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Climate Litigation vs. Legislation

Avoiding Excessive Judicial Activism in the EU

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Summary

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On 24 March 2021 the German Federal Constitutional Court issued a decision with far-reaching consequences. The court ruled that the lack of sufficient specifications for further CO_2 emission reductions from 2031 onwards in the German Climate Act ran contrary to the Constitution. In so ruling, the court narrowed the scope of action available to the legislator. Just a few weeks later a Dutch court went one step further, declaring that the oil and gas company Shell had violated its human rights obligations by failing to take adequate action to curb its contributions to climate change and global warming.

These are just two examples of the approach to climate change that has been adopted by some courts in the EU. They coincide with the EU's very recent legislative initiatives to promote a uniform legislative package on climate change that could act as a vehicle for the European Green Deal. We are confronted with two mutually exclusive risks: regulative overreach and efforts that are too little, too late.

This policy brief proposes a balance between them. It demands that the legislator on the European level take a proactive role, especially in a time when climate change litigation is growing exponentially. The gap between legislative intentions and actions has been left unfilled for too long, so the courts are stepping in. To tackle a contemporary issue such as climate change, we have to find a solution to the old problem of the EU's legitimacy and the extent to which member states have leeway in developing their own climate change policy.

Keywords Climate change – Climate change litigation – European Climate Law – Judicial governance – CBAM

Introduction

'If I just pay more to the government, it will take care of the temperature, right?' The irony behind such a statement gives expression to the idea that any climate regulation could be easily thwarted if it were presented as an unjustified encroachment on one's liberty. At the same time, policy actions against climate change are particularly delicate as they have often been labelled as 'too late' or 'insufficient'. We are dealing with a problem that urgently requires big (and unpopular) decisions at a moment when big decisions are less and less likely.

Nothing reveals this better than the courts' proactive stance on climate change. Their reasoning increasingly mirrors every critical allegation made against EU policy and thus can be used as a guideline for the legislative errors that the Union needs to avoid. This policy brief focuses on how and to what extent the courts' conclusions can be transformed into policy. It is divided into four sections. The first provides an up-to-date picture of climate change litigation and the related discussions. The second describes the perils of judicial overreach in the increased attempts to implement climate policy through the courts. The third focuses on the EU's legislative efforts in this area and some of the challenges the Union now faces and will face in the future. The fourth provides policy recommendations based on a comparative analysis of climate litigation and legislation.

The rise of climate litigation

'Climate change litigation' (or 'climate litigation') is an umbrella term which refers to any kind of lawsuit initiated in response to the effects of climate change and its mitigation.[1] It can be said that the increase in the number of climate cases in recent years has been even more significant than the rise in sea levels. Studies show that since 2015 around 1,000 cases related to climate change have been brought before the courts, more than double the number brought between 1986 and 2014.[2] The lawsuits are of various kinds. They involve both state and individual liability under diverse types of legislation, both national and supranational, such

[1] J. Setzer and C. Higham, *Global Trends in Climate Change Litigation*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (London, 2021), 8.

[2] Ibid., 4.

as the European Convention for Human Rights. While some of the cases have become public due to the large amounts of money involved (e.g. claims for damages), others have been brought for purely strategic purposes to enforce climate commitments. However, the common thread running through all of these cases is that their influence has been growing beyond the courtroom. Part of the explanation is that in Europe climate litigation is perceived to lead to favourable outcomes for climate policy.[3]

One of the major countries that had lacked a seminal climate case was Germany. That was until 29 April 2021, when the German Federal Constitutional Court—traditionally an important stakeholder when it comes to European policy—declared that Germany's Climate Protection Act was insufficient in its climate neutrality aims.4 The reason given was that the legislator had adopted legitimate measures up until 2030 but not for the period after that year. And this, the court decided, violated citizens' fundamental rights. Whether the newly presented act will also be challenged remains to be seen. But it is indicative that even though the German government had been given until the end of 2022 to respond, it did so almost immediately.

Already glorified as a 'climate verdict' by leftist commentators,[5] the decision makes a very clear statement in the language of the Paris Agreement by referring to the goals of sustainable development and intergenerational equity.[6] Such political phrasing by courts all around Europe and the US is no longer surprising. In this regard the most striking of all European climate cases was the decision of the Dutch Supreme Court in the *Urgenda* case. This decision became final and binding in December 2019 and is now regarded as having broad normative implications beyond its particular context.[7]

In *Urgenda* the Dutch Supreme Court ruled that the Dutch government was under a legal obligation to reduce its greenhouse gas emissions by at least 25% before the end of 2020. A particularly interesting detail is that the Supreme Court expressly referred to the right to life under the European Convention on Human

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3 Ibid., 19.

4 German Federal Constitutional Court, 'Constitutional Complaints Against the Federal Climate Change Act Partially Successful', Press release no. 31/2021 (29 April 2021).

5 F. Ekardt and F. Heß, 'The Climate Verdict of the German Constitutional Court', *Social Europe*, 4 May 2021.

6 S. Jankovic, 'Germany's Constitutional Court Gives Teeth to the Paris Agreement', *International Law Blog*, 12 May 2021.

7 S. Roy, 'Distributive Choices in Urgenda and EU Climate Law', in M. Roggenkamp and C. Banet (eds.), *European Energy Law Report 11*, Intersentia (2017), 47; J. Spier, '"The 'Strongest' Climate Ruling Yet": The Dutch Supreme Court's *Urgenda* Judgment', *Netherlands International Law Review* 67 (2020).

Rights—unlike the district court, which had resolved the case by applying Dutch law only. The reference to human rights grievances as part of the lawsuit opened up the potential for using other domestic and international legal instruments.[8] For example, Belgian activists followed the Dutch example, and in the *Klimatzaak* case in June 2021, the Court of First Instance of Brussels declared that Belgium's climate policy violates the legal duty of care and the right to life.

Once the courts opened this Pandora's box, it was only a question of time before the next step would be taken. This happened at the end of May 2021 when the Dutch District Court of the Hague ordered Shell to reduce all CO_2 emissions resulting from its global operations by 45% by 2030. While human rights were not appealed to directly, the court nevertheless referred to them in ruling that they should be considered when deciding upon the due standard of care. Under Dutch law the due standard of care is interpreted as 'what according to unwritten law has to be regarded as proper social conduct.'[9] To decide in *Urgenda* what counts as proper social conduct, the court used the reports of the Intergovernmental Panel on Climate Change. In fact, these reports set a temperature target as an objective, but without prescribing *any* obligations, let alone obligations for a private entity such as Shell. Moreover, in its reasoning the court ruled that Shell must reduce emissions from its global operations at the same pace at which CO_2 emissions need to be reduced globally.

In reaction to these cases, the term 'judicial governance' has been coined and is indeed fully applicable to them.[10] Two points are worth noting. First, in all of the cases, the courts rejected the argument that they were dealing with matters which went beyond their jurisdiction, declaring that they were merely applying the law. Second, with each precedent that is set, the court further transcends the usual judicial context of a legal dispute between two parties, rendering decisions that are relevant to a much larger group of people. Precisely these observations call into question the so-called judicial turn in climate governance.

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8 Setzer and Higham, *Global Trends*, 6.

9 B. Mayer, 'Milieudefensie v Shell: Do Oil Corporations Hold a Duty to Mitigate Climate Change?', *Oxford Business Law Blog*, 7 June 2021.

10 C. V. Giabardo, 'Climate Change Litigation and Tort Law: Regulation Through Litigation?', *Diritto & Processo* (University of Perugia Law School Yearbook) (2020), 366.

The risk of judicial overreach

Developments like the one just described can be easily traced back into the past. A common example used by proponents of climate litigation are the tobacco lawsuits in the US that led to more stringent liability for tobacco companies and acted as a substantial incentive for legislative amendments. After all, a court decision urging governments and other actors to take the necessary measures seems at first glance a powerful tool for establishing accountability and speeding up reforms.

However, the analogy with tobacco lawsuits—or with any dispute based on tort law—is not persuasive. Climate change is not a private issue, as is always the case with tort law.[11] Its effects can be triggered anywhere and at any time, and they are practically unlimited in terms of both delinquents and victims. This affects how disputes are resolved. For example, a fundamental element of tort liability such as causality can never be fully applied in climate cases since causation has always been understood as a particular connection between the wrongdoing and the harm. Consequently, it is frequently modified to a probabilistic and abstract concept for the purposes of climate litigation.[12]

Admittedly, litigation increases the accountability of the bodies responsible for drafting and enforcing the legislation. However, it is difficult to determine when the line has been crossed between good intentions and outright seizure of power by the judiciary.[13] In fact, a strong case can be made that climate change is largely a non-justiciable issue. In the words of a US judge who dismissed a claim brought before him, climate change 'deserves a solution on a more vast scale than can be supplied by a district judge.'[14] Unlike the legislature, the judiciary is not democratically accountable.[15] Moreover, it lacks the expertise necessary to render decisions with such far-reaching implications.[16] Further still, policy issues demand different approaches that can best be tackled by politicians. The proponents of judicial governance forget the fact that, unlike the broader political forum, courtrooms allow for little or no deliberation in

11 Ibid., 374.

12 R. Stuart-Smith et al., 'Filling the Evidentiary Gap in Climate Litigation', *Nature Climate Change* 11 (2021), 355.

13 V. Vujanic, 'Climate Change Litigation and EU Environmental Liability Directive', *Zbornik radova Pravnog fakulteta u Splitu* 48/1 (2011), 136.

14 As quoted by P. Mougeolle, 'Business and Human Rights Symposium: Climate Change Litigation Against Corporations and the Role of Civil Liability', *OpinioJuris*, 23 June 2021.

15 L. Bergkamp and S. Stone, 'The Trojan Horse of the Paris Climate Agreement: How Multi-Level, Non-Hierarchical Governance Poses a Threat to Constitutional Government', *Environmental Liability* 4, 122.

16 Giabardo, 'Climate Change Litigation and Tort Law', 369.

challenging the viability of various instruments to fight climate change.[17] Moreover, the efforts of individual courts undermine the cohesiveness that is a necessary feature of an adequate approach to the issue.[18]

It is no exaggeration to say that some climate cases violate the separation of powers principle.[19] This is especially true of cases where, without any statutory requirement empowering the courts to take such a decision, they have instructed their governments to reduce emissions because the courts recognise a personal constitutional right to a clean environment. Particularly notable for this sort of controversial approach is the case against Fingal County Council that was brought before the Irish court in 2017.[20]

Furthermore, climate litigation is often seen through the prism of 'filling the gaps' in domestic climate governance,[21] its rise being explained as a response to institutional failures in the field of climate change and a way to contest climate policies.[22] However, as the number of climate laws in effect is larger than ever,[23] litigation is no longer necessary to fill the gaps. Were climate litigation to continue, then in principle every policy issue could be brought before the courts since no doubt some connection could be found with the rising global temperature. The courts inevitably rely on unwritten standards when dealing with notions such as 'duty of care.' The precise meaning of such legal terms has been left open on purpose. The discretion that is in this way deliberately afforded to the courts is, in principle, seen not only as a tool for developing more precise rules by the courts but also as a vehicle for societal change.[24] The problem is not in the use of open norms but in the fact that the meaning of terms such as 'climate neutrality' is not only open but ambiguous. For example, 'climate neutrality' can mean the total reduction of domestic CO_2 emissions and no removal of CO_2 from the atmosphere. But it can also mean the removal of large volumes of CO_2 and correspondingly

17 S. Bogojevic, 'EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture', *Law & Policy* 35/3 (2013), 201.

18 L. Elborough, 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change', *New Zealand Journal of Environmental Law* 21 (2017), 91.

19 Bergkamp and Stone, 'The Trojan Horse of the Paris Climate Agreement', 29.

20 M. Zemel, 'The Rise of Rights-Based Climate Litigation and Germany's Susceptibility to Suit', *Fordham Environmental Law Review* 29/3 (2018), 490.

21 S. Eskander, J. Setzer and S. Fankfauser, 'Global Lessons from Climate Change Legislation and Litigation', *Environmental and Energy Policy and the Economy* 2 (2021), 46.

22 J. Setzer and L. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Government', *Wiley Interdisciplinary Reviews: Climate Change* 10/3 (2019), 4.

23 For a comprehensive review of the legislation, see Eskander, Setzer and Fankfauser, 'Global Lessons', 71.

24 I. Kampourakis, 'The Power of Open Norms', *Verfassungsblog on Matters Constitutional*, 15 June 2021.

lower domestic reductions. An example of a more precise approach is the Swedish Climate Act, which stipulates that by 2045 domestic emissions must be reduced by 85%, with the remaining 15% being dealt with through removals and offsets.[25]

This situation was confirmed in *Urgenda* and the subsequent cases, as the non-binding targets of the Paris Agreement were used as points of reference. From a certain ideological point of view, this may seem to be a positive development. But the same reasoning could be used to bolster ideologies that oppose such a perspective. Even a perfect legal provision may be revoked or simply devalued if the courts have too much power in discussing its premises and consequences. This conclusion is supported by the theory of power, according to which in any given context power as a whole is always a fixed quantity, so that the question remains as to who exercises it.[26] Having already granted too much power to the judiciary, the legislative branch is losing its own sovereign opportunities, for when it comes to power, there can be no voids.

The ubiquitous nature of climate change undermines the credibility of judicial climate activism. In *Urgenda* the government objected that its contribution to greenhouse gas emissions amounted to only 0.4% of global emissions, but the court still found that the government was obliged to reduce emissions in proportion to the percentage of the total emissions for which it was responsible. Similarly, companies such as Shell have a very strong case in that they could ask whether they have been doing worse than any other oil company, a question that was never discussed in the 2021 decision.[27] Even if a future lawsuit against a corporation were to be successful, it is disputable whether this would drive any change other than the insolvency of the company, including the redundancy of all its workers.[28] This might result in a backlash that would then lead to 'carbon leakage' as a result of investment relocation to a less restrictive jurisdiction in a country outside the EU, would will be a loss for the whole European economy.[29]

Moreover, companies are vulnerable to unpredictable outcomes if their investment is threatened by the mere fact that it exists. Litigation can bring various financial impacts, such as increasing premiums under liability insurance policies, increasing capital costs and changes to market valuation.[30] Companies are also

25 N. Meyer-Ohlendorf, *A European Climate Law: Analysis of the European Commission Proposal* (6 April 2020).

26 Giabardo, 'Climate Change Litigation and Tort Law', 367.

27 Mayer, 'Milieudefensie v Shell'.

28 B. Batros, *Climate Liability Suits as a Forward-Looking Strategy for Change* (30 September 2020).

29 H. Sigman, 'Legal Liability as Climate Change Policy', *University of Pennsylvania Law Review* 155 (2007), 1956.

30 Setzer and Higham, *Global Trends*, 12.

likely to suffer reputational damage, which is especially harmful from the point of view of the financial markets.[31] Immediately after the German Federal Constitutional Court issued its decision, a comparison was drawn with the investment cases brought by German energy companies such as RWE against the Netherlands in response to the process of phasing out coal power plants in the wake of *Urgenda*.[32] Oddly enough, court-driven policy could disincentivise investors from developing environment-friendly projects for fear of being exposed to such immense risk. Studies show that compensation for the persons affected is not effective when it raises the social costs of climate change by discouraging investors from adapting to the changes in climate.[33] The necessary adaptations include, for example, adjusting the agricultural infrastructure or taking other comparable measures.

Considering the above, it is easy both to imagine why courts are stepping into the legislator's shoes and to criticise them for doing this. Only by taking precisely aimed measures will the EU legislator be able to regain control over climate governance.

Tackling climate change at EU level

The courts' proactive approach shows that legislative efforts at EU level are insufficient to provide clear guidance for case law, the kind of guidance that would result in the judiciary refraining from political overreach in its work. The recent development of enforcing the EU's climate commitments through law reveals some of the reasons for that.

The European Climate Law (ECL) was published in the Official Journal on 9 July 2021 and entered into force on 29 July 2021.[34] It was preceded by many discussions and revisions, and some doubts have not yet been quelled.

From the very start the main criticism against the ECL was the alleged 'power grab' by the European Commission.[35] The proposed draft empowered the Commission to

31 Setzer and Vanhala, 'Climate Change Litigation', 12.

32 M. Burianski and F. Parise Kuhnle, 'Reshaping Climate Change Law', *White and Case*, 14 July 2021.

33 Sigman, 'Legal Liability', 1954.

34 European Parliament and Council Regulation (EC) no. 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) no. 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L243 (9 July 2021), 1.

35 See, e.g. *Financial Times*, 'EU's Climate Law Faces Criticism on All Fronts', 5 March 2020.

push the climate agenda through delegated acts. The powers to be conferred on the Commission included 'setting out a trajectory at Union level to achieve the climate-neutrality objective set out in Article 2(1) until 2050', without any further definition of the term 'trajectory'.[36] This primary decision arguably ran contradictory to the very foundation of the EU, since Article 290 of the Treaty on the Functioning of the European Union reserves to the Parliament the adoption of essential legislation and does not provide for the possibility of delegating this role to the Commission.[37] Therefore, delegating this role to the Commission could be done only if its discretion were limited in advance by legislation which has yet to be implemented. Since 'the trajectory' was the only benchmark for evaluating progress at EU level, it represented an essential term and was thus unfit for delegation.[38] One of the key issues was that delegated acts are not subject to real scrutiny as they are only reviewed by expert groups with no right to vote on them—which is the reason such acts are sometimes labelled as 'Orwellian' by commentators.[39] Another problem was that delegated powers are only allowed for a specific period whereas, according to the draft version of the law, the Commission was supposed to have a mandate 'for an indeterminate period of time', which directly contradicts the rationale for delegated acts set forth in the Treaty on the Functioning of the European Union.[40]

In fact, the final draft did not grant to the Commission any powers of that kind, and thus the most unfavourable scenario was averted. Nevertheless, the chain of events described above should act as an important reminder of the risks at play. Although climate change is an urgent issue, there is no reason to believe that trying to circumvent the democratic procedures will result in the measures being enforced more effectively. In light of this situation, it has been recommended that, when it comes to setting climate goals, a permanent, obligatory dialogue should replace discussions restricted to specific sectors of the economy.[41] The ECL provides for such an option. Moreover, the review mechanism could be set forth in detail, so that it includes an independent review that is responsible for engaging with external stakeholders.[42]

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36 M. Chamon and M. Peeters, 'The European Climate Law: Too Much Power for the Commission?', *Maastricht University Blog*, 30 March 2020.

37 Meyer-Ohlendorf, *A European Climate Law*.

38 M. Menner and G. Reichert, 'European Climate Law', CEP Policy Brief no. 2020-03 (12 May 2020).

39 D. Guéguen, 'The EU's Green Finance Taxonomy: An Orwellian Mechanism', *Euractiv*, 20 November 2020.

40 M. Trombetti, 'The EU's New Climate Law: Are Delegated Acts the Way Forward or an Interference in Legislative Functions?', *A Path for Europe*, 22 March 2020.

41 Meyer-Ohlendorf, *A European Climate Law*.

42 A. Averchenkova and L. Lazaro, *The Design of an Independent Expert Advisory Mechanism Under the European Climate Law: What Are the Options?*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (London, 2021), 22.

Another important condition for the ECL to be influential is the adoption of the Carbon Border Adjustment Mechanism (CBAM). This mechanism was introduced in response to problems with implementing the EU Emissions Trading System (ETS), which has been in effect since 2005. The ETS is essentially a cap-and-trade system which is designed to encourage investors to shift from carbon-intensive sectors.[43] It puts a cap on overall carbon emissions and makes it possible for rights to emit carbon to be sold in energy exchanges. The number of emissions allowances purchased is gradually reduced so that the allowance price continually rises.

The ETS has been praised for eliminating the need to set a price for CO_2 emissions, as this is determined on a market basis. However, it has also been criticised for making companies' investments even more uncertain. This occurs when there is an oversupply of allowances, which results in prices being volatile or too low, thus undermining the system's entire reason for existing.[44] Both companies and climate activists worry that the higher carbon price will shrink economic activity in the EU and lead to carbon leakage: emissions will be shifted to countries with lower standards, meaning there will be no reduction in total emissions.

The CBAM represents a reaction to these considerations. Its official aim of avoiding carbon leakage is intertwined with the more distant goal of normalising carbon taxation by imposing a tax on imported products equivalent to the tax on products manufactured in the EU.[45] The mechanism will authorise importers to import their products only if they fall within the scope of the CBAM. If a product to be imported is produced under emissions standards different from those in effect in the EU, importers will have to purchase a carbon emissions certificate, thus paying a carbon price that is similar to the one applied to products manufactured in the EU.

The CBAM has been criticised on legal grounds by Brazil, South Africa, India and China for discriminating unfairly against them.[46] It has been argued that the mechanism is inconsistent with WTO rules against discrimination, which stipulate that imported products must be treated in the same manner as domestic products. It has also been shown that the CBAM would impact European economic development as it would influence export-oriented economies in markedly different ways.[47]

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43 J. Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism* (9 August 2021).

44 L. Faggiano, *On the Way to Fit-for-55: The Carbon Border Adjustment Mechanism* (14 May 2021).

45 C. Bellora and L. Fontagné, *EU in Search of a WTO-Compatible Carbon Border Adjustment Mechanism* (28 September 2021).

46 J. Bacchus, 'When Two Global Agendas Collide: How the EU's Climate Change Mechanism Could Fall Afoul of International Trade Rules', *Cato Institute*, 7 July 2021.

47 L. Eicke et al., 'Pulling Up the Carbon Ladder? Decarbonization, Dependence, and Third-Country Risks From the European Carbon Border Adjustment Mechanism', *Energy Research & Social Science* 80 (2021), 1.

The reasons for its inconsistency with WTO rules can be summarised as follows. The CBAM could be viewed as violating the most favoured nation principle, according to which an advantage granted to a WTO member in connection with imported products must be accorded immediately and unconditionally to all other WTO members.[48] Differential treatment of specific countries' products based solely on these products' carbon content is inevitable when the EU chooses its importers and requires only some of them to purchase emissions certificates. This situation would become aggravated if the price of the certificates were to increase as the EU expands the CBAM in the future. The EU has stated on numerous occasions that the CBAM is a climate measure necessary for health or environmental reasons and that this provides sufficient grounds for its being exempted from WTO obligations. However, other WTO members may well reject this line of reasoning by arguing that, among other things, a carbon tax might act as a more reasonable and less restrictive measure for international trade.[49] Any trade measure that is inconsistent with the WTO regime would render the CBAM useless, as it would not significantly reduce carbon leakage.[50] In any case, even if the CBAM is found to be compliant with WTO rules, it could still provoke retaliatory measures or a breakdown of the climate of cooperation between states.[51]

For this reason modifications to the CBAM have been proposed. These deserve attention.[52] The CBAM is described as a 'one size fits all' mechanism. In contrast, an 'individual adjustment mechanism', based on a given product's actual carbon intensity, may be useful since it would reflect the manufacturer's decarbonisation efforts. From a legal standpoint, a voluntary adjustment mechanism could ensure that only manufacturers that are less carbon intensive than the default intensity set by the EU would avail themselves of the mechanism and that the more carbon-intensive manufacturers would be treated as if they were as carbon efficient as the default intensity.[53] This in turn would solve the problem of the discriminatory nature of the CBAM.

48 See Bacchus, *Legal Issues*.

49 Ibid.

50 A. Nevalainen, 'EU's Carbon Border Adjustment Mechanism: Its Purpose and Effects on Carbon Leakage', Bachelor's thesis, Aalto University School of Business, Spring 2021.

51 Eicke et al., 'Pulling Up the Carbon Ladder?', 3.

52 M. Mehling and R. Ritz, *Going Beyond Default Intensities in an EU Carbon Border Adjustment Mechanism* (October 2020).

53 Ibid.

The disputes over the CBAM exemplify how difficult it is to make progress in regulating climate change. It is far from being the only deal breaker, as other issues remain no less contentious. These include the effects of shutting down carbon-intensive industries; the role of nuclear energy;[54] and the effect of the so-called Jevons paradox, according to which the economical use of fuel does not lead to diminished consumption but in fact increases it.[55] Although these controversies are equally a matter of economic and technical arguments, they are also related to the legal shortcomings of the ECL: the language is too vague, a full impact assessment is missing and the risks posed by its application are underestimated. Regulating without taking the consequences into consideration is even worse than not regulating at all. Underestimating the economic realities involved is counterproductive. This has already been demonstrated in Germany, where the phasing-out of nuclear energy has led to the expanded use of lignite coal. This legal inconsistency has created the conditions for resolving problems through individual cases before the court, rather than through a unified framework.

Policy recommendations

Based on the above comparison between climate litigation and climate legislation, the following policy recommendations can be provided.

First, climate legislation and litigation go hand by hand. In principle, litigation is often used as a tool for enforcing policy. An increase in litigation is a sign of legal mobilisation, often provoked by legislative deficits.[56] Therefore, the climate litigation boom shows that legislation must in the first place be more detailed and less contentious. Better drafted laws would stifle the judiciary's urge to enforce policies through the courts under the pretext of applying the law.

Climate legislation should not only set objectives but also establish clear measures for achieving them. 'Reducing emissions to zero' is not sufficient when the legislation lacks any further details on how to do it, and especially when emissions reductions are not the only imaginable sustainable measure. Similarly,

54 S. Dennison, R. Loss and J. Söderström, *Europe's Green Moment: How to Meet the Climate Challenge* (20 April 2021).

55 E. Trincado, A. Sanchez-Bayon and J. Vindel, 'The European Union Green Deal: Clean Energy Wellbeing Opportunities and the Risk of the Jevons Paradox', in A. Sanchez-Bayon et al. (eds.), *Energies: Governance, Legislation and Economic Policy for Green Energy Production: The EU Green Deal Framework and Horizon 2030* (2021), 9.

56 Eskander, Setzer and Fankfauser, 'Global Lessons', 46.

the Preamble of the ECL speaks about a transition that is both 'successful and just' and about reductions that are both 'gradual' and expected to be immediate. How the envisaged transition or reductions are supposed to work in practice is hard to imagine. One way to clarify the path before the EU is to specify a total budget for the period beyond 2030. This currently exists only in certain countries, such as Germany and France. This would result in budgetary predictability, which, in turn, would make it clear what measures are to be implemented. Moreover, it would make it possible to adopt these measures before it is too late.

Second, in codifying its policies, the EU should bear in mind that every measure exists within a context and cannot have an independent effect. For example, every step towards a green economy could make the EU more dependent on importing products and raw materials.[57] This could lead to the Union becoming more vulnerable to countries such as China. But it could also result in a loss of competitiveness that could not be compensated for by means of tariffs, unless discriminatory trade measures were taken. The reduction of emissions should be tackled along with other issues such as cost efficiency. Currently, the terms 'cost effectiveness' and 'cost efficiency', as used in EU legislation, are used interchangeably. But it is not clear whether they actually have the same meaning.[58] Likewise, EU measures that are potentially discriminatory in nature, including the CBAM, must be avoided. Without details or a sober estimation of the far-reaching consequences of the EU's actions, any reliance on 'principles' could have an adverse effect. In this sense, climate litigation has proven that courts can use effective corrective powers and that these need to be addressed.

Moreover, as the EU is responsible for less than 8% of global emissions, it should strive for global measures and alliances in order to justify its own policy. Without accountability and red lines, the EU cannot cooperate with its partners—and most importantly, with China. But these red lines are yet to be drawn.[59]

Third, the EU legislator should focus on including the various stakeholders and not on excluding them. Currently, exclusion occurs on at least three levels:

1. Climate legislation is targeted at particular groups of people (e.g. workers or the jobless) but not at a particular region as a whole.[60]

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57 M. Leonard et al., *The Geopolitics of the European Green Deal* (3 February 2021).

58 Roy, '*Distributive Choices*', 57.

59 J. Oertel, J. Tollman and B. Tsang, *Climate Superpowers: How the EU and China Can Compete and Cooperate for a Green Future* (December 2020).

60 R. Fleming and R. Mauger, 'Green and Just? An Update on the "European Green Deal"', *Journal for European Environmental & Planning Law* 18 (2021), 175.

2. The ECL does not take into account the real differences between the member states in terms of their economic structures or their views on the Union's energy future.[61]

3. The current law does not sufficiently provide for the participation of experts, but this is necessary as energy policy has to be implemented on the basis of scientific consensus and not through political slogans.

Fourth, the EU should make its ideological choices, since two core values lay at the heart of this discussion: rationality and legitimacy. These values embody the very clear cleavage between leftist and rightist ideologies. While it is usual for left-wing politics to push revolutionary and progressive ideas at all costs, centre–right parties led by the European People's Party (EPP) must support gradual and more conservative steps, which nevertheless have undisputed rational justification. Similarly, insisting on 'roadmaps' and the supremacy of procedures should be challenged if these run counter to popular sentiment and lead to greater Euroscepticism. A popular party such as the EPP should rely on popular sentiment by supporting only measures of which the populace approves.

Some policies can be better implemented without broad approval, but climate policy is not one of them since the climate affects everyone everyday. This means that the biggest trap for all reasonable and cautious parties is to acquiesce to accusations of being complicit in some kind of 'global apocalypse.' For this reason, the centre–right parties, and especially the EPP, must have a clear response to the dangers of adopting radical green measures, one that can be communicated in simple terms. Unfortunately, there are already sufficient arguments to bolster such a response. The EU's dependence on energy supplies from third countries, increased electricity bills and the negative effects on nature (for example, through the extensive extraction of rare materials) are some of the developments for which the 'just' green transition is partially responsible.

[61] Dennison, Loss and Söderström, *Europe's Green Moment*.

Conclusion

The legislature and the judiciary in Europe are currently competing for supremacy in conducting climate policy. The wave of climate cases will not recede. On the contrary, these cases will be resolved more extensively in the courtroom until the issue of climate change ceases to be held hostage to dogmas and rivalries between different political forces. Placing more confidence in the courts will automatically reduce trust in the European institutions and make them obsolete.

Climate litigation is indispensable, but only with clearly defined boundaries of justifiability that do not undermine the separation of powers and do not rely on abstract standards. The European legislator must establish rules that are both more detailed and realistic. In this endeavour the EU must think globally about the significance of CO_2 emissions reductions among all other policies. But it must also act locally so as to take into account that climate, unlike many other legislative questions, is not a matter of convenience. For this reason, a clear legal and political message is necessary as to who supports what.

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