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EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture

SANJA BOGOJEVIĆ

The purpose of this article is to show it is only in light of legal culture that climate change jurisprudence in the European Union can be explained. Examining the case law concerning the EU Emissions Trading Scheme, this article demonstrates that climate change proceedings in the European Union raise questions that stand at the heart of the EU legal order; that is, they demand that the boundaries of the EU's regulatory competences are drawn. In effect, the EU courts focus on ensuring that EU climate change laws are in accord with the rule of law or, in the context of EU law, the borders of the EU's environmental regulatory powers. As such, this article shows that attention needs to be given to the interaction between climate change laws and the constitutional role of the EU judiciary. These interactions are considered here together with the contingency of EU climate change litigation on EU legal culture.

I. INTRODUCTION

Climate change litigation has, in recent years, mushroomed. Much of this type of litigation aims to help mitigate, prevent, or adapt to climate disruption by using existing public law and private law venues to establish new judicial claims centred on the impact of climate change (Averill 2009; Ghaleigh 2009). In this context, the judiciary is thought of as a "critical forum" (Osofsky 2010, 4) in which the future of climate change regulation and responsibility is debated, and the need for further legislative action is flagged. From this viewpoint, a key feature of climate change litigation is its accessibility to civil society—in other words, its ability to shift the decision-making paradigm regarding climate change from states only to that of the general public (Hunter 2009). This raises important questions regarding the

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Address correspondence to Sanja Bogojević, University of Lund—Law Faculty, Lilla Gråbrödersgatan 4, Lund SE-22100, Sweden. Telephone: +46 46 222 10 84; E-mail: sanja.bogojevic@jur.lu.se.

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role that the judiciary plays, or ought to play, in mobilising comprehensive laws to address pressing issues, such as climate change, and the extent to which, if at all, courts can be relied upon to redress institutional failure—for instance, the failure to adopt climate change regulation or adopting rules that limit or impede combating climate change (Peel 2011; Preston 2011).

The purposes of this article are to illustrate how climate change litigation plays out in the EU legal context and show how such litigation is contingent on EU legal culture. Here, the concept of legal culture is used simply as a lens through which the interaction between rules and institutions, or more precisely, the constitutional role of the EU judiciary and EU climate change laws, is explained. In this regard, this article highlights that in interpreting the EU's climate change law regime, the EU courts think of constitutional—as opposed to environmental—impacts in resolving climate change–related disputes. As such, the judiciary pays little, if any, attention to providing a broad forum, open to different stakeholders, to challenge the viability of emissions trading to reduce the impact of climate change, or to promote stricter or improved climate change laws. As will be explained, this fits well with EU legal culture. However, it stands in contrast to the high profile enjoyed by climate change litigation in much of the literature on this topic, which sees the courts as key actors in furthering broad, environmental motives in judicial climate change deliberations.

This article is divided into six parts. First, climate change litigation, and, more specifically, the role that the judiciary is expected to play in creating legal opportunities for social movement actors in the context of climate change regulation, is fleshed out. This is only a brief overview of the burgeoning literature on this topic; it serves, nonetheless, to highlight the hopes that tend to be imposed on the courts in the context of climate change litigation. Second, the concept of legal culture, as it tends to be employed in the relevant scholarship, and its application in this study, is outlined. In the following part, the specific understanding of EU legal culture that this article builds upon is fleshed out by reference to the constitutional role of the EU courts and their set jurisdictions in interpreting and deciding the legal questions raised in EU climate change litigation. As such, legal culture, in the context of this article, focuses narrowly on institutional culture and its role in properly understanding climate change litigation. Subsequently, climate change litigation in the EU—or, the EU emissions trading system (ETS) case law—is scrutinised, focusing on the meaning that the EU courts give these deliberations. In the two final parts, these findings are evaluated and fitted into a larger jigsaw that is scholarship on climate change litigation.

Before starting, a number of caveats must be listed. First, in discussing EU climate change litigation, I examine only EU ETS case law, although several other legal mechanisms, such as energy taxation, or eco-labelling exist in the EU to combat climate change (see Krämer 2011; Peeters and Deketelaere 2006). This is because I am not seeking to establish an exhaustive study of EU climate change litigation; rather, the intention is to illustrate how legal

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culture—here, focusing on institutional culture of the EU judiciary—shapes EU climate change proceedings and their outcome. The aim is to thus provide a reminder of the importance of legal culture as opposed to examining EU climate change litigation per se.

Second, this article does not engage with any conceptual definitions of "climate change litigation" (see, e.g., Hilson 2010) but instead, and as a starting point, uses the EU ETS case law as an example thereof. Indeed, the EU ETS jurisprudence has been conceptualised as climate change litigation elsewhere (Ghaleigh 2010) and following Markell and Ruhl's definition (2010), it clearly falls within such a category on the basis that it directly raises issues of fact and law regarding EU's climate change policy.

Third, this article examines how the EU courts understand and interpret the EU emissions trading regime, but it is not a comprehensive study—either of how the EU courts work or how they interpret cases from a more general perspective. As such, I do not inquire into how the EU's judicial institutions may in other instances be mobilised to further socially pressing issues (see Schepel and Blankenburg 2001), but rather focus on explaining questions that the EU ETS proceedings revolve around and how the EU courts respond to these with reference to EU legal culture.

Fourth, the article does not seek to examine EU legal culture bottom-up with focus on the various legal cultures of the member states (see Lyons 2001) nor to address the question of whether those legal cultures are "converging" or "diverging" (Legrand 1997; Gibson and Caldeira 1996). Here legal culture is understood to demand that EU climate change litigation is examined against the backdrop of the constitutional roles and jurisdictions of the EU courts, and the key notion of competence in defining the shared responsibility of the EU and the member states in regulating the environment. As such, this article employs the concept as a lens through which to illustrate the contingency of EU climate change litigation on the EU legal culture.

II. THE JUDICIARY AND CLIMATE CHANGE LITIGATION

As a global problem, climate change is often understood as having only a global solution that has to be brought about through the continued development of appropriate international law (Meltzer 2012; Parker and Karlsson 2010). In the wake of failing efforts to develop an effective and comprehensive international institutional framework, climate change litigation is often understood as stepping into a "gap-filling role" to deal with these failings (Osofsky 2010). More precisely, the scholarly debates on this topic tend to suggest that the authoritative role of the judiciary impacts climate change deliberation in at least the following different ways.

First, testing climate change claims before the court is thought to make climate change tangible and immediate. The argument is that climate change advocates focus on specific injuries in specific cases, and through this

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so-called storytelling, climate litigation synthesises the complex science involved in determining climate change, making it accessible to a wide audience (Hunter 2009). This is considered significant, especially when climate change science is questioned in part due to its incomprehensiveness and inaccessibility to the general public (Jasanoff 2010). The idea is thus that in the courtroom, and through the personification of hard climate change claims, the tone of climate change debate changes, thereby enabling the public dialogue about climate change to become widely enhanced.

Second, climate change litigation is seen to "democratise" global environmental law and policymaking by empowering civil society to shape climate change policy agendas through legal opportunity. For instance, climate change litigation is thought to provide important loci for dialogue among disparate actors across different levels of governance about how to address climate change (Osofsky 2009). From this viewpoint, it is considered to inform a regulatory dialogue, offering private parties an opportunity to raise concerns and flag the need for climate change action (Peel 2011; Preston 2011). Such impact is contrasted with formal climate negotiations that tend to be monopolised by governments and focused on vertical efforts in dealing with climate change questions (Hunter 2009; Osofsky 2007).

These types of "proactive pro-climate change litigation" (2010) are thought to place the judiciary in a strong position to impact climate law deliberation. According to Ewing and Kysar (2011), the judiciary is capable of helping combat climate change through a system of "prods and pleas." This refers to the capacity of different authorities to push each other to action; that is, in the case of climate change litigation, judges are understood to perform their roles with a view toward catalysing activity somewhere else in the system. This means that the role of the court is ultimately to activate a series of actors, including governments, businesses, and nongovernmental groups, to take measures to make international agreements both effective and possible. In this regard, it is argued that climate change litigation has the effect of undermining state opposition to any international law framework, such as the Kyoto Protocol and its successor, and is thus seen to push international law in new directions as shaped in the courtroom (Faure and Peeters 2011; Freeman and Vermule 2007).

Scholarly contributions on climate change litigation recognise that courts may also limit climate change claims by, for instance, rejecting scientific findings or models used in measuring the global carbon levels (see, e.g., *In the Matter of Otter Tail Power Company*[2008]). Often, nonetheless, the judiciary is thought of as a central player, or the key "tool" (Burns and Osofsky 2009) in these discussions, described as able to create a platform, open to civil society, trying to vindicate climate change concerns. The view is that the "domino effect" of such deliberation is the mobilisation of climate laws and action toward creating a coherent legal climate change framework, thereby helping to close the policy gap in the existing climate change regime. To date, climate change litigation has received considerable legal attention in the

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United States, where typical such legal action is driven by nongovernmental organisations (NGOs) who act as plaintiffs (Markell and Ruhl 2010).

Following this description, EU climate change case law, here exemplified by ETS jurisprudence, stands in contrast to the classic case of climate change litigation. Rather than pressing for new climate change–related claims through established legal venues, or using the courtroom with a broader political motive, EU ETS litigation is predominately driven by the member states, the European Commission (Commission), and industries covered by the EU emission trading regime, raising questions that stand at the centre of EU law, or more precisely, they demand that the regulatory competences between the Commission and the member states in the context of constructing and managing the EU ETS, are drawn. In the same vein, the EU courts rule on EU climate change by focusing on the rule of law or, in the context of EU law, ensuring that climate change laws are enacted and applied within the borders of the EU's environmental regulatory powers. This shows that in order to appreciate EU climate change litigation, careful attention needs to be given to the interface between the question of law that it raises and the role of the judiciary in interpreting and ruling on this particular legal enquiry—or, more broadly, to EU legal culture.

III. WHAT DOES LEGAL CULTURE GOT TO DO WITH IT?

The discussion so far has made clear that the aim of this article is to illustrate that EU climate change litigation—including the type of legal proceedings that reach the EU courts, as well as the outcomes—needs to be examined in light of EU legal culture. The concept of "legal culture," however, is ubiquitous (Gibson and Caldeira 1996), raising many questions of its own, not the least concerning its significance and utility (Webber 2004; Teubner 1998). Here, the concept legal culture is employed to highlight the significant interactions between rules and institutions (see Nelken 1995)—or more precisely, between the EU judiciary and EU climate change laws. From this view, thinking about climate change litigation in terms of legal culture, we are not just thinking about climate change *laws*, but also about institutions (see Fisher, Lange, and Scotford 2013) and the particular ideas and motivation underpinning their understanding of the rules and legal processes relevant to climate change jurisprudence.

Studying the EU courts in this way shows that to appreciate EU climate change litigation is to appreciate the interface between climate change law and the limits on the member states, on the one hand, and the European Union, on the other hand, to take regulatory action with regard to climate disruption. What this article demonstrates is that EU climate change case law projects little concern for the need to mobilise climate change *action* or to shed light on climate change *impacts* during the court proceedings; rather, this jurisprudence focuses on questions about EU environmental

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competences, which have already been exercised, and which are then tested in the EU courts. As such, EU climate change litigation—contrary to what is often assumed in the literature on climate change litigation—currently plays no role in attempting to compel the European Union or the member states to pursue a particular climate change objective.

Thus, this article focuses on *institutional* culture, which is a subset of a more general view of the concept of legal culture. Indeed, in a more general use, legal culture is, for instance, employed to define patterns of social behaviour, attitude, values, aspirations, mentalities, and ideas that give a law or regime their particular meaning (Nelken 2004). Also, it tends to be used in a comparative fashion, examining, for instance, a set of claims, policies, and/or laws, and their relative success in different legal systems (Blankenburg 1998; Nelken 2001). In this article, however, understanding EU climate change litigation against the backdrop of legal culture is not an exercise in comparative studies. Rather, legal culture is used to underline the "thickness" of law (Fisher 2010, 35). Instead of treating climate change law as a mere black-letter text, or climate change litigation as a straightforward pattern of straightforward objectives and results, this article demonstrates that legal reasoning, the specific legal questions raised in climate change case law, and the specific institutional architecture of the EU courts need to be taken seriously.

The concept of legal culture is particularly well established in political science, more so than in legal scholarship, and especially in the EU legal community (ibid.). This is a significant reason why it is necessary to bridge debates on legal mobilisation, the potential role of the judiciary as a venue for policy debates, and legal culture—which, ultimately, is what this article attempts to do. Indeed, this study adds to the literature that sees the judiciary as a powerful actor in furthering effective climate change laws by showing that such hopes, at least in the EU legal setting—and as shown below—are restricted by the constitutional and jurisdictional limits imposed on the EU courts, which are distinctive of the EU legal culture.

IV. THE CONSTITUTIONAL ROLE OF THE EU COURTS

The Court of Justice of the European Union (CJEU), consisting of the General Court and the Court of Justice, plays a seminal constitutional part in the EU legal order. Article 19 of the Treaty on European Union (TEU), which sets out the basic rules governing the EU courts, stipulates that the CJEU "shall ensure that in the interpretation and application of the Treaties law is observed." Since regulatory competences are attributed to the European Union as listed in the TEU (art. 5.1), this interpretative role is essential in observing and effectively deciding who—between the European Union and its member states—gets to do what in the EU legal order. As such, the CJEU is undoubtedly the key institution in the EU's constitutional architecture (Scotford 2013; Tridimas 2006).

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Relying on article 19 TEU, the CJEU has over the years progressively developed a wide constitutional base both for its own rulings and for EU law more broadly. For instance, the EU courts have asserted supremacy and direct effect of EU law over national jurisdictions (Alter 1996) and developed a normative framework that governs the relationship between the institutions and the member states (Weiler 1999). The manner in which the EU courts have been able to progress in this way has a great deal to do with the ambiguity of EU provisions. As described by Lord Denning, much EU law "lacks precision [and] uses words and phrases without defining what they mean" (Douglas-Scott 2002, 28), which has meant that in utilising article 19 TEU, the CJEU has, by "observing" EU law, de facto articulated its purpose and meaning. As a result of this gap-filling role, the CJEU has engaged in "constitution making" (Weiler 1999), and in the process, cemented its own role as the EU institution with the highest authority to make these types of structural decisions, including shaping climate change governance in the European Union.

These observations are well established in the academic community, but what is of relevance to note in this article are the broad interpretative powers entrusted to the CJEU in exercising its jurisdictions. Namely, it is within the framework of these that the EU ETS cases appear and are given their legal meaning. Three jurisdictions in particular—as stipulated in articles 263, 276, and 258 of the Treaty on the Functioning of the European Union (TFEU)—are important to highlight in this regard.

A. THE JURISDICTIONS OF THE EU COURTS

The CJEU enjoys a wide array of jurisdictions and three that are of particular relevance here. First, the CJEU has the power, according to article 263 TFEU, to order EU acts to be annulled. Article 263(2) TFEU stipulates that these actions can be brought against any of the institutions, listing various grounds for review, including lack of competence, essential procedural infringement, and misuse of power. To date, most EU ETS actions have appeared within the scope of article 263 TFEU; the most frequent cause being the use of the Commission's regulatory powers under the EU ETS directive (Directive 2003/87) to review member states' emissions allowance caps—the so-called national allocation plans (NAPs). Two distinct groups have used article 263 TFEU in this regard: the member states and the industries covered by the directive. Since article 263(2) TFEU provides the member states with the status of "privileged applicants"—meaning that they do not have to show any special interest in the case to gain standing—cases initiated by governments have all been admitted to the court. Private operators, here referring to the industries covered by the EU emissions trading regime, on the other hand, are according to the treaty provisions "non-privileged applicants," and, as such, they must comply with the

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notoriously restrictive conditions under article 263(4) TFEU to gain standing (25/62 *Plaumann*). As a result, all actions relying on article 263(4) TFEU have, to date, been found inadmissible. This point is crucial as it shows that EU ETS jurisprudence is distinct from the more general prototype of climate change litigation found in other jurisdictions that, as described earlier, is driven by NGOs. Moreover, the fact that the EU courts are constitutionally restricted in hearing cases from the relevant industries means that EU ETS litigation is almost exclusively driven by the member states and the Commission, which, indeed, is one of the key features of this series of ETS-based climate change jurisprudence.

The second CJEU jurisdiction is codified in article 267 TFEU and allows the Court of Justice to interpret EU law upon a national court or tribunal making a preliminary reference. This process of interpretation is recognised as the "jewel in the crown" (Craig 2012, 263) of EU constitutional law, as it is through these processes that the Court has progressed to secure authoritative interpretations of EU law, establishing, for instance, its direct effect (26/62 *Van Gend en Loos*). One notable feature of Article 267 TFEU–type of cases is that the Court of Justice does not rule on the validity of the conflicting views before the Court, but it nonetheless offers an authoritative view of what it believes EU law to mean. The Court is thus often seen laying down fundamental principles of the EU legal system through the judicial dialogue of preliminary reference procedure (Tridimas 2003). To date, a number of preliminary references have been issued in relation to the EU ETS (e.g., C-203/12 *Billerud Karlsborg Aktiebolag v Naturvårdsverket*; C-566/11 *Iberdrola v Spanish State*) but only two have been ruled on: one from the French administrative court concerning the question whether the directive is compatible with the principle of equal treatment (C-127/07 *Arcelor*), and one from the United Kingdom regarding the validity of Directive 2008/101 in the light of a series of international law provisions and principles of international customary law (C-366/10 *Air Transport Association of America*). Although private operators, including NGOs and public institutions, may use the preliminary reference procedures alike—that is, they are not restricted by standing issues—to date, only industries covered by the EU emissions trading regime have challenged the ETS directive through this particular legal procedure. Again, similarly to the previous category of the EU ETS case law, article 267 TFEU–type of actions has sought to challenge the regulatory competences of the EU to legislate both in light of EU law and international law.

The CJEU enjoys a third jurisdiction over enforcement cases between the Commission and the member states as stipulated in article 258 TFEU. These cases are brought by the Commission against the member states, or between the member states for failing to fulfil Treaty obligations. With regard to the EU ETS, the Commission has brought two such cases: against Italy (C-122/05) and Finland (C-107/05) for their failure to implement the ETS directive according to the set time limit. In both instances the Court made the relevant

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declarations owing to the incomplete transposition of the directive within the relevant time.

The above descriptions are significant for three reasons. First, they outline EU ETS cases to date, illustrating that these are treated according to three categories that also serve to shape the constitutional roles of the EU courts. As such, EU climate change litigation is embedded in the legal structure specific to the EU legal order and needs to be understood in accordance with the terms of the Court. Second, they show that the most common EU ETS case is an action challenging the Commission's regulatory discretion under the directive, or the EU's environmental regulatory powers more broadly, which, highlights that the issue of competence stands at the heart of EU ETS jurisprudence. This adds to the argument that this group of climate change litigation is a reflection of the competence-focused EU legal culture.

Finally, considering that the CJEU is the highest interpretative authority of EU law (Douglas-Scott 2002), and because much of the scholarship on climate change litigation sees the judiciary as able to mobilise climate change laws, it is clear that the EU courts' understanding of the EU ETS is crucial. What the following section examines is the interpretation that this institution gives climate change litigation and how this conceptualisation is specific to the EU. First, however, the EU ETS will briefly be introduced so as to orient the reader for the overview of the case law that follows.

V. EU EMISSIONS TRADING REGIME

The EU ETS is a significant climate change law in the EU legal context. It is described as the "parade horse" (Deketelaere and Peeters 2006, 8) and the "eight-hundred-pound gorilla" (Ghaleigh 2010, 48) of EU climate change policy. In the words of EU ETS Directive 2003/87, the aim is to contribute to fulfilling the commitments of the EU and its member states under the Kyoto Protocol "more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment" (pmbl.) "and to promote reductions of greenhouse gas emissions 'in a cost-effective and economically efficient manner" (art. 1).

In brief, the way in which the EU ETS is understood to function is by requiring each installation, covered by the directive, to obtain a permit in order to emit predetermined levels of pollution, which, if there is a surplus, is tradable (art. 5). The idea is that if an installation does better than its target, it can sell its surplus allowances, and if it does worse, it has to buy additional allowances on the emissions market (Lefevere 2003). The rationale is to allow industries with high abatement costs to invest in industries with lower abatement costs by buying allowances freed up by these, thereby reducing costs of compliance. This scheme, however, is limited in scope and covers only certain

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private sectors, including the power- and heavy-industry sector across the Union (annex I) and certain emissions thereof (annex II). By adopting the amending Directive 2008/101, the EU has, nonetheless, extended the application of the EU ETS to include the aviation sector for which emissions allowances will have to be accounted (Bogojević 2012).

This seemingly "simple" legislative construction of the EU emissions trading regime (Skjærseth and Wettestad 2008) has given rise to much litigation. In only the first four years following the start of emissions trading in the EU, the directive was challenged in more than forty cases (Ghaleigh 2009). To understand the essence of these legal proceedings, as well as their outcome, the legal culture in which this case law appears needs to be considered. In doing so, the focus here is on the legal questions that are raised regarding the EU ETS before the EU courts and the manner in which the judiciary conceptualises and decides these. This is done by examining the two first categories of EU ETS case law listed above (these are the only two categories of EU ETS jurisprudence that have resulted in litigation): actions for annulment and preliminary references. As such, this is not a full review of EU climate change litigation, but rather mere glimpses thereof. The reason for the choice of these, which, moreover, are to a large extent technical, is to provide a reminder of why it is essential to think of climate change litigation in the legal context in which it is carried out.

Before analysing the set case law, it is necessary to highlight that from 2013 onwards, the initial EU ETS directive (Directive 2003/87) is amended by Directive 2009/29, which, inter alia, empowers the Commission to set a total cap on emissions allowances for the EU as a whole, instead of only reviewing the various national caps. As such, the national allocation plans—as explained next—are no longer a feature of the EU emissions trading regime. However, since all annulment actions concerning the EU emissions trading regime are to date concerned with the initial EU ETS directive, this particular legal framework is examined—in addition to brief references to Directive 2008/101. Additionally, and as a practical note, it should be mentioned that certain judgments examined below were decided prior to the Lisbon Treaty. However, in analysing these, reference will primarily be to the EU courts by their current names.

A. ACTIONS FOR ANNULMENT

The bulk of EU ETS jurisprudence relies on article 263 TFEU, contesting the allocation of regulatory powers under the directive between the Commission in reviewing the NAPs that establish the total levels of emissions, and the member states in implementing the directive. Here, it is useful to briefly highlight the main rules—encapsulated in articles 9, 10 and 11 of the directive—for determining NAPs, as these constitute the areas of dispute between parties in the relevant case law. Article 9 stipulates that member states

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> shall develop a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them.

This sets out the general obligation on the part of the national authorities to which the directive sets out a number of further qualifications. First, member states must notify their NAP to the Commission and the other member states under a specific time schedule (art. 9.1); and second, the member states must follow "objective and transparent criteria" in determining their NAP, taking into account criteria listed in Annex III, as well as comments from the public (art. 9.3). It is on these criteria that the Commission may "reject that plan, or any aspect thereof," which is a key regulatory discretion entrusted to the Commission. These provisions are seemingly technical, but the EU ETS case law shows that in application, they give rise to significant competence questions. More precisely, the typical action for annulment in EU ETS cases concerns the Commission's decision to reject a particular NAP, leaving the EU courts to interpret whether the Commission's reasoning for doing so is in line with article 9(3) of the directive and EU law more generally. As explained earlier, two distinct groups have relied on article 263 TFEU in this regard: the member states ("privileged" applicants) and the industries covered by the directive ("non-privileged" applicants). These are discussed next.

1. "Privileged" Annulment Actions

In examining EU ETS actions brought by the member states, the focus is on two cases that are most recently decided *Estonia v Commission* (T-263/07) and *Poland v Commission* (T-183/07), and their respective appeals: *Commission v Estonia* (C-505/09) and *Commission v Poland* (C-504/09). These are concerned with the so-called Phase II of emissions trading that saw prices in the EU carbon market plummet due to the overallocation of emissions allowances. The General Court heard the two cases on two consecutive days, and factually the cases are identical. In short, the Commission had rejected both the Estonian and the Polish NAPs on the basis that the assessment data of emission quantities—on which emissions allowances were determined—did not match the Commission's own set of data. The two member states argued that the Commission overstepped its regulatory powers in this regard. More precisely, they held that rather than reviewing the NAPs, the Commission replaced these with its own set of data and thereby de facto determined emissions ceilings for the member states.

In the Polish case, the Commission's key point is that a correct assessment of NAPs (para. 64)

> must enable a situation to be avoided in which surpluses of allowances build up, thereby risking a "collapse in the market" as happened during the trading period from 2005 to 2007.

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This shows that the Commission focuses on the *impacts* of the NAP on the emissions market and the viability of the ETS regime to control the total level of emissions allowances in determining its regulatory competence to review quantitative emissions data under article 9(3) of the directive. In fact, the Commission clearly articulates this, claiming that its reviewing powers are not limited to assessing the quality of data but take into account "the reaction which the market is likely to have in relation to the quality of those data" (para. 67). On this basis, the Commission explains that it had to reject the NAP in question, as it would have added an immediate surplus of allocations to the emissions market, which would have "an effect on the price of those allowances" (ibid). Thus, in the Commission's view, should a market crash loom due to the way in which the member states have drawn their NAPs, and as such, irregularities in EU climate change laws occur, it would be empowered to reject emissions allowance plans.

The General Court, however, delivers a different view of the Commission's role in managing the ETS regime. The Court clarifies that the Commission's powers do not stretch to taking into account the effects of NAPs on the emissions market, but rather are severely limited. More precisely, the General Court explains that even if a NAP would add an excess of emissions allowances and thereby contribute to a possible collapse of the emissions market, this (para. 129)

> cannot justify maintaining the contested decision in force in a community governed by the rule of law such as the Community, since that act was adopted in breach of the distribution of powers between the Member States and the Commission, as defined in the Directive.

The reference to the rule of law here is significant because it highlights the importance of legal culture in appreciating the Court's understanding of what ETS cases are essentially concerned with. To elucidate this point, it is useful to briefly highlight the meaning that the concept of the rule of law enjoys in the EU legal context.

The rule of law is codified in article 2 TEU and is applied to secure violations of EU law through court access, aiming to see to that the corpus of EU law is respected. This process is understood to create "autonomous influence of law and legal rulings extend[ing] to the political process itself" (Alter 2001, 1). Ultimately, the rule of law at the EU level allows the EU to effectively influence member state behaviour, compelling member state compliance via available court venues (ibid.; Shaw 2000), and ensuring that the regulatory power balance between the member states and the EU institutions is maintained (294/83 *Les Verts*). The focus is thus on the *central governance* levels within the EU context as opposed to focusing on safeguarding *individual* freedom against arbitrary government actions (see Hayek 1976), which tends to be a feature of more typical climate change litigation in other jurisdictions (Markell and Ruhl 2010). From this perspective, the reference to the rule of law is significant in showing the EU-specific meaning that the

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Court gives this climate change case law. Indeed, in the statement above, the General Court points to the division of powers between the member states and the Commission in stressing the importance of the rule of law, which indicates that it has an EU-based view of this principle. This signals that in analysing the directive, the Court's focus is on ensuring that the power balance between the member states and the EU institutions is secured and that regulatory compliance on the central governance level is achieved as opposed to focusing on the individual, or in this case, the effectiveness of a climate change law to stabilise emissions markets and control the total level of greenhouse gases.

Similar to the Polish case, in *Estonia v Commission* the Commission pleads for a teleological interpretation of the directive, arguing that its reviewing powers encompass the discretion to reject a NAP on the basis that member states have fixed emissions allowance ceilings that are unable to entail an increase in the price of carbon (para. 42). In particular, the Commission emphasises the importance of effective price signalling in emissions trading and concludes that if its powers to review NAPs are limited to only assessing the quality of the data therein, as opposed to evaluating the impact of NAPs on the market, oversupply of allowances will follow, which the Commission takes to "completely undermin[e] the effects of the Directive as a tool to reduce emissions" (para. 42).

In this judgment, the General Court states that the directive is of primary importance in the EU's fight against global warming, which the Court defined as "one of the greatest social, economic and environmental threats which the world currently faces" (para. 49). However, with regard to whether the Commission's reviewing powers extend to assess impacts on the emissions market, the General Court concludes (para. 50),

> in a community governed by the rule of law, administrative measures must be adopted in compliance with the competences attributed to various administrative bodies.

These statements above show two things. First, they demonstrate that the General Court recognises the importance of the EU ETS with regard to combating climate change. Second, they highlight that despite its importance in responding to climate change, the Court sees the directive as primarily a matter concerning constitutional law, revolving around competences. Following the above, the Court rejected the Commission's plea.

The Commission appealed both above-mentioned cases to the CJEU on the basis that the General Court, *inter alia,* erred in law in its interpretation of the scope and the objective of article 9(3). The CJEU, nonetheless, dismissed the appeals in two similar judgments. The core of the CJEU's reasoning relates to the importance of assuring that the allocation of regulatory power under the directive is in line with the intentions of the legislator—even if this leads to higher emissions levels (*Commission v Estonia*, para. 80 and *Commission v Poland*, para. 78):

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> In the present case, even supposing that the approach favoured by the Commission could improve the functioning of the European Union scheme for greenhouse gas emissions trading and thus make it possible to achieve more efficiently the objective of reducing greenhouse gas emissions substantially, that fact could not alter the allocation of powers between the Member States and the Commission as provided for in Articles 9 and 11 of Directive 2003/87.

This statement elucidates that the CJEU, similarly to the General Court, identifies the allocation of regulatory competence as the chief concern in EU ETS litigation. It also shows that the Court acknowledges the impact that the EU ETS might have on combating climate change but the CJEU does not allow this to weigh in on its interpretation of the Commission's competences. This approach overlaps with the opinions of Advocate General Trstenjak, who argues that the "[c]onsideration of the smooth operation of the trading system does not justify conferring on the Commission additional *extra legem* powers" (Opinion to *Commission v Poland*, para. 84; Opinion to *Commission v Estonia*, para. 79).

In effect, these appeals go to the heart of EU constitutional law in the sense that they deal with the principle of subsidiarity (Groussot and Bogojević forthcoming; Biondi 2012). In an area of shared competence, such as the environment, the member states are allowed to legislate in so far as that regulatory activity has not been harmonised (art. 5 TEU). What the CJEU thus seeks to establish is whether the EU legislator has fully harmonised the rules concerning the construction and operation of the EU ETS according to article 5 TEU, or whether the member states still enjoy a wide discretion in this regard (*Commission v Estonia*, para. 81; *Commission v Poland*, para. 79; Opinion of Advocate General Trstenjak to *Commission v Poland*, para. 62). The Court states that according to the wording of the directive, the intention of the EU policymakers is to empower the Commission only to verify the conformity of the NAPs with the criteria set out in the directive (*Commission v Poland*, para. 47), meaning that the Commission's review power is limited to review of legality (*Commission v Estonia*, para. 48). In stating this, the CJEU makes clear that it is up to the legislator to decide how the climate change regime should operate, refraining from delivering prescriptive judgments on whether climate change laws ought to imposed, and whether they ought to be made stricter so as to become more effectively geared toward reducing greenhouse gas emissions. In other words, the EU Court focuses on questions about EU environmental competence that has already been exercised in creating and managing the EU ETS, and refrains from compelling the exercise of discretion by the EU, or the member states to pursue climate change laws.

These glimpses of the ETS judgments demonstrate two things. First, they show that distinct narratives exist in the courtroom, each portraying emissions trading as a regulatory concept differently. The Commission focuses on the function of the market, including the viability of the EU climate change regime and, based on this outlook, argues that power allocation must be

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assigned according to the needs to stabilise the operation of the emissions market. The EU courts, however, centre their judicial deliberation on exercised competence, and defining the EU emissions trading regime so as to fit the set power divisions between the member states and the institutions in light of EU constitutional law—irrespective of possible adverse effects on the operation of the emissions market and its effectiveness in reducing greenhouse gases.

2. "Non-Privileged" Annulment Actions

The second group of litigants who have brought actions for annulment are private operators covered by the directive. As noted earlier, the member states enjoy the status of "privileged applicants" and as such have direct access to the EU courts. The individual operators, however, must fulfil the restrictive criteria under article 263(4) TFEU in order to get standing, which they have failed to do in all instances with regard to challenging the Commission's regulatory competences under the directive (e.g., T-489/04 *US Steel*; T-241/07 *Buzzi Unicem*). In this regard, what is important to highlight is the type of reasoning that leads the General Court—in concurrence with the Commission—to reject actions for annulment from private operators covered by the directive and how this links to the legal culture of the European Union. Here this is briefly illustrated by examining one of the first actions for annulment brought by private litigants: *EnBW Energie Baden Württemberg v Commission* (T-387/04).

In this case, EnBW brought an action challenging the Commission's decision to approve the German NAP that contained the so-called transfer rules (paras. 40–47). These allow operators, who decommissioned old plans with new installations, to enjoy the same number of emission allowances that they would have been granted had they continued to operate their old plant. The purpose of this provision, Germany explains, is to reward investments in clean energy. The applicant, on the other hand, argues that this constitutes state aid as it allows its key competitor to benefit from an excess of emission allowances and thus enjoy a competitive advantage on the emissions allowance market (paras. 31–36).

This judgment centres on the question whether EnBW is allowed standing to challenge the contested decision. Here, the General Court investigates whether annulment of the contested decision is "capable of having legal consequences" (para. 96) that could procure an advantage on EnBW. In deciding this point, the Court looks at whether individual operators incur rights from the Commission's decision on the NAP. The Court concludes—and in doing so delivers the key point in this case—that the Commission's role in reviewing the NAP is not concerned with the creation of rights but to provide "legal certainty for the Member States" (para. 115). In other words, the Commission's approval of the NAPs is viewed necessary merely for the member states to know how to allocate emissions allowances nationally

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(para. 117). On this basis, the Court finds the contested decision unable to procure an advantage on EnWB, subsequently announcing the application inadmissible (para. 123).

Investigating standing more generally, it is clear that its purpose is to regulate the level at which intervention in the regulatory processes is allowed (Sunstein 1988). Moreover, examining standing in the EU context, and in light of an early study by Stein and Vining (1976), it is equally clear that the EU courts' focus and conceptualisation of the standing provisions, including the requirement to show "direct" and "individual" concern for non-privileged applicants (*Plaumann*), ultimately manifests a deeper interest in maintaining the delicate balance between the member states' and the Commission's regulatory powers at the EU level. Private applicants are instead directed to seek judicial protection indirectly via national courts and according to the preliminary reference procedure (*Les Verts*)—as opposed to challenging political proceedings directly at the supranational level. This approach fits well with the General Court's reasoning in EU ETS cases—as all private applicants to date have been dismissed—at the same time as preliminary references concerning the EU emissions trading regime are steadily increasing in number (e.g., *Billerud Karlsborg Aktiebolag v Naturvårdsverket*; *Iberdrola v Spanish State*). As such, any direct annulment action in the context of EU climate change litigation is thus restricted to the member states and the EU institutions.

This brief overview of the legal actions brought directly by private operators covered by the directive highlights the important factor of legal culture in understanding EU climate change litigation in at least two ways. First, privileged applicants (here, including the member states and the Commission) have been permitted to directly challenge the EU ETS regime. Private operators, which to date have exclusively comprised industries covered by the directive, must instead rely on the national courts to gain access, via the procedure of preliminary reference, to the Court of Justice. Moreover, in its interpretation of article 263(4) TFEU, the General Court refuses to secure rights to the industries covered by the directive and, as such, fails to provide them with a platform to voice their political motivation concerning climate change; nor does it press for the mobilisation of more effective climate change law. Rather, its focus is on the member *states* and ensuring legal certainty under the EU emissions trading regime for the national authorities. This multilevelled judicial system is indeed typical of the EU legal order and specific to its legal culture.

B. PRELIMINARY REFERENCE

To date, two preliminary references concerning the EU ETS have been decided by the CJEU: *Arcelor* and *Air Transport Association of America*—both testing the limits of the EU's environmental regulatory power. The latter case—and the one examined in this article—was brought by several

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U.S. airlines and led by their trade body, challenging the validity of Directive 2008/101 in light of international law and international customary principles. The key question that the trade body raises is whether the EU is allowed to unilaterally control greenhouse emissions from aviation that, so far, are unregulated at an international level.

The Court of Justice, however, spends most of the judgment considering the extent to which individuals can rely on international law agreements and principles of customary law in reviewing EU legislation, in addition to listing and applying conditions for such review. As such, the Court dismisses the claimant's reliance on the Kyoto Protocol in challenging the validity of Directive 2008/101 on the basis that the protocol is neither unconditional nor sufficiently precise so as to confer rights on individuals (para. 77). Similarly, it rejects the claim that Directive 2008/101 breaches the Chicago Convention, pointing to the fact that the EU has not signed and therefore is not bound by this corpus of law (para. 71). Moreover, the CJEU uses this case as an opportunity to reinstate its own competence to rule on the validity of EU law (para. 47). Referring back to its earlier case law, the Court states that it "alone has jurisdiction to determine that an act of the European Union, such as Directive 2008/101, is invalid" (para. 48). Along similar lines, it clarifies, in instances where the EU concludes international treaties, that only the Court has the competence to interpret these in light of EU law (ibid.). This judicial exercise is extensively formalistic, which positions the case in a constitutional law setting and demonstrates, in interpreting climate change laws, that the Court focuses on defining the boundaries of competences—including its own. This illustrates, in interpreting the EU's climate change regime that the Court thinks of constitutional—as opposed to environmental—impacts in resolving climate change-related dilemmas.

At a later point in the case, however, the Court adopts a broader purposive, environmental approach, which arguably sets this case apart from the previously discussed annulment actions. More precisely, the CJEU found that the EU is justified in imposing environmental obligations on commercial operators that conduct their activities wholly or in part in the EU, stating (para. 128),

> the European Union legislature may in principle choose to permit a commercial activity . . . to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself

This sends a powerful message about the EU's environmental competences. It explains that EU's Treaty-based environmental protection objectives are able to condition commercial pursuits, and that, as such, EU environmental goals exist at the forefront of economic activities—even if amounting to de facto unilateral international environmental action. What is, however,

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pertinent to note here is that the Court interprets the EU's regulatory discretion only to the extent that it is already exercised. As such, it refrains from any suggestions, or legal arguments to compel the EU, or the member states to pursue, or further a particular climate change policy. This highlights the constitutional limits of the EU courts (see Scotford 2013), which indeed is a part of the legal culture in which EU climate change deliberation exists and is interpreted.

Ultimately, what this brief overview of preliminary reference concerning the EU ETS highlights is the need to consider the interface between climate change litigation, the question of law that it raises, and the judiciary's approach and role in resolving it. Here, the Court's emphasis on competences—both in assessing the admissibility of the trade body's attempt to annul EU climate change law, as well as interpreting EU's policy-making discretion to broaden the scope of the EU emissions trading regime to aviation—illustrates that the judiciary understands this set case law to be a constitutional dilemma as opposed to a pressing environmental problem. Subsequently, this judgment projects little concern with the need to mobilise climate change action, or to shed light on climate change impacts during the court proceedings, which is often seen as the key benefit of climate change litigation in the literature on this topic. Instead, EU climate change litigation is concerned with questions about *exercised* EU environmental competences that are subsequently tested before the EU courts.

VI. REFLECTIONS

The analysis above provides glimpses of EU climate change litigation. What these glimpses, nonetheless—and in particular in the annulment cases—show is that distinct conceptualisations of emissions trading exist, ultimately contributing to a complex and conflicting emissions trading discourse before the EU courts (Bogojević 2013). The Commission centres its narrative on the operation of the emissions market, including a discussion on the viability of the EU climate change regime. The EU courts, on the other hand, stress the significance of providing legal security for the member states and respecting the principle of attributed competences. Ultimately, the judiciary rejects the Commission's line of reasoning, focusing on questions of EU constitutional law and answers these by relying on well-established doctrines and legal tests. The EU courts thus "speak [. . .] the language of constitutional law" (Scott 2011, 811), which is illustrated also by references to the subsidiarity principle. Indeed, the judiciary pays little, if any, attention to providing a broad forum, open to different stakeholders to challenge the viability of emissions trading to reduce the impact of climate change or to promote stricter and improved climate change laws. This is illustrated in the Court's dismissal of any direct private actions before the EU courts, instead relying on the national courts to offer indirect standing to private

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litigants via preliminary procedures. In effect, the Court's emphasis on the need to balance regulatory powers between the Commission and the member states overshadows any considerations of ensuring that climate change laws reduce levels of greenhouse gas emissions or that climate change litigation provides a broad political platform for private litigants to voice their climate-change related concerns.

Unpacking EU ETS jurisprudence, as carried out in this article, is limited in numerous ways. First, the case law examined provides only snapshots of the key arguments surfacing in the set judgments. Second, the European Union is currently in the lead on combating climate change (Carlarne 2010; Brunée 2008), and, as such, there may be little interest to challenge the EU ETS to try to mobilise climate change action. A related third point is that the EU ETS is a control mechanism that regulates industries, which means that the directive is challenged mainly by the private sector or member states lobbied by the private sector seeking to protect their respective economic interests. Such climate change litigation, as explained by Hilson (2010), is less frequently undertaken in order to mobilise stricter environmental protection laws—or, at least in jurisdictions, such as the European Union, where environmental NGOs, which might have wanted to challenge these laws, enjoy only limited access to the judiciary.

Moreover, this article has discussed the EU courts in general terms, although the specific composition, jurisdiction, and structure of the General Court and the Court of Justice are significantly different, with different effects on the judgments delivered. For example, the General Court covers mainly cases that are brought by private persons or companies against the EU institutions. The Court of Justice, on the other hand, deals, in essence, with actions that are brought by the Commission against a member state, preliminary references issued by the national courts, and appeals against judgments of the General Court (see Krämer 2013). These different types of legal venues influence how the distinct courts respond to the various actions; that is, the General Court is constrained by the conditions set out in article 263 TFEU, which are far narrower in scope in comparison to the interpretative breadth entrusted to the Court of Justice under article 267 TFEU. As such, the Court of Justice tends to deliver "meta-teleological or broad, system-level purposive interpretation" (Conway 2012, 3), which fits the example of preliminary reference examined in this article. Indeed, this explains why the Court of Justice is often understood as being "more innovative and creative" (Krämer 2013, 127) in comparison to the General Court, which is seen to project the environment simply as "one factor in society among many" (Krämer 2009, 95). Investigating the impact that the structure and constitutional roles vested with these two judicial institutions have on the outcome of the EU case law offers an intriguing new line of inquiry. The point to make here is that the judicial construction of the EU emissions trading regime is culture specific and thus can only be properly explained with references to EU legal culture.

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VII. CONCLUSION

This article provides a series of snapshots of the EU ETS case law, representing neither a complete picture of EU's climate change jurisprudence nor a final say on this topic. What these nonetheless make clear, is that EU climate change litigation is about the question "who decides" the construction and management of the EU emissions trading regime. What drives this competence question is the EU legal doctrine concerning jurisdictional matters, including the subsidiarity principle and the rule of law. As such, careful attention needs to be given to the interface between climate change litigation, the question of law that it involves, and the judiciary's interpretation thereof. The reason why it is important to highlight this interface is because it points to the specificity of law—specificities that are often overlooked in environmental law scholarship. This article has been an attempt to consider these interfaces and encourage further exploration of socio-legal concepts, such as legal culture, to explain the importance of law.

SANJA BOGOJEVIĆ *is a Lecturer in Law at Lund University, Sweden. Her research examines the interplay between states and markets in regulating natural resources, as discussed in her book,* Emissions Trading Schemes: Markets, States and Law *(Hart Publishing 2013).* *This research is generously sponsored by Vetenskapsrådet and Ragnar Söderberg Stiftelsen.*

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