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# Content

# Introduction

*Charlotta Zetterberg*

Fortunately, this edition has neither been delayed nor hindered by the corona virus so far, so I am pleased to present this twenty-fourth issue of the Nordic Environmental Law Journal in order. It includes three contributions.

The first one *The (limits of) transferability of climate change litigation to Denmark*, written by Sine Rosvig Sørensen and Kateřina Mitkidis takes as a starting point the Danish decision to host international highly energy-demanding data centres when exploring the possibility of bringing successful climate change litigation (CCL) before the Danish courts. Comparisons are made with the Urgenda and Vienna Airport cases and one conclusion is that the largest potential of CCL is in its indirect and other-than-legal effects, particularly in constitutionalising the climate change issue and mobilising climate change actions at different levels.

The second contribution: *Accountability in the Paris Agreement: The Interplay between Transparency and Compliance*, is authored by Christina Voigt and Xiang Gao. In the background of an elaboration of accountability in the context of the Paris Agreement and by an in-depth analysis of the two accountability procedures; the enhanced transparency framework and the modalities for the committee to facilitate implementation and promote compliance, the authors find that both procedures together function as an "accountability continuum". Therefore, the Agreement hold the strength and effectiveness necessary to "induce" Parties to accept responsibility for their actions (or inactions). Nevertheless, some unresolved issues which could lead to uncertainties in implementation are highlighted.

This issue ends with Jan Darpö's article: *Should locals have a say when it's blowing? A comparison between Sweden and Norway concerning the influence of municipalities in permit procedures concerning wind power installations*. From a legal scientific and policy viewpoint on local influence on decision-making concerning renewable energy installations, the author concludes that local acceptance is crucial, why national planning instruments ought to be combined with possibilities for the municipalities to have a say concerning the localization of wind farms. Another conclusion is that financial arrangements to the benefit of those municipalities hosting such installations should be developed in order to increase the local acceptance.

Take care and stay healthy!

# The (limits of) transferability of climate change litigation to Denmark

*Sine Rosvig Sørensen* and Kateřina Mitkidis***

## Abstract

This paper takes the Danish decision to host international highly energy-demanding data centres as a starting point to explore the possibility of bringing successful climate change litigation (CCL) before the Danish courts. We discuss potential legal bases, the rules on standing, and the use of international law in the Danish setting.

Our analysis confirms concerns expressed by others that the transferability of legal arguments and strategies among jurisdictions and the potential of legal win in CCL might be overstated. Instead, we see the largest potential of CCL in its indirect and other-than-legal effects, particularly in constitutionalising the climate change issue and mobilising climate change actions at different levels.

## 1. Introduction

### 1.1 Introduction to climate change litigation

Within the past 20 years, there has been an increase in the adopted national, regional, and international laws addressing climate change.[1] This has happened on the background of growing scientific certainty about the causes and effects of climate change,[2] leading to an increased sense of urgency to fight the growing average global temperature and the consequences thereof.[3] While the scope of the problem is being continuously clarified, the policies and laws often lag behind, unable to capture the complexity, changing nature, and magnitude of the issue.[4] The intensified regulatory activity on the one hand and the dissatisfaction with its outcomes on the other, prompted litigation 'addressing the causes and consequences of climate change' (climate change litigation, CCL).[5] CCL may aim e.g. to fill the gaps of the laws, to push for corporate action to tackle climate change, or to pressure

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[1] United Nations Environment Programme (UNEP), The Status of Climate Change Litigation – A Global Review, May 2017, 6; M Nachmany and J Setzer, *Global trends in climate change legislation and litigation: 2018 snapshot*, LSE policy brief, 2.

[2] IPCC, Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty, October 2018, available at: https://www.ipcc.ch/sr15, accessed 10 March 2020.

[3] The sense of urgency has permeated the general public debate leading to new movements, especially led by the young generation (https://time.com/person-of-the-year-2019-greta-thunberg/, accessed 9 January 2020), as well as the political debate (https://www.euronews.com/2019/05/26/green-wave-has-climate-change-impacted-the-european-elections, accessed 9 January 2020).

[4] J Peel, 'Issues in Climate Change Litigation' (2011) 5(1) *Carbon & Climate Law Review* 15, 15. Further on the complexities faced by decision-makers when they (try to) regulate climate change: H M Osofsky, 'The continuing importance of climate change litigation' (2010) 1(1) Climate Law 3, 10-11 and 13.

[5] J Setzer and L C Vanhala, 'Climate Change Litigation: a Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change e580, 1.

decision-makers to be more ambitious regarding climate change mitigation and adaptation[6] – the two last litigation 'types' known as 'strategic CCL'.[7]

While many countries around the globe have already seen such cases,[8] CCL can still be described as an emerging tendency. With an increasing number of CCL around the world, the Danish government has, so far, not been challenged for non-ambitious climate policy or decisions undermining the achievement of climate goals.[9] Due to the small size of the country, and an open but relatively small economy, the country's contribution to global climate change remains also limited. Moreover, Denmark has been intensively developing renewable energy production and stands, in general, at the forefront of the EU's climate action ambition.[10]

Yet, the country has been pursuing some policies and adopting some decisions that are controversial from a climate point of view. One of the recent controversial decisions is to host highly energy-demanding international data centres of tech giants such as Apple, Facebook, and Google.[11]

There are strong indications that the newly built data centres will increase the use of electricity in Denmark considerably, thus endangering the achievement of Denmark's. 2030 goals regarding greenhouse gas (GHG) emission reductions and the share of energy from renewable sources in the total energy mix. Despite this, Danish (local and state) authorities have permitted the construction and operation of several data centres in Denmark and attempt to attract more data centres to the country.[12] In this way, Denmark is potentially opening up to a threat of CCL, similar to cases seen in, for example, Austria[13] and the Netherlands.[14]

### 1.2 Aim of the paper

Though the number of CCL grows globally, there have only been few cases decided in favour of a stronger climate change response (especially true for strategic CCL). Procedural rules, the political question doctrine, and rules related to the causal relationship between the challenged activity and suffered damage have been some of

[6] UNEP, n 1, 6. It must be noted, that there is a considerable amount of case law, namely in the EU and the USA, where climate change policies and laws are challenged for being too ambitious/stringent/disproportionate (occasionally referred to as 'negative' CCL). Usually, such claims are brought by corporate entities having interest in lowering the burden imposed on them by national climate change laws and policies. These cases form a separate group of CCL that will not be considered in this paper.

[7] J Setzer and R Byrnes, *Global trends in climate change litigation: 2019 snapshot*, LSE policy report, 2 (2019), available at: http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/ ('LSE 2019 snapshot').

[8] LSE 2019 snapshot, 3.

[9] LSE 2019 snapshot, 3 and 5.

[10] In December 2019, the Danish government has reached a broad agreement on the adoption of a new Climate Act with the goal of 70% reduction in $CO_2e$ emissions by 2030 in comparison to the 1990 levels.

[11] F O'Sullivan, 'Denmark's Carbon Footprint Is Set to Rise Sharply', CITYLAB, 25 June 2018, https://www.citylab.com/environment/2018/06/denmarks-carbon-footprint-is-set-to-rise-sharply/563486/ accessed 31 January 2020.

[12] See further in section 2.2.1 below.

[13] Austria's Federal Administrative Court, BVwG Wien, W109 2000179-1/291E, 2nd of February 2017('*Vienna Airport*, first instance') and Austria's Constitutional Court, VfGH E 875/2017-32, E 886/2017-31, 29th of June 2017 ('*Vienna Airport*, second instance').

[14] *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015), the Hague District Court ('*Urgenda*, first instance') (upheld by the Hague Court of Appeal, ECLI:NL:GHDHA:2018:2610, 9 October 2018 ('*Urgenda*, second instance'), and the Supreme Court, ECLI:NL:HR:2019:2007, 20 December 2019 ('*Urgenda*, third instance')) (altogether as the '*Urgenda* case').

the major hinders to overcome.[15] Yet, inventive legal strategies of the plaintiffs and the existing successes[16] have sparked hopes for their transferability to other jurisdictions. Legal scholars have engaged in this transferability discussion, pointing to both the possibilities and limitations.[17] Non-governmental organizations (NGOs), legal practitioners, and the public (especially the young generation) have also shown interest in borrowing legal arguments and strategies across borders, and consequently, more CCL is initialized in various jurisdictions.[18]

By exploring the possibility of commencing a CCL before the courts in Denmark and the prospect of its successful outcome, this paper adds to the discussion on the transferability of legal strategies used in CCL among jurisdictions. We take the two above-mentioned cases – the *Urgenda* and *Vienna Airport* cases – and examine the transferability of selected legal arguments and strategies of the parties to the Danish context in order to assess whether such litigation would be feasible in Denmark. To keep the discussion focused and topical, we build the analysis around the example of the decision to attract and host major international data centres (also termed 'hyperscale data centres') in Denmark.

## 2. Setting the scene

Before analysing the possibility of commencing a CCL in Denmark, we firstly introduce the country's climate policy, hyperscale data centres, and the predictions in respect to the effects hyperscale data centres will have on the country's climate and energy goals.

### 2.1 Introduction to the Danish climate policy

Denmark is a small Nordic country with a reputation of being climate and sustainability conscious.[19] The Danish climate policy comprises of climate goals decided at multiple levels. A substantial part of the Danish climate change policy is stipulated at the European Union (EU) level. Of particular importance are the targets regarding GHG emission reductions ('climate targets') outlined in the effort sharing legislation (ESD and ESR)[20] and the targets regarding the

[15] These questions have been discussed in most of the CCL cases, including *Greenpeace Nordic Ass'n and Nature and Youth v. Ministry of Petroleum and Energy*, 16-166674TVI-OTIR/06 (upheld by the appeal court, Borgarting Lagmannsrett, 23January 2020, 18-060499ASD-BORG/03); *Thomson v. Minister for Climate Change Issues*, [2017] NZHC 733; and cases in the USA supported by the Our Children's Trust, https://www.ourchildrenstrust.org/juliana-v-us accessed 9 January 2020.

[16] E.g. *Urgenda* case; *Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/201; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

[17] See e.g. G Corsi, 'The New Wave of Climate Change Litigation: a Transferability Analysis', ICCG Reflections No59/October 2017; S Roy and E Woerdman, 'Situating Urgenda v the Netherlands Within Comparative Climate Change Litigation' (2016) 34(2) Journal of Energy & Natural Resources Law 165.

[18] E.g. the plaintiffs in the *Friends of the Irish Environment v. Ireland* case state on their website that 'This case is inspired by other climate cases globally, including for example a case brought by an NGO and 900 Dutch citizens who filed a successful case against the Dutch Government (Urgenda case)', https://www.climatecaseireland.ie/climate-case/#documents accessed 9 January 2020. See also Greenpeace Climate Justice and Liability Campaign, Holding your Government Accountable for Climate Change: A peoples' Guide (2018).

[19] The SDG Index and Dashboards Report 2018, available at https://sdgindex.org/reports/sdg-index-and-dashboards-2018/, accessed 16 January 2020.

[20] Decision No 406/2009/EC of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136, ('ESD'), Article 3(1) and Annex II, and Regulation (EU) 2018/842 of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, p. 26 ('ESR'), Article 4(1) and Annex I. The ESD and the ESR regulate EU Member States' GHG emissions from non-ETS sectors (sectors not covered by Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ L

increase in the share of energy from renewable sources in the total energy consumption ('energy targets').[21] Moreover, Danish climate change policy is influenced by internationally determined goals and ambitions, as Denmark is a party to the UN Framework Convention on Climate Change (UNFCCC),[22] the Kyoto Protocol (KP),[23] and the Paris Agreement (PA).[24]

Under the ESD and ESR, Denmark is obligated to reduce its GHG emissions from non-ETS sectors by 20% by 2020,[25] and by 39% by 2030[26] compared to 2005 emission levels.[27] Regarding the energy targets, Denmark must ensure that by 2020 30% of the total Danish energy consumption is covered by energy from renewable sources.[28] In June 2018, the former Danish government and all the parties of the Danish Parliament adopted an Energy Agreement, which contains a target of achieving a share of renewable energy of (approximately) 55% by 2030.[29]

The Danish Energy Agency (DEA) has estimated that Denmark will meet and exceed its climate and energy targets for 2020,[30] but most likely fail to deliver on the national 2030 targets.[31] Still, Denmark has the potential to remain at the forefront of the EU climate ambition but to maintain this status and to achieve its climate and energy targets for 2030 the country must adopt further measures.

### 2.2 Data centres in Denmark

A hyperscale data centre is a big facility housing a large number of computer servers. It can supply data services, e.g. cloud computing solutions, to the whole world provided that the data centre has access to adequate electricity supplies and optical fibre connections.[32] In Denmark, three hyperscale (and multiple smaller) data centres are expected to be in operation by the end of 2021.[33]

Hyperscale data centres have an average capacity of 150 MW per data centre.[34] The Danish green think tank CONCITO estimated that the yearly energy consumption of Facebook's data centre near Odense would be 1.3 TWh, corre-

275, 25.10.2003, p. 32 (EU ETS)) for the periods 2013-2020 and 2021-2030, respectively.

[21] Renewable Energy Directives no. 2009/28/EC (OJ L 140, 5.6.2009, p. 16), stipulating targets for 2020, and no. (EU) 2018/2001 (OJ L 328, 21.12.2018, p. 82), stipulating targets for 2030 (RED).

[22] United Nations Framework Convention on Climate Change, 1771 UNTS 107.

[23] Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997.

[24] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015.

[25] ESD Article 3(1) and Annex II.

[26] ESR Article 4(1) and Annex I.

[27] Furthermore, the Danish industries covered by the EU ETS must comply with the ETS directive. However, the EU ETS does not contain any specific GHG emission reduction targets for Denmark as the emission reductions achieved through the ETS are set and controlled at the EU level.

[28] RED Article 3(1) and Annex I, part A.

[29] https://en.efkm.dk/energy-and-raw-materials/energy-proposal/, accessed 10 March 2020.

[30] Danish Energy Agency (DEA), Denmark's Energy and Climate Outlook 2019, October 2019 (DECO 2019), 59. See also European Environment Agency (EEA) report no. 16/2018, Trends and projections in Europe 2018 – Tracking progress towards Europe's climate and energy targets, 26-27 and 39 (2018).

[31] DECO 2019, n 30, 19 and 62. For instance, Denmark will be ca. 14% short of its non-ETS climate targets for 2030.

[32] DEA, Denmark's Energy and Climate Outlook 2018: Baseline Scenario Projection Towards 2030 With Existing Measures (Frozen Policy), July 2018 (DECO 2018), 23; COWI (for the DEA), Temaanalyse om store datacentre, February 2018, 9.

[33] Facebook has opened a data centre near Odense in September 2019. Apple is currently constructing a data centre near Viborg. Moreover, Google has acquired a plot of land near Fredericia to build a data centre. For a map of data centres in Denmark, see https://datacenterindustrien.dk/data-center-map/, accessed 14 January 2020.

[34] DECO 2018, n 32, 23; COWI, n 32, 12.

sponding to the yearly energy consumption of 330,000 households.[35]

*2.2.1 Predictions about implications of data centres for Danish climate and energy targets*

The DEA has estimated that the Danish gross energy consumption and final energy consumption will increase from 2020 to 2030.[36] One of the key factors in causing this increase is the hyperscale data centres, which are estimated to account for 15% of the total Danish electricity consumption in 2030.[37] In its 2018 report, the DEA estimated that the increase in gross energy consumption would raise the usage of fossil fuels for energy production after 2021, which would in turn increase the Danish GHG emissions (unless new measures to counter this development were implemented).[38] This estimation has been toned down in the DECO 2019 report, expecting 'that consumption of fossil fuels by industry and services will fall up to 2024 and then level off.'[39]

Yet, these numbers are only estimates based on multiple assumptions, such as the 'frozen policy scenario'[40] and, thus, subject to significant uncertainties. However, they highlight that the introduction and operation of hyperscale data centres in Denmark pose insecurity about Denmark's ability to meet its climate and energy targets for 2030 unless new measures are introduced.[41]

Despite the outlined negative influence of hyperscale data centres on the achievement of the climate and energy targets, Denmark has been welcoming them. The mayors of the municipalities that are hosting the three planned hyperscale data centres have expressed great excitement about the development, and highlighted the promise of new jobs and a boost to the local businesses.[42] However, not only the municipalities try to attract data centres to Denmark. The Ministry of Foreign Affairs of Denmark has also been an active player in catching the attention of the tech giants. On its website, the Ministry tries to secure the choice of Denmark as a location for new data centres by listing the advantages of choosing Denmark. These advantages include among others a reliable power grid, a mild climate that allows low-energy cooling all year round, and 72% of power supply from renewable energy sources.[43] In the course of time, however, it might no longer be possible to guarantee some of these listed advantages due to global warming effects and Denmark's inability to achieve its climate and energy targets.[44]

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[35] Statement of director of CONCITO, Torben Chrintz, to the Danish newspaper *Information*, 6 October 2016, https://www.information.dk/indland/2016/10/facebooks-datacenter-bruge-el-svarende-330000-husstande, accessed 18 July 2019.

[36] DECO 2019, n 30, 21-22.

[37] DECO 2019, n 30, 23-24; see also Denmark's Draft Integrated National Energy and Climate Plan under the Regulation of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action, Ares(2019)16924, 3 January 2019, 76.

[38] DECO 2018, n 32, 21-22, 29-30 and 57-58.

[39] DECO 2019, n 30, 35.

[40] See DECO 2019, n 30, 11; and DECO 2018, n 32, 11.

[41] DECO 2019, n 30, 57; and specifically, regarding the energy targets, see analysis from The Danish Council on Climate Change (Klimarådet), *Store datacentre i Danmark*, 6 (2019).

[42] See e.g. statement to national media regarding Google's data centre in the Fredericia municipality: https://www.jv.dk/erhverv/Nyt-gigacenter-Google-op-foerer-datacenter-til-45-milliarder-ved-Fredericia/artikel/2663647, accessed 14 January 2020.

[43] The Ministry of Foreign Affairs of Denmark, https://investindk.com/set-up-a-business/cleantech/data-centers accessed 14 January 2019.

[44] We nevertheless acknowledge that from a global climate change perspective, Denmark is a better solution for placement of data centres than other locations where the share of renewable energy is not that high or the climate so mild, and where the operation of data centres would, thus, entail higher GHG emissions than what will likely be the case in Denmark.

### 2.3 Notes on methodology

This paper discusses potential CCL in the Danish context. In our analysis, we focus on the possibility to bring CCL before the Danish courts. However, it should be noted that Denmark has a tradition for establishing specialised administrative appeals boards within many areas of administrative law, including environmental law.[45] The administrative appeals boards deal with and review administrative decisions brought before them by plaintiffs[46] and may, thus, be a relevant avenue for some types of CCL. Such tradition for administrative appeals boards may not be common in many other jurisdictions. In order to add a relevant contribution to broader discussions on transferability among jurisdictions, we have therefore chosen to focus on the court system.

To keep the analysis relevant, we chose to work with a fictitious scenario – a case against the public authorities' decisions and actions to host hyperscale data centres. We have selected two court cases from other jurisdictions, which guide our analysis and help us to structure the discussion. However, we do not employ a traditional comparative methodology, as no strategic CCL, in fact, exists in Denmark. Rather, taking the Danish perspective, we present a positivistic view on climate litigation cases in other jurisdictions and the feasibility of their transfer to the Danish context.

The chosen cases are the *Urgenda* and the *Vienna Airport* cases.[47] Both are from EU Member States, i.e. states that are under the same EU climate change law as Denmark, though the national climate and energy goals differ. In both cases, it is a state agency/authority that is sued, which would also be the case in our data centres scenario. Furthermore, each of the cases bears a specific relevance to our research.

The choice of the *Urgenda* case is rather straightforward. The case has been labelled a 'global precedent',[48] suggesting its transferability to other jurisdictions. It should be noted that in this context precedent is not understood as a court decision that must be followed by courts in the same jurisdiction, but more broadly as 'a previous judicial decision that has normative implications beyond the context of a particular case in which it has been delivered.'[49]

In the *Urgenda* case, the plaintiffs (the Urgenda Foundation) challenged the Dutch government claiming that its unambitious climate policy exposes Dutch citizens to foreseeable harm, as it is insufficient to prevent dangerous climate change. The legal basis for the claim is found in the Dutch Civil Code/tort law and firmly rooted in Dutch case law concerning the state's duty of care. However, the plaintiffs used international law – both written law and principles of law – to fill in the abstract concept of the national legal obligation of duty of care. The case was famously decided in favour of the plaintiffs in 2015 by the Hague District Court. Subsequently the decision was confirmed in 2018 by the Hague Court of Appeal and in 2019 by the Dutch Supreme Court, both finding that the legal basis for the claim can be deduced directly from the European Convention on Human Rights (ECHR).[50]

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[45] European e-justice portal, Access to justice in environmental matters – Denmark ('European e-justice portal'), II. Judiciary, available at https://beta.e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?DENMARK&member=1#II, accessed 11 March 2020.

[46] European e-justice portal, n 45, II. Judiciary. For more on appeals boards, see section 3.1.2.4.

[47] In relation to both cases, we have worked with the English translations available at http://climatecasechart.com accessed 30 March 2020.

[48] Roy and Woerdman, n 17, 166.

[49] J Komarek, 'Reasoning with Previous Decisions' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012) 67.

[50] See further section 3.1.

While the *Urgenda* case does not deal with an administrative decision as we do in our studied data centres scenario, there are interesting aspects seen from the Danish point of view. One is the treatment of international law within national litigation and the fact that it is even used as a legal basis for the case. Another is the question of the standing of an NGO. Possibly the most resonating outcome of the case is the understanding of the state's duty to protect its citizens against the harmful consequences of climate change as a legal obligation stemming directly from international human rights law, and not only as a legal obligation stemming from national law, a political/policy question, or a moral obligation.

The other selected case – the *Vienna Airport* case – then bears many factual similarities to our hypothetical scenario. In this case, an administrative decision allowing a construction project was under adjudication. Concerned citizens and NGOs challenged the approval of the Lower Austrian government to build a third runway at the Vienna-Schwechat Airport. The plaintiffs used arguments rooted in both national and international law. The Austrian Federal Administrative Court ruled in 2017 in favour of the plaintiffs, after it engaged in a detailed balancing exercise according to § 71 (1), (2) of the Austrian Aviation Act between the economic benefits and the negative environmental impacts of the third Vienna Airport runway. The same year, the decision was overruled by the Austrian Constitutional Court, which found that the decision in the first instance 'involved climate protection and land consumption in an unconstitutional way in its weighing of interests.'[51]

The first of the major similarities of the *Vienna Airport* case to our scenario is the use of administrative law as a legal basis for CCL. As Danish courts are traditionally reluctant to decide on matters deemed to belong to the legislator[52] and to review the discretionary elements of administrative authorities' decisions, the ruling of the Austrian Constitutional Court may prove to be a similarity between the *Vienna Airport* case and the scenario studied in this paper. The second similarity is that the question of standing of the respective plaintiffs is answered before engaging with the facts of the case. The third one then is the refusal of the Austrian Constitutional Court to consider international law as a source of direct obligations within the national context and as a source of interests to be balanced by an administrative body. This would likely resonate with the opinion among the Danish judiciary.

The *Vienna Airport* case is not as prominent in the CCL academic and popular discourse as the *Urgenda* case is, but has still been discussed in multiple academic publications.[53]

Thus, the selection of cases was guided by the geographical and jurisdictional closeness to Denmark, the prominence of the cases within international CCL discourse, the factual relevance and similarity to the studied scenario, and the accessibility of the relevant case documents.

[51] Constitutional Court President Gerhart Holzinger, https://www.reuters.com/article/flughafen-wien-court-idUSL8N1JQ1X1, accessed 10 March 2020.

[52] M Wind, 'Do Scandinavians Care About International Law? A Study of Scandinavian Judges' Citation Practice to International Law and Courts' (2016) 85 Nordic Journal of International Law 281, 286.

[53] See e.g. B Hollaus, 'Austrian Constitutional Court: Considering Climate Change as a Public Interest is Arbitrary – Refusal of Third Runway Permit Annulled' (2017) 11(3) Vienna Journal on International Constitutional Law 467; J Peel and H M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37.

## 3. Analysis

### 3.1 Legal basis

Identifying the right legal basis is crucial for a successful legal claim. It determines the procedural rules that apply to the specific situation and the scope of the parties' arguments. Various legal bases have been used for pursuing climate change mitigation goals in courts. The selection of the legal basis/bases depends on the specific characteristics of the legal order in which the proceeding takes place as well as on the outcome and/or remedy the plaintiffs seek. There are three broad groups of legal bases used most frequently within CCL: constitutional claims, including human rights-based claims, administrative claims, including planning law and industrial permissions-related claims, and private law claims, including tort law claims.[54] However, the legal basis is considerably nuanced in every single case, as will be shown below.

#### *3.1.1 Constitutional claim/human rights-based claim*

The *Urgenda* case is often classified as a tort law case, but can also be categorized as a constitutional (human rights-based) claim. The plaintiffs relied on several legal stipulations in their petition. Firstly, they purported that the state failed to protect the environment and thus keep the country habitable. This obligation stems from Article 21 of the Dutch Constitution. The state's failure amounted to, according to the plaintiffs, hazardous negligence, thus breaching the state's duty of care which is established in Book 5, Section 37 and Book 6, Section 162 of the Dutch Civil Code. Both the constitutional and the tort law duty of care of the state is worded vaguely, and thus the plaintiffs relied on written and customary international law to detail the vague language. According to the plaintiffs, the state's climate policy breached Articles 2 and 8 of the ECHR, was against the 'no-harm' principle, and was not in line with the Dutch obligations under the UNFCCC and the PA. While the Hague District Court agreed with the plaintiffs that international law can be used as an interpretational tool when concretizing obligations under national law,[55] it also declared that the plaintiffs could not derive any positive obligations of the state towards them from international human rights law. Moreover, the Court based this part of the decision on the lack of standing under ECHR Article 34.[56] The latter assessment was amended by the Hague Court of Appeal, which grounded their reasoning directly on ECHR Articles 2 and 8. The Court stated that '[…] the State has a positive obligation to protect the lives of citizens within its jurisdiction under ECHR Article 2, while Article 8 creates the obligation to protect the right to home and private life […] If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.'[57] Furthermore, the Court of Appeal stated that the conditions for standing in ECHR Article 34 only apply to the access to the European Court of Human Rights (ECtHR), but they are not applicable to the access to Dutch courts.[58]

The decisions in the *Urgenda* case have been taken as evidence of the 'human rights turn'[59] in

[54] M Clarke et al., 'Climate change litigation: A new class of action', White&Case, 13 November 2018, available at https://www.whitecase.com/publications/insight/climate-change-litigation-new-class-action, 4 February 2020; for other classification see e.g. M Dellinger, 'See You in Court: Around the World in Eight Climate Change Lawsuits', 42(2) William & Mary Environmental Law and Policy Review 525.

[55] *Urgenda*, first instance, paras. 4.43 and 4.46; this use of international law is detailed further below in section 3.3.

[56] *Urgenda*, first instance, paras. 4.42 and 4.45.

[57] *Urgenda*, second instance, para. 43.

[58] *Urgenda*, second instance, para. 35. This has been confirmed by the Supreme Court, *Urgenda*, third instance, para. 5.9.3.

[59] Peel and Osofsky, n 53.

climate litigation cases, i.e. basing claims in CCL on national and international human rights instruments.[60] Corsi perceives the use of human rights claims as highly transferable among jurisdictions.[61] He purports that environmental rights are protected in constitutions of over 100 countries globally, although in various degrees of concretization.[62] As one of the most active NGOs in the area, Greenpeace also considers human rights as an especially viable tool for bringing CCL against national governments.[63] It is thus relevant to consider this avenue in our scenario.

Originating in 1849 and last amended in 1953, the Danish Constitution does not guarantee the protection of citizens' environmental rights.[64] Therefore, we are not likely to see truly constitutional CCL in Denmark. However, Denmark is a party to the ECHR. As such, there is a theoretical possibility to use the construction of state's duty of care stemming from ECHR Articles 2 and 8, as found by the Court of Appeal and the Supreme Court in the *Urgenda* case, to build up a human rights-based claim. However, this avenue may face the question of Danish sovereignty in general and the question of the position of international law within the national legal system especially.

The Danish legal system is dualistic.[65] Thus, international law is not part of it unless it is incorporated by the Danish legislator into Danish law. The dualistic character of the Danish legal system is somehow relaxed by an unwritten principle of the so-called 'rule of interpretation', according to which 'Danish law – to the fullest extent possible – is to be interpreted in accordance with Denmark's obligations under international law.'[66] However, once an international convention is incorporated into the national legal system, it is to be applied by the courts as an integral part thereof. The ECHR was incorporated into the Danish legal order in 1992.[67] As such, it is directly applicable. However, building our scenario case primarily on the ECHR would face several obstacles.

Firstly, Danish courts would need to accept the existence of the state's duty of care. While the ECHR has been a part of the Danish legal order for years, Danish courts have been reluctant to set aside public decisions that could breach the Convention, where there is no corresponding case law from the ECtHR.[68] While the ECtHR has interpreted the Convention as providing a gradually higher degree of environmental protection, the link to states' climate policies have not yet been discussed. Thus, the Danish courts would most likely not deliver such an independent interpretation of the ECHR.

Secondly, a specific right that is being breached would need to be identified. This would likely be the broad right to life secured by Article 2(1) of the ECHR stating that '[e]veryone's right to life shall be protected by law. […]'. According to the ECtHR, the article provides both positive

[60] Setzer and Vanhala, n 5, 10-11.
[61] Corsi, n 17, 4-5.
[62] Corsi, n 17, 4-5.
[63] Greenpeace, n 18.
[64] The Constitutional Act of Denmark of 5 June 1953, available in English at http://www.stm.dk/_p_10992.html, accessed 4 February 2020.
[65] Justitsministeriet, Betænkning om inkorporering mv. inden for menneskeretsområdet, Betænkning nr. 1546, available at http://www.justitsministeriet.dk, accessed 2 October 2019.
[66] Supreme Court of Denmark, ACA Europe seminar – December 18, 2013, Notes on the hierarchy of norms, 3, available at http://www.aca-europe.eu/seminars/Paris2013bis/Danemark.pdf, accessed 17 January 2020; Justitsministeriet, n 65, 47; J Christoffersen and M R Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights' (2011) 80(3) Nordic Journal of International Law 257, 265.
[67] Lovbekendtgørelse 1998-10-19 nr. 750 om Den Europæiske Menneskerettighedskonvention.
[68] Betænkning nr. 1220/1991 om Den Europæiske Menneskerettighedskonvention og dansk ret, 3.9.

and negative obligations of the state. The positive ones being: '(a) the duty to provide a regulatory framework; and (b) the obligation to take preventive operational measures.'[69] However, the state is only obliged to take a positive action if it knows or ought to have known at the time of 'the existence of a real and immediate risk to the life' and if the positive action does not place an 'impossible or disproportionate burden on the authorities'.[70] As the choice of operational measure is left to the individual state, the Danish state would possibly claim to take preventive measures in the climate change area through its strong climate policy (in line with and even exceeding EU climate goals), climate law,[71] and other specialized laws. Any substantial negative impact of its decision to host hyperscale data centres on its ability to achieve the policy goals would only be obvious in the future, thus posing a question mark to the requirement of a 'real and immediate risk' to life. The Court of Appeal decided on this issue in the *Urgenda* case and found that the dangerous situation caused by climate change is imminent.[72] The legal analysis was, however, different in the judgement of the Borgarting Court of Appeal in Norway.[73] This was a case on the legality under ECHR Article 2 of granting new oil drilling licenses in 2016. The court concluded that the decision to issue the oil licenses itself cannot be found to pose a 'real and immediate risk' to life. We expect that a Danish court would rule in line with its Norwegian counterpart. We base this expectation on the documented lack of internalization of international human rights law in Scandinavian countries[74] as well as the factual difference of challenging the whole national climate policy, as done in the *Urgenda* case, and challenging a specific decision, as done in the Norwegian and our scenario cases. This discussion leads to the third issue – the causality and cross-temporal challenges.[75]

The causality challenge in human rights-based strategic CCL is a well-known obstacle.[76] The plaintiffs need to prove the causal link between the governments' action/inaction and the negative impact on a specific human right. In our scenario, we would thus need to prove the causal link between the decision of the Danish state and/or its institutions/bodies to host hyperscale data centres and an appropriate right based in the ECHR, probably the right to life. The right to life as understood under the ECHR encompasses the right of individuals to be protected against negative environmental impacts caused by human activities.[77] However, if the state is challenged on its decision to host hyperscale data centres, it may furnish an argument that the decision is only a part in its economic, social, and environmental policies, and that its negative impact on the right to life must be seen in the context of other state obligations. If any such decision is interpreted as breaching the right to life, it could open up floodgates for cases against most of the state's decisions. A possible distinction can be drawn in this regard between the *Urgenda* case and our scenario. The Urgenda Foundation challenged the broad Dutch climate policy goals affecting the state and its citizens

[69] Council of Europe/ECtHR, Guide on Article 2 of the European Convention on Human Rights – Right to life, 2019, 8.

[70] ECtHR, Osman v. the United Kingdom, § 116.

[71] The Danish Climate Change Act, Act No. 716 of 25 June 2014. The Act established an independent, academically based Climate Council and the obligation to annually prepare a Climate Policy Report by the Danish government, see B E Olsen and H Tegner Anker, 'Nordic countries: A. Denmark' (2016) 25(1) *Yearbook of International Environmental Law* 347. A new and more ambitious Climate Act is planned to be adopted within 2020.

[72] *Urgenda*, second instance, para. 71.

[73] *Greenpeace Nordic Ass'n and Nature and Youth v. Ministry of Petroleum and Energy*, n 15.

[74] Wind, n 52, 282.

[75] Setzer and Vanhala, n 5, 10.

[76] Setzer and Vanhala, n 5, 10.

[77] Council of Europe/ECtHR, n 69, 11 et seq.

as a whole, while we work with only one decision that can be seen as a part of broader state policies. A counter-argument would have to be based upon the severity of the impact on the right to life. Climate change is happening and is threatening human survival and every contribution to it counts. As the court in *Urgenda* puts it: 'The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emissions contribute to climate change.'[78] The courts in all instances then refused the state's argument regarding the 'waterbed effect' and 'carbon leakage.'[79] However, even if the causality is established, we could still hit the wall of the cross-temporal challenge, which captures the difficulties with overcoming the time-span between cause and effect. Most climate-related impacts on the right to life are only predicted, as they are to appear in a (relatively distant) future. This might in itself not be a hurdle for the application of ECHR Article 2, since the ECtHR acknowledged that the article also covers risks that may materialize in a longer term; however, the risks must be rather concrete.[80] The risks to life that would materialize through the aggravation of a global climate change stemming from a decision to host hyperscale data centres on Danish territory will most probably not fulfil this requirement. Both the global advantages of placing such data centres in a cooler location with possible available sources of renewable energy and the quickly advancing technological progress will most certainly be taken into consideration. Thus, we are looking not solely for preventive, but also precautionary measures. While the obligation of the state to take action even if the materialization of the danger in question is not certain has been recognized by the ECtHR case law on some occasions,[81] in most cases, precautionary measures are not required by the court. As such, they would most probably not be required by Danish courts either.

To summarise, while it is theoretically possible to base CCL in the data centres scenario on the ECHR, as the convention has been incorporated into Danish law, there are several obstacles to the success of such a case. Firstly, the national courts are known to be reluctant to extend the interpretation of the ECHR beyond interpretation confirmed by the ECtHR.[82] Secondly, the right to life as secured by the ECHR is arguably protected by the national climate change policy and law, which forces us to view the decision to host hyperscale data centres in a broader context. Thirdly, the decision is interrelated with other national policies and measures in environmental, social, and economic areas, making it difficult to ascertain the causal relationship between this decision and the negative impact on the right to life of Danish citizens.

#### *3.1.2 Administrative claim*

The *Vienna Airport* case is an example of CCL based in administrative law. In this case, the plaintiffs challenged the administrative approval (issued by the Lower Austrian government) to construct the third runway at the Vienna-Schwechat Airport. The plaintiffs claimed that the deciding authority failed to balance the public eco-

[78] *Urgenda*, first instance, para. 4.90; this reasoning was confirmed by the Court of Appeal and developed further by the Supreme Court (*Urgenda*, third instance, paras. 5.7.6 and 5.7.7).

[79] *Urgenda*, first instance, para. 4.81 and *Urgenda*, second instance, para. 56. See also similarly, *Gloucester Resources Limited v. Minister for Planning*, NSWLEC 7, 2019, paras. 534-545.

[80] ECtHR, 30 November 2004, no. 48939/99 (Öneryildiz/Turkey), paras 98-101.

[81] ECtHR, 30 November 2004, no. 48939/99 (Öneryildiz/Turkey), paras 98-101; ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), paras. 147-158; ECtHR, 28 February 2012, no. 17423/05 (Kolyadenko et al./Russia), paras. 165 and 174-180.

[82] Christoffersen and Madsen, n 66, 271.

nomic interest in the construction against 'other public interests' as they were required to by § 71 (1), (2) of the Austrian Aviation Act. When defining the 'other public interests', the plaintiffs and the court of the first instance used various sources of law, including international (the PA), European (the Charter of Fundamental Rights Article 37), and national law (the Climate Protection Act, national and state constitutions).[83]

In the first instance, the Federal Administrative Court carefully weighted the various public interests against each other, especially noting the urgency of the climate protection measures in light of Austria's international commitments. It ruled that the public interests with respect to the environment (and public health) outweighed the public economic interests and decided in favour of the plaintiffs.[84]

However, the decision was soon annulled by the Austrian Constitutional Court. The Constitutional Court did not dispute that a balancing exercise is necessary in order to issue a permit for the airport enlargement. At the same time, it ruled that the weighted interests are to be found exclusively within the Aviation Act.[85] As the Aviation Act was adopted in 1957, it does not include environmental (climate) interests to be considered in the balancing exercise but refers to economic interests only. The Constitutional Court also refused that constitutional norms, such as the Federal Constitutional Act on Sustainability,[86] could be used to read 'other public interests' into the Aviation Act. The Constitutional Court ruled that such norms, external to the Aviation Act, could only be used to interpret environmental interests-related provisions already existing in the Aviation Act.[87] This reasoning was quite surprising,[88] inter alia because the court basically undermined its law interpretation powers.

Using administrative law as a legal basis could potentially be a good avenue in our scenario. In relation to the administrative procedures of permitting the construction and operation of a hyperscale data centre in Denmark, we identify three decisions that could involve climate change considerations and which could be challenged; (i) adoption/amendment of the local and/or municipal plan, (ii) environmental assessment of the local/municipal plan, and (iii) environmental assessment, including a subsequent development consent, of the specific project of building a data centre.

*3.1.2.1 Planning law*

First, we examine whether the planning decisions related to the construction and operation of a data centre could be challenged in court for the lack or inadequate consideration of climate change impacts.

Under Danish law, the construction of such a large project usually requires an adoption or amendment of the local plan for the area in which the project is to be located[89] and, sometimes, even an amendment of the municipal plan.[90] Ac-

[83] *Vienna Airport*, first instance, part 4.5.1.

[84] *Vienna Airport*, first instance, Ruling.

[85] *Vienna Airport*, second instance, part 4.

[86] Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Water and Food Supply Safety and Research, BGBl. I No. 111/2013, 11 July 2013.

[87] G Kirchengast, V Madner et al., 'VfGH behebt Untersagung der dritten Piste' (2017) 6 Recht der Umwelt 252, 258.

[88] Hollaus, n 53.

[89] The Planning Act Section 13(2). For instance, 'Permits under the Building Act […] cannot be given until the local plan has been finally adopted or approved', cf. E M Basse, *Environmental Law in Denmark* (2nd ed., DJØF Publishing, 2015), 413.

[90] Local plans must comply with the overall framework of the municipal plan but only local plans are directly binding towards the citizens of the municipality. See H Tegner Anker, 'Planloven med kommentarer' (Jurist- og Økonomforbundets Forlag, 2013), 337.

cording to Section 1 of the Danish Planning Act, both the municipal and local planning should synthetize public interests into land use (e.g. interests in economic growth and development) with the protection of the environment, 'so that sustainable development of society with respect for people's living conditions and the conservation of wildlife and vegetation is secured'.[91] The Planning Act thus, similar to the Austrian Aviation Act, calls for balancing various public interests when the public authorities adopt or amend plans.

Climate interests are not specifically mentioned in Section 1 of the Planning Act and are, thus, not to be found explicitly within the main interests to be considered by the authorities when they exercise their competences under the Act. However, as mentioned above, the Planning Act provides that planning activities should forward 'sustainable development' – a concept that arguably accommodates climate protection. Thus, climate protection can reasonably be considered a relevant interest to take into account when adopting and amending municipal and local plans.

Whether authorities *must* consider climate change in planning activities and how it is to be weighted against other factors, is, however, not stipulated in the Act. When adopting or amending plans, the municipalities have a wide margin of discretion in regards to the balancing of relevant interests. Due to the strong division of powers characteristic of the Danish democracy, the courts generally do not subject discretionary elements of administrative authorities' decisions to intensive judicial review.[92] The courts' review of administrative decisions is usually limited to a 'legality review', i.e. review of the authorities' factual findings, their interpretation of the relevant statutory rules, their compliance with procedural rules, their compliance with fundamental principles of administrative law, and whether the relevant authority exceeded the limits of its discretionary powers.[93] In other words; the courts will determine whether an administrative decision is unlawful but not whether it is appropriate.[94] Thus, it would pose a significant challenge for CCL plaintiffs to attain a court ruling that a municipal planning authority did not attribute enough weight to climate protection when it balanced the different interests at stake.

Another challenge of using planning law as the legal basis for CCL is that local plans are not aimed at the regulation of national or global issues. Plaintiffs would therefore have to convince the courts that climate change is a local matter that is appropriately addressed at the local level.

Finally, the Planning Act concerns *land use* and is not aimed at regulating polluting or environmentally challenging *activities*. The climate change issues that arise from hyperscale data centres stem from the operation of the installation and the accompanying GHG emissions, i.e. the climate change consequences are caused by an activity rather than by the specific location of the facility. Thus, challenging a local plan to address the broader issue of climate change may not be the most appropriate, or successful, choice.

Instead of directly challenging the local plan, plaintiffs could challenge the environmental assessment of that plan or the environmental assessment of the specific data centre project for lack or insufficient consideration of climate change impacts.

[91] The Planning Act in Denmark, Consolidated Act No. 287 of 16 April 2018 with subsequent amendments.

[92] Basse, n 89, 453; European e-justice portal, n 45, II. Judiciary.

[93] Basse, n 89, 453-454; European e-justice portal, n 45, II. Judiciary.

[94] European e-justice portal, n 45, IV. Access to Justice in Public Participation.

*3.1.2.2 Assessment of environmental impacts of the plans*

According to the Danish Environmental Assessment Act (the EA Act),[95] a municipal or local plan adopted under the Planning Act (with the purpose of creating the necessary legal planning basis for allowing the construction of a large project) must be subjected to an environmental impact assessment before its final adoption.[96] The EA Act adopts a broad understanding of the term 'environment', which includes inter alia climate and climatic factors and which applies to environmental impact assessments of both plans and concrete projects.[97] Plaintiffs that challenge the construction of a hyperscale data centre could argue that the municipality did not, in its environmental assessment of the municipal or local plan, sufficiently take into account the problem of increased GHG emissions from energy production caused by the extensive energy consumption of the hyperscale data centre. The success of such a lawsuit is, however, unlikely because of the reluctance of the Danish courts to review discretionary elements of administrative decisions. As mentioned above, the adoption of local or municipal plans involves a significant level of discretion on the part of the municipalities. Deciding on what actions to take based on the findings from an environmental impact assessment of the plan, including deciding what weight to attribute to these findings, is also part of the municipalities' discretionary decision-making and, thus, only subject to limited judicial review. Moreover, a win may not necessarily bring plaintiffs the result they hope for. If the plan is subject to an environmental impact assessment before its adoption, the EA Act only requires the administrative authorities to carry out this assessment and take it into account when deciding on the adoption and content of the plan.[98] As such, the environmental impact assessment is procedural in nature and the EA Act does not demand that the administrative authorities discard the plan in case the assessment uncovers significant environmental impacts. Moreover, a different result is not guaranteed even in the unlikely event that a court concludes that a plan is invalid due to insufficient consideration of climate change impacts in the environmental impact assessment. It is likely that the court in such a situation will refer the matter back to the municipality for reconsideration in light of the court's findings. On reconsideration, the administrative authority could lawfully reach the same overall result even after it had paid more attention to climate change impacts.

*3.1.2.3 Assessment of environmental impacts of a project*

Instead, plaintiffs could challenge the environmental impact assessment of the concrete data centre project. However, this is only an option if such an assessment is required and/or carried out.

According to the EA Act, certain projects can only be realized if development consent is obtained.[99] If an environmental impact assessment of the project is required pursuant to the EA Act, the relevant authority can grant a development consent after the assessment has been carried out.[100] The EA Act distinguishes between two types of projects; projects, which are always

[95] Consolidated act no. 1225 of 25 October 2018 on environmental assessment of plans and programs and of concrete projects.

[96] EA Act Section 2(1), (1).

[97] EA Act Section 1(2).

[98] EA Act Section 13.

[99] EA Act Section 15 (implementing Article 2(1) of the Environmental Impact Assessment (EIA) Directive (directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1)).

[100] EA Act Section 25.

subject to an environmental impact assessment (listed in Annex 1), and projects, which are subject to an assessment if the individual project is deemed likely to have significant effects on the environment (screening decision)[101] (listed in Annex 2).[102] Both a screening decision and a final decision regarding the development consent can be brought before the courts.[103]

A hyperscale data centre (the installation as such) is a type of facility that is neither included in Annex 1 nor Annex 2 of the EA Act. Thus, no obligation to carry out an environmental assessment for such a project exists. However, if the project developer conducts an environmental assessment on a voluntary basis, the requirement for a development consent applies to the project.[104] This makes challenging the environmental impact assessment of the project a less attractive avenue for CCL, as plaintiffs depend on the developer to voluntarily choose to apply for an assessment.

If an environmental impact assessment of the specific data centre project actually *is* carried out, and a development consent is granted by the municipality, another hurdle for CCL plaintiffs arises. The decision to grant development consent entails a significant element of discretion as the relevant authority conducts a holistic assessment of the environmental impacts of the project based on the developer's application, the environmental impact assessment report, any available additional information, and the information stemming from the involvement of the public.[105] As explained above, it is unlikely that the Danish courts will review the discretionary elements of the decision, which limits the scope and intensity of the judicial review.

It should be noted that *parts* of a data centre, for instance, an emergency power facility,[106] or the *construction works*[107] involved with building a data centre could be subject to requirements of permits under the EA Act or other elements of Danish environmental law. However, we do not focus on these elements. The reason is that the major climate change concern caused by the data centres is the *operation* of the centres, i.e. the extensive energy consumption involved in their operation and the GHG emissions related to the production of the necessary energy. The construction phase is limited in time and an emergency power facility is only in operation during tests and (rare) blackouts. These elements, therefore, do not entail significant GHG emissions (compared to the emissions related to the operation of the centre) and are, thus, not central to the climate change problems connected to a data centre.[108]

[101] EA Act Section 16 and Section 21.

[102] Annex 1 and 2 of the EA Act corresponds to Annex I and II of the EIA Directive, respectively.

[103] European e-justice portal, n 45, IV. Access to Justice in Public Participation.

[104] EA Act Section 15(1), (3).

[105] EA Act Section 25.

[106] This was e.g. the case with Apple's data centre near the city of Viborg. Its emergency power facility (consisting of 14 diesel-fueled electricity generators) was subject to a requirement of a screening decision pursuant to Section 16 (in conjunction with Annex 2, section 3 a)) of the EA Act. In addition, the facility also needed an environmental permit pursuant to Section 3 of the Ministerial Order No. 1534 of 9 December 2019 on activities requiring environmental permits under Section 33 of the Environmental Protection Act (Consolidated Act No. 1218 of 25 November 2019 with subsequent amendments, 'EP Act').

[107] Such construction works are projects in their own right and must be subjected to a screening decision and perhaps an environmental assessment (if deemed necessary after the screening process and decision), cf. EA Act Section 16 and Section 21 and Annex 2, section 10.b), to the EA Act.

[108] As part of the permitting process in relation to Apple's data centre in Viborg, an environmental report was prepared. Concerning climate and energy aspects of the data centre project, the report stated that the construction phase of the data centre project would only cause limited GHG emissions and only insignificantly affect environment and climate. In relation to the continuous

*3.1.2.4 Conclusion on administrative claims*

From the above analysis, it becomes clear that the decisions of the administrative authorities regarding planning and environmental impact assessments are characterised by extensive discretionary elements. Thus, it would be very difficult to convince a court to rule that too little attention was paid to climate change impacts in the administrative balancing exercises related to planning and environmental impact assessments of plans and projects. Only if the interest balancing or environmental impact assessment is clearly and legally flawed – e.g. if the administrative authority includes interests that are not relevant according to the law – could it be possible to succeed with the case. Yet, it is likely that the court would 'only' invalidate the administrative decision and return the matter to the administrative authority to adopt a new decision.

A possible remedy for these challenging circumstances could be for plaintiffs to utilise the administrative appeals system (introduced above in section 2.3) instead of bringing the case before the courts. The appeals boards can submit administrative decisions to a full review unless such a review is explicitly limited by law.[109] This means that in most cases, including many (but not all) environmental law cases, the appeals board will review not only the legality but also the discretionary elements of the administrative decision.[110] This makes the administrative appeals system a more attractive avenue for climate plaintiffs who rely on an administrative law legal basis for their claim. As mentioned earlier, this article focuses on CCL brought before *courts* and therefore this avenue will not be explored any further. It should, however, be mentioned that the law *does* expressly limit the review of the relevant appeals boards in cases concerning municipal and local plans, the screening decisions and environmental impact assessment of such plans, and potential screening decisions regarding specific projects.[111] Thus, in most of the administrative decisions addressed above, the extent and intensity of the appeals boards' review are the same as that of the courts.

### 3.2 Standing

To initialise CCL and obtain a court decision on the substantial climate change questions of the case, plaintiffs must be entitled to standing before the court. The procedural hurdle of gaining the right to standing has been highlighted as a general challenge for plaintiffs in CCL across different jurisdictions.[112]

This section of the paper addresses the possibility to gain standing before the Danish courts and the transferability of the standing-related arguments and circumstances in the *Urgenda* and *Vienna Airport* cases.

*3.2.1 General standing*

To be entitled to standing before the Danish courts, a plaintiff must have a 'legal interest' in bringing the case.[113] This requirement is not stip-

operation of the data centre, however, the report concluded that the energy consumption of the operation of the data centre would lead to a level of GHG emissions that significantly affects environment and climate (pages 121-124 and 126-127 of the environmental report of February 2016 concerning Apple's data centre in Viborg). These findings are, however, not mentioned in the subsequent environmental permit for the data centre (granted pursuant to the EP Act) or in the development consent for the data centre project (granted pursuant to the EA Act) issued by Viborg Municipality on 1 June 2016. In fact, neither of these two municipality decisions mention GHG emissions at all.

[109] European e-justice portal, n 45, II. Judiciary.

[110] European e-justice portal, n 45, II. Judiciary and IV. Access to Justice in Public Participation.

[111] EA Act Section 49(1), cf. Section 21.

[112] UNEP, n 1, 27-29.

[113] U R Bang-Pedersen et al., *Den Civile Retspleje* (4th ed, Pejus, 2017) 122; European e-justice portal, n 45, VII. Legal Standing.

ulated in statutory law but is based on principles derived from case law.[114] The, somewhat vague, concept of 'legal interest' entails a requirement that the plaintiff has a significant and individual interest in the outcome of the case.[115] If, for instance, a plaintiff seeks to challenge a decision made by an administrative authority in court, the requirement entails that the plaintiff 'must be protected by the rules according to which' the decision was adopted, and must be 'affected by the decision in a manner that is significant as compared to other citizens'.[116]

If an *Urgenda*-like case (i.e. a case where plaintiffs challenge the general climate change policy and ambition of the state) was attempted in Denmark, we would not expect Danish courts to apply the standing requirements under ECHR Article 34 in the domestic settings, even if the claims were based on human rights protection offered by the ECHR.[117] Instead, both individual citizens and NGOs would have to fulfil the above-described general standing requirement in order to gain standing before the courts.

Yet, there is a clear difference between the *Urgenda* case and our scenario. In the *Urgenda* case, special rules were at play and because of this, the plaintiff – the Urgenda Foundation (an NGO[118]) – did not encounter any significant problems regarding standing. All three court instances found that the Urgenda Foundation was entitled to standing pursuant to Book 3, Section 305a of the Dutch Civil Code.[119] This provision of Dutch law allows organizations to bring a case aimed at protecting inter alia public interests, if the particular interests are connected to the objectives formulated in the organization's by-laws.[120] Danish law does not contain a similar provision and NGOs are, thus, not in a privileged position according to a written rule of national law.

Based on the (scarce) Danish case law on standing for environmental NGOs, it is possible to derive some requirements that such an organization will probably have to fulfil to prove that it has a 'legal interest' in the case and, thus, gain standing.

Firstly, the organization must have a certain fixed structure, probably with a board and membership fees, in order to act as a party in the case.[121] Secondly, it counts towards gaining standing if the purpose of the organization is recognized in or protected by law and if the objective is relevant to the matter under adjudication.[122] As will be further elaborated below in section 3.2.2, an organization is more likely to be granted standing if it is entitled to bring complaints regarding specific administrative decisions within the administrative appeals system,[123] because this shows a societal recognition of the role of the organization in environmental matters. Lastly, the organization must also have a concrete interest in the matter under adjudication in the sense that 'it has suffered financial

[114] Bang-Pedersen et al., n 113, 121; Basse, n 89, 454; European e-justice portal, n 45, VII. Legal Standing.
[115] Basse, n 89, 454; European e-justice portal, n 45, VII. Legal Standing.
[116] Basse, n 89, 455.
[117] The same as the Court of Appeal in the *Urgenda* case did, n 58.
[118] In *Urgenda*, first instance, paras. 2.1 and 2.2, the Urgenda Forundation is described as a Dutch citizens' platform established in January 2008, which aims to 'stimulate and accelerate the transition processes to a more sustainable society' and which 'is involved in the development of plans and measures to prevent climate change'.
[119] *Urgenda*, first instance, paras. 4.6. and 4.9.; *Urgenda*, second instance, paras. 36-38; *Urgenda*, third instance, paras. 5.9.2-5.9.3.
[120] K J de Graaf and J H Jans (2015) 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' 27(3) *Journal of Environmental Law* 517, 518 (FN 5).
[121] Basse, n 89, 456; Bang-Pedersen et al., n 113, 50-51.
[122] Basse, n 89, 456.
[123] Basse, n 89, 456.

loss or […] its rights have been infringed in a way that is comparable to an infringement of an individual's legal position'.[124]

This illustrates that it is not impossible for an environmental NGO to gain standing before Danish courts in an *Urgenda*-like case but it is by no means an easy task. Even though legal literature seems to have detected a general trend towards wider access for plaintiffs to challenge the legality of decisions and actions of administrative authorities,[125] organizations still do not have general access to bring cases on matters within their expressed purpose to court.[126]

### *3.2.2 Enhanced standing chances in administrative law*

As briefly indicated above, if an organization is entitled by law to bring a complaint within the administrative appeals system, it may influence the chances of gaining standing before the courts. In fact, such entitlement to bring administrative appeals may constitute a specially enhanced avenue for gaining standing. This avenue is an option in administrative law-based cases and, therefore, this section takes the *Vienna Airport* case as its starting point.

In the *Vienna Airport* case, a variety of plaintiffs challenged a decision made by national administrative authorities pursuant to national law. The plaintiffs include an environmental organization (NGO), the city of Vienna, several citizens' initiatives, and individual citizens.

The Austrian Federal Administrative Court denied standing for two of the plaintiffs (one citizens' initiative and one individual) but otherwise entitled the rest of the plaintiffs to judicial review of their complaints. The issue of standing was not addressed by the Austrian Constitutional Court, which focused on other aspects of the case. In the following analysis of the transferability of the arguments and the legal circumstances in the *Vienna Airport* case to the Danish context, we will focus on standing for individuals and NGOs as these are the most likely plaintiffs in our data centres scenario and the group of plaintiffs that raise the most interesting legal issues.

In order to initialize a case challenging administrative decisions before Danish courts, plaintiffs must, as a starting point, fulfil the general standing requirement described in section 3.2.1 above. However, when a claim is based on administrative law, it could potentially be somewhat easier for individuals and organizations to establish that they have a sufficient 'legal interest' in the outcome of the case.

Commonly, Danish administrative law contains specific provisions that determine who have access to bring a complaint within the administrative appeals system. This is also the case for much of the legislation relating to environmental matters. As described above, administrative appeals boards are not courts. However, this access to bring administrative appeals is still important because, to some extent, there is a correspondence between the individuals and the organizations that have a right to file a complaint within the administrative appeals system and the individuals and organizations that are entitled to standing before the courts.[127] This correspondence entails that the individuals and the organizations that have a right to bring administrative appeals are also generally considered to fulfil the requirement of having a sufficient 'legal interest' in bringing that same case to the courts.[128]

[124] Basse, n 89, 456.
[125] Bang-Pedersen et al., n 113, 133, 143.
[126] Bang-Pedersen et al., n 113, 143.
[127] Basse, n 89, 455.
[128] European e-justice portal, n 45, VII. Legal Standing.

The Danish EA Act and the Planning Act[129] both contain (very similar) provisions on who can bring a complaint before the relevant administrative appeals boards. Firstly, anyone with a 'legal interest' in the outcome of the case has the right to bring a complaint before the appeals board.[130] Note that this 'legal interest'-criterion is, in substance, different from the general standing requirement (described in section 3.2.1 above) although it is linguistically similar. The 'legal interest'-criterion is not necessarily understood and interpreted in the same way in the EA Act and the Planning Act, and – moreover – the interpretation of the criterion differs depending on the circumstances of the case. However, the addressee of an administrative decision is normally considered to have a 'legal interest' in filing a complaint.[131] Additionally, the criterion may at times be interpreted to include those that are individually and significantly affected by the decision (e.g. neighbours of the addressee) or even a broad group of citizens (in some types of cases, for example, the Planning Act opens the possibility to complain for many citizens).[132] Thus, the conditions for bringing administrative complaints are – in some instances – easier to fulfil for individuals compared to the conditions for gaining standing before the courts.

Secondly, both the EA Act and the Planning Act contain a provision that grants organizations the right to bring a complaint within the administrative appeals systems provided that they 1) are nationwide, 2) have nature and environment protection as their purpose, 3) have bylaws or similar that document their purpose, and 4) have at least 100 members.[133] The provisions do not require the organizations to have an individual, significant, or concrete interest in bringing the complaint. It is sufficient that the organizations fulfil these four formal requirements. It is therefore quite easy for the organizations to fulfil the conditions to bring an administrative appeal.

Because of the correspondence between the access to administrative appeal and the access to the courts described above, the (slightly less strict) conditions for bringing administrative complaints, in turn, makes it easier for individuals and (especially) NGOs to bring the case to the courts.

However, using the right to initiate administrative appeal as a stepping stone to gain standing before the courts also has its limitations. Firstly, this approach to standing is only relevant when the case that is brought before the courts concerns particular administrative decisions, not if the aim is to challenge the general climate change policy of the Danish state. Thus, this standing approach would not provide a route to challenge the efforts of The Ministry of Foreign Affairs of Denmark to attract more data centres to Denmark as these efforts do not entail any specific administrative decisions. Secondly, even though it might be somewhat easier to gain standing in claims based on administrative law, it might not be of much use as the courts are generally reluctant to review the discretionary elements of an administrative decision.[134]

In conclusion, to be entitled to standing before the Danish courts is – both for individuals and NGOs – quite challenging but yet possible.

[129] The two main administrative law legal bases identified and analysed above in section 3.1.2 as relevant to our studied data centre scenario.

[130] EA Act Section 50(1) and Planning Act Section 59(1).

[131] European e-justice portal, n 45, VII. Legal Standing.

[132] European e-justice portal, n 45, VII. Legal Standing.

[133] EA Act Section 50(1) and Planning Act Section 59(2).

[134] Section 3.1.2.1 above.

### 3.3 The use of international environmental law

In strategic CCL at national/regional courts, which aims to strengthen climate actions of state entities, plaintiffs regularly refer to international environmental law (both written (conventional) law and principles of law) to describe the context and to specify the obligations of the state entities.[135]

#### *3.3.1 International conventions on climate change*

From written sources, the parties mostly refer to the UNFCCC, KP, and PA. In contrast to international human rights law that might be used as a legal basis of CCL,[136] the relevance of the international environmental law sources stems mostly from their overall aims and the principles they are built on, rather than from specific obligations, they prescribe.[137] This is logical as they are international law instruments binding among states; private parties cannot derive any positive obligations of the state towards them from international environmental law.[138] Yet, they have been invoked both by the parties to argue their CCL cases and by the courts to substantiate their rulings. The treatment of international environmental law by courts largely depends on the legal tradition of the specific country, which is illustrated by the two cases studied in this article.

All three instances in the *Urgenda* case used written international environmental law to establish the scope of the state's obligations in mitigating climate change. While the court of the first instance recognized the inability of the plaintiffs to derive concrete rights directly from the international conventions, it acknowledged that international law has a 'reflex effect' in national law.[139] As such, it can be used by the court 'when applying and interpreting national law open standards and concepts […]'[140] as is the case when to determine 'the minimum degree of care the State is expected to observe' according to the Dutch tort law duty of care.[141] The Court of Appeal and the Supreme Court diverted from this line of reasoning, as they did not rely on tort law, but on the human rights legal basis to decide the case. Still, they used international environmental law to support their arguments. Namely, they turned to the PA to determine the existence of a 'real and imminent' threat to life brought by climate change and the necessity of more ambitious climate policy to avoid the threat.[142] Such application of written sources of international law was possible as the Netherlands is a monist country that gives priority to international law over domestic law.[143]

The two courts in the *Vienna Airport* case adopted largely varying positions towards the use of written international law. The Federal Administrative Court agreed with the plaintiffs that the international climate change conventions were relevant in interpreting the Federal Aviation Act. As the Aviation Act did not specify the 'other public interests' to be balanced against the economic interests in the proposed project, those 'other public interests' should be found through the interpretation of positive law. Since the constitution for Lower Austria of 1979 states that environmental and climate protection

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[135] P De Vilchez Moragues, 'Broadening the Scope: the Urgenda Case, the Oslo Principles and the Role of National Courts in Advancing Environmental Protection Concerning Climate Change' (2016) 20 Spanish Yearbook of International Law 71, 76.

[136] Section 3.1.1 above.

[137] De Vilchez Moragues, n 135, 76.

[138] *Urgenda*, first instance, para. 4.44; *Vienna Airport*, second instance, part 2(a).

[139] *Urgenda*, first instance, para. 4.43.

[140] *Urgenda*, first instance, para. 4.43.

[141] *Urgenda*, first instance, para. 4.52 (in general).

[142] *Urgenda*, second instance, paras. 49, 50, 66; *Urgenda*, third instance, especially section 7.

[143] A Cassese, *International Law in a Divided World* (Clarendon Press, 1992) 17 (citing G J Wiarda).

is of particular significance, the positive law of reference should include international environmental law. The Constitutional Court, however, refused the interpretative value of the constitution for Lower Austria and thus also the interpretative value of the international environmental law in respect to the Federal Aviation Act.[144] Moreover, the Constitutional Court stated that international environmental law is not immediately applicable in the national setting. The final instance thus rejected not only direct applicability of international environmental law, but also its 'reflex effect' in Austrian federal law. This is perhaps not surprising, as Austria has been described as 'moderately' monist country in the literature.[145] 'Moderate' meaning that 'national law conflicting with international law will not be invalidated as such, but rather may give rise to international responsibility.'[146]

As already stated, Denmark is a dualistic country.[147] The relationship between national and international law is not governed by the Constitution,[148] which obscures the possibility of the use of international law within national litigation. The 'rule of interpretation' of national law in line with the state's international obligations applies to international environmental law the same as to human rights law.[149] However, the international climate conventions have not been incorporated into the Danish legal system, as the ECHR has been, and thus their use for interpretation of national legislation may be close to impossible in situations of their direct or indirect conflict with national rules.[150] National law adopted by the Danish Parliament is central in the Danish legal order, which is inter alia characterized by the absence of a constitutional court and the absence of a strong tradition for constitutional review.[151] Danish judges generally see themselves as those who apply only positive law, they do not create any rules.[152] Given the architecture of Danish majoritarian democracy which is absent of strong judicial review on the one hand and the dualistic setting of the legal order on the other, we must presume that the use of international environmental law conventions by Danish courts in the review of administrative decisions, such as those related to hyperscale data centres' location and operation, is highly unlikely.[153]

### *3.3.2 Environmental law principles*

Besides international environmental conventions, parties in CCL make regular use of well-established environmental principles to support their claims. Many environmental law principles were referred to in the first instance in the *Urgenda* case. Those included the principle of prevention, the no-harm principle, the precautionary principle, the intergenerational equity principle, the common but differentiated responsibilities principle, and, more generally, the fairness principle. The Supreme Court then primarily used the no-harm principle to substantiate the obligation of the state to adopt preventive and precautionary measures in order to avoid the threats posed by climate change.[154]

144 *Vienna Airport*, second instance, part 4.
145 A Epiney and B Hofstötter, 'The Status of "Europeanised" International Law in Austria, Switzerland and Liechtenstein' in J Wouters, A Nollkaemper and E de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States* (T.M.C. Asser Press, 2008), 10 in version available at https://doc.rero.ch/record/10679/files/Beitrag99.pdf, last accessed 31 January 2020.
146 Ibid.
147 N 65; Wind, n 52, 290.
148 Christoffersen and Madsen, n 66, 265.
149 N 66.
150 Christoffersen and Madsen, n 66, 266.
151 Wind, n 52, 286 and 299.
152 Wind, n 52, 300.
153 Wind, n 52, 292.
154 *Urgenda*, third instance, 5.7.1–5.7.9.

In the *Vienna Airport* case, the Austrian Federal Administrative Court used the principle of sustainable development to support its finding that the administrative bodies failed to weight climate change interests against economic interests when they approved the construction of the third runway at the Vienna Airport. However, rather than referring to the basis of this principle in international environmental law, the court used the expression of the principle in national legislation, namely the Constitution of Lower Austria and the Federal Constitutional Law for Sustainability. Reviewing this decision, the Constitutional Court refrained from commenting on the use of environmental law principles in the case. In fact, the word 'principle' does not appear in the decision even once. The Constitutional Court remained strictly within the positivistic attitude towards the interpretation and application of national laws.

Considering the dualistic character of the Danish legal system and the dogmatic approach of the Danish judicial branch,[155] it seems highly unlikely that principles of international environmental law could be used independently as a source of the state authorities' obligations. Yet, they may be used as a source of law in situations where they have been articulated in national legislation.[156] Such disregard for independent use of environmental law principles might be striking at first in a country with a strong environmental protection pedigree, but it should be considered in the context of the whole legal system. When exercising competences under the Planning Act, administrative authorities are both guided and restricted by legal principles. Environmental law principles fall mostly under the guiding principles, while administrative law principles, such as the legality principle, have a more restricting function.[157] Thus, while the principle of fairness has a prominent position at Danish courts when, for example, commercial law disputes are decided,[158] it is of less importance in administrative law, which is strictly positivistic.

## 4. Conclusion

The analysis above demonstrates that several factors pose challenges to bring and succeed with CCL concerning hyperscale data centres in Denmark. These include the difficulties in finding an appropriate legal basis for plaintiffs' claims, the fulfilment of the requirements for standing, and the reluctance to use international legal sources by national courts. On the example of the Danish legal system, we thus show that the transferability of legal arguments and strategies used in CCL among jurisdictions is not straightforward. Due to differences in national legal orders and their political foundations as well as factual differences among individual CCL, no one case is transferable in its entirety. Yet, individual arguments and strategies from foreign judgements can be used on a 'pick and choose' basis, allowing plaintiffs to use them as puzzle pieces to build up a new case fit for the specific factual and legal circumstances of their jurisdiction. In that sense, the growing number of CCL globally 'arms' the plaintiffs. However, they also 'arm' the defendants and underpin the courts' reluctance to decide on topics, so far, considered to be within the political realm. The

[155] J Vedsted-Hansen, 'The absence of foreign law in Danish asylum decisions – quasi-judicial monologue with domestic policy focus?' in G S Goodwin-Gil and H Lambert (eds.), *The Limits of Transnational Law* (CUP, 2010), 182-184.

[156] An example can be found in Sections 9i–9r of the EP Act reflecting the polluter-pays-principle.

[157] E M Basse (ed.), *Miljøretten 1, Almindelige emner* (Jurist- og Økonomforbundets Forlag 2006, 2nd ed.) 113.

[158] K Mitkidis and T Neumann, 'Entire Agreement Clauses: Convergence between US and Danish Contract Law?' (2017) 2017/2 Nordic Journal of Commercial Law 180, 205.

partial transferability of CCL thus brings along not only positive effects.

In line with this, our analysis shows that although relevant legal bases do exist and although gaining standing and the use of international law is not completely ruled out, to bring *successful* CCL in Denmark seems to be more a theoretical than a practical possibility. However, this does not mean that bringing CCL in Denmark will have no influence or effects at all.

CCL may have a multitude of indirect or other-than-legal effects. In addition to the obvious effects of publicising and creating awareness about the cause, CCL may bring to light specific climate change impacts or specific mitigation and adaptation failures,[159] thus making the problem, the need for action, and the urgency more tangible. Moreover, CCL and the courts may provide a forum for changing the discourse and the understanding of the climate change problem,[160] and for changing the tone of the debate, thereby enabling and enhancing the public political debates on climate change.[161] The Danish public debate on climate change has been intensified with the new Climate Act planned to come into effect during 2020[162] as well as with the adoption of the proposal for a European Climate Law.[163] This might be a sign of the constitutionalisation of the climate change issue in Denmark,[164] which moves climate change from being *only* a political issue towards being a constitutional and, thus, a legal matter.[165] It would follow that courts might be able to – legitimately – make decisions on climate change without being at odds with the principle of separation of powers.[166] However, only time will tell whether this development will take place in Denmark, a country that is characterized by a strict division between the legislative and judicial powers.

The 'informal' effects of CCL may have an indirect regulatory impact in the sense that they may lead to a shift in the 'regulatory environment for addressing climate change' and stimulate different (policy or regulatory) choices.[167] Through informal and indirect effects of CCL, attention could be drawn to relevant administrative and political decisions and their potential inconsistency with the Danish government's broader climate change policies. Thus, CCL could spark important debates and, perhaps, action on aligning policies across different fields, which would lead to a more coherent climate change response. Such effects would also suggest that even the challenge of one concrete decision (e.g. a decision adopted by a municipality on the local plan) has the potential of constitutional strategic CCL.

We would also like to highlight that even though this paper has taken a specific data cen-

[159] N S Ghaleigh, '"Six honest-serving men": Climate change litigation as legal mobilization and the utility of typologies' (2010) 1(1) Climate Law 31; Peel and Osofsky, n 53, 67.

[160] Osofsky, n 4, 8.

[161] S Bogojevic, 'EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture' (2013) 35(3) Law & Policy 184, 187.

[162] N 71.

[163] Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), 4.3.2020 COM(2020) 80 final.

[164] This tendency is already observed on the global scale. See L Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 Transnational Environmental Law 55, 71.

[165] Burgers, n 164, 71-73, 75. Burgers bases her analysis on the political theory on deliberative democracy of the German philosopher and sociologist J Habermas (*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Wiliam Reig tr, John Wiley & Sons, 2015)).

[166] Burgers, n 164.

[167] J Peel and H M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 24-25, 47-48.

tre scenario as its focus, many of the legal findings, discussions, and considerations are more general. This extends the relevance of this paper beyond the (somewhat) hypothetical climate problems related to the estimated future number of hyperscale data centres in Denmark. It demonstrates that no jurisdiction is immune to CCL. Even though Denmark is often considered a 'green' and climate-conscious country, concrete decisions in different policy areas may not be perfectly in line with this perception of Denmark and the state's central climate policies.

Yet, it becomes relevant to ask whether the national perspective is the most useful one for judging climate change topics. While the decision to host hyperscale data centres in Denmark might endanger the achievement of the national climate change targets, it seems like a sound decision from the global perspective.[168] This brings the widely-researched topic of the multi-level governance of climate change[169] and the efforts of aligning the various levels of legal regulation into the centre.

We thus call for more research into the position of national CCL within the multi-level legal order and exercising more caution from legal scholars when they suggest the transferability of CCL among jurisdictions.

[168] N 44.

[169] E.g. J Scott, 'Climate Change Governance: Policy and Litigation in a Multi-Level System' (2011) 5(1) *Carbon & Climate Law Review* 25; J Peel, L. C. Godden and R. Keenan, 'Climate Change Law in an Era of Multi-Level Governance' (2012) 1(2) *Transnational Environmental Law* 245; M Jänicke, 'The Multi-level System of Global Climate Governance – the Model and its Current State' (2017) 27(2) *Env. Pol. Gov*. 108; M Di Gregorio et al., 'Multi-level governance and power in climate change policy networks' (2019) 54 Global Environmental Change 64.

# Accountability in the Paris Agreement: The Interplay between Transparency and Compliance

*Christina Voigt* and Xiang Gao***

## Abstract

Following the adoption and entry into force of the Paris Agreement, the "Climate Package"[1], adopted in Katowice in December 2018, is generally regarded as the "Rulebook" for the implementation of the Paris Agreement.[2] The negotiations of the Agreement and the "Rulebook" were conducted on a theme-by-theme basis. However, the Paris Agreement can only be implemented as one holistic instrument. This article aims at identifying the inter-linkages of different parts of the package, especially between the procedural arrangements for enhancing transparency and for promoting compliance. Both aspects together establish the basis for Parties´ accountability for their performance under the Paris Agreement. In this article, the authors start with the elaboration of accountability in the context of the Paris Agreement, followed by an in-depth analysis of the two accountability procedures; namely the enhanced transparency framework (ETF) and the modalities for the committee to facilitate implementation and promote compliance ("Article 15 Committee"). The authors find that both procedures together function as an "accountability continuum". In the end, they highlight some unresolved issues which could lead to uncertainties in implementation. They also provide suggestions for further academic research as well as for policy making.

***Keywords**: Paris Agreement, accountability, transparency, reporting, review, compliance, governance*

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[1] Katowice climate package. https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package. The Climate Package is a series of decisions adopted by the conference of the Parties of the UNFCCC, Kyoto Protocol, and the Paris Agreement.

[2] Liu Zhenmin and Patricia Espinosa, *Tackling climate change to accelerate sustainable development*, Nature Climate Change, 9: 494-496 (24 June 2019); Charlotte Streck, Moritz von Unger and Nicole Krämer; From Paris to Katowice: COP-24 Tackles the Paris Rulebook, *Journal for European Environmental & Planning Law*, 16(2): 165-190 (2019).

## 1. Transparency and Accountability: Clarifying Terms

### a) What is Accountability?

"Accountability" is a many-faceted term. In the context of governance, it generally means answerability for actions.[3] Grant and Keohane define accountability as the power or right to be held to a set of standards.[4] Keohane further suggests three components of accountability: standards, information, and sanctions.[5] Some consider accountability as a tool to constrain power by "the linkage of two components: the ability to know what an actor is doing and the ability to make that actor do something else".[6] It is also more generally accepted as a means to accept responsibility for actions, disclose them and to increase accessibility to and transparency of information about them.

In the context of the Paris Agreement, the authors adopt the wider understanding of accountability as responsibility for actions and accessibility to and transparency of information about those actions. The Paris Agreement established a system where Parties are left with significant discretion in defining their mitigation and adaptation efforts to climate change. On the one hand, it encourages the wide participation of Parties, while it on the other hand seeks to match global goals listed in Article 2, paragraph 1 (a–c), with the aggregate efforts of Parties. In order to facilitate each Party to prepare and implement its Nationally Determined Contribution (NDC) at the highest possible ambition, and in order to meet the global goals, it is crucial to hold each Party accountable for its performance of its obligations under the Paris Agreement. In this context, it could be argued that the inclusion of sanctions and other punitive measures and of an enforcement mechanism would have held stronger accountability elements.[7] However, for political reasons this was not possible. Instead, Parties agreed that the Agreement will be implemented in a facilitative, non-adversarial, non-punitive manner and in an atmosphere of mutual trust.

The authors therefore define "accountability" in the context of the Paris Agreement as holding Parties accountable for their performance in light of the nature and content of relevant provisions of the Agreement and in relation to the mechanisms and procedures established under the Agreement. The Paris Agreement sets up several elements for Parties' individual "accountability" in such wider sense which, when seen together, can be considered an "accountability continuum": the continuum of each Party's interconnected individual obligations, where one follows from the other. In concrete terms, this can be described in the following way: From the obligation to submit an NDC and to provide information necessary for clarity, transparency and understanding of that NDC[8], flows the obligation to report on the progress in implementing and achieving this NDC through the enhanced framework for transparency of action and support[9], including a technical expert review and participation at the facilitative, multilateral consideration of progress, and, finally, the engagement with the mechanism to promote compliance and facilitate implementation of the pro-

[3] See Richard Mulgan, «Accountability»: An ever-expanding concept?, 78 *Public Administration* 4, 555-573 (2000).

[4] Ruth Grant and Robert Keohane, Accountability and Abuses of Power in World Politics, *The American Political Science Review*, 99(1): 29-43 (2005).

[5] Robert Keohane, Abuse of Power: Assessing Accountability in World Politics, *Harvard International Review*, 27(2): 48-53 (2005).

[6] Thomas Hale, Transparency, accountability, and global governance, *Global Governance* 14: 73-94 (2008).

[7] Daniel Bodansky, *The Art and Craft of International Environmental Law*, Harvard University Press (2010).

[8] Article 4, paragraph 8, Paris Agreement; and Decision 4/CMA.1.

[9] Article 13 Paris Agreement; and Decision 18/CMA.1.

visions of the Paris Agreement in cases where a Party encounters difficulties with implementing and/or complying with its obligations.[10]

While the provisions in the Paris Agreement were instrumental for establishing the core obligations, procedures and institutional set-ups; they were insufficient in making those arrangements operational.[11] The "Rulebook" adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) at its first session in 2018 solved this core issue by specifying provisions, including on enhancing transparency of action and support[12], and by adopting the modalities and procedures for the committee to facilitate implementation of and promote compliance with the provisions of the Paris Agreement, established by Article 15 to (hereinafter as "Article 15 committee").[13]

The "Rulebook" includes 18 decisions[14] aiming at enabling the comprehensive implementation of the Paris Agreement by its Parties. In order to understand how Parties are to implement the agreement in a responsible manner and to fully grasp Parties´ accountability throughout the various stages of implementation ("accountability continuum"), it is important to analyze the inter-linkages among the different parts and mechanisms of the Paris Agreement and its "Rulebook". In this article, the authors explain how these mechanisms are expected to work, how they relate to each other, and which questions (still) arise in ensuring effective and integrated functioning of the various accountability elements.

**b) The Role of Transparency**

The term "transparency" is borrowed from physics where it describes the property of allowing light to pass through matter without being scattered.[15] Transparency is often cited as a metaphor, implying visibility in contexts related to the behavior of individuals or groups, and beyond that, openness, communication, and accountability. Scholars have defined "transparency" under international politics or international law in different ways, and generally, they regard "transparency" as a right of access to and dissemination of relevant information.[16] Those defi-

[10] Article 15 Paris Agreement; and Decision 20/CMA.1.

[11] Daniel Bodansky, The Legal Character of the Paris Agreement, *Review of European Community & International Environmental Law* 25(2): 142-150 (2016); Xiangwen Kong, Achieving accountability in climate negotiations: Past practices and implications for the post-2020 agreement, *Chinese Journal of International Law*, 14(3): 545-565. (2015); Christina Voigt, The Compliance and Implementation Mechanism of the Paris Agreement, 25 *Review of European, Comparative & International Environmental Law* 2, 1-13 (2016); Gu Zihua, Christina Voigt and Jacob Werksman, Facilitating Implementation and Promoting Compliance with the Paris Agreement: Conceptual Challenges and Pragmatic Choices, 9 *Climate Law*, 65-100 (2019).

[12] Decisions 4, 5, 6, 9, 10, 12 and 18 of CMA.1, and part of Decision 11/CMA.1 with regard to experiences sharing on adaptation efforts.

[13] Decision 20/CMA.1 (2018), Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement.

[14] For an overview of the decisions, see: https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package.

[15] M. Kerker, *The Scattering of Light* (Academic, New York) (1969).

[16] A. Tzanakopoulos, Transparency in the security council. In: A. Bianchi, A. Peters (Eds.), *Transparency in International Law* (Cambridge University Press) 367-391 (2013); C. Creamer and Beth Simmons, Transparency at home: how well do governments share human rights information with citizens? In: Bianchi, A., Peters, A. (Eds.), *Transparency in International Law* (Cambridge University Press) 239-268 (2013).; Anne Peters, Towards transparency as a global norm. In: Bianchi, A., Peters, A. (Eds.), *Transparency in International Law* (Cambridge University Press) 534-607 (2013); Tian Wang and Xiang Gao, Reflection and operationalization of the common but differentiated responsibilities and respective capabilities principle in the transparency framework under the international climate change regime, *Advances in Climate Change Research*. 9: 253-263 (2018).

nitions echo with the practice of existing transparency arrangements in international treaties.

Transparency is closely related to accountability. As mentioned above, transparency is often considered to be the basis of accountability and, thus, a condition for the international legitimacy of state behavior. It has been argued that international agreements are more likely to succeed in the negotiation and implementation process when they are built on increasing transparency of verifiable data and information.[17] Such agreements enhance mutual trust and create stronger confidence in agreed norms, and can better influence the behavior of nations to improve the effectiveness of international institutions.

Transparency is a fundamental issue in global climate governance.[18] As one of the six pillars of the negotiation process[19] towards the Paris Agreement, transparency has always been at the heart of the UN climate negotiations from Durban to Paris and to Katowice, and the adoption of modalities, procedures and guidelines (MPGs) for the transparency framework for action and support has been seen as a "highlight" of the whole "Rulebook".[20]

As the Paris Agreement adopted a system that requires its Parties to strengthen the global response to the threat of climate change in a nationally determined way, a robust transparency system was crucial to ensure the implementation and effectiveness of such a regime.[21]

Under the Paris Agreement, the enhanced transparency framework fulfills four functions: (i) to understand the contribution of each Party towards the collective temperature goal of the Paris Agreement; (ii) to provide an opportunity for the sharing of experiences and for mutual learning; (iii) to create peer pressure between Parties in order to facilitate the improvement of their performance; and (iv) to enable the public to engage in decision-making which will contribute to the implementation and achievement of NDC.

*i. Understanding the contribution of each Party towards the collective temperature goal of the Paris Agreement*

Under the Kyoto Protocol, developed country Parties agreed on negotiated quantifiable emissions limitation and reduction commitments (QELRCs) and relevant common accounting, re-

[17] Jesse Ausubel and David Victor, Verification of International Environmental Agreements, *Annual Review of Energy and the Environment*, 17(1): 2-3 (1992); Owen Greene, International Environmental Regimes: Verification and Implementation Review, *Environmental Politics*, 2(4): 156-173 (1993).

[18] Aarti Gupta, Transparency in Global Environmental Governance: A Coming of Age? *Global Environmental Politics*, 10(3): 1-9 (2010).

[19] Decision 1/CP.17 (2011), Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action.

[20] U.S. Department of State, Outcome of the 24th Session of the Conference of the Parties (COP24) to the UN Framework Convention on Climate Change (UNFCCC); available at: https://www.state.gov/r/pa/prs/ps/2018/12/288121.htm (2018); European Commission, UN climate talks: EU plays instrumental role in making the Paris Agreement operational, available at: https://ec.europa.eu/clima/news/un-climate-talks-eu-plays-instrumental-role-making-paris-agreement-operational_en (2018).

[21] Daniel Bodansky, The legal character of the Paris Agreement, *Review of European Comparative & International Environmental Law*, 25(2): 142-150 (2016); Christina Voigt and Felipe Ferreira, "Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement, 5 *Transnational Environmental Law* 2, 285-303 (2016); Lavanya Rajamani, Developing countries and compliance in the climate regime, In: Jutta Brunnee, Meinhard Doelle, and Lavanja Rajamani (Eds.), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press) 367-394 (2012); Harald Winkler, Brian Mantlana and Thapelo Letete, Transparency of action and support in the Paris Agreement, *Climate Policy*, 17(7):853-8722 (2017); Peter Lawrence and Daryl Wong, Soft law in the Paris climate agreement: strength or weakness? *Review of European, Comparative and International Environmental Law*, 26(3): 276-286 (2017).

porting and review rules. The QELRCs are listed in Annex B of the Kyoto Protocol. The aggregated emission reduction commitments by these Parties are defined in Article 3 of the Protocol, which shall not exceed the QELRCs. Article 3 gives these commitments legally binding effect. Different from the Kyoto Protocol, the system set by the Paris Agreement allows each Party to determine its contribution individually.

The Agreement gives guidance on the scope of Parties NDC, their level of ambition ("highest possible ambition") and progression in article 4, paragraphs 3 and 4. Other than that, Parties are required to provide information when they communicate their NDC on certain elements (sometimes referred to as "*ex-ante* transparency"), such as, the reference point, time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches and how it considers its NDC to be fair, ambitious and contributing towards the objective of the Convention. Without such information, it would be difficult to understand the NDC of a Party. Even the Party itself could encounter difficulties in the design and implementation of its NDC. This would also cause problems to the assessment on an aggregate level, as it would be impossible to compare the coverage and content of the NDC of one Party with those of others. During the implementing phase and after the end of the NDC period, transparency (also sometimes referred to as "*ex-post* transparency") of information in the context of reporting is important in order to understand the progress made by each Party and whether it achieved its NDC or not. This is crucial for building mutual trust and confidence that efforts are taken without free-riding.

*ii. Providing an opportunity for the sharing of experiences and for mutual learning*

Information provided under the enhanced transparency framework is not only fact-based, but also provides insights into how well a Party is making its effort to address climate change, including which challenges and possibilities it encounters. There are success-stories and good practices, failures and lessons learnt, as well as assessments on gaps and needs. The transparency provisions can also provide a possibility for Parties to get into a dialogue with each other in order to enhance mutual learning.

*iii. Creating peer pressure between Parties in order to facilitate the improvement of their performance*

When preparing the information required under the transparency framework and when making it public, it requires of governments to seriously consider their commitments and implementation, as the information disclosed could have reputational costs.

*iv. Enabling the public to engage in decision-making which will contribute to the implementation and achievement of NDC*

National strategies, laws and policies are the instruments for states' climate actions. Transparency on NDC, its implementation and achievement will draw public awareness towards the "climate attitude" of a country or regional economic integration organization. It can also encourage sub-national governments, businesses, non-governmental organizations, civil society, and individuals to make climate-friendly decisions, either because of political incentives, or business interest, or reputation, or faith. The more stakeholders actively engage in climate policies and measures, the easier and more effective a Party could achieve its NDC, and, thus, be accountable for its commitment.

This article will next analyze how the transparency framework under the Paris Agreement is supposed to function.

## 2. Transparency in the Paris Agreement

### a) Transparency in a wider sense: Article 13 and other relevant provisions

Although Article 13 of the Paris Agreement is widely regarded as *the* "transparency article", the authors argue that there are several other articles, which also set up requirements relevant for transparency. These articles and provisions, together with relevant CMA decisions adopted by CMA.1 in Katowice in 2018, are meant to enhance the transparency of planned and implemented actions and support by Parties of the Paris Agreement, as shown in Table 1.

**Table 1. Relevant transparency provisions of the Paris Agreement**

| Article (paragraph) | Corresponding CMA decisions | Component and transparency related activities | | | | |
|---|---|---|---|---|---|---|
| | | mitigation | adaptation | finance support | technology development and transfer | capacity building |
| 4 (2, 8, 9) | 4/CMA.1 | Information to be provided when communicating an NDC (ex-ante) | | | | |
| 4 (13) | 4/CMA.1 | Accounting for NDC, in accordance with guidance under Article 4 | | | | |
| 6 (2, 5) | 8/CMA.1 and further decisions to be taken by CMA | Accounting for cooperative approaches | | | | |
| 7 (10) | 9/CMA.1 | | Communication | | | |
| 9 (5) | 12/CMA.1 | | | Communication of indicative quantitative and qualitative information on financial resources to be provided | | |
| 9 (7) | 18/CMA.1 | | | Information on support provided and mobilized | | |
| 11 (4) | | | | | | Report |
| 13 (7a) | 18/CMA.1 | Report (Greenhouse Gas Inventory) | | | | |
| 13 (7b) | 18/CMA.1 | Report on progress in implementing and achieving the NDC (ex-post) | | | | |
| 13 (8) | 18/CMA.1 | | Report | | | |
| 13 (9) | 18/CMA.1 | | | Report (ex-post on providing) | Report (ex-post on providing) | Report (ex-post on providing) |
| 13 (10) | 18/CMA.1 | | | report (needed and received) | report (needed and received) | report (needed and received) |
| 13 (11) | 18/CMA.1 | TER and FMCP (ex-post) | | TER and FMCP (ex-post on providing) | TER (ex-post on providing) | TER (ex-post on providing) |

*Note: 1) TER refers to "technical expert review"; 2) FMCP refers to "facilitative, multilateral consideration of progress".*

### b) Nature of the transparency framework under Article 13 of the Paris Agreement

The transparency framework is facilitative in nature. The purpose of the transparency framework, as stated in Article 13, paragraphs 5 and 6, is to build mutual trust and confidence, to provide a clear understanding of actions, provide clarity on support provided and received, and to inform the global stocktake under Article 14 of the Paris Agreement. There is no intention for any punitive consequence or sanction within the transparency framework; though voluntary or reputational consequences may result. Paragraph 3 of Article 13 states clearly that the transparency framework shall "be implemented in a

facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties".

The articles and CMA decisions listed in Table 1 above set out the transparency required of Parties to the Paris Agreement. However, these provisions are not all of the same legal nature. In the context of the UNFCCC, the Kyoto Protocol and the Paris Agreement and based on a shared understanding and practice by Parties, a provision using "shall" is mandatory in nature and leads to different consequences compared to "should" or "may" provisions. For example, under the Paris Agreement, the stronger normative character of "shall provisions" has the effect that non-compliance by a Party with those obligations will be addressed by the Paris Agreement implementation and compliance committee. Paragraph 22(a) of Decision 20/CMA.1, Annex, lists mandatory reporting or communication obligations, all of which are "shall" provisions in the Paris Agreement and all of which, if not adhered to by a Party, lead to initiations of committee proceedings. Moreover, during the technical expert review process, a Party which has not met a "shall" reporting requirement will receive a "recommendation", while for non-"shall" provisions, it will only receive an "encouragement". This consequence is set out in paragraph 162 of Decision 18/CMA.1.

With respect to the decisions of the CMA, their legal nature depends on the mandate for the CMA expressed in the Paris Agreement itself. Only if the mandate is formulated in a manner that gives competence to the CMA to adopt a legally-binding decision, that decision is mandatory.[22] One example of such mandate is Article 4, paragraph 8, of the Paris Agreement.

For the provisions in Table 1, there are three types of legal nature:

- mandatory for all Parties, for example, Article 4, paragraphs 2, 8, 9, and 13, Article 6, paragraphs 2 and 5, Article 11, paragraph 4, and Article 13, paragraphs 7(a), 7(b) and 11;
- mandatory for developed country Parties, but voluntary for the rest, including Article 9 (provisions of paragraphs 5 and 7), and Article 13, paragraph 9; and
- voluntary for any Party, including provisions of Article 7, paragraph 10, and Article 13, paragraph 8.

**c) Components, institutional arrangements, and processes**

The mandate for the negotiation of the Paris Agreement, the Durban Platform, established by COP17 in 2011[23] clearly indicated the six pillars of the negotiation process, among which five are substantive issues, namely mitigation, adaptation, finance, technology development and transfer, and capacity-building. The sixth one is of procedural character, which is the transparency of action and support. It was understood that the outcome of the transparency negotiations would cover all the five substantive issues. It is therefore no surprise, that the final outcome, as shown in Table 1, does cover all the five substantive issues.

As mentioned above, for providing and enhancing transparency under the Paris Agreement (i.e. "ex-ante" information on NDCs and adaptation information, as well as "ex-post" reporting and review), there are several channels, vehicles and arrangements: (i) the communication of an NDC including necessary informa-

[22] Robin R. Churchill and Geir Ulfstein, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, *The American Journal of International Law*, Vol. 94, No.4, 623-659 (2000).

[23] Decision 1/CP.17 (2011), Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action.

tion, (ii) adaptation communication, (iii) biennial communication of indicative quantitative and qualitative information related to Article 9, paragraph 5, of the Paris Agreement; ("Article 9.5 communication" for short), (iv) other information on support; (v) biennial transparency reports (BTRs) and the national inventory report; (vi) the technical expert review (TER); and (vii) the facilitative, multilateral consideration of progress (FMCP).

*i. The NDC communication*

According to Article 4, paragraphs 2, 8 and 9, communicating an NDC every five years is mandatory for all Parties. When communicating an NDC, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the CMA. In other words, it is mandatory for all Parties to provide such information. Decision 4/CMA.1 adopted the guidance on such information, as applicable to each Party´s NDC. At the same time, CMA1 decided that Parties shall provide the information necessary for clarity, transparency and understanding when communicating their second and subsequent NDCs in accordance with the guidance adopted in Annex I of Decision 4/CMA.1.[24] However, Parties are strongly encouraged to provide this information already in relation to their first NDC, including when communicating or updating it by 2020.[25]

Before the adoption of the Paris Agreement, according to Decision 1/CP.19[26], Parties were invited to communicate intended nationally determined contributions (INDCs) by 2015, which started the five-year processes of NDC communication.[27] When Parties joined the Paris Agreement, they either submitted an NDC or transformed their INDC into an NDC. NDCs communicated by Parties are recorded in an interim public registry maintained by the secretariat. Each Party is obliged to pursue domestic measures, with the aim of achieving the objectives included in its NDC. There is a general understanding that the achievement of the NDC is not a legally binding obligation[28], and there is no mechanism to individually review the content or level of ambition of the NDC itself as communicated by each Party.

Article 4, paragraph 13, further obliges Parties to account for anthropogenic emissions and removals corresponding to their NDCs in accordance with guidance adopted by the CMA.[29] The Katowice outcome has also provided the

[24] Decision 4/CMA.1 (2018), Further guidance in relation to the mitigation section of decision 1/CP.21, paragraph 7.

[25] Ibid.

[26] Decision 1/CP.19 (2013), Further advancing the Durban Platform.

[27] According to Decision 1/CP.21, paragraph 23, the COP "requests those Parties whose intended nationally determined contribution […] contains a time frame up to 2025 to communicate by 2020 a new [NDC] and to do so every five years thereafter pursuant to Article 4, paragraph 9, of the Agreement", while in paragraph 24 of Decision 1/CP.21, the COP "requests those Parties whose intended nationally determined contribution pursuant to decision 1/CP.20 contains a time frame up to 2030 to communicate or update by 2020 these contributions and to do so every five years thereafter pursuant to Article 4, paragraph 9, of the Agreement". After lengthy negotiations, CMA2 in Madrid in 2019, recalled those provisions and urged Parties to consider the "significant gap between the aggregate effect of Parties´ mitigation efforts in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels" with a view to reflecting their highest possible ambition when responding to the request to communicate a new or update their existing NDC in 2020. See: Decision 1/CMA.2, paragraphs 7 and 5.

[28] Daniel Bodansky, The legal character of the Paris Agreement, *Review of European Comparative & International Environmental Law*, 25(2): 142-150 (2016).

[29] Article 4, paragraph 13, Paris Agreement.

guidance for accounting, but it is only mandatory for the second and subsequent NDCs, while Parties may elect to apply the accounting guidance already in relation to their first NDC.[30] There is no review or multilateral consideration process for the information provided when communicating an NDC.

Accounting for the NDC, however, shall be done in the biennial transparency reports (BTRs), including through a structured summary, and will be subject to technical expert review as well as facilitative multilateral consideration of progress, according to Article 13 of the Paris Agreement.

When submitting their NDCs, Parties shall, *inter alia*, provide assumptions and methodological approaches for accounting for emissions and removals as well as assumptions and methodological approaches for accounting for the implementation of policies and measures in the NDC.[31] The accounting approach is important to ensure that the NDC is robust and progress and achievement of the NDC is transparent and reliable. A Party shall make its accounting approach clear when communicating its NDC. In the same spirit as NDCs, the accounting approach is nationally determined. However, there are some basic requirements. According to Article 4, paragraph 13, in accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, including as per Article 6, paragraph 2, Parties shall apply robust accounting to ensure the avoidance of double counting. This applies, in particular, when Parties participate in cooperative approaches under Article 6, paragraphs 2 and 4. Moreover, when accounting for their NDCs, Parties shall use common metrics and methodologies assessed by the IPCC and adopted by the CMA. If this is not possible due to the type or nature of a Party´s NDC, the Party needs to provide information on their own methodology used.[32] In accounting for their NDC, Parties need further to ensure methodological consistency, including on baselines, between the communication of their NDC and its implementation.[33]

*ii. The adaptation communication*

Article 7 requests each Party to submit and update periodically an adaptation communication. Decision 9/CMA.1 adopted the guidance for it. However, neither the submission and update, nor the application of guidance in Decision 9/CMA.1 is mandatory. There also is no provision to define "periodically", which means Parties could submit an adaptation communication whenever they wish to do so without a fixed frequency. Furthermore, according to that decision, the adaptation communication is not subject to review.

There is a real danger of a duplication between adaptation communication established by Article 7, paragraph 10 and the reporting on adaptation issues under Article 13, paragraph 8, which are both provisions on how to report on adaptation related issues. However, Decision 9/CMA.1 on adaptation communication under Article 7 makes it clear that "the adaptation communication shall be, as appropriate, submitted and updated periodically, as a component of or in conjunction with other communications or documents, including a national adaptation plan, a nationally determined contribution as referred to in Article 4, paragraph 2, of the Paris

[30] Decision 4/CMA.1, paragraph 14.
[31] Decision 4/CMA.1, Annex I, paragraph 5.
[32] Decision 4/CMA.1, Annex II, paragraph 1.
[33] Decision 4/CMA.1, Annex II, paragraph 2.

Agreement and/or a national communication". Furthermore, according to COP decision 1/CP.24[34], "Parties may submit their national communication and BTR as a single report". Therefore, it seems rather unlikely that there will be a stand-alone and comprehensive "adaptation communication" by a Party in the near future. Rather, we might see either that Parties name their "national adaptation plan" also "adaptation communication", or they could attach an additional document to their "national adaptation plan" or to their NDC called "adaptation communication", or there could be a part of the NDC or national communication or even BTR marked as "adaptation communication".

The adaptation communication or reporting of adaptation in the BTR is not subject to review, as agreed in Decision 9/CMA.1 and Article 13 of the Paris Agreement, respectively. However, if a Party includes an adaptation component in its NDC, and reports the progress of such component in accordance with the transparency guidance contained in Decision 18/CMA.1, it could be argued that according to Article 13, paragraph 11, of the Paris Agreement, also this information undergoes a TER and FMCP. However, this scenario is somewhat uncertain. Equally, the argument could be made that Article 13, paragraph 7, refers to the NDC under Article 4. Even if is possible to submit an adaptation communication under Article 7 through the NDC, the guidance on NDC information in CMA decision 4/CMA.1 is without prejudice to the inclusion of such an adaptation communication.[35] It can be expected, however, that this uncertainty will be resolved by the TER practice.

*iii. "Article 9.5 communication"*

According to Article 9, paragraph 5, it is mandatory for developed country Parties and optional for other Parties to biennially communicate indicative quantitative and qualitative information related to climate finance. Decision 12/CMA.1 adopted guidance on the types of information to be provided by Parties in this regard, and requested developed country Parties to provide such information starting in 2020.[36] It is not clear, however, whether Parties will submit such information in conjunction with their NDC or BTR or as a stand-alone document; although the latter appears to be highly likely. In any case, it is understood that such information is outside the scope of TER process established by Article 13.

*iv. Other information on support*

Regarding the information of support, as shown in Table 2 below, the processes of providing information vary depending on the category of information and of Parties. Except for the "Article 9.5 communication", all other information of support is to be reported through the BTR. As discussed above, the communication of "Article 9.5 information" is mandatory for developed country Parties, while voluntary for the others and not subject to TER or FMCP. There is no requirement on indicative reporting for

[34] Decision 1/CP.24 (2018) Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

[35] Decision 4/CMA.1, paragraph 8 "*Emphasizes* that the guidance on information necessary for clarity, transparency and understanding is without prejudice to the inclusion of components other than mitigation in a nationally determined contribution, *notes* that Parties may provide other information when submitting their nationally determined contributions, and in particular that, as provided in Article 7, paragraph 11, of the Paris Agreement, an adaptation communication referred to in Article 7, paragraph 10, of the Paris Agreement may be submitted as a component of or in conjunction with a nationally determined contribution as referred in Article 4, paragraph 2, of the Paris Agreement…".

[36] Decision 12/CMA.1 (2018), Identification of the information to be provided by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement.

technology development and transfer nor for capacity building support. Reporting and TER on financial, technology development and transfer and capacity-building support provided and mobilized is mandatory for developed country Parties, but only the information on financial support will undergo FMCP as a mandatory requirement. Reporting on financial, technology development and transfer and capacity-building support provided and mobilized is not mandatory for other Parties, including developing country Parties, that provide support. However, according to Article 13, paragraph 11, of the Paris Agreement, if these Parties voluntarily provide this information, the TER of such information should be mandatory, and the FMCP for the information on financial support will also be mandatory. Nevertheless, in Katowice the CMA agreed that these Parties' information may undergo TER at the Party's discretion.[37] Information on support needed and received by developing countries is not mandatory, and such information will not undergo TER nor FMCP.

*v. BTR and national inventory report*

Article 13 of the Paris Agreement does not set up the requirement for Parties to submit a BTR. It only establishes clarity on which information Parties need to provide, and which information will undergo a technical expert review. Paragraph 90 of Decision 1/CP.21 requests all Parties to provide relevant information as requested by Paris Agreement "no less frequently than on a biennial basis", and therefore the outcome of Katowice negotiation decides that Parties shall submit relevant information on a biennial basis, and named the document BTR. In the BTR, each Party shall provide a national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs, the information necessary to track progress in implementing and achieving its NDC, and voluntary information on climate change impacts and adaptation. Furthermore, developed country Parties shall provide information pursuant to Article 13, paragraph 9, on provision of financial, technology transfer and capacity-building support provided to developing countries. Developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received under Articles 9, 10 and 11. Not all the information in the BTR will be subject to review, as the authors will elaborate in the following parts.

The relationship between BTR and the national inventory report varies depending on how a Party submits them. Decision 18/CMA.1 gives Parties the options to either submit a national inventory report as a stand-alone report or as a component of the BTR. At the same time, in order to avoid inconsistencies, Decision 1/CP.24 requests those Parties to the Convention that are also Parties to the Paris Agreement, to prepare and submit national inventory reports in accordance with Decision 18/CMA.1 including in years in which a BTR is not due under the Paris Agreement. This is to recognize that Annex I Parties to the Convention have the obligation under the Convention to submit national inventory reports annually. Respectively, Decision 18/CMA.1 creates a new mode of review called simplified review to be used for Party's national inventory report submitted in a year in which BTR is not due.

The first BTR, in accordance with the modalities, procedures and guidelines, is due at the latest by 31 December 2024.[38] This is because, in

[37] Decision 18/CMA.1(2018) Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, paragraph 150(c).

[38] UNFCCC. 2018. Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement. Decision 18/CMA.1, paragraph 3.

practice, there will be a time lag in collecting information and preparing for reporting according to agreed guidance. For example, in China the national statistics system usually takes almost two years to get energy, industry, agriculture and other activity data[39], and it would take more than one year to compile the greenhouse gas inventory. Since the NDC is for contributions from 2020 onward, data for at least 2021 is necessary to reflect any progress.

With regard to the information to be reported for tracking progress of NDC′ implementation and achievement, there is a general scope and a narrower scope, which is reflected as Section III.A and Section III.B. and C of Decision 18/CMA.1, respectively.

Under the general scope, each Party needs to provide information on national circumstances and institutional arrangements, including government structure, population profile, geographic profile, economic profile, climate profile and sector details. Institutional arrangements include legal, administrative and procedural arrangements for domestic monitoring, reporting, archiving of information and stakeholder engagement.[40]

For the narrower scope, the information to be reported includes a description of each Party′s NDC, including targets and descriptions, such as target types, target years or periods, reference points, levels baselines, base years, starting points and their values, time frames, scope and coverage, the intention to use cooperative approaches and any updates, mitigation policies and measures, actions and plans, summary of greenhouse gas emissions and removals, projections of greenhouse gas emissions and removals and other information, indicators to track progress and their value or information, accounting approach, explanation on the consistency of methodology used, and the assessment of whether the Party has achieved the target(s) for its previous NDC.[41]

As part of the accounting approach, each Party is also requested to report on the contribution from the land-use, land-use change and forest (LULUCF) sector, if it contributes to the achievement of NDC but is not included in the inventory time series of total net GHG emissions and removals. Also, for any Party that participates in cooperative approaches (Article 6, paragraph 2) that involve the use of internationally transferred mitigation outcomes (ITMOs) towards its NDC under Article 4, or authorizes the use of such mitigation outcomes for international mitigation purposes other than the achievement of its NDC, shall also provide the information on annual GHG emissions and removals, emission balance reflecting its use or acquisition of ITMOs, and other relevant information consistent with guidance to be developed for Article 6 of the Paris Agreement.

*vi. Technical Expert Review (TER)*

All information submitted under paragraphs 7 and 9 of Article 13 of the Paris Agreement, shall undergo a TER. This means that the national inventory report shall undergo a TER, whether it is submitted as a stand-alone report or as a component of the BTR, as well as information necessary to track progress made in implementing and achieving its NDC under Article 4 in the BTR and information on financial, technology development and transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11 of the Paris Agreement in the BTR. The TER is technical in nature, without introducing political judgment. Accord-

[39] For example, the "China Energy Statistical Yearbook 2018" which includes energy statistics information of the year 2017 was published on September 2019.

[40] Decision 18/CMA.1, paragraphs 59-63.

[41] Decision 18/CMA.1, paragraphs 64-79.

ing to Decision 18/CMA.1, the TER will be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty.[42] The TER will review the consistency of the information submitted by the Party with the modalities, procedures and guidelines of Decision 18/CMA.1, will consider the Party's implementation and achievement of its NDC and the Party's support provided, as relevant, will identify areas of improvement for the Party related to implementation of Article 13 of the Paris Agreement, and will assist in identifying capacity-building needs for those developing country Parties that need it in the light of their capacities.[43]

The TER for each individual Party is conducted by a single TER team and supported by the UNFCCC secretariat. The secretariat is responsible for the composition of TER teams to ensure the collective skills and competencies of the teams correspond to the information to be reviewed.

Decision 18/CMA.1 introduced at the same time a "negative mandate" for the TER teams, stating that the TER team shall not: 1) make political judgments; 2) review the adequacy or appropriateness of a Party's NDC under Article 4 of the Paris Agreement, of its associated description or of the indicators; 3) review the adequacy of a Party's domestic actions; 4) review the adequacy of a Party's support provided; 5) for those developing country Parties that need flexibility in the light of their capacities, review the Party's determination to apply flexibility that has been provided for in the MPGs, including the self-determined estimated time frames referred to in paragraph 6 above (of the Annex to Decision 18/CMA.1), or whether a developing country Party possesses the capacity to implement that specific provision without flexibility.

Prior to the Paris Agreement, under the UNFCCC, TERs for greenhouse gas inventory were carried out for developed country Parties only. The GHG inventory of developed country Parties was reviewed for any issue in the submitted report related to transparency, consistency, comparability, including failure to use agreed reporting formats, completeness, accuracy, and adherence to the UNFCCC Annex I inventory reporting guidelines. The technical review for Biennial Reports and National Communications of developed country Parties under the Convention only identified issues related to transparency, completeness, timeliness and adherence to the reporting guidelines.[44] For developing country Parties, the technical analysis (TA) process for Biennial Update Reports (BUR) under the Convention only identified the extent to which the necessary information was included in the BUR. It undertook a technical analysis of information contained in the BUR, and identified capacity-building needs in order to facilitate BUR reporting, and participating in international consultation and analysis (ICA).[45] The Katowice outcomes did not copy existing practice under the Convention. Rather, the TER under the Paris Agreement will now review, for all Parties, issues related to transparency, consistency, comparability, completeness, accuracy, and adherence to reporting guidelines, as applicable to different information categories.

The outcome of the TER will be a TER report for each individual Party. In the TER report,

[42] Decision 18/CMA.1 (2018) Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement.

[43] Ibid, paragraph 146.

[44] Decision 13/CP.20 (2014) Guidelines for the technical review of information reported under the Convention related to greenhouse gas inventories, biennial reports and national communications by Parties included in Annex I to the Convention.

[45] Decision 20/CP.19 (2013) Composition, modalities and procedures of the team of technical experts under international consultation and analysis.

the team will include "recommendations" (for "shall" provisions in reporting) and/or "encouragements" (for non-"shall" provisions in reporting).[46]

*vii. Facilitative multilateral consideration of progress (FMCP)*

In addition, each Party shall undergo a facilitative multilateral consideration of progress (FMCP). The FMCP will consider the information in the BTR and national inventory report submitted by each Party (except the adaptation related information), the TER report, and any additional information provided by the Party for the purpose of FMCP.

The FMCP will be conducted in two phases: a "question and answer phase" and a "working group phase". In the written question and answer phase, Parties may submit question to another Party within the information scope as above, and the Party in question shall make best efforts to respond. In the working group phase, after a Party made its presentation, other Parties could share their views for discussion. The working group sessions are also open to registered observers. The record of the FMCP, containing the questions submitted and answers provided, a copy of the Party´s presentation, a recording of the working group session, a procedural summary of the FMCP and any additional information generated during the FMCP will be published on the UNFCCC website by the secretariat.[47]

**Table 2. Information regarding financial, technology development and transfer and capacity-building support**

| | **Indicative information on financial resources to be provided** | **Financial support provided and mobilized** | **Technology development and transfer support provided** | **Capacity-building support provided** | **Financial support needed and received** | **Technology development and transfer support needed and received** | **Capacity-building support needed and received** |
|---|---|---|---|---|---|---|---|
| **Developed country Parties** | - R/C (mandatory, Article 9.5) | - R/C (mandatory, Articles 9.7 and 13.9)<br>- TER (mandatory, Article 13.11)<br>- FMCP (mandatory, Article 13.11) | - R/C (mandatory, Articles 13.9 and 10)<br>- TER (mandatory, Article 13.11) | - R/C (mandatory, Articles 13.9 and 11)<br>- TER (mandatory, Article 13.11) | N.A. | N.A. | N.A. |
| **Other Parties (including developing country Parties)** | - R/C (voluntary, Articles 9.2, 9.5(2), 13.9) | - R/C (voluntary, Articles 9.7 and 13.9)<br>- TER (mandatory Article 13.11)<br>- FMCP (mandatory, Article 13.11) | - R/C (voluntary, Article 3.9)<br>- TER (mandatory, Article 13.11) | - R/C (voluntary, Article 13.9)<br>- TER (mandatory, Article 13.11) | For developing country Parties:R/C (voluntary Articles 13.10 and 9) | For developing country Parties:R/C (voluntary Article s. 13.10) and 10 | For developing country Parties:R/C (voluntary Articles 13.10 and 11) |

*Note: 1) R/C refers to reporting or communicating; 2) TER refers to "technical expert review"; 3) FMCP refers to "facilitative, multilateral consideration of progress"; 4) N.A. means not applicable*

[46] Decision 18/CMA.1 (2018) Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement.

[47] Decision 18/CMA.1, Annex, paragraph 199.

**d) Further steps**

Although after three-years of negotiations on transparency provisions, the Katowice outcome provided the MPGs that should enable Parties to be ready for implementation, there are still two significant issues unresolved.

The first issue is the development of reporting tables and outlines to facilitate the reporting and review process, as well as to help the audience to easier and better understand the information provided. These negotiations are currently being conducted under the Subsidiary Body for Scientific and Technological Advice (SBSTA), and are supposed to conclude by the end of 2021, for adoption by CMA3.

The second issue is related to Article 6. There are three elements established by Article 6 of the Paris Agreement for a Party to use for achieving its NDC, on a voluntary basis. Article 6, paragraph 2, establishes cooperative approaches, under which mitigation outcomes can be internationally transferred towards the achieving of NDCs. To ensure environmental integrity and transparency, guidance to ensure that double counting is avoided on the basis of a corresponding adjustment by Parties is requested by Decision 1/CP.21, paragraph 36. Article 6, paragraph 4, establishes a mechanism, under which a body designated by CMA supervises the activities by Parties with regard to the quality of mitigation actions, verification and certification of emission reductions, and ensuring emission reductions is not used by more than one Party to demonstrate achievement of the NDC. Decision 1/CP.21 also requests the CMA to adopt rules, modalities and procedures in this regard. Article 6 also recognizes the importance of non-market approaches being available to Parties to assist in the implementation of their NDCs, and a framework for non-market approaches is defined by Article 6, paragraph 8. Decision 1/CP.21 requested the CMA to adopt a work program on the non-market approaches, which was supposed to be part and parcel of the "Katowice Rulebook". However, the negotiations on rules for the entire Article 6 were not completed in Katowice. Parties struggled not only over how double counting should be avoided but also what constitutes double counting and whether it should be avoided under all circumstances.[48] Relevant reporting and review provisions could neither be agreed upon by the CMA in 2019, in Madrid, Spain.

Making use of Article 6 possibilities is important for some Parties to formulate, implement and achieve their NDC. Therefore, the accounting, reporting and review rules are equally important. In Katowice, in order to make sure the accounting and reporting about Article 6 related activities is robust, Parties agreed on some general provisions,[49] but these provisions are without prejudice to the outcomes on matters relating to Article 6.[50] It is expected that more specific rules and guidelines will be adopted by CMA3.

In Katowice, Parties also agreed to "undertake the first review and update, as appropriate, of the modalities, procedures and guidelines no later than 2028 on the basis of experience in reporting, technical expert review and facilitative, multilateral consideration of progress".[51]

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[48] Lambert Schneider, Maosheng Duan, Robert Stavins, Kelley Kizzier, Derik Broekhoff, Frank Jotzo, Harald Winkler, Michael Lazarus, Andrew Howard, Christina Hood, Double counting and the Paris Agreement rulebook: Poor emissions accounting could undermine carbon markets, *Science*, 366 (6462): 180-183 (2019).

[49] Decision 18/CMA.1, paragraph 77(d).

[50] Decision 8/CMA.1 (2018) Matters relating to Article 6 of the Paris Agreement and paragraphs 36–40 of decision 1/CP.21.

[51] Decision 18/CMA.1 (2018) Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement.

## 3. Facilitating Implementation and Promoting Compliance: The Article 15 Committee

Another important aspect of enhancing Parties´ accountability under the Paris Agreement, is the possibility to engage with Parties with respect to their implementation and compliance by an independent, standing, expert body: the committee established under Article 15, paragraph 1, of the Agreement ("Article 15 Committee" or the Paris Agreement Implementation and Compliance Committee – PAICC). Under the modalities and procedures established for the functioning of the Article 15 committee, Parties will be able to engage in a dialogue with the committee with the purpose of identifying challenges, making recommendations and sharing information.

Following the definition of accountability set out in the beginning of this article, by establishing a "compliance committee", Parties accepted responsibility for their actions, to disclose them and increase accessibility to and transparency of information. The Article 15 committee is an accountability mechanism in the understanding that it is designed to hold Parties accountable for their performance in light of the nature of relevant provisions of the Agreement and in relation to the mechanisms and procedures established under the Agreement. As mentioned above, accountability of Parties addressed by the Article 15 committee is a "continuum" of other processes. Parties´ individual obligations are interconnected and one flows from the other. There are clear linkages between the NDC preparation guidelines, guidelines for reporting and review, all the way to the processes according to Article 15. Policy makers are well-advised to have this "accountability continuum" in mind, already when preparing their NDCs.

### a) Nature of the Article 15 Committee

Article 15, paragraph 1, of the Paris Agreement establishes a mechanism to facilitate implementation of and promote compliance with the provisions of the Agreement. This mechanism consists of a committee.

The Article 15 Committee is expected to enhance the effective functioning of the Paris Agreement both by encouraging Parties to implement the Agreement and by holding them accountable for aspects of their performance. Effectiveness depends on the extent to which it is being implemented by Parties including on Parties' compliance with their legally-binding obligations. The processes under Article 15 are therefore designed to build confidence and trust among Parties.[52]

The committee is to be facilitative in nature, transparent, non-adversarial, non-punitive (Article 15, paragraph 2). In the same vein as the transparency framework, it shall strive to avoid duplication of effort, shall not function as enforcement or dispute settlement mechanism, not impose sanctions or penalties, and shall respect national sovereignty.[53]

The Article 15 committee will express its facilitative nature through its operation, both in terms of which issues get before the committee, how it deals with them and what outcomes and measures it can adopt. The CMA in Decision 20/CMA.1 has put in place the modalities and procedures intended to safeguard the effective functioning of the committee in line with the general guidance set out in Article 15 of the Paris Agreement. In doing so, the Article 15 Committee has

[52] Christina Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement', 25(2) *Review of European Comparative and International Environmental Law* 1 (2016).

[53] Decision 20/CMA.1 (2018), Modalities and procedures for the effective operation of the committee referred to in article 15, paragraph 2, of the Paris Agreement, Annex, paragraph 4.

been tailored to fit the unique characteristics of the treaty it serves; including the requirements of holding Parties accountable for their performance in light of the nature of relevant provisions of the Agreement and in relation to the mechanisms and procedures established under the Agreement.

**b) Composition, Competence and Decision-making**

The Committee is a constituted standing, expert body under the Paris Agreement, with a mandate to address situations related to the performance of individual parties. It consists of twelve members, plus twelve alternate members.

The first members and alternates were elected by CMA 2, in December 2019, and the first two co-chairs were elected by the members of the committee during its first meeting on 2 June 2020.[54] It is composed on the basis of equitable geographical representation, with two members each from the five regional groups of the United Nations and one member each from SIDS and LDCs, while taking into account gender balance as shown in Table 3.[55] Members will serve for a term of three years and can be re-elected once.

**Table 3. Size and composition of the Article 15 Committee**

| | **Developed country Parties** | **Developing country Parties** |
|---|---|---|
| African Group | | 2 |
| Asia Pacific Group | | 2 |
| Eastern European Group | 2 | |
| Group of Latin American and Caribbean Countries | | 2 |
| Western European and Other Group | 2 | |
| Small Island Developing States | | 1 |
| Least Developed Countries | | 1 |
| **Subtotal** | **4** | **8** |
| **Total** | **12 (+12 alternates)** | |

The Committee's composition is supposed to include a broad range of relevant scientific, technical, socioeconomic and legal expertise. It is, however, up to the CMA, every time when electing the members and alternates of the committee to see that a representation of these various backgrounds is ensured in order to keep the committee functional.

Members serve in their individual, expert capacity based on recognized competence in those fields. The considerable size of the Committee compared, for example with the ad hoc TER teams under the Enhanced Transparency Framework combined with the requirement for the diversity in scientific backgrounds, should ensure that this wide range of expertise is made available to a party. When comparing with TER teams, the biggest difference is that the competence of TER teams is ensured by the review coordinator and by the secretariat when choosing experts from all areas that are needed. The competence of the Article 15 Committee is ensured by the CMA. The guidance on members´ expertise should well-position the Committee to address the wide spectrum of implementation or compliance issues that could come before it,

[54] UNFCCC, *Key Paris Agreement Implementation and Compliance Work Initiated*, news article, 26 June 2020, available at: https://unfccc.int/news/key-paris-agreement-implementation-and-compliance-work-initiated.
[55] Decision 1/CP.21, paragraph 102.

reflecting all relevant articles and elements of the Paris Agreement.[56]

The committee will meet at least twice a year, desirably in conjunction with the sessions of the subsidiary bodies serving the Paris Agreement. The covid-19 pandemic in 2020, however, led the committee to conduct its first meeting in a virtual manner.[57]

The Committee shall make every effort to make decisions by consensus. However, if all efforts are exhausted, the decision may be adopted by a majority vote (3/4 of the members present and voting).

**c) How will issues come before the Committee?**

The modes of initiation of committee proceedings reflect the different legal nature of the provisions in the Agreement.[58]

There are three modes of initiation, i.e. of how an "issue" could get before the committee. These are:

- Self-referral by a Party on all provisions of the Paris Agreement (Decision 20/CMA.1, annex, paragraph 20);
- "Automatic" initiation of the committee in cases of a violation of specified legally binding provisions of the Agreement (Decision 20/CMA.1, annex, paragraph 22(a));
- Discretionary initiation, with consent of Party, in cases of *significant and persistent inconsistencies* of the information submitted under Article 13, paragraph 7 and Article 13, paragraph 9, with MPGs, based on recommendations in TER Report (Decision 20/CMA.1, annex, paragraph 22(b)).

First, in any case, a Party can always bring a matter concerning its own implementation and/or compliance to the attention of the committee, based on a written submission (Decision 20/CMA.1, annex, paragraph 20). In this situation, the committee has discretion as to whether it "takes on the issue". It will undertake a preliminary examination of the submission within a certain timeline and inform the party of whether and how the issue will be taken further.

Second, for provisions that set out a *legally binding, individual obligation* for Parties, the committee will start proceedings automatically if a Party has failed to comply. In those cases, no consent of the Party concerned is required, and the committee has no discretion on whether to consider the issue or not.

This applies specifically to cases where a Party has not:

- Communicated or maintained a nationally determined contribution under Article 4 of the Paris Agreement, based on the most up-to-date status of communication in the public registry referred to in Article 4, paragraph 12, of the Paris Agreement;
- Submitted a mandatory report or communication of information under Article 13, paragraphs 7 and 9, or Article 9, paragraph 7, of the Paris Agreement;
- Participated in the facilitative, multilateral consideration of progress, based on information provided by the secretariat;
- Submitted a mandatory communication of information under Article 9, paragraph 5, of the Paris Agreement.[59]

[56] For a detailed account of the article 15 committee, see: Gu Zihua, Christina Voigt and Jacob Werksman, Facilitating Implementation and Promoting Compliance with the Paris Agreement: Conceptual Challenges and Pragmatic Choices, *Climate Law* 9, 65-100 (2019).

[57] https://unfccc.int/sites/default/files/resource/June_momentum_overview_of_meetings.pdf.

[58] See, e.g., Daniel Bodansky, 'The Legal Character of the Paris Agreement', 25(2) *Review of European, Comparative and International Environmental Law*, 28(2) *Journal of Environmental Law* 337 (2016).

[59] Decision 20/CMA.1, Annex, paragraph 22 (a).

The TER of the Enhanced Transparency Framework will review the completeness of information submitted by each Party, including the "mandatory report or communication of information under Article 13, paragraphs 7 and 9, or Article 9, paragraph 7, of the Paris Agreement". If a Party does submit a BTR, but does not submit all mandatory reports or communications, the TER will give recommendations to the Party in the TER report. In this situation, however, the absence of mandatory reports or information will also trigger the proceedings of the "Article 15 committee". In this situation, it will be important that the TER team and the Article 15 collaborate on how to best approach this situation in order to avoid duplication of efforts. If, however, a Party does not submit a BTR at all, no TER will be conducted and the "Article 15 committee" will consider this situation.

For the other cases in the first three bullet points above, the Enhanced Transparency Framework has no review or assessment process and therefore cannot address them. In other words, those situations will never be "picked up" by the ETF and there is no overlap between the competences of the "Article 15 committee" and the TER.

The Committee will base its consideration on publicly available information, published through the information channels established under the Paris Agreement: public registries of NDCs, the online portal for BTRs and national inventory reports, information by the secretariat and the online portal for posting and recording biennial communications under Article 9, paragraph 5.

Third, proceedings with respect to *other provisions* can only commence if the Party concerned has requested the committee to act or has given its consent. This applies in particular to situations where the TER report includes "recommendations" with respect to mandatory "shall" requirements for reporting, but the Party concerned was not able to resolve the issues. This applies, however, only in cases of significant and persistent inconsistencies of information submitted in the BTR with the modalities, procedures and guidelines for the Enhanced Transparency Framework.

In these cases, the committee might be able to 'backstop' the oversight exercised by the transparency framework of a Party's performance in relation to significant and persistent inconsistencies identified but left unresolved by the ETF. Under paragraph 22(b), the Committee may initiate cases in a way that complements the rules, procedures, and institutions of the ETF. The roles of the TER teams and the Committee are designed to be complementary in both helping Parties and holding them accountable for their individual performance. As explained above, the purpose of the transparency framework includes the tracking of progress towards implementing and achieving Parties' NDCs and providing clarity on support provided and received by Parties.[60] To this end, each Party is to submit, regularly, national inventory reports and other mandatory information.[61] Moreover, developed country Parties 'shall' (and other parties that provide support 'should') submit information on support provided to developing countries to implement the Agreement.[62]

As already mentioned, each BTR and national inventory report will undergo a TER carried out by a TER team.[63] The TER team will review the consistency of the information submitted by the party with the transparency Modalities, Procedures and Guidelines (MPGs), while taking into account the flexibility accorded to those developing country parties that need it in

[60] Article 13, paragraphs 5 and 6, Paris Agreement.
[61] Ibid., paragraph 7.
[62] Ibid., paragraph 9.
[63] Decision 18/CMA.1, Annex, VII.

light of their capacities. With regard to the 'shall' provisions in the MPGs, the TER team will identify any 'areas of improvement', in the form of 'recommendations' and/or 'encouragements', which it will include in its final TER report.[64] The reports will be published on the UNFCCC website.[65] The TER teams have a role in holding Parties accountable for providing the information necessary to track progress made in implementing and achieving NDCs, in accordance with the transparency MPGs. However, once the final TER report has been published on the UNFCCC website, the role of the TER teams ends. This is the interface where, in situations of "significant and persistent inconsistencies" the role of the Article 15 committee starts.

Prior to the adoption of the modalities and procedures for the Article 15 committee, many Parties expressed doubts about making a link between the ETF and the Article 15 processes.[66] Some were of the view that a TER team's engagement with a Party would provide enough assistance and incentive to ensure that the Party implements the MPGs. Some were concerned that strengthening the link between Article 15 and the transparency framework would raise sovereignty issues and lead to a weakening of the mandatory character of the transparency MPGs, as well as to a less rigorous TER. Others yet were concerned that linking the two processes could undermine the TER teams' role, worrying that technical experts would be hesitant to identify 'areas of improvement' if this were taken to trigger the Article 15 Committee proceeding.[67] Still other Parties felt it essential that the ad hoc TER teams be backstopped by the standing Committee, particularly where a TER team's engagement with a Party did not resolve a performance problem. Finding common ground required coming to an understanding among Parties as well as within delegations, as some transparency and Article 15 negotiators belonging to the same Party disagreed with each other on these questions.[68]

In the end, a balance was struck that enables the Committee to take up issues unresolved by the TER teams, but limits the scope of the Committee's role in several important respects. Under paragraph 20(b), the Committee may, at its discretion, and only with the consent of the party concerned, engage that party in cases of "significant and persistent inconsistencies" between the information that the party has submitted under the transparency framework and the transparency MPGs.

In order for such a case to be taken up by the Committee, a TER team must have included in its final report a "recommendation" or "encouragement" related to an "area of improvement" of the Party's performance on the ETF's MPGs of the "shall" provisions only.[69] The Committee will not address an "area of improvement" expressed as "encouragement" in the TER report, which is for non-mandatory reporting provi-

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[64] Ibid., paragraph 162(d).

[65] Ibid., paragraph 187.

[66] Sue Biniaz, *Elaborating Article 15 of the Paris Agreement: Facilitating Implementation and Promoting Compliance*, IDDRI Policy Brief (October 2017).

[67] This concern was derived in part from the experience of the Kyoto Protocol's Compliance Committee, which can be triggered by the identification by an ERT of a 'question of implementation'. See, for example, Jutta Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum', in Gerd Winter (ed.), *Transnational Governance of Environmental Change* (Cambridge University Press, 2005), 387; and Meinhard Doelle, 'Experience with the Facilitative and Enforcement Branch of the Kyoto Compliance System', in Brunnée et al. (eds.) 201-221 (2012).

[68] For a discussion of the link between Article 13 and 15, see Sue Biniaz, *Elaborating Article 15 of the Paris Agreement: Facilitating Implementation and Promoting Compliance* (IDDRI Policy Brief, October 2017); and IDDRI, *Articles 13 and 15 – Takeaways from the May 2017 Bonn Workshop*, IDDRI (2017) (on file with authors).

[69] Decision 20/CMA.1, Annex, paragraph 22(b).

sions. It is important to note that Article 13 limits the scope of TER, and therefore also limits the Committee's review to information provided under Article 13.[70] Most of the transparency MPGs are "shalls", and generally are expressed in mandatory terms when they implement a mandatory treaty-based reporting obligation in the Agreement. Thus, for example, each Party "shall" provide information necessary to track progress under Article 13, paragraph 7(b), of the Paris Agreement: the corresponding MPGs are also "shall" provisions.[71] At the same time, the MPGs associated with the Agreement's "encouragement" to countries (other than developed-country parties) to provide support are expressed as "should" provisions;[72] these will result in neither a TER team recommendation nor a case under paragraph 22(b).

To understand whether or how the Committee might take up a case under paragraph 22 (b) requires an analysis of the transparency MPGs and the role of TER Teams in reviewing the MPGs.[73] For initiation, the Committee must decide whether the recommendation in the TER team's report, together with any written comments provided by the party during the review, relate to a "significant and persistent" inconsistency between the information submitted by the Party and the transparency MPGs. It is not expected that the TER report will point out "significant and persistent inconsistencies".

The Rulebook does not define "significant and persistent", but the language implies a judgment by the Committee on whether the inconsistency crosses a *de minimis* threshold and demonstrates the Party's failure to respond to repeated efforts by the TER team to encourage the party to improve its performance. "Significant" could indicate that the Committee is to act only on cases where the inconsistencies limit the effective functioning of the transparency framework with regard to the party concerned. "Persistent" may be taken to refer to circumstances where a Party has failed to improve over time—for example, where an issue is unresolved after repeated TER cycles. The two threshold criteria will need to be further developed by the Committee through its rules of procedure or its own practice or operational guidelines, taking into account qualification criteria, e.g. whether the reported information by a Party is too vague to understand the progress made in NDC implementation and achievement, and quantification criteria, e.g. with how much under-estimation or over-estimation will a certain issue result in the overall assessment of the progress or achievement of the NDC, while at the same time also consider the balance between time needed for a Party to see and address "recommendations" and the limited number of years within an NDC timeframe.

[70] For example, the MPGs exclude from TER and recommendations (and therefore from the scope of the Committee) provisions related to the description of the NDC (Decision 18/CMA.1, paragraphs 149(b) and 64).

[71] Decision 18/CMA.1, Annex, ch. III.C.

[72] Ibid., ch. V.

[73] For example, under paragraph 6 of Decision 18/CMA.1, those developing countries that exercise 'a flexibility' in the MPGs 'shall clearly indicate the provision to which flexibility is applied, concisely clarify capacity constraints… and provide self-determined estimated time frames for improvements provided for in relation to these constraints'. As this is a 'shall' provision, a TER Team could make a recommendation, and the Committee might act on that recommendation. However, there might be doubt on whether a recommendation on para. 6 would amount to 'significant' inconsistency, which is an issue that needs to be decided by the Committee in its future work. Meanwhile, para. 6 clarifies that the TER Teams are not to review the substantive basis of the party's determination to apply such flexibility, nor its capacity to implement the provision without flexibility. In this context it seems that neither the TER Team nor the Committee will be in a position to second-guess a developing country on whether it 'needs' flexibility in light of its capacities: Decision 18/CMA.1, Annex, paragraph 149(e).

As mentioned above, a case under paragraph 22(b) will move forward only with the consent of the Party concerned. This was a compromise arising from a concern of some Parties about intrusion on sovereignty. Yet the initiation may provide a degree of accountability even if the Party concerned ultimately withholds its consent. This partly depends on how the Committee's consideration of a case is sequenced and made public. Read together, paragraphs 22(b) and 24 suggest that the process begins with a Committee decision to initiate consideration. It would make sense that this involves a preliminary determination that a "significant and persistent" inconsistency exists. The Committee will then notify the Party and request it to provide information, including whether it consents to the case moving forward. If the preliminary stages of this process were to be made public, the Party would face political pressure to engage with the Committee to provide its perspective on the issue, or even to seek to benefit from whatever assistance the Committee can facilitate. Making the Committee's preliminary determination public might, however, be seen as undermining the right of the Party to withhold its consent and as running counter to the emphasis on "facilitative consideration". If the preliminary determination is not made public, some pressure on the Party would still remain if the Committee were to include the fact that the Party withheld its consent in its annual report to the CMA.

In the course of its engagement, the Committee "shall" take appropriate measures, which may include the measures listed in paragraph 30. Where the significant and persistent inconsistencies are due to gaps in the Party's capacity, measures involving assistance in engaging with bodies that provide financial, technological, or capacity-building support may be of particular relevance.[74] In circumstances where the inconsistencies have resulted from a lack of political attention, the Committee's initiation of a case may be enough to solve the problem by raising the profile of the issue before the Party's authorities.

Fourth, the committee may also address *systemic issues* which it identified during the course of its work.[75] Systemic issues are those that are experienced by several Parties and point to a shortcoming in the system itself, as opposed to individual performance of Parties. It may bring such issues to the attention of the CMA and provide recommendations. At the same time, the CMA could ask the committee to examine systemic challenges.

It is worth noting that, with the exception of paragraph 22 (b), the Committee will not address the content of NDCs or of other communications or reports. Neither will the work of the Committee change the legal character of the provisions of the Paris Agreement.

The Committee is required to pay particular attention to the respective national capabilities and circumstances of Parties, recognizing the special circumstances of LDCs and SIDS, at all stages of the process.

**d) What will the Committee do?**

In the situations outlined above, the Committee is tasked to take appropriate measures to facilitate implementation and promote compliance.

Decision 20/CMA.1, annex, provides the following, non-exhaustive catalogue of measures:

[74] Decision 20/CMA.1, Annex, paragraph 30(b) and (c); Paris Agreement, Article 13, paragraphs 14 and 15; and Decision 1/CP.21, paragraph 84, which establishes a Capacity-building Initiative on Transparency to support developing countries in implementing the ETF.

[75] Decision 20/CMA.1, Annex, paragraphs 32-24.

- Engaging in a dialogue with the Party to share information, identify challenges and recommend solutions (paragraph 30 (a))
- Assist the Party in engaging with the appropriate finance, technology and capacity-building bodies and arrangements under or serving the Paris Agreement in order to identify possible challenges and solution (paragraph 30 (b))
- Make recommendations to the Party with regard to those challenges and solutions and communicate them, with the consent of the Party concerned, to the relevant support bodies or arrangements (paragraph 30 (c))
- Recommend development of an action plan (paragraph 30 (d))
- Issue findings of fact in relation to matters listed in paragraph 22 a (paragraph 30 (e)).

Importantly, these measures are designed in such way as not to impede, but complement and add value to other processes under the Paris Agreement.

It is worth noting that issuing finding of fact *only* applies only to those matters listed in paragraph 22(a), as a consequence of their legally binding character. However, those matters can be brought to the committee by the Party itself (self-referral according to paragraph 20) or through "automatic" initiation (paragraph 22(a)). The Committee would still need to define in its operational guidelines what "issuing finding of fact" implies; but it can be expected that it will most likely involve a public statement about the circumstances of non-compliance of a party with one of the issues listed in Decision 20/CMA1, Annex, paragraph 22(a). Furthermore, the committee shall annually report to the CMA where the "finding of fact" will also be included.

**e) Further Steps**

The Modalities and Procedures for the effective operation of the "Article 15 Committee" foresee that the Committee develops its rules of procedure for adoption by CMA3; provided that the committee is able to commence and finalize this work despite the constraints put to UNFCCC processes by the covid-19 pandemic.[76] The rules of procedures will have to cover more specific details on, for example, timelines, conflict of interest, role of the co-chairs and reasoning in the decisions of the committee.

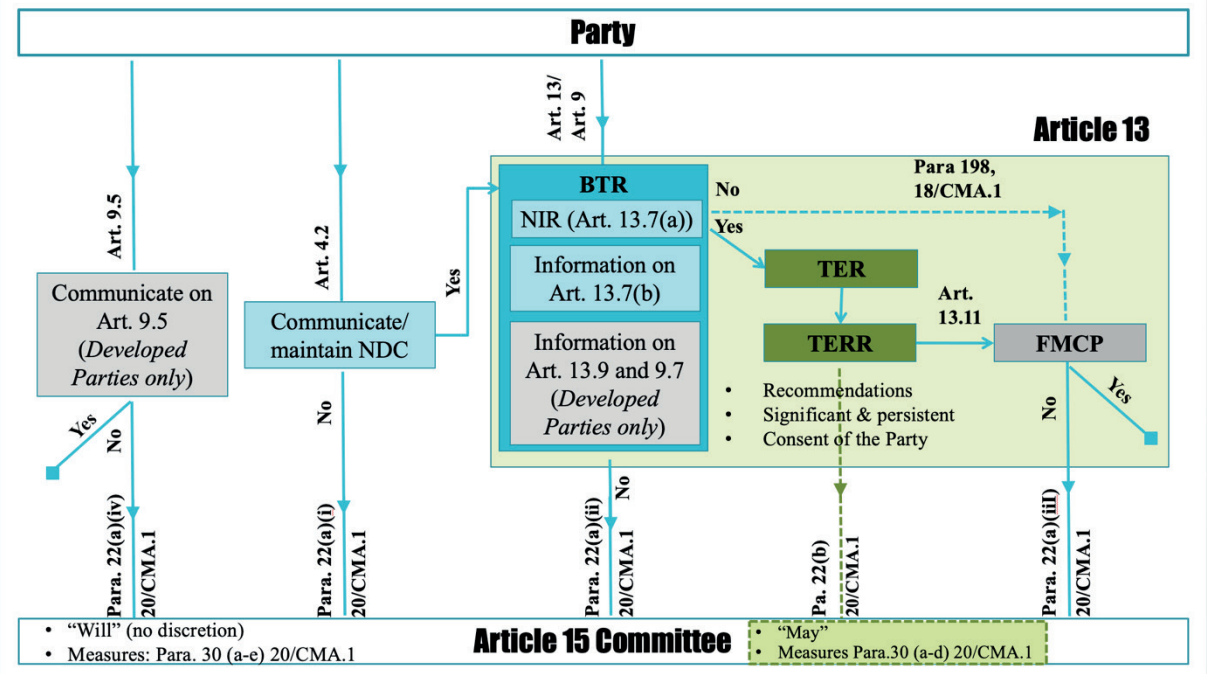
Moreover, negotiations on the rules and guidelines for cooperative approaches under article 6 of the Paris Agreement continue throughout 2020 and 2021 with the view of reaching agreement at CMA3. Also in this context, the role of the committee could be further elaborated and refined.[77]

Table 4 summarizes the inter-linkage between the transparency provisions of Article 13 and other articles and the facilitating and compliance provisions of Article 15 under the Paris Agreement.

[76] At the time of writing, COP26/CMA3 in Glasgow was postponed to 2021, and the meetings of the SBs were postponed from October 2021. See: https://unfccc.int/news/cop26-postponed. See also: https://unfccc.int/news/cop-bureau-reschedules-unfccc-subsidiary-body-meetings-to-2021. The Article15 committee might be able to work remotely in the meantime. However, it needs to be taken into account that the committee has never met in person.

[77] See Christina Voigt, *Linkages between Cooperative Approaches, Transparency and Compliance (Articles 6, 13 and 15 of the Paris Agreement*), ERCST Paris Agreement Policy Brief (2019); available at: https://ercst.org/wp-content/uploads/2019/08/20190819-Arts.-6-13-15_Brief-w-Letterhead.pdf. See also: Christina Voigt, *An Appeal Procedure for the Mechanism Established by Art. 6.4 of the Paris Agreement* (19 August 2019) ERCST Policy Brief and Options Assessment, available at: https://ercst.org/publication-art-6-4-appeal-procedure/.

**Table 4: The Interplay between Transparency and Compliance under the Paris Agreement**




**Explanation of Table 4:**

According to Article 4, paragraph 2, each Party shall prepare, communicate and maintain successive NDC. If any Party fails to do so, according to paragraph 22(a)(i) of Decision 20/CMA.1 (Annex), the Committee will initiate the consideration of this issues, and take appropriate measures as provided in paragraph 30 (a) to (e) of that. There is no discretion for the committee as to whether consider such case.

According to Article 9, paragraph 5, each developed country Party shall biennially communicate indicative quantitative and qualitative information related to provision of financial resources to assist developing country Parties. If a developed country Party fails to do so, according to paragraph 22(a)(iv) of the Annex of Decision 20/CMA.1, the Committee will initiate the consideration of this issues, and take appropriate measures as provided in paragraph 30 (a) to (e) of Decision 20/CMA.1. There is no discretion to initiate such case.

After communicating the NDC, during the implementation phase, according to Article 13, paragraph 7, Article 13, paragraph 9 and Article 9 paragraph 7, each Party shall provide mandatory reports and information as relevant. According to Decision 18/CMA.1, the BTR with the national inventory report as a component or stand-alone document will be used for this reporting. If a Party fails to provide such mandatory information, according to paragraph 22(a)(ii) of Decision 20/CMA.1, the Committee will initiate the consideration of this issues, and take appropriate measures as provided in paragraph 30 (a) to (e) of Decision 20/CMA.1. There is no discretion for the committee to initiate proceedings.

The BTR and national inventory report will undergo TER according to Article 13, paragraph 11 and Decision 18/CMA.1. The TER team will publish a TER report, including 'areas of improvement' expressed as 'recommendations' and/or 'encouragements'. For those 'recommendations', according to paragraph 22(b) of Decision 20/CMA.1, if the Article 15 Committee recognizes any significant and persistent inconsistencies with the modalities, procedures and guidelines adopted by Decision 18/CMA.1, with

the consent of the Party concerned, the Committee may engage in a facilitative consideration, and take appropriate measures as provided in paragraph 30 (a) to (d) of Decision 20/CMA.1. In this case, the Committee has discretion on whether initiate the consideration or not.

After TER, each Party shall participate in a FMCP according to Article 13 paragraph 11 and Decision 18/CMA.1. If any Party fails to do so, according to paragraph 22(a)(iii) of Decision 20/CMA.1, the Article 15 Committee will initiate the consideration of this issues, and take appropriate measures as provided in paragraph 30 (a) to (e) of Decision 20/CMA.1. There is no discretion for this case. Participation in the FMCP is an obligation for Parties of the Paris Agreement. The Decision 18/CMA.1 also considered the situation that if a Party did not submit a BTR on time, it can also participate in a FMCP. In such a case, the Article 15 Committee will initiate its consideration.

## 4. Conclusions: The "accountability continuum" in the Paris Agreement

As this article has shown, the procedures for creating and enhancing transparency under Articles 4, 9 and 13 of the Paris Agreement, and for facilitation of implementation and promotion of compliance under Article 15 of the Agreement are inter-linked in many ways. Some of the linkages are clear and explicit; others can only be understood by a careful, in-depth analysis of the provisions in the Rulebook for Articles 4, 9, 13 and 15.

In any case, these linkages are deliberate and increase Parties′ accountability for their actions as well as for their compliance with the rules and obligations established under the Agreement. In fact, by seeing the two processes (i.e. transparency and compliance) together, one can identify a kind of procedural "accountability continuum" for parties′ performance in light of the nature of relevant provisions of the Agreement and in relation to the mechanisms and procedures established under the Agreement.

Parties accepted responsibility for their actions, the obligation to disclose them and to increase accessibility to and transparency of information. They created an "accountability continuum" for Parties′ individual obligations which "flows" through several processes: There are clear linkages between the NDC preparation guidelines (Article 4), decisions for reporting of finance related issues (Article 9), guidelines for reporting and review (Article 13), all the way to the implementation and compliance processes under Article 15. As mentioned above, policy makers would be well-advised to have this "accountability continuum" in mind, when preparing their NDC's.

The Enhanced Transparency Framework together with the "Compliance Mechanism" establish an oversight system to ensure the effective implementation of the provisions of the Agreement. This "oversight" is vital to the accountability of Parties and forms a cornerstone of the conceptual apparatus of the agreement.[78] Since the Paris Agreement does not contain legal obligations of (quantifiable) result which would be enforceable under international law, the provision of mandatory information, both "*ex-ante*" when submitting an NDC under Article 4 and "*ex-post*" when reporting under the transparency framework (Article 13) has been considered "the main mechanism to hold states accountable for doing what they said they would do".[79] It was noted that peer pressure and public pressure due to publicly available information can be as effective as legal obligations in influenc-

[78] Daniel Bodansky, Jutta Brunnee and Lavanja Rajamani, *International Climate Change Law*, Oxford University Press (2017) 242.
[79] Ibid.

ing behavior.[80] The MPGs for the functioning of the transparency framework are of surprisingly high "normative density", i.e. they are detailed and prescriptive and witness the willingness of Parties to commit to common criteria for providing necessary information.

This, however, is not the entire "accountability" picture. As this article has shown, the link to the "article 15 committee" provides another accountability aspect with respect to parties´ performance. In situations where Parties are either unable or facing other challenges with implementing the provisions of the Paris Agreement, they can always engage voluntarily with the "Article 15 committee" in order to seek help and support to address their situation. This way, it might be possible to avoid worsening circumstances and prevent non-performance by the respective Party. This is in line with the understanding that with respect to climate change and other environmental harm, preventing non-compliance and non-performance of Parties might be more important and meaningful than any *ex-post* sanctions or punitive measures for non-compliance.[81]

Yet, in situations where a Party does not comply with its legally-binding obligations under the Agreement, i.e. under Article 4 paragraph 2, Article 13, paragraph 7, Article 13, paragraph 11, Article 9, paragraph 5 and Article 9, paragraph 7, its accountability will be addressed by the Article 15 Committee. The committee´s nature is facilitative, non-punitive and non-adversarial; but it is nevertheless an independent body designed to work with Parties in order to get them to do what they agreed they would do. The modalities and procedures set up a direct engagement with the party concerned, a dialogue and a process in order to facilitate the "return to compliance" by the Party. The publicity around these procedures, the public report to the CMA, as well as open meetings further enhance the "accountability" aspect of the committee´s function.

The committee will to a significant extent build upon the work of the ETF, e.g. in accessing information about the provision of mandatory reports under Article 13. In others words, the committee will need to rely on the ETF registry for initiating its work. Moreover, as detailed above, the committee is designed to function as a back-stop to the TER. After the TER teams publish their reports, their engagement with Parties ceases. In cases, however, of significant and persistent inconsistency with the transparency MPGs, the Article 15 committee can continue the dialogue with the Party concerned in order to address its challenges and to provide recommendations, including on assessing finance, technology and capacity-building support, and communicate such recommendations to the relevant bodies or arrangements under or serving the Paris Agreement. Moreover, the committee can work together with the Party concerned in developing an action plan on how best address implementation and compliance issues. It is in these continued engagements with a Party, that the "accountability continuum" lies. The possibility to "pick up" parties´ performance challenges and seeking to address them is a logical continuation from the accountability that lies in providing information and being transparent about such challenges, where they exist.

An accountability-linkage between the transparency framework and Article 15 exists

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[80] Dinah Shelton, *Commitment and Compliance*: *The Role of Non-Binding Norms in the International Legal System* (OUP, 2000); see also: D. Victor, K. Raustiala, and E. Skolnikoff (eds.) *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice*, MIT Press (1998).

[81] Edith Brown Weiss, Invoking State Responsibility in the Twenty-First Century, The American Journal of International Law, Vol. 96, No. 4, 798-816 (October 2002); Dinah Shelton (ed.) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford University Press (2003).

further in cases where a Party does not participate in the FMCP; a central building-block of the ETF. These main mechanisms together hold states accountable for doing what they said they would do.

The Paris Agreement has occasionally been criticized as weak and "toothless" (in terms of not being enforceable)[82], or prone to unravel.[83] Such criticism, however, appears somewhat speculative, premature and unsubstantiated as it is rarely (if at all) based on an in-depth study of the Agreement´s architecture or a profound understanding of its mechanisms, let alone the inter-linkages between them. Based on the analysis above, the authors take the opposite view, i.e. that the carefully designed and crafted procedural "accountability" elements of the Agreement hold the strength and effectiveness necessary to "induce" Parties to accept responsibility for their actions (or inactions).

The processes under Articles 4, 13 and 15 were created in order to enhance the visibility and "understandability" of parties´ actions; and for holding Parties accountable for their performance. These procedures set up a system which is complex, but flexible; a system which consists of several steps and building blocks, while also being dynamic, evolving, and fine-tuned to the Agreement´s architecture; but most importantly, a system which puts accountability at the core of international climate governance.

[82] Anne-Marie Slaughter, 'The Paris Approach to Global Governance', Project-Syndicate (28 December 2015), found at: https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12; see also: Richard Falk, 'Voluntary International Law and the Paris Agreement' (16 January 2016), found at: <https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>.

[83] Noah Sachs, The Paris Agreement in the 2020s: Breakdown or Breakup? *Ecology Law Quarterly*, Vol. 46, No. 1 (2019).

# Should locals have a say when it's blowing?
## The influence of municipalities in permit procedures for windpower installations in Sweden and Norway*

*Jan Darpö*

**Abstract**

Windpower is increasingly promoted as an environmentally friendly solution in a power-hungry world. At the same time, local resistance against such large scale developments is growing in many European countries, including Belgium, Denmark, Germany and the Netherlands. Against this background, a crucial issue concerns what voice local communities have in decisions regarding new windpower projects. This article investigates this issue through a comparison between Sweden and Norway, two countries with contrasting experiences.

After a brief description of the development of windpower in Sweden and in Norway, the system for environmental decision-making in Sweden and the permit procedure for wind farms are presented, followed by analysis of how the 'veto rule' is applied in practice and the debate on this issue. A presentation of the Norwegian system for environmental decision-making comes next, followed by a section on lessons learned about the influence of the municipalities in these processes. The article concludes with some remarks from a legal scientific and policy viewpoint on local influence on decision-making concerning renewable energy installations.

The author argues that, basically, local acceptance is crucial for this development. National planning instruments should be combined with possibilities for the municipalities to have a say concerning the localization of wind farms. Further, financial arrangements to the benefit municipalities hosting such installations ought to be developed in order to increase local acceptance. This combination of local influence and economic benefits for the hosting societies may prove effective in promoting these much-needed renewable energy sources.

### 1. Introduction

As part of the research project 'Competing land-use pressures in Norway' at the Fridtjof Nansen Institute, I have undertaken a legal scientific comparison between Norway and Sweden concerning local communities' influence on decision-making about windpower installations. For the Swedish part, I have benefitted from the material obtained in the research programme PROSPEC, a cooperative venture between Uppsala Universitet and the Swedish Species Information Centre (ArtDatabanken) at the University of Agricultural Sciences.[1] We have stud-

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[1] https://jur.uu.se/forskning/forskningsamnen/miljoratt/prospec/.

ied all permits for windpower installations in Sweden 2014–2018, a total of 192 cases involving more than 500 decisions and judgements. Although the focus in that research project is on species protection, we also have learned much about the application of the 'municipal veto rule' in Sweden. For the Norwegian part, I have benefitted from research conducted at the Fridtjof Nansen Institute and my own examinations. Taken together, this provided material for a comparative study of Sweden and Norway concerning local influence in the decision-making on wind farming – a topic that is becoming increasingly controversial all over Europe.

However, it should be noted that although Sweden and Norway are close neighbours, the administrative and judicial systems differ greatly, as do the cultural values attached to ownership of natural resources. This point should be borne in mind, as this article aims to describe the systems and offer some comparative remarks – not to undertake a legal transplant in either direction. Additionally, comparison between the two countries may seem simple, as the languages are very similar and are generally mutually intelligible. But also here a caveat is needed, as there are some 'false friends' between Norwegian and Swedish: for example, in Norwegian the term *vindkraftverk* refers to a windpower installation or wind farm as a whole, whereas in Swedish it means an individual wind turbine.[2]

## 2. Windpower development in Sweden and Norway

The development of windpower in both countries has been strong, with some differences in timing. In 2003, Sweden introduced 'electricity certificates' – a market-based support system for renewable electricity production – which proved crucial to attracting investment in windpower in those early days. Recent years have seen the rapid development of turbine technology, resulting in taller windpower stations with greater capacity. Whereas turbines constructed between 2010 and 2015 were 150 to 180 m. high, producing between 2 and 3 MW each, modern ones can be 250 meters and have a capacity of 5 to 6 MW.[3] These two factors – state aid and technical development – have been the main drivers behind the windpower boom in Sweden since 2010. As of 2019, Sweden had 4,100 turbines with a total capacity of 8,984 MW; for 2020 the corresponding figures are expected to be 4,550 turbines with total capacity of almost 11,000 MW.[4] Electricity production is forecast to double in four years, from 17 TWh in 2018, to 33 TWh in 2021 and 38 TWh by 2022.[5] In 2018, more than 10% of the electricity produced in Sweden came from windpower. Thus, the goals set for the development of onshore windpower have been met so far. However, this does not apply to the offshore development, as very few wind farms have been

[2] Such 'false friends' can lead to comical misunderstandings. A few years ago, a Swedish paper wrote that the Norwegian government claimed that the wolf population created problems by predating on *free ranging pigs*, which in turn threatened the traditional way of country life in Norway. In Norwegian, the word *sau* means sheep, whereas the similar "so" in Swedish refers to a sow, i.e. a female pig. I still wonder if the journalist really believed that there are pigs foraging in the wild in our neighbouring country…

[3] These height figures include the wings. For example, the tower of a 3.6 MW Vestas turbine is 142 meters and the wing span (diameter) is 136 meters; a total height of 210 meters.

[4] Figures from the national trade organization Svensk Vindenergi; https://svenskvindenergi.org/wp-content/uploads/2020/02/Statistics-and-forecast-Svensk-Vindenergi-feb-2020-FINAL.pdf.

[5] Figures from the Swedish National Energy Agency (EM); http://www.energimyndigheten.se/nyhetsarkiv/2020/prognos-sa-mycket-okar-elproduktionen-fran-sol-och-vind-till-2022/.

built in Swedish waters.[6] The main barrier here – in addition to the high costs – is military, as the Swedish Armed Forces have opposed the construction of almost all wind farms in the Baltic Sea and parts of Sweden's west coast.

Norway is one of the 'big ten' in the world in hydropower; nearly 95% of all electricity production comes from this source. This may have been one reason why the introduction of large-scale windpower came later than in the other Nordic countries. The first 15 years, development proceeded very slowly; Norway came nowhere near to meeting the goal set in 1999 of 3 TW production by 2010.[7] In 2003, a system for financial support was introduced, which resulted in a 'Klondike atmosphere' with many less serious applications for concessions for windpower installations.[8] In 2008, the construction of wind farms was exempted from the municipal planning system, leaving the national administration as the sole decision-maker in the concessions procedure. From 2012, Norway and Sweden have a common electricity certificate market, which permits trading and receiving certificates for renewable electricity production in either country. Thereafter, windpower development in Norway proceeded very rapidly – production doubling from 2.6 TWh in 2016 to 5.5 TWh by 2019. Installed effect in 2019 was 2,444 MW in 800 turbines, corresponding to 3% of the electricity produced.[9] By 2021, production from all windfarms including those under construction today, is expected to amount to somewhere between 14 and 16 TWh, covering 10% of the electricity production. However, as in Sweden, offshore windpower development is quite a different story, with only one wind farm built, although it is the first one floating. In contrast to Sweden though, there are 20 more wind parks planned in Norwegian waters, some of which will be among the largest in Europe.

In sum, windpower development today is strong in both Sweden and Norway. There is a substantial inflow of foreign capital for investments in the sector, and both countries are major exporters of electricity to the European market.[10] These facts may be good to keep in mind in the discussion to follow.

## 3. Sweden: Legislation and permit procedures for wind farms

### Environmental law and procedures in Sweden

Sweden has a 'universally' applicable Environmental Code (1998:808, MB), which harmonizes the general rules and principles in this field of law. The Code, which applies to all human activities that may affect the environment, specifies the principles and provide with provisions on environmental quality norms as well as environmental impact assessments. Certain listed water operations, industrial undertakings, quarrying

[6] According to the report *Havsbaserad vindkraft – potential och kostnader* (SWECO 2017-01-31) four are operating and another eight have permits that are finally decided; https://www.energimyndigheten.se/globalassets/fornybart/framjande-av-vindkraft/underlagsrapport-sweco---havsbaserad-vindkraft---potential-och-kostnader.pdf.

[7] Blindheim, B: Implementation of windpower in the Norwegian market; the reason why some of the best wind resources in Europe were not utilized by 2010. *Energy Policy* 58 (2013), pp. 337–346.

[8] Inderberg, THJ & Rognstad, H & Saglie, I-L & Gulbrandsen, LH: Who influences windpower licensing decisions in Norway? Formal requirements and informal practices. *Energy Research & Social Science* 52 (2019) 181-191.

[9] Figures from the Norwegian Water Resources and Energy Directorate (NVE); https://www.nve.no/energiforsyning/kraftproduksjon/vindkraft/?ref=mainmenu.

[10] Vasstrøm, M & Lysgård, HK: Bevegelser i norsk vindkraftpolitikk – drivkrefter, motkrefter og fremtidige utfordringer. *WINDPLAN* Policy note #1, University of Agder 2020. https://windplan.uia.no/wp-content/uploads/2020/03/Policynotat-WINDPLAN-1-Politikkutvikling-og-fremtidige-utfordringer.pdf.

Figures from the Norwegian Water Resources and Energy Directorate (NVE); https://www.nve.no/energiforsyning/kraftproduksjon/vindkraft/?ref=mainmenu.

and other environmentally hazardous activities require a permit. The Environmental Code also contains provisions relating to nature conservation, flora and fauna protection, chemicals and wastes. Today, almost all environmental legislation in Sweden emanates from EU law, with some national varieties and some purely national law.[11]

Sweden has administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The administrative courts decide cases on their merits in a reformatory procedure, meaning that they replace the appealed decision with a new one following analysis of all the relevant facts of the case. Ultimate responsibility for investigation of cases rests with the court according to the *ex officio* principle. The Environmental Code establishes a system of five Land and Environmental Courts and one Land and Environmental Court of Appeal. These are all divisions within the ordinary courts, but essentially act as administrative courts for cases under the Environmental Code and the Planning and Building Act (2010:900, PBL). A Land and Environmental Court has some of the characteristics of a tribunal, consisting of law-trained judges as well as technicians and experts. All members of the courts have an equal vote.

The Swedish concept of 'standing' in administrative cases is heavily interest-based. If the provisions in an Act are meant to protect certain interests, representatives of those interests can challenge the decision-making under that legislation by way of appeal. In recent years in the wake of the case-law of the Court of Justice of the European Union (CJEU), the standing rights of ENGOs (environmental non-governmental organizations) have been expanded by national courts applying the principle of judicial protection under EU law.[12] As a general rule, environmental procedures in Sweden are free of charge; there are no court fees or any obligation to pay the opponents' costs.

**The permit procedure for wind farms**

There is a basic permit requirement in the Environmental Code for the building of wind farms.[13] Environmental impact assessments (EIA) are also compulsory according to Chapter 6 of the Code, as per the EIA Directive (2011/92). Permits are issued by special regional bodies, Regional Licensing Delegations (Miljöprövningsdelegationen, MPD), hosted by 12 of the County Administrative Boards. Decisions by the MPDs can be appealed to one of the five Land and Environmental Courts, and thereafter – if leave to appeal is granted – to the Land and Environmental Court of Appeal.

In decisions on a permit, one applies the general rules of consideration in Chapter 2 of the Environmental Code. This set of rules reflects most of the general principles of environmental law, such as the requirement for knowledge, best available technologies and the precautionary principle. The burden of proof, showing that the operation will satisfy these requirements,

[11] See Darpö, J: *Ömsesidig glädje och nytta? Sverige och EU på miljörättens område*. http://www.sieps.se/globalassets/publikationer/2019/sieps-2019_9epa_sieps.pdf.

[12] See Darpö, J: Pulling the trigger: ENGO standing rights and the enforcement of environmental obligations in EU law (In: *Environmental Rights in Europe and Beyond*, eds. Sanja Bogojević and Rosemary Rayfuse. Hart Publishing 2018, pp. 253–281) with reference to CJEU cases C-263/08 *DLV* (2010), C-115/09 *Trianel* (2011), C-240/09 *Slovak Brown Bear* (2011), C-243/15 LZ II (2016) and C-664/15 *Protect* (2017).

[13] The statutory limit is two or more turbines if the height exceeds 150 meters including the wings, which in practice includes all wind farms developed in Sweden today. This limit has been altered over the years, but as most finance institutions require a permit for the operation as security for their loans, the provision is of lesser importance. If a permit is not required by law, operators will still apply for a 'voluntary' permit.

lies with the applicant. As regards wind farms, the major provision is found in Chapter 2 section 6 of the Code (2:6 MB); that 'a suitable site shall be selected with regard to the purpose being achieved with a minimum of damage or nuisance to human health and the environment'. Guidance on the choice of site can be found in Chapters 3 and 4 of the Code. The latter of the two contains vaguely formulated provisions concerning certain areas, such as the mountains and archipelagos of Sweden. As specified in Chapter 3, the authorities responsible for certain sectors have listed areas of 'national interest'. The Swedish Energy Agency has listed 284 terrestrial areas and 29 areas at sea and in inland waters as being of national interest for wind farming (3:8 MB). The Swedish Environmental Protection Agency has listed areas of national interest for the protection of nature and species (3:6 MB), and the Swedish Armed Forces have termed certain parts of the country and most of the Baltic Sea as unsuitable for wind farming, on grounds of national defence interests (3:9 MB). If an area is of national interest for several incompatible purposes, preference shall be given to the one most likely to promote sustainable management of land and water. If the area is needed for a total defence installation, preference shall be given to that (3:10).

In addition to these rules on the balancing of different interests, a permit for a wind farm must meet requirements that are more 'absolute' according to EU law and international obligations. Species protection and Natura 2000 according to the Birds Directive (2009/147) and the Habitats Directive (92/43) often pose challenges, as wind farms can have detrimental effects on slow-flying birds such as birds of prey and grouse, as well as certain sensitive species of bats found in the southern and middle parts of the country. Also reindeer herding and Sami interests are important, although this is not clearly reflected in the Environmental Code. According to 3:4 MB, the Swedish Board of Agriculture shall list those areas which are of national interest for reindeer herding, a provision that is accordingly subjected to the balancing of interests under 3:10 MB. In case-law, however, the importance accorded to reindeer herding and Sami interests is greatly strengthened by Sweden's international obligations under the Council of Europe, ILO and UN.[14] And as noted, national defence interests always have preference, not only because of the provision in 3:10 MB, but also because the courts are obliged to refer the case to the government if the Armed Forces so urge.

**The municipal 'veto rule'**

In order to obtain permission to construct a wind farm, approval is also required from the municipality(-ies) where the installation is planned. What has become known as the 'municipal veto' rule is regulated in 16:4 MB: '*a permit for a windpower station may be granted only if the municipality where the power station is intended to be built has approved*'. This approval is regarded as a substantial requirement, which the relevant authorities and courts must respect. Normally, the request for municipal approval is made by the MPD when the permit application and the EIA for the project are 'complete' and ready for public consultations. This may take some time, as several

[14] In the recent judgement in the *Girjas case* (*Högsta domstolen* 2020-01-23; T 853-18), the Supreme Court stated that Swedish law on the protection of Sami land-use rights shall be understood in the light of the international obligations in the Council of Europe's Framework Convention for the Protection of National Minorities (1995), the 1996 UN Covenants on Economic Social and Cultural Rights, and on Civil and Political Rights, and the UN Declaration on the Rights of Indigenous Peoples (2007). The Court also made it clear that although Sweden – unlike Norway – has not signed the 1989 ILO Indigenous and Tribunal Peoples Convention (no. 169), this instrument expresses international law principles that shall be taken into consideration.

rounds of communication with the applicant for additional information are often necessary. Thereafter, the municipality will take some time to deliver its decision, which is normally made by the municipal council, as the issue concerns a 'matter of principal interest' regarding local land-use. Case-law has made clear that the requirement for municipal approval applies not only to original permit applications, but also to permission for changes in the operation according to 16:2 MB.[15] This commonly occurs when the original permit for a wind farm has never been utilized – for financial reasons, lack of net capacity on the electrical grid, etc. – and time has made the height condition obsolete due to recent technical developments. For example, instead of 20 turbines with maximum height 150 meters, the applicant may now wish to have 15 wind turbines, 250 meters in height. This requires new approval by the municipality – which seems logical, as the disturbances from taller wind turbines can be quite different. Importantly, the warning lights from turbines over 150 meters are no longer red, but flickering white – a greater nuisance for those living nearby. On the whole, the public finds these taller, larger wind turbines far more controversial, which obviously puts greater pressure on local politicians. And, as the Land and Environmental Court of Appeal has pointed out, if approval were not necessary for such changes, the operator would be able to circumvent the requirements by first applying for a certain design of the installation, and later intending something quite different, without needing approval from the municipality. Further, the municipal decision is not regarded as binding according to the principles of public law, which enables the municipal council to change its mind in the course of the procedure, even when the permit is on appeal.[16] Finally, the validity of the municipal decision is not affected by a party requesting judicial review of the decision as such. This may happen when a disappointed applicant wants to challenge the decision in court – thus far, without success.[17]

**Application of the municipal veto rule 2014–2018**

As noted, our study of wind farm permits between 2014 and 2018 covered 192 cases with decisions and judgements from the MPDs, Land and Environmental Courts and the Land and Environmental Court of Appeal.[18] In about 80% of the cases, the MPDs decisions are appealed to court. Leave to appeal was issued by the Land and Environmental Court of Appeal in about 20% of the cases, a fairly normal share for this kind of procedure under the Environmental Code.[19] Appellants were distributed, about 50/50, between developers (applicants) and opposing individuals and their organizations, including ENGOs.

The 192 cases concerned a total of 4,254 wind turbines. Of these, 11 (390 turbines) were dismissed by the MPDs or courts due to lack of investigation, flawed EIAs, etc. Of the remaining 181 cases (3,864 turbines) which were tried on their merits, permits were issued for 2,891 turbines (75%).

[15] Land and Environmental Court of Appeal 2018-05-15; M 6227-17 (MÖD 2018:6); http://www.rattsinfosok.dom.se/.

[16] MÖD 2016-09-21; M 10647-15; https://www.domstol.se/mark--och-miljooverdomstolen/avgoranden/.

[17] See for example judgement by the Administrative Court in Jönköping 2019-11-07 in case No 5313-18.

[18] Those figures include only cases where a final decision has been made. In addition come slightly more than 20 cases decided by the MPDs during the period, which still are pending.

[19] The portion was lower in the south of Sweden and higher in the six northern counties, largely due to conflicts between wind farming and reindeer herding and other Sami land-use rights.

Of the 25% where the application was tried on the merits and rejected (973 turbines), the reasons were as follows: municipal veto 11% (427 turbines), species protection 8% (311 turbines), Sami land-use rights and reindeer herding interests 3% (116 turbines), and national defence 2.4% (93 turbines). Neighbours, landscape and cultural heritage do not feature in the statistics; these interests sometimes entail stricter conditions or that a couple of turbines are excluded, but rarely result in denial of a permit for a wind park.[20]

Thus, the most frequent reason for denying a permit for a wind farm is the municipal veto. Even if 11% is a rather high figure, is it not in the vicinity of the figures found in other studies applying a similar method.[21] Of course it might be argued that these figures underestimate the impact of the municipal veto, as many applicants simply decide not to proceed past the EIA consultation stage when they realize that the local politicians are negative. That may be so, but it could also be said of all the above-mentioned grounds for refusal and it is impossible to check without further study. Moreover, the system is set up so that the municipal decision enters the procedure rather late, when the EIA has been produced and the application has been completed, at substantial cost for the applicant.[22] Moreover, many municipalities hesitate to give a clear response until they have studied the full application – which also means that they may have a rather positive attitude at the hearing, and later change their minds due to public pressure. Further, it happens that the municipality sets conditions of its own as regards approval, e.g. distance requirements or limit values for noise that are stricter than those decided in case-law on permits for wind farms. These conditions can be enforced effectively if the MPD does not abide by them, as the municipality may appeal the decision if they find it unfavourable and subsequently issue a new and negative 16:4-decision.

**The Swedish debate on the veto rule**

The 'veto rule' was introduced in 2009 in order to safeguard municipal influence over decision-making concerning windpower installations when the requirement for local planning was abandoned. The system has since then been criticized for discriminating against windpower in relation to other sources of energy production, thus representing an obstacle to climate-change adaption. Critics note the waste of resources if applications are denied or withdrawn at a very late stage in the procedure. Local opinions are also said to have too much weight, to the disadvantage of renewable energy production. Further it is claimed that the veto rule can be used in order to 'blackmail' applicants to contribute to the local economy. Finally, the veto power is said to be applied very differently from one municipality to another. Against this backdrop,

[20] During the period under study, only one application (for ten wind turbines) was turned down on grounds of cultural heritage interest: the exploitation area was close to Fågelsjö Gammelgård, a UNESCO World Heritage Cultural site.

[21] In one region in southwestern Sweden – Västra Götaland – a study of permit applications between 2009 and 2014 found that 45% of all cases were turned down by municipal veto (*Användning av det kommunala vetot mot vindkraft i Västra Götalands län*. Franzén Wallberg, A & Göthe, L. Miljöbyrån Ecoplan AB, March, 2015. There may be various reasons for this discrepancy: the system was introduced in 2009 and was therefore rather new, and communications between applicants and municipalities were less developed; public opinion was more negative towards wind farms at that time – or simply that the figures reflect the fact that the resistance is much greater in densely populated South Sweden than in the northern regions.

[22] According to the guidelines issued by Swedish Energy Agency, the municipal decision is to be issued *no later than* when the application is complete (Energimyndigheten: *Vägledning om kommunal tillstyrkan vid tillståndsprövning av vindkraft*. ER 2015:05, part 3). However, this guidance is non-binding, and few municipalities deliver the 16:4-decision at an earlier stage.

the system is argued to suffer from lack of predictability and legal certainty, which may be in breach of Article 13.1(d) of the EU Renewable Energy Directive (2008/29), according to which the authorization procedures shall be 'objective (and) proportionate'.[23]

The windpower industry has strongly advocated reform of the system from the very beginning. Over the years, this criticism has attracted some attention; and in 2017, the Swedish Energy Agency and the Environmental Protection Agency proposed abolishing the municipal veto rule.[24] The majority of the instances that made their voices heard during the remit were in favour, but the proposal never gained political acceptance. My guess is that powerful municipal-level stakeholders in the Parliament would not accept such an idea unless they could be convinced that they would still have a say in the local land-use planning concerning wind farms.

Since then, alternative ideas concerning municipal consent in the Environmental Code has been discussed – for example, requiring that the decision be made early in the procedure and be binding. But even so, the voices are strong from those who advocate the abolishment of any such consent. However, in my view, some of the arguments put forward for such a solution are misleading or misinformed. For example, it is claimed that the municipalities will retain their influence through the comprehensive plan according to Chapter 3 of the PBL. Such a plan, although not binding, has a certain importance for the localization of wind farms according to jurisprudence. The support for this is a judgement by the Land and Environmental Court of Appeal from 2009 (MÖD 2009:4). That conclusion may have been true some ten years ago, but is no longer relevant when the Energy Agency has designated more than 300 'areas of national interest' for wind farming under the Environmental Code. Such a designation is decisive for the land-use in a given area, regardless of any local efforts at planning otherwise. When a comprehensive plan is displayed for public consultation, the County Administrative Board (CAB) is assigned by law to protect the national interests. If the municipality proceeds to plan for land-use in an area which is not in line with a designation for a purpose of national interest, the CAB is obliged to lodge an objection, which will become a part of the comprehensive plan. If the municipality proceeds and decides to adopt a detailed plan for that area, the CAB is obliged by law to quash that plan (11:10-12 PBL).[25] Moreover, the law is equally clear when an application

[23] See Michanek, G: One national windpower objective and 290 self-governing municipalities, in: *Renewable Energy Law in the EU: Legal Perspectives on Bottom-up Approaches*, eds. M. Peters & T. Schomerus, Edward Elgar 2014, p. 144, also Malafry, M: *Biodiversity Protection in an Aspiring Carbon-Neutral Society. A Legal Study on the Relationship between Renewable Energy and Biodiversity in a European Union Context* (dissertation, Faculty of Law, Uppsala Universitet, 2016), section 2.5.6.3 Example from Sweden – the municipal veto rule (pp. 75 ff.).

[24] *Kommunal tillstyrkan av vindkraft*. Redovisning av regeringsuppdrag i regleringsbrevet för 2016. Skrivelse 2017-06-19; dnr NV-00099-16, EM 2016-4752.

[25] This system for state control was illustrated in a case in one of the Land and Environmental Courts concerning an application for a permit to construct three wind turbines in Lilla Edet on the Swedish west coast (Mark- och miljödomstolen in Vänersborg, judgement 2015-01-29 in case No. P 2142-14). The municipality turned down the application, on grounds that, according to the comprehensive plan, that area was designated for outdoor recreation. On appeal from the developer, the CAB annulled this decision, referring to the fact that the area had been designated by the Energy Agency as of national interest under 3:8 of the Environmental Code. The municipality then appealed to the Land and Environmental Court, which accepted the decision to deny a permit for the windpower installations. Decisive here was that the CAB had failed to state its objections at the consultation stage, which is why the comprehensive plan took precedence. From this line of argument, it is obvious that a designation from a national agency as to land-use in a certain area takes precedence over any conflicting municipal decision under that law in all normal circumstances.

for a permit for a windpower installation is to be decided under the Environmental Code; according to 3:8 MB, areas of the national interest for energy production 'shall be protected against measures that may substantially obstruct the establishment or use of such facilities'. And on this matter, case-law is firm; any municipal interest in the land-use of that area must yield to the national interest in wind farming (MÖD 2019:5, MÖD 2017:20, MÖD 2010:38).

## 4. Norway: Legislation and permit procedure for wind farms

### Norway and the EEA Agreement

Norway is not a member of the EU. However, as a member of the EFTA, it has been bound by most EU laws since 1994 through the EEA (European Economic Area) Agreement.[26] This means that most (but not all) EU regulations and directives apply in Norway. For example, the EU Water Framework Directive (2000/60), the Renewable Energy Directive (2008/29), the EIA Directive (2011/92) and the Public Participation Directive (2003/35) are all included in the Norwegian EEA Agreement. However, the nature conservation directives – that is the Birds Directive (2009/147) and the Habitats Directive (92/43) – have been left out. This has consequences for wind farming, as such installations may have detrimental effects on birds and bats. On the other hand, under the Council of Europe, Norway is bound by the 1979 Bern Convention.[27] This international instrument is the overarching European agreement that the both nature conservation directives intended to implement into the Union. Thus, the level of species protection is meant to be similar.

The difference between the obligations under EU law and under the Bern Convention lies not in the substance of law, but in the mechanisms for implementation and enforcement. The Commission is the main driver for the integration of the EU Directives in the Member States by way of guidelines, communications and – if necessary –infringement cases brought to the CJEU. Judgements of the CJEU are binding on the Member States, and the Commission can apply for fines if a Member State is found in breach of EU law[28], as Sweden has painfully experienced.[29] In addition, all national courts in the Member States have the possibility – and for the final instances, an obligation – to request the CJEU for a preliminary ruling on the understanding of EU law in a given issue. Over the years, this possibility has been widely used by various courts to obtain a common understanding of the EIA Directive, the Birds Directive and the Habitats Directive. In contrast, the only compliance mechanism in the Bern Convention is the possibility for the public concerned or another Party to notify the Standing Committee of alleged infringements. This Standing Committee is mainly a tool for diplomatic negotiations, and

[26] Today, Norway, Iceland, Liechtenstein and Switzerland constitute the European Free Trade Association (EFTA), to which also Sweden belonged before joining the EU in 1995. Norway, Iceland, Liechtenstein have, together with EU's. 27 Member States, formed the European Economic Area (EEA), aimed at an internal market governed by the basic rules of the four freedoms on the movement of goods, persons, services and capital. Switzerland has a separate agreement with the EU and the UK has a temporary withdrawal agreement with the Union which ends on 31 December 2020.

[27] Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

[28] The case C-261/18 Com v IE (2019) on breaches of the EIA Directive in Ireland serves well for illustration.

[29] In the cases C-607/10 (2012) and C-243/13 (2013), Sweden was found to be in breach of updating requirements for permits for industrial installation under the IPPC Directive (2008/1). When the case concerning fines arrived at the CJEU, there was still one installation without modern conditions in the permit. That omission cost Sweden the lump sum of €2M plus € 4,000 in daily fines for almost a month.

is generally reluctant to issue decisions apart from general recommendations. However, that does not prevent the Committee from occasionally taking a harder bite in issues concerning species protection, as happened concerning the Norwegian wind park at Smøla, widely known for causing serious damage to white-tailed eagle populations over the years.[30] But at the end of the day, the only sanction available if a Party neglect such findings is the possibility to report back to the Standing Committee and for the Committee to take a renewed stance on the alleged breaches of the obligations in the Convention.

In addition, also concerning those fields of law which are covered by the EEA Agreement, the system for implementation and enforcement is very different from the one within the EU. There is a supervisory body – the EFTA Surveillance Authority (ESA) – and a court, the EFTA Court.[31] The ESA has similar competence as the EU Commission to pursue infringement cases.[32] However, the EFTA system is much weaker as regards implementation than that of the EU. To begin with, the national courts of Norway, Iceland and Liechtenstein may request a preliminary ruling from the EFTA Court, but they are not obliged to. Moreover, rulings of the EFTA Court in such cases are formally termed 'advisory opinions'. Although these judgements are binding under international law and must accordingly be taken into account by the national courts, the Norwegian Supreme Court (*Høyesterett*) has occasionally chosen to dissent.[33] Provisions in EU Directives under the EEA Agreement are used as 'interpretive factors' in the understanding of the implementing legislation in the EFTA countries, but are not awarded any 'direct effect'. In contrast, the principle of direct effect is of utmost importance in EU environmental law, as it obliges Member States' courts to give precedence to those provisions containing sufficiently precise and unconditional rights and obligations over any contrasting national law.[34] Finally, the EFTA Court is not empowered to impose fines on a country for breaches of the EEA Agreement.

**Norwegian environmental law**

Environmental law in Norway is not contained in a single piece of legislation such as a Code, but divided according to the substance of regulation

[30] Recommendation No. 144 (2009) of the Standing Committee, adopted on 26 November 2009, on the wind park in Smøla (Norway) and other windfarm developments in Norway. https://wcd.coe.int/ViewDoc.jsp?id=1560617&Site.

[31] Obviously, there are substantial differences between the two courts concerning the size and number of cases handled. Whereas the CJEU has 65 justices and 11 advocates-general, more than 20,000 employees and decides on about 1,500 cases each year, the corresponding figures for the EFTA Court are three justices, a staff of less than 20 persons, and rarely more than 15 cases a year.

[32] See for example the complaint from Renøy reindeer herding district about Norwegian implementation of the EIA Directive: https://www.eftasurv.int/cms/sites/default/files/documents/gopro/4893-Request%20for%20information.pdf It may be noted that most communications between the ESA and EFTA countries are openly published on the authorities' website – in stark contrast to the EU system, where all communications between the Commission and the Member States are kept secret. The reason for why we know about the infringement cases between the Commission and Sweden is because the Swedish government has a more open attitude when it comes to disclosing communications from the EU Pilot, Letter of Formal Notices and Reasoned Opinions. Also Finland has a similar attitude. In both countries, the transparency principle holds a strong position.

[33] The Høyesterett has, on the one hand, declared that rulings of the EFTA Court shall be accorded 'considerable weight' (*'vesentlig vekt'*) in national jurisprudence (see Rt. 2000 s. 1811 *Finanger I*). On the other hand, in EFTA correspondence on the *Laval case* about free movement of labour (C-341/05), Høyesterett chose not to abide to the ruling from the EFTA Court (*Rt*. 2013 p. 258, cf. E-2/11 *STX Norway offshore*), which led the ESA to open a new infringement case, see http://www.eftasurv.int/press--publications/public-documents?ActionEvent=-Search&casenr=74557).

[34] The CJEU uses the expression 'to set aside' or to 'dis-apply' provisions in national legislation contravening EU law; see Darpö 'Pulling the trigger' (n.12 supra).

or sector in society. The most important pieces of legislation with general application are the Pollution Control Act (LOV-1981-03-13-6, FL), Nature Diversity Act (LOV-2009-06-19-100) and the Environmental Information Act (LOV-2003-05-09-31). The Nature Diversity Act is meant to implement the Convention on Biological Diversity (CBD)[35] and the Bern Convention. All these acts are under the responsibility of the Ministry of Climate and Environment (KLD). Also the Planning and Building Act (LOV-2008-06-27-71, PBL) has general application. Alongside with provisions on planning and building, it contains rules on environmental impact assessments. The PBL is under the Ministry of Local Government and Modernization (KMD). Decision-making under the PBL is mainly a responsibility of the municipalities, although regional and state bodies have legal means to intervene in order to protect higher-ranking interests.

The Ministry of Petroleum and Energy (OED) is in charge of the energy sector. Hydropower is regulated through the Act Relating to Regulation of Watercourses (LOV-1917-12-14-17) and the Water Resources Act (LOV-2000-11-24-82).[36] Provisions on windpower installations and issues related to electricity nets and grids are found in the Energy Act (LOV-1990-06-29-50, EL).

The Norwegian system for environmental decision-making concerning large-scale operations can be described as more centralised and politicized than in Sweden.[37] Permits for industrial installations, hydropower and environmental hazardous activities are normally issued by state authorities in the regions (*fylkesmann*, County Governor) or at the national level, such as the Environment Agency (*Miljødirektoratet*) or the Norwegian Water Resources and Energy Directorate (*Norges vassdrags- og energidirektorat, NVE*). Decisions by the NVE can be appealed on the merits ('administrative appeal') to the OED. The definition of those who can appeal – the public concerned – is 'interest-based' and traditionally concerned individuals, ad hoc groups, local community groups and ENGOs all have standing. Judicial review of the decisions by the Ministry can be brought to court, but in contrast with Sweden, this rarely happens. Three factors may be relevant here. First, criteria for concessions are broadly formulated, leaving the administration considerable room for discretion to decide, for example, what is 'socio-economically effective'. In practice, the review in court will be confined to formal issues and other basic rules of good governance. Second, it is procedurally complicated to bring an action for judicial review in Norway, as one must bring the claim to the first level in the general court system, that is the District Court. Thereafter, the case must proceed over the Court of Appeal before arriving at the final instance, the Norwegian Supreme Court (*Høyesterett*). Third, the costs of bringing such a case may be considerable, as the loser-pays-principle applies in all instances.[38] There

[35] The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).

[36] Also relevant in this context is the Waterfall Rights Act (LOV-1917-12-14-16), according to which only public actors can purchase larger waterfalls in Norway.

[37] Rudberg, P & Weitz, N & Dalen, K & Kielland Haug, JJ: *Governing growing windpower: Policy coherence of windpower expansion and environmental considerations in Sweden, with comparative examples from Norway*. Stockholm Environment Institute (SEI), project report 2013-04, also (although somewhat out-of-date) Pettersson, M & Ek, K & Söderholm, K & Söderholm, P: Windpower planning and permitting: Comparative perspectives from the Nordic countries, *Renewable and Sustainable Energy Review* 14 (2010) pp. 3116–3123.

[38] In 2018, when the WWF challenged the decision on hunting wolves, the litigation costs in Oslo District Court amounted to more than NOK 450,000 equivalent to €47,000. However, in cases concerning issues of principal interests, the claimants can be exempted from paying the opponent's costs. The latter happened when two ENGOs (*Natur og Ungdom* and *Föreningen Greenpeace Nor-*

is still another phenomenon that differs in our two countries. Whereas ENGOs in Sweden are large, centralized and few, they are small, local and many in Norway. This may be one reason why the Swedish organizations seem to be more litigious. This may on the other hand be an oversimplification, as the Norwegian Trekking Association (DNT) – far bigger than any Swedish equivalent – has been very active in windpower cases. There may thus be other underlying factors for this difference in the willingness to go to court, which cannot be examined here.[39]

**Permit procedure for windpower installations**

Also in Norway, the permit procedure for windpower installations was simplified in 2008. Before the reform, such installations required both municipal approval in the form of a regulation plan according to the PBL and a permit decision according to the EL. Today, for wind farms with capacity of more than 1 MW the developer only needs to apply for a permit from the NVE according to sections 3-1 and 3-2 EL.[40] The term 'concessions' (*konsesjoner*) is used here for those permit decisions, which in my view is accurate as they cover the windpower installation as such, the powerlines and connection to the electricity grid, as well as any necessary expropriation of land.

The concessions procedure at the NVE is only partly regulated in the EL and the PBL and subordinate bylaws.[41] In addition, administrative practice plays an important role. For installations with capacity of more than 10 MW – some 90% of all applications at the NVE[42] – the process starts with a notification to the authority. An EIA according to Chapter 14 of PBL is mandatory for wind farms of that size. For smaller projects requiring a concession according to EL (1–10 MW), the authorities shall make an assessment according to Article 4.2 and Annex II of the EIA Directive: a screening evaluation and decision. After announcement and public consultation, the NVE communicates a first opinion to the developer, with advice on whether to proceed or not. Although this procedure is not regulated by law, one third of the applications are withdrawn already at this stage.[43] Common reasons are that the area is not suitable for wind farming due to conflicting interests, or that the authorities are currently not giving priority to applications in that particular region. If the applicant instead decides to proceed, an investigation programme is established in accordance with the EIA requirements. A consultation group is commonly created and at least three public hearings are held with representatives of the municipalities involved, the public concerned, societal groups and ENGOs, the County Council (regional par-

*den*) challenged the OED decision to open Barents Sea to oil extraction. The District Court awarded the OED the equivalent of €53,000, whereas the Court of Appeal exempted the ENGOs from all costs. As the ENGOs had lost the case in substance, they appealed to the Supreme Court, which granted leave to appeal in February 2020, see http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/?cn-reloaded=1.

[39] See Fauchald, OK: Environmental Justice in Courts – a Case Study from Norway. Nordic Environmental Law Review 2010 pp. 49-67, also Tegner Anker, H & Fauchald, OK & Nilsson, A & Suvantola, L: The Role of Courts in Environmental Law – a Nordic Comparative Study. Nordic Environmental Law Journal 2009 pp. 9-33.

[40] At sea, there is a permit requirement according to the Act on the production of renewable energy at sea (LOV-2010-06-04-21, *havenergilova*), which will not be dealt with here.

[41] Guidelines from the KMD and OED, most importantly *Retningslinjer for planlegging og lokalisering av vindkraftverk* (T-1458, June 2007) and KE-notat 13/2014 *Rammer for NVEs behandling av vindkraftsaker og orientering om viktige vurderingstemaer* (NVE 2014).

[42] Fauchald, OK: *Konsesjonsprosessen for vindkraftutbygginger – juridiska rammer*. Fridtjof Nansens Institutt, FNI Report 1/2018, at p. 41 f.

[43] *Konsesjonsprosessen for vindkraft på land*. NVE rapport 3/20, section 1.2. For further reading, see Inderberg et al 2019 (n.8 supra).

liament), County Governor (representing the state), and, as applicable, *siida*s (traditional Sami villages) and the Sami Parliament, and others. After this, the application for concession can be formally submitted to the NVE, often including a request for the necessary permit for net connection and access to land. If agreement cannot be reached with the landowners, compensation issues are dealt with by the general courts. The NVE commonly holds hearings with the public concerned, has meetings with those authorities who have raised objections (see below) and makes site visits before reaching a conclusion concerning the concession. In its decision, the NVE balances various private and societal interests: on the one hand, the need for renewable energy, net security, financial issues and prospects for profit, added value to the community and region; and on the other, nature conservation and species protection according to the Nature Diversity Act, outdoor recreation and landscape protection, national defence, nuisance for local residents, reindeer herding interests, cultural heritage, etc.

In comparison with Sweden, the room for administrative discretion in Norwegian concession cases is very wide. Decisions under the EL are also quite different from the Swedish system, as they usually provide only a general framework for the windpower installation as regards capacity and localization. The placement and number of turbines are not clearly stated, but left for the operator to decide in cooperation with the supervisory department of the NVE later in the procedure.[44] The stated reason for this is to ensure that the solution chosen is most suitable from a technical and financial viewpoint.[45] Many controversial issues are left for further investigation and/or decisions in the detailed plan for the installation, sometimes without public consultations. In recent years, however, the NVE has issued guidelines aimed at strengthening the involvement of the public concerned also in these stages of the procedure.[46] Even so, there is considerable flexibility as regards extension of time limits for windfarm construction and operation. Moreover, the NVE's decisions are formulated very briefly; most information can be found in the various background documents. Guidelines exist, but as they tend to be rather dated, most attention is given to appeals decisions from the Ministry (OED). Regional windpower plans use to exist, but was widely regarded as recommendations only. Some years ago, there are also existed schemes issued by the KLD for avoiding conflicts ('TKVs'), but they were not closely followed.[47]

Numerical comparisons on windfarm installations in Sweden and in Norway are not easy to perform, as the figures are not really compatible. Norwegian wind farms are commonly larger than Swedish ones; and due to the design of the concession, it is difficult to get information on the number of turbines per decision.[48] Moreover, the Norwegian procedure is divided into two stages: notification and application. Similar to the case in Sweden, most NVE decisions are

[44] *Vindkraft: Håndteringen av miljøhensyn i konsesjonsordningen – situationsbeskrivelse og anbefalinger*. Miljødirektoratet Rapport 2015-10-20, at p. 40.

[45] See the NVE's position in the *Sandhaugen* case in the District Court of Oslo (Oslo tingrett 2020-02-21 in case No. 53708; TOSLO-2019-53708) at pp. 4 (on the scope of the concession) and 31 (on the detailed plan for the installation).

[46] See for example the NVE note on 'expectations to permit holders at the planning and building of windpower installations' (2019-07-04; 201835505-2).

[47] Fauchald (n.41 supra) at p. 38.

[48] Recent figures from the NVE (2020-02-06) show that 39 wind farms have been built with total effect 2,416 MW. The number of concessions granted are 86, concessions denied 46. Ongoing cases are 20, but there are still another 104 in the planning stage. Information about the number and type of turbines etc. can be found on; https://www.nve.no/energiforsyning/kraftproduksjon/vindkraft/vindkraftdata/.

appealed to the ministry (OED), but the success rate is rather low.[49] However, some figures may be indicative. Research at the Fridtjof Nansen Institute has shown that, out of 195 notifications to the NVE in the period 1999–2019, 82 were dismissed or withdrawn at the first stage of the proceedings.[50] Out of the remaining 113 cases, concessions were granted by the NVE in 75 instances, and 38 rejected. As of June 2018, 79 decisions were appealed to the OED, out of which 64 were upheld by the Ministry. In the end, 48 applications for concession out of 113 were denied – or 43%. In addition, a further 82 were dismissed or withdrawn at the notification stage. Finally, my impression is that the grounds for denial are broader than in Sweden, as landscape protection, outdoor recreation and cultural heritage are specifically mentioned as barriers to windpower development.

As noted, administrative decisions can be subjected to judicial review in the general courts of Norway. However, such court decisions concerning wind farms are almost non-existent. A simple search resulted in 15 judgements, most of which dealt with compensation issues.[51] Only two of the cases shed some light on the concession process, albeit indirectly. These cases concerned two landowners living on estates bordering an area where a concession for a windpower installation had been granted. They sued the developer for compensation for breach of due consideration according to neighbourhood law and respect of property rights under the European Convention on Human Rights (ECHR). They claimed that, as the closest wind turbine would be placed no more than a few metres from their properties, economic damage had been inflicted because of the loss of opportunity to establish a windpower station on their own land, in addition to loss of property value. One of the cases went all the way to the Supreme Court, which dismissed the claims;[52] the other failed for similar reasons at the Court of Appeal.[53] To these two cases can be added a recent judgement from the District Court of Oslo, where a developer was granted compensation due to maladministration at the OED when the Ministry unlawfully revoked a given concession.[54] However, there are no reported cases where the public concerned or ENGOs have challenged a court decision on a windpower installation concession.[55]

**Influence of the municipalities**

With the 2008 reform, Norwegian municipalities lost much of their possibilities for influencing the development of windpower installations through planning. The municipalities are still important regarding communications with the developer and the NVE, but their formal decision-making power has been effectively removed. The NVE regards region plans as recommendations only; and if a municipal plan is incompatible with windpower development in the area, the national authorities can award the concession the status of a state area plan, which

[49] Fauchald (n.41 supra) at p. 15.

[50] Gulbrandsen, LH & Inderberg, THJ & Jevnaker; T: Political decisions gone with the wind? Windpower politics and administration in Norway. Forthcoming 2020.

[51] I am grateful to Professor Ole Kristian Fauchald at the Faculty of Law, the University of Oslo and the Fridtjof Nansen Institute, for assistance here.

[52] Høyesterett 2011-05-27 in case No. 2011/60 (Rt 2011 s. 780, *Helland*).

[53] Gulating lagmannsrett 2014-10-15 in case No. 89583 (LG-2013-89583, *Undheim*).

[54] Oslo tingrett 2020-02-21 in case No. 53708 (TOSLO-2019-53708, *Sandhaugen*).

[55] Norwegian court cases are reported in Lovdata (https://lovdata.no/), but the coverage of judgements from the District Courts is meagre. However, according to recent media reports, the ad hoc group 'Motvind' initiated one court case in May 2020 concerning a windfarm development, and has eight more upcoming, involving requests for injunctive relief. All cases concern installations in the coastal areas: https://www.nrk.no/vestland/motvind-vil-ta-atte-vindkraftverk-for-retten-1.15033299.

takes precedence. Further, if the local authorities adopt any new plan in breach of a concession, the developer may appeal that decision to the Ministry of Local Government and Modernization (KMD), within the same government that decided on the installation to begin with. Thus, in formal terms, Sweden and Norway differ considerably as regards local influence on decision-making on windpower installations.

However, this picture can be nuanced. In practice, municipalities exercise influence mainly through the administrative instrument of *innsigelse* ('objection'), which has been developed under planning law as a means for regional and state influence on local decision-making. According to the PBL, certain state authorities, the Sami Parliament, the County Council and the County Governor, as well as neighbouring municipalities may raise objections to a local plan – if the plan concerns an issue of fundamental importance to that entity's area of responsibility or interest.[56] The objection must be made during the consultation stage of the proceedings, after which the municipality is required to initiate negotiations performed by the County Governor.[57] If agreement cannot be reached and the authority that raised the objection persists, decision-making on the controversial plan is raised from the municipal level to the KMD.

This system has been transferred to the EL. Reference is made to the provisions in the PBL which shall be applied 'as far as suitable', thus enabling the NVE to adapt the system to the concessions procedure (section 2-1 EL). First of all, the hosting municipality where the windpower installation is planned is accorded competence to raise objections. An objection results in compulsory mediation, to which the developer is invited. If the objection is upheld, the objection-raising body may develop its arguments, after which the NVE issues a decision in the case. This decision is thereafter remitted to the Ministry (OED), which handles the objections together with the appeals made against the NVE decision.

In cases concerning windpower installations, objections are often raised from the hosting municipalities.[58] As they also have standing to appeal, the difference under the EL between the two possibilities is slim, although an objection may be regarded as more serious.[59] Although the NVE on its website states that those bodies having competence both to raise objections and to appeal 'shall' use the former possibility,[60] it is not obvious from studying OED decisions on appeals that all municipalities have read those instructions. In general, the NVE has proven very reluctant to go against the opinion of an objecting municipality. Already in 2007, the authority declared that acceptance from the hosting municipality was of utmost importance when deciding on windpower installations.[61] In fact, in only six cases has the NVE overruled a protesting local community.[62] Moreover, con-

[56] Information from the KLDs website: https://www.regjeringen.no/no/tema/plan-bygg-og-eiendom/plan--og-bygningsloven/plan/kommunal-planlegging/innsigelsessaker/id2008038/.

[57] *Retningslinjer for innsigelse i plansaker etter plan- og bygningsloven*. Rundskriv H-2/14 2014-02-17.

[58] *Vindkraft: Håndteringen av miljøhensyn i konsesjonsordningen – situasjonsbeskrivelse og anbefalinger*. Miljødirektoratet Rapport 2015-10-20, pp. 43 ff.

[59] Telephone interview with NVE senior adviser Erlend Bjerkestrand, 13 May 2020.

[60] NVE: Innsigelse till konsesjonssaker – praktiske rutiner; https://www.nve.no/flaum-og-skred/arealplanlegging/energianlegg-i-arealplanlegging/innsigelse-til-konsesjonssaker-praktiske-rutiner/.

[61] See the *Kvalvåg* decision below.

[62] Concession cases concerning *Kvalvåg vindkraftverk* (Austevoll), NVE 2007-02-19 (NVE 200700069 mfl), OED 2009-01-12 (08/00903-1), *Selbjørn vindkraftverk* (Austevoll), NVE 2007-02-19 (NVE 200301593 mfl), OED 2009-02-06 (08/00903-1), *Haram vindkraftverk* (Ålesund), NVE 2008-06-23 (NVE 200708130-5), OED 2009-12-14 (08/02489-21), *Raudfjell vindkraftverk* (Tromsø), NVE vedtak 2012-05-11

cerning appeals, the OED has been even more reluctant and in one case only – *Raudfjell* (NVE 2012, OED 2015) – has the concession been granted despite the opposition from the hosting municipality. Thus, although they lack formal decision-making possibilities, Norwegian municipalities have an informal 'veto power' on windpower installations, at least before the concession is granted. However, the municipality and the public concerned are excluded from the ensuing stages: decision-making on major issues such as the design of the wind farm, the type, height and position of the turbines, the localization of roads etc. have basically become matters to be decided between the developer and the NVE.[63]

**Norwegian debate on local influence and windpower installations**

Local opposition to windpower installations has been growing in Norway recent years. The protests have focused especially on the weak involvement of the public concerned in the stages after the concession has been granted; between the initial decision and the actual construction, many years can pass, during which the basic design of the installation and the necessary infrastructure may be altered in important aspects. Many critics note what the municipalities once agreed on is not what emerges when the wind farm is built.[64]

In response to such criticism, while also taking a holistic approach to the development of renewable energy, in early 2017 the government entasked the NVE with drawing up a national plan for windpower. After comprehensive communications with stakeholders and in-depth analysis of relevant international literature, the NVE presented its report in April 2019.[65] As guidance for developers and authorities, 13 areas were designated as the most suitable for windpower development. The criteria for choosing were as follows: evaluation of local wind resources, the need for power supply taking into account the existing electricity net, balanced against conflicting environmental and social interests. However, at the remit of the report, there was a public outcry against the national plan with more than 5,000 responses to the OED.[66] The Government felt the pressure and gave in later that year. The latest plan is to issue a report to the Parliament (Storting) before the summer, presenting the government's analysis, plans and ambitions in the matter. No concessions will be granted in the meantime.

As part of this work, the NVE in early 2020 published a report on the concession procedure and the main issues that have been raised by the municipalities and other stakeholders.[67] According to the report, many actors express mistrust with the concession process and the authorities involved. Viewpoints here concern the lack of

(NVE 200701246-89), OED 2015-05-26 (08/1567-), *Skveneheii vindkraftverk* (Åseral), NVE vedtak 2014-06-27 (NVE 201004523-85), OED 2017-02-03 (16/385-), and *Bukkanibba vindkraftverk* (Vindafjord), NVE vedtak 2014-07-01 (NVE 201004370-74), OED 2016-06-13 (10/1759-). Concerning *Haram vindkraftverk* (2008), the OED granted the concession as they concluded that the municipality had changed their mind and was in favour of the project.

[63] Inderberg et al (n.8 supra); also Inderberg, THJ & Theisen, OM & Flåm, KH: What influences windpower decisions? A statistical analysis of licensing in Norway, *Journal of Cleaner Production* (forthcoming 2020).

[64] The criticism was recently voiced in a debate in Norwegian television, see NRK TV 4 June 2020; Stormfullt om vindkraft; https://tv.nrk.no/serie/debatten/202006/NNFA51060420.

[65] *Forslag til nasjonal ramme for vindkraft*. NVE rapport 12-2019 (2019-04-01); http://publikasjoner.nve.no/rapport/2019/rapport2019_12.pdf.

[66] Vasstrøm & Lysgård (n. 10 supra) at p. 11.

[67] *Konsesjonsprosessen for vindkraft på land*. NVE rapport 3/20.

public involvement, undemocratic procedures, vague basis for the decision-making and insufficient considerations to local interests and the environment. Against this backdrop, NVE concludes that it is vital to strengthen the trust from the public concerned. When it comes to ideas and proposals on how to improve the concession procedure in this respect, the NVE discusses better information and guidance, swifter handling of the cases, stricter requirements for prolongation of time limits for the construction and operation of the installations. According to the report, the decision-making should continue to be held at national level and under a single piece of energy legislation, although the steering effect of regional regulation plans for windpower installations may be further developed. Maximum heights shall be decided in the concessions and the conditions for the operation stated more clearly. As for the after stage with detailed planning of the development, shorter time limits will be discussed, as well as requirements for EIA and public hearing. On a general level, the communication with local stakeholders should be improved, measures to compensate for loss of outdoor recreation possibilities discussed, as well as schemes for economic compensation to the local society.

What will come out of the OED report to the Storting remains to be seen.[68] However, judging from the recent debate in Norwegian media it is not evident that these proposals from the NVE will mollify the opposition to windpower development. From a Swedish perspective, the debate on the other side of the border seems fierce, and a bit strange. Arguments about lack of democratic procedure and insufficient protection of outdoor recreation areas, cultural heritage and the environment are mixed with voices against colonization of Norwegian nature to profit foreign investors and risk capitalists. In an article in *Welt am Sonntag*, the ENGO *La naturen leve* ('Let nature live') urged for support for the resistance to Stadtwerk München's investments in Norwegian windpower.[69] According to the article, the reason for these investments is that the distance criterion which applies in Bayern makes it impossible to develop windpower in that region. Further, a highly reputed Norwegian newspaper reported on new studies on carbon leakage from windfarm construction.[70] Another article noted local opinion in Agder, which has gone from quite positive to very negative towards windpower, which in turn led the operator to request the OED to award the concession status

[68] The report to the Storting actually came on 19 June 2020, after this article was submitted for publishing; *Stortingsmelding OED 2020-06-19 Meld.St.28 Vindkraft på land. Endringer i kosesjonsbehandlingen*; https://www.regjeringen.no/contentassets/b5f9e2ddc8dc45c58c06b12d956fe875/stm201920200028000dddpdfs.pdf In the report, the OED announces that the local influence will be strengthened by earlier in-volvement and an improved dialogue between the NVE and the municipalities and regions. Concessions for wind farming will be dealt with region by region in order to find the most suitable places with as little negative impact as possible on the environment, social interests and reindeer herding. A legal basis for early refusals will be introduced, as well as shorter timeframes for all parts of the process, including the after stages and the detailed plans for the permitted installations. Moreover, the concessions will contain stricter conditions for the localization and heights of the turbines, and the system for balancing different interests pro and con will be clarified. The OED report will be discussed in the Storting after the summer break and it is too early to give a prognosis on the outcome, especially since the Norwegian Association of Local and Regional Authorities (KS) already has announced its opposition, see; https://tv.nrk.no/serie/dagsnytt-atten-tv/202006/NNFA56062220/avspiller.

[69] *Welt am Sonntag* 2019-02-17: Windkraft zerstört Wildnis, also reported in Norwegian national radio; https://www.nrk.no/trondelag/tysk-utbygger-er-overrasket-over-norsk-vindkraftmotstand-1.14510926.

[70] *Aftenposten* 2020-04-26: *Karbon slippes fri ved graving i urørt natur. Et argument for å droppe store vindparker, mener naturvernere*.

as a state plan.[71] Also frequently mentioned are the differences in economic gain for local society in comparison with hydropower, as compensation granted for windpower installations tends to be meagre. Clearly, the debate on windpower investments in Norway has become national, with clear divides in society. Continuing reports of incidents involving civil disobedience against windpower development, even sabotage, have led some major investors to declare that they will drop the business due to lack of public support.[72]

Any discussion of local opinion in Sweden and in Norway should take into consideration the clear differences in national cultures. The perception of natural resources as something belonging to all – to society as a whole and the people – is very strong in Norway, as illustrated by the situation in hydropower, where most operators have been state-owned or public corporations. Also the Norwegian lifestyle of outdoor recreation is distinctly different – as any Swede working in Oslo who tries to arrange a meeting with colleagues during weekends can report. In addition, Norway has an immense richness of natural resources.[73] All this has consequences for the public debate on renewable energy and the balancing of interests when planning and deciding on such issues. But even so, we all can learn about the growing resistance to windpower installations in Norway, to which I now turn.

## 5. What can we learn from the comparison?

When I first began studying the Norwegian windpower concession system, I noticed that there was quite some media attention to municipalities where opposition to windpower installations was strong. Especially one point was highlighted: that the municipality had been positive when the concession was granted, but that local opinion had turned in the course of time. As noted above, one reason seemed to be that the project had originally a certain design that was subsequently altered in scale and size, resulting in something quite different. From this, I drew the premature conclusion that Norwegian municipalities have little to say about windpower installations. Instead, the explanation proved to lie in the concession system. In reality, local influence in the procedure leading to the concession decision is quite similar in Sweden and in Norway. What differs is mainly what happens next. Whereas the municipalities and the public concerned in Norway have little to say about the final design of the wind farm and the infrastructure needed, the Swedish courts have found that this 'box' model for windpower installations is incompatible with the EIA Directive, unless all alternative positioning of the turbines can be accepted from the point of view of opposing interests – in practical terms, species protection, reindeer herding and aviation security (MÖD 2017:27 *Kölvallen*). The Swedish Land and Environmental Courts are also sensitive to the development of EU law, where it is clarified that prolongation and changes in given concessions for in-stallation with environmental impact requires may require renewed EIAs or even per-

[71] *Morgenbladet* no. 16 2020 (24–30 April), pp. 10–17: *Vinden har snudd. Kommuner på Agder drømte om miljøvenlig energi. Ti år senere føler tidligere vindmølletilhengere seg lurt*.
[72] TU Energi 2019-03-30; *Stakraft frykter folkelig motstand og dårlig omdømme*; https://www.tu.no/artikler/stakraft-frykter-folkelig-motstand-og-darlig-omdomme/461685 Svenska läsare bör observera att omdømme inte betyder omdöme, utan rykte eller goodwill.
[73] The Norwegian Pension Fund (the 'Oil Fund') is among the largest in the world; https://en.wikipedia.org/wiki/Government_Pension_Fund_of_Norway.

mits.[74] It is also interesting to note that there is today a difference in attitudes in our societies: the tendency in Norway seems to be to formalize and strengthen the municipalities' possibilities to have a say in the matter, whereas Sweden – so far at least – appears to be headed the other way. Obviously the starting points are very different, but even so, it is worrying that the voices heard in the Swedish debate rarely mention the need for local acceptance. In particular, the opinion from the Swedish windpower industry as such appears surprising, as the general attitude among developers seems to be that positive municipalities is a necessary prerequisite when deciding on investments in windpower.

My conclusion from this study is that Sweden and Norway have something to learn from each other regarding windpower development. If we further broaden the perspective to several other countries in Europe, it should be possible to agree on some starting points for future expansion. It has now become clear that, even if windpower has developed rapidly in recent years, if we are to meet the climate targets for the future – whether 'zero net greenhouse gas emissions by 2045' (Sweden) or 'emission neutrality by 2030' (Norway) – the need for renewable energy will be immense. On the other hand, the development of renewable energy sources is dependent upon public acceptance. The change in opinion is not a Norwegian phenomenon, quite the opposite. The above-mentioned distance criterion in Bayern is a result of local opinion that sees windpower turbines in the landscape as being in breach of 'German values'.[75] A similar development can be seen in Denmark, Belgium, the Netherlands and elsewhere.[76] If windpower is to have any future at all, we will have to deal with local opinion, lest it be kidnapped by populistic movements.

In order to achieve this goal, some starting points may need to be emphasized. First of all: the arguments pro and con must be straightforward, clear and honest, to prevent conflicting interests from becoming contentious. Second, we must reject any romantic ideas about a wind farm as something you can have in your own backyard producing household electricity. We must recognize that we are dealing with large-scale industrial installations, whether in the forest or mountains or at sea, with major impacts on the local area – indeed on the environment as a whole. And third, we must recognize that there is a genuine conflict between municipal interests in local land-use planning and the national – or even global – interest in providing renewable energy.

There is little room here to do more than just point at possible directions for solutions of this dilemma. I think that the most obvious instrument for future windpower development is planning on various levels. Obviously, there is a need for some kind of framework on the national level for balancing different state interests,

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[74] See AG Kokott's opinion in C-254-19 *River Shannon* (2020). In her opinion, she also analyses the concept "legitimate expectations" (Vertrauensschutz) in relation to given permits (paras 43-44), as well as the meaning of "direct effect" in environmental law (paras 65-66).

[75] In late 2019, the German Minister of Economic Affairs and Energy, Peter Altmaier, proposed a 1km distance criterion between windpower installation and inhabited areas. However, the proposal created debate, why this competence was transferred to regional level. If applied, such a distance criterion would effectively rule out the possibility to further develop windpower installations in Länder such as Nordrhein-Westfalen and Hessen; https://www.euractiv.com/section/energy/news/planned-turbine-free-zones-could-halve-germanys-wind-energy-potential/.

[76] See the country reports in the study *Renewable energy projects and species protection. A comparison into the application of the EU species protection regulation with respect to renewable energy projects in the Netherlands, United Kingdom, Belgium, Denmark and Germany*. Utrecht Centre for Water, Ocean and Sustainability Law, 28 May 2018. Eds. Backes, C & Ackerboom, S.; https://www.uu.nl/sites/default/files/res_biodiversity_a_comparison.pdf.

but any such instrument should be combined with possibilities for the municipalities to have a say as regards implementation. This may be achieved through binding 'windfarm plans' at local level, to enable the municipality to balance the different land-use interests against each other. In addition to such planning on several levels, an individual evaluation must be made in a permit procedure in order to ensure species protection, reindeer herding interests and consideration for neighbours, etc. Obviously, not all 'most suitable' areas for windpower will be exploited, but that may be worth the price. If one opts for a more 'Swedish' solution, awarding the municipalities veto power at least in certain areas in the community, then the requirements for proportionality and foreseeability in the EU Renewable Energy Directive will have to be solved. If a request for a preliminary ruling is launched to the CJEU from a national court, I doubt that the former would find it problematic that decision-making competence lies on the local level, as this is a very common situation in many EU Member States. Probably the CJEU would even accept a veto power, at least if it meets basic criteria of the principles of good governance in EU law. In that context, I suspect that the Court would find a system where a local decision can be altered any time during the process to be in breach of those principles. On the other hand, if the municipal decision is required to be binding, the authorities must have, at that point, all information on the case. This conflict is not an easy one to solve.

Then after all, perhaps the solution does not lie in law. Instead, it may be found in economic issues, such as the contribution to the local economy. Sweden is the only Nordic country where property taxes go to the state budget.[77] Indeed, there have been efforts to gain local support through various financial arrangements. For example, in a two-year period (2017–18), the Swedish Energy Agency was assigned to distribute €7M in 'windpower premiums' to the municipalities, based on how much windpower production became operative each year. Under that scheme, in one year the southerly municipality of Mariestad introduced 14 turbines with capacity of 44 MW, thus gaining about €2M. By contrast, in Finland and Norway, the municipalities are beneficiaries of the property tax. However, not all Norwegian municipalities have introduced property tax and it may vary from one community to another due to political decisions. Even so, an example shows that a municipality with 1,000 inhabitants and many windpower installations gains as much as €2M per year in property tax.[78] Be that as it may, it is also said that in Finland the municipalities are fighting to get windpower investments, for economic reasons. In Denmark, there is no property tax on windpower installations, but operators are required to contribute a certain fee per MW to a 'green fund' that the municipalities are obliged to establish. Local acceptance is here emphasized as the key factor for the future development of the windpower industry.

Throughout the Nordic countries, windpower developers contribute to the local economy in one way or the other. In Sweden, there is an old tradition of paying a 'countryside fee' more or less voluntarily, although this can be regarded as 'pocket money' in a wider context.[79] For example: for a wind park with 100 turbines producing 1 TWh, a countryside fee of say €1,000 per turbine will contribute €100,000 to

[77] Information from Svensk Vindenergi 2020-05-18.

[78] Saglie & Inderberg & Rognstad at p. 153.

[79] *Kommunal tillstyrkan av vindkraft – hur fungerar det idag?* Geijer, E & Lundmark Essen, A. Naturvårdsverket Rapport 6769, June 2017, English summary at page 10; https://www.naturvardsverket.se/Documents/publikationer6400/978-91-620-6769-4.pdf?pid=20835.

the local economy, whereas a property tax at the rate 0.161 cent/kWh will yield an annual income of €1.61M! Surely, a reasonable conclusion to be drawn from this is that a formalized scheme for financial contribution to the local economy may be a key factor for acceptance in hosting municipalities. Not only would such a system bring financial support to those communities, it would also promote a general feeling of fairness in the distribution of burdens – a factor not to be ignored.[80]

## 6. Concluding remarks

To study another country's legal regime in a given field is to travel. This has become evident in my efforts to understand Norwegian environmental legislation and administration, first in 2016 on hydropower[81] and now on windpower installations. Sweden and Norway are very close, but also so different in many ways. It has been fascinating to learn more about Norway and the encounter between the attitude 'we are building the country', said to characterize Norwegian regulation and administration on the utilization of nature resources, and the strong outdoor recreation culture and traditional perceptions of national values. I have tried to draw a picture of this specific of area of law in our two countries in order to perform some comparisons, but as I alerted the reader in the very beginning, my perspectives remain fundamentally Swedish. I therefore invite the readers – Norwegians in particular – to correct any misconceptions presented in this text. Surely, the debate on the development of windpower in our countries will continue.

[80] Inderberg et al 2019 (n. 8 supra).

[81] Darpö, J: *Så nära, och ändå så långt bort! En svensk betraktelse av norsk vattenrätt och frågan om tillstånds rättskraft*. Report in the research programme SPEQS, Working Paper 2016:1, Faculty of Law/Uppsala University. Available in Swedish only.