranteed by agreement»[100]. This is a sorely needed provision, as many environmentalists have faced threats to their lives and some have been killed in recent years[101].

The DA is expected to improve the region's environmental performance. However, while the NCP may point at obstacles encountered to access to justice, it cannot solve problems that stem from national systems.

4. *Proposals for making the agreement operative*

Turning to the question of implementation, this is the major challenge the future Convention has to face. In Europe the Aarhus Convention was backed by the European Union which enacted directives to fulfil the obligations giving rise to two channels to ensure compliance: through EU institutions (Commission and

[98] *Draft agreement*, art. 2. *Definitions*.
[99] DA, art. 8.4, *d)*, *e), f)* and *g).*
[100] This was initially a numeral and has been included now as an article. The wording is in line with the IACtHR's jurisprudence, which has indicated the state's responsibility to protect the human rights of environmental defenders. See *Kawas Fernández v. Honduras* (3 April 2009), available at <http://www.corteidh.or.cr/ docs/casos/articulos/seriec_196_ing.pdf> accessed 7 July 2017.
[101] Amongst other high profile cases involving environmental defenders, there is Chico Mendes, the leader of a forest conservationist campaign in the Amazon, who was killed by the police in 1998, later becoming the symbol of the global environmental movement. More recently, Berta Caceres, a Honduran environmental activist opposing to the construction of a dam in indigenous territory, was murdered.

Court of Justice) and through the Compliance Committee which was set up in 2002 to oversee parties' compliance[102]. Two considerations are in order. First, there is no comparable organization for regional integration in the Americas. Second, the Implementation Committee has strongly criticized the lack of proper compliance with the Convention on the part of the EU[103].

Evidently, the draft agreement reflects the IACtHR body of jurisprudence relating to the protection of the environment which adds a regional dimension to the question and constitutes a solid basis for the development of environmental protection. Translating the norms into action in domestic jurisdiction will be far more difficult since the implementation of international environmental norms is never straightforward. First, a certain expertise is necessary to set up the various compliance processes[104]. The implementation of international environmental norms requires the knowledge of a wide range of disciplines, strengthening the cooperation between natural and social sciences. This often implies regulatory impact and cost-benefit analysis. Second, the effective implementation of the different limbs will not be achieved just by tweaking national legislation: rather it will require a major overhaul of some legal systems. It would be relatively easy to achieve for the environmental frontrunners or champions, like Costa Rica which enacted a very comprehensive law protecting the environment[105]. Obstacles to implementation may water down the wording of the convention in other countries. The draft text contains some tools to avoid this situation through a specific provision: there is a "non-lowering of environmental standards" clause which declares that «[s]tates must refrain from adopting measures that could hinder the effectiveness and guarantee of the right of access to information and participation in environmental issues»[106].

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[102] Pursuant to Article 15 of the Aarhus Convention on review of compliance, the Meeting of the Parties in October 2002 adopted decision I/7 on review of compliance, establishing the Committee and electing its first members.

[103] Findings and Recommendations of the Compliance Committee with regard to Communication Accc/C/2008/32 (Part II) concerning compliance by the European Union. Adopted by the Compliance Committee on 17 March 2017 <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C200832/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf> accessed 5 October 2017.

[104] *Draft agreement*, art. 10 [Capacity-building and cooperation] and art. 11 [Resources].

[105] Organization of the Environment Act (Law N 7554).

[106] As stated in para 21 bis of the preamble «States should promote and take appropriate and necessary measures with a view to achieving progressively the full exercise and enjoyment of rights of access to information and participation in environmental issues, and that, in order to ensure their realization».

Monitoring will take place through the Conference of the Parties (CoP) and other subsidiary bodies created by it to ensure compliance and run non-compliance procedures (NCP). Clearly, the institutional set up designed in the Convention comprises only inter-governmental bodies to be created after the entry into force[107]. This may create an initial legal vacuum in ensuring compliance with the DA. The CoP is at the centre of the NCPs: states will report back on the policies and measures adopted to implement the agreement and the activities conducted with the public, issuing recommendations accordingly; it will establish the subsidiary bodies and adopt the rules of procedure[108]. A subsidiary body of consultative nature called the 'Facilitation and Follow-up Committee' (FFC) is also envisaged to review compliance with the agreement and formulate recommendations[109]. However, the wording of the DA here is milder, as it states that the main role is «to promote application and support the Parties with implementation of the Agreement». Emphasis is thus put on capacity-building and cooperation. Submissions will be made by «the Parties, other entities of the present Agreement and members of the public» again the DA remains cryptic as to the definition of these entities (presumably these are other subsidiary bodies)[110]. The Bali Guidelines may assist the FFC in ensuring compliance with the agreement.

The setting up is to be completed by a peer review mechanism to evaluate the observance of the provisions of the agreement established by the CoP «not later than at the third meeting»[111]. Therefore, the CoP is in charge of stocktaking of the achievements of the compliance mechanism, which seems to be appropriate. The Secretariat is tasked with the function of issuing Guidelines to facilitate the application by public authorities and to foster the participation of stakeholders in the compliance system[112]. In the NCP, «the national capacities

[107] *Draft agreement*, art. 12 [Conference of the Parties]; art. 13 [Right to vote: 'Each Party to the present Agreement shall have one vote']; art.14 [Presiding Officers]; art.15 [Secretariat]; art. 16 [Consultative groups or subsidiary bodies].
[108] DA.
[109] *Draft agreement*, art. 17 [Implementation, monitoring and evaluation]; art. 18 [Settlement of disputes]; art. 20 [Signature, ratification, acceptance, approval and accession].
[110] DA, art. 17.4.
[111] *Ibid.*
[112] See, for instance, Scottish Government. Access to Environmental Information - Guidance for Scottish Public Authorities and Interested Parties - Guidance on the Implementation of the Environmental Information (Scotland) Regulations 2004. Available at <http://www.scotland.gov.uk/Publications/2004/11/20280/47015>.

and circumstances of the Parties» and the «least developed countries or Caribbean small island developing States» shall be taken into account[113]. In practice, this may lead to a 'differentiated speed' system.

Drawing on the Aarhus Convention Compliance Committee (ACCC), it is worth looking at the practice of the NCP as it may prove relevant for the functioning of the FFC. Indeed, the ACC, established as a separate quasi-judicial body made up of independent experts, has accrued considerable experience in handling communications. The AC establishes that other states and international organizations could join it, which has broadened the regional scope of the Convention and the ACCC's activities[114].

Under the Aarhus system, the CC may examine: submissions about compliance made by parties against other parties, submissions by the parties about their own compliance, referrals by the secretariat and communications put forward by members of the public (individuals, groups of individuals, organisations and groups of organisations) and submissions by the Conference of the Parties (CoP)[115]. Statistics on compliance demonstrate that organisations are the more frequent users of the system[116]. The architecture of the CC is circumscribed to monitoring compliance in general of the respective national legal framework with the provisions of the Convention. Thus the ACCC cannot engage in a comprehensive analysis of national environmental law systems[117]. Equally, the NCP before the ACC is not meant to be a redress procedure.

Regarding communications from the public, the traditional rule of exhaustion of domestic remedies applies to the NCP[118]. In accordance with the

[113] DA, art. 17. 2 and 4.
[114] Armenia (25 Jun 1998/1 Aug 2001), Kazakhstan (25 Jun 1998/11 Jan 2001), Kyrgyzstan (1 May 2001 a), Tajikistan (17 Jul 2001 a) and Turkmenistan (25 Jun 1999 a).
[115] AC. 18. On the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Convention with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received. During the four-year period mentioned above, the Party may revoke its notification thereby accepting that, from that date, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention.
[116] UNECE. Compliance Committee statistics.
[117] ACCC, Belarus ACCC/C/2009/37, ECE/MP.PP/2011/11/Add.2, April 2011, para.61.
[118] UNECE. Draft revised version of the Guidelines. March 2017.

AC, once the communication has been declared admissible, the state concerned is given the opportunity to make its submissions. After that, a public hearing will take place. The investigation concludes with a report on compliance alongside recommendations which are finally adopted by the CoP. The findings of the ACC are studied by the respective CoP which monitors the follow up.

The case law arising from non-compliance and misapplication of the Convention provision depicts a clear picture of the implementation of the AC[119]. The Committee has set out the requirements in terms of admissibility, such as that the communications should cover the period? since the entry into force of the AC for the state concerned, and must not be anonymous. Three main aspects concerning compliance are revealed in the case law: failure to provide of access to environmental information, lack of access to decision-making (namely concerning EIA processes) and obstacles to access to environmental justice[120]. Another aspect that deserves attention is follow-up of the decisions on compliance. A good practice to be observed consists of providing concerned states with precise indications as to the changes to be introduced in domestic law to bring it in line with the AC within a specific time frame.

Taking into consideration the current landscape, it may be difficult to engage LAC states in compliance. Some crucial aspects should be addressed, otherwise the DA risks being more a theoretical than an effective compliance tool. As discussed in the previous paragraphs, the Aarhus Convention has developed a relatively advanced compliance mechanism with experience accumulated over the years which may constitute an invaluable guidance for the FFC. LAC signatory countries could *mutatis mutandi* adopt similar rules for the handling of communications. This separate compliance committee is to act as an independent quasi-judicial body. In checking compliance with the agreement provisions, states concerned should be given the possibility to present their pleadings as has been established in the Aarhus NCP. Rather than pointing at the non-compliers as the culprits of environmental degradation, a more collaborative approach is to be taken. Evidently, information about FFC (containing clear and precise guidelines) should be disseminated amongst the relevant users of the system (citizens and NGOs), and reports on compliance should be made available

[119] A. ANDRUSEVYCH, T. ALGE, C. KONRAD (eds.), *Case Law of the Aarhus Convention Compliance Committee (2004-2014)*, 3rd Edition, 2016, RACSE, Lviv.
[120] Arts. 6.2, 6.4 6.8 of the AC.

to the public. Without visibilisation of the NCP, there would be little incentive for organisations to submit complaints and create hindrances for the states to comply with the DA. There is clearly the need for an effective NCP in LAC, otherwise the FFC may become yet another lost opportunity for the region to help ensure compliance with environmental rules.

A successful implementation strategy should involve also cooperation with subregional organisations[121]. From an environmental governance standpoint, LAC states have adopted sub-regional strategies and agreements for environmental protection that may be used as a blueprint for the DA under examination[122]. Under the umbrella of the Central American Commission on Environment and Development (CCAD) Central American States have signed agreements on biodiversity, climate change, hazardous wastes and conservation of forests. In South America Mercosur has launched a Ramsar implementation strategy through its specialised working group on environmental and sustainable development. The Andean Community members have developed their own regional biodiversity strategy. Other examples include the common strategy for implementation of the Climate Change Convention adopted and the 2002 General guidelines for the implementation of environmental law at national level by Caribbean countries[123]. Similarly, there is the example of subregional strategies on the implementation of the DA on access rights; such regional strategies could be deployed to encourage effective compliance with the agreement.

At this point of the discussion, it is worth asking if this is a case of a legal transplant. In other words: is the DA a cherry picking of Aarhus provisions blended with region-specific components? When compared to the Aarhus Convention (negotiated at the end of the 1990s) one observes the evolution of international environmental law and the different generations of rights[124]. Of the environmental access rights as formulated in the Rio Declaration only access to environmental information is formulated in human rights language. In the DA, they are imbued with human rights considerations; however, the case law of the

[121] The CoP has an express mandate to develop cooperation pursuant to DA art 12.5.b.
[122] Gregory L Rose, 'Gaps in the Implementation of Environmental Law at the National, Regional and Global Level, First Preparatory Meeting of the World Congress on Justice', Governance and Law for Environmental Sustainability, 12 - 13 October 2011 - Kuala Lumpur, Malaysia.
[123] INECE Website, "*Performance Measurement Guidance for Compliance and Enforcement Practitioners*", <http://www.inece.org/indicators/guidance.pdf> accessed 5 October 2017.
[124] M. FITZMAURICE, *Environmental Degradation*, 2014; D. MOECKLI, S. SIVAKUMARAN, *International Human Rights Law,* 2nd ed., Oxford University Press, Oxford, pp. 590-609.

ACCC is more concerned with specific aspects of effective implementation relying on the set of IEL principles, giving rise to specific case law with clear implications for domestic environmental legislation.

Unlike the Aarhus Convention, which is a regional treaty with universal vocation as it is open to ratification by other states, the DA is intended to be restricted to signature and ratification by countries contained in the Annex (LAC countries)[125]. No provision explicitly foresees the possibility of it being ratified by international organisations, despite the many already operating in LAC[126]. The long time spent in the making may also be explained by the fact that the agreement does not admit reservations, hence the need for the states to scrupulously negotiate every single term of the text[127].

Perhaps, the right approach for the DA would be to find a common ground, following the rhetoric of human rights but grounded in environmental law. In certain regards the DA marks an evolution from Aarhus, which may indicate that IEL is moving forward as the text contains new approaches to access rights. In the end, one may thus inquire if the DA could be seen as an evolved specimen from the Aarhus Convention. The answer to this question depends upon the implementation and the progressive interpretation made by the FCC and domestic and regional courts.

In sum, the draft text reflects the evolution of international environmental law, crystallizes the development in terms of access rights, and includes the increasing role of non-state-actors[128]. For all these reasons, the agreement being negotiated in LAC can be seen as a quite differentiated treaty although it has benefited from the Aarhus Convention's experience.

5. *Conclusions: Towards a universal consensus on environmental access rights?*

[125] DA, art. 20.1 and art. 2.
[126] *Ibid.*
[127] DA, art. 22.
[128] *Draft agreement*, art. 21. Entry into force: «1. The present Agreement will enter into force on the ninetieth day after the date on which the fifth instrument of ratification, acceptance, approval or accession has been deposited. 2. With respect to each State that ratifies, accepts or approves the present Agreement or accedes to it after the fifth instrument of ratification, acceptance, approval or accession has been deposited, the present Agreement will enter into effect on the ninetieth day after the date on which the State has deposited its instrument of ratification, acceptance, approval or accession». Pursuant to art 22, the Agreement does not admit any reservations.

Although this period is probably too limited to draw any firm conclusions, some initial reflections on the DA as it stands could be drawn. Noting the widespread state support for the negotiations and the interests of NGOs in the process, the likelihood of entry into force in the foreseeable future once the text will be adopted is quite high. Various reasons have prevented from translating IEL into effective domestic norms in LAC and, therefore, the need for an effective access rights agreement has increased.

In view of current human and environmental threats to the region's natural resources, coupled, sometimes, with poor environmental governance and compliance with IEL, the potential role that the DA could play, once in force and widely ratified, as discussed, may be critical. Clearly, the DA is not a panacea for the deficit in the implementation of environmental legislation observed in LAC, but could enormously contribute to enhancing compliance and foster best practices in the field.

While a closer look to the DA's drafting and negotiation process throws light about the future, the subsequent practice of states will determine if the DA will be fully implemented and shape the content of different provisions.

In the broader picture, the DA represents a step in the evolution of access rights. The draft agreement is a blended text combining elements of international human rights law environmental law principles and regional environmental law as the harbinger for upholding the protection of environmental rights in LAC. The DA fails to grasp and integrate the cosmovision of indigenous peoples. In a broader context, the main implication for the evolution of international environmental law probably consists in reaching consensus towards general obligations which seem to guarantee universal standards for the respect of environmental access rights.

Bearing in mind the peculiarities of each region, there are some lessons to be learned from the application of the Aarhus Convention in Europe. The work of the UNECE could offer a fertile ground for reflection. The success of the Aarhus Convention resides in the outcome that the provisions were captured almost verbatim by the parties and EU Directives and then transposed into

domestic legislation[129]. Despite the similarities and resemblances, in the agreement negotiated in LAC there is apledge for authenticity, going beyond a mere transplant of European standards and provisions. Whilst the draft agreement looks quite good on paper, it remains to be seen if when adopted it will be fully implemented. In any case, it represents a step in the right direction and a major legal achievement for environmental protection in LAC.

[129] To illustrate: in the United Kingdom it led to the adoption of the respective Environmental Information Regulations 2004 in England and Wales and Environmental Information (Scotland) Regulations 2004.

ABSTRACT

Belén Olmos Giupponi – *Setting the stepping stones for environmental democracy in Latin America and the Caribbean (LAC): An analysis of the Draft Regional Agreement on environmental access rights*

Principle 10 of the 1992 UN Rio Declaration laid the groundwork for the implementation of access to environmental information, public participation and access to environmental justice which constitute the three pillars of environmental democracy. The 2012 United Nations Conference on Sustainable Development (Rio +20) marked a turning point in this evolution as nine Latin American and Caribbean (LAC) countries launched the proposal for a regional convention embodying the three sets of environmental rights.

Environmental access rights are gaining momentum as the negotiations for a regional convention unfold. This represents a unique opportunity to reflect not only on the agreed upon text but also, more broadly, about the implementation of environmental rights in LAC. Thus, the article first addresses the question of the delayed implementation of environmental democracy rights in LAC. The analysis then reflects upon progress attained so far, underlining outstanding challenges and lessons to be learned from the negotiations.

KEYWORDS: *Environmental Democracy; Latin America and the Caribbean (LAC); Environmental Access Rights; Access to Environmental Information; Public Participation in Environmental Decision-Making; Access to Environmental Justice.*