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The Role of the Judiciary in Climate Change Action
- A Comparative Analysis of EU and US Jurisprudence

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Contents

Summary

Several decades after the initiation of international climate change negotiations, the world still struggles with the issue of how to mobilize climate action. In the meantime, the costs of inaction rise to unprecedented heights. It has proven more than difficult – even impossible for the international society to agree upon a binding common framework, and also on regional and local levels are regulatory measures, as well as persuasive voluntary measures conspicuous by their absence.

Simultaneous to this incapacity or unwillingness to act, courts around the world are receiving an increasing amount of climate-related claims on their tables. Public as well as private parties are testing different legal instruments to gain their cause, whether this is to encourage, or to block climate change regulations.

The European Court of Justice handed down its judgment in the controversial, highly debated *Air Transport Association of America* case, where a number of airlines challenged the validity of the EU scheme imposing emission allowances on the aviation industry. This case raised fundamental questions concerning the ability of the EU, a regional decision-maker, to take unilateral action with impacts reaching far beyond the external borders of the Union.

The US Supreme Court has ruled on two closely interlinked cases – that of *Massachusetts* and *AEP*, where the applicants sought to mobilize climate change action on a national level.

This thesis investigates the role of the high Courts in legitimizing and promoting climate change action. The comparison will highlight how the Courts have identified and legitimized specific actors, but also analyze how similarities and dissimilarities in the separate legal systems will impact on the role of the judiciary in the climate change context. It will focus on some specific barriers to judicial review brought to the fore in the cases – primarily displacement and issues of non-justiciable political question – as these issues are closely related to the question of the courts' role in climate change action.

By legitimizing and encouraging some type of action, the Courts may serve to break the longstanding political deadlock on climate change.

Sammanfattning

Årtionden efter att internationella klimatförhandlingar inleddes tampas världen fortfarande med den grundläggande frågeställningen hur klimatåtgärder skall mobiliseras. Samtidigt stiger kostnaderna till följd av vår passivitet. Det har visat sig nästintill omöjligt för det internationella samfundet att göra upp om ett gemensamt, bindande regelverk för klimatpåverkan. Även på regional och lokal nivå lyser både bindande regleringar och effektiva marknadsåtgärder med sin frånvaro.

Parallellt med denna oförmåga, eller ovilja att vidta åtgärder, utgör domstolar runt om i världen spelrum för allt fler klimatrelaterade tvister. Offentliga såväl som privata aktörer söker använda olika rättsliga medel för att stimulera, eller i vissa fall, blockera, klimatåtgärder. Europeiska unionens domstol avgjorde 2010 det så kallade *ATAA*-fallet, vari ett antal flygbolag ifrågasatt giltigheten i ett EU-direktiv som ålägger utsläppsrätter för flygindustrin. Fallet väckte grundläggande frågor om EU:s möjligheter att såsom en regional beslutsfattare ensidigt besluta om klimatåtgärder med inverkningar långt utanför EU:s eget territorium.

USA:s Högsta Domstol avgjorde 2007 och 2011 två relaterade fall, *Massachusetts* respektive *AEP*. Sökande i båda dessa fall efterfrågade klimatåtgärder på nationell nivå.

Samtliga dessa fall rör frågan om hur klimatåtgärder skall mobiliseras. Den här uppsatsen undersöker vilken roll högre domstolar har i att legitimisera och främja klimatåtgärder. En jämförelse av de tre fallen belyser hur likheter och skillnader i EU och USA påverkar domstolarnas roll i en klimatkontext. Den fokuserar på ett antal hinder mot rättslig prövning som aktualiserats i fallen – den så kallade ’displacement’-doktrinen och frågor om gränsdragningar mellan politiska och rättsliga frågor.

Genom att legitimisera och främja en vis typ av åtgärder verkar domstolarna för att bryta det ihållande politiska stillestånd som råder i debatten om hur vi ska förhindra klimatförändringar.

Preface

First of all I would like to express my gratitude to my supervisor, Sanja Bogojević, for her constructive criticism, for helping me to navigate through stacks of information and to keep a clear sight. I would also like to thank her for always being available, even at short notice.

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Brussels, 28 May 2013.

Sanna Keivanlo

Abbreviations

ACES	American Clean Energy and Security Act
AEP	American Electric Power
ATAA	Air Transport Association of America
CAA	Clean Air Act
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
COP	Conference of the Parties
ECJ	European Court of Justice
EPA	Environmental Protection Agency
ETS	Emissions Trading Scheme
EU	European Union
FYROM	Former Yugoslav Republic of Macedonia
GHG	Greenhouse gases
NGO	Non-governmental Organization
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
USA	Unites States of America

1 Introduction

"It is my hope that this report shocks us into action".[1] This is the first sentence in a report published by the World Bank in 2012. It depicts the scenario of a four degree warmer world, a scenario that "*scientists are nearly unanimously predicting by the end of the century, without serious policy changes*".[2]

The report concludes that the predicted 4°C global temperature rise "*simply must not be allowed to occur*"[3] – demanding instant, cooperative policy action in response to the prevailing lack of strategies on how to deal with climate change.

So far, ongoing efforts to combat climate change have proven insufficient. Efficient international regulatory measures are conspicuous by their absence. Voluntary marked-based mechanisms and civil society action have not been able to influence corporations to reduce pollution. The victims of climate change stand without remedies, and nature remains scantily protected.[4]

Simultaneous to this immobilization, an outburst in new types of environmental governance institutions can be observed, *inter alia* an establishment of specialized environmental courts and tribunals, specializing in disputes relating to the environment, natural resources and land use.[5] Parallel to this, a surge in climate-related litigation in general courts can be noticed, both at national, subnational and supranational level.[6] To exemplify, the US passed from one climate-related case brought in 2003, to over a hundred cases by 2010.[7] In the EU, the EU ETS Directive alone had, by the end of 2008, already been challenged in 40 actions before the CJEU.[8] As policy-making is not advancing, litigation has come to represent a battleground and a forum for debate: a means to petition governments to

[1] World Bank. 2012. "Turn down the heat: why a 4°C warmer world must be avoided." Washington DC: World Bank. p. ix
[2] Ibid. p. ix
[3] Ibid p. 64
[4] UNEP. 2011. "Building the Climate Change Regime. Survey and Analysis of Approaches." United Nations Environment Programme, World Resources Institute. p. 2
[5] Pring, Catherine K., Pring, George R. 2009. "Greening Justice: Creating and Improving Environmental Courts and Tribunals." *The Access Initiative*. pp. ix
[6] Osofsky, Hari M. 2007. "Climate Change Litigation as Pluralist Legal Dialogue?" *Stanford Journal of International Law, Vol. 26 & Stanford Journal of International Law*, Vol 43(Joint Issue). p. 181
[7] Gerrard, Michael B., Wannier, Gregory E. 2012. "United States of America." In *Climate Change Liability.Transnational Law and Practice*, edited by Richard Lord QC, Silke Goldberg, Lavanya Rajamani, Jutta Brunnée. 562
[8] Ghaleigh, Navraj Singh. 2009. "Emissions Trading Before the European Court of Justice: Market Making in Luxembourg." In *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond*, edited by David Freestone and Charlotte Streck. p. 11-12

take protective action – or, the opposite – to prevent public interventions into the individual freedom to act, to contract – to pollute. Ultimately, what takes place within the ambit of a climate change lawsuit provides for a measurement of the current state of affairs of environmental protection.[9]

The adjudication of climate change politics is a fairly new phenomenon, and its role and impact still under debate. One such discussion concerns the impact on regulatory governance and the possibilities of courts to fill in the regulatory gap caused by inadequate governmental action.[10] In 2004, two separate lawsuits were filed in US district courts, to later on reach the Supreme Court on appeal. The *Massachusetts*[11] and the *AEP*[12] cases both concerned the possibilities to 'stimulate' regulatory action by the federal US government – and the question of what to do if action fails to come off. In 2009, the *ATAA*[13] case reached the CJEU through a preliminary reference procedure, in essence concerning the legitimacy of EU climate change regulations in the lacuna of international action.

Through a comparative analysis, this thesis will examine the role of the judiciary in climate change action. By this I hope to contribute to the ongoing discourse on future pathways for environmental governance.

1.1 Purpose and Research Question

With European Court of Justice and US Supreme Court climate-related litigation as the point of departure, I have studied the Courts guided by the following research question:

> *What is the role of the judiciary in legitimizing climate change action?*

The thesis presents the opinion that courts have an important role in encouraging climate change action, in identifying and encouraging action. In order to consider this, the thesis will first analyze how the Court judgments contribute to legitimizing a certain institution or type of policy

[9] Osofsky, Hari M. 2010. "The Continuing Importance of Climate Change Litigation." In *Climate Law* 1: 3-29. p. 4
[10] Ibid. p. 43
[11] *Commonwealth of Massachusetts, et Al., Petitioners v. Environmental Protection Agency, Respondent Alliance of Automobile Manufacturers, et Al., Intervenors*, 415 F.3d 50, 367 U.S. App. D.C. 282 (D.C. Cir. 2005).
[12] *State of Connecticut, et al., Plaintiffs,v. American Electric Power Company, Inc., et al., Defendants.Open Space Institute, et al., Plaintiffs, v.American Electric Power Company, Inc., et al., Defendants.* 406 F.Supp.2d 265 (2005)
[13] Case C-366/10 *The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change* (2011) OJ C260/9.

making, and second, how the Court's perception of its own role is reflected in the cases.

The subject of analysis is motivated by the importance of the EU and the US as actors in the combat of global climate change. Not only their stances in international negotiations, but also their internal policy development will have a considerable effect on the prospect of combatting climate change. Furthermore, the CJEU and the US Supreme Court are both recognized as two of the world's most powerful high Courts, with significant impact on their respective legal systems.[14]

Climate change is a '*multiscalar*' problem with both highly transnational and highly local characteristics.[15] Its governance remains at an initial stage of development, still struggling with the fundamental question of *where* and *how* to take decisive action. It will require progress both at national and international level, including some degree of harmonization. There are therefore numerous reasons to take a comparative look at the role of a major actor in climate change policy debate: the high Courts of the EU and the USA.

1.2 Dispostion

This thesis is divided into three main parts. First follows a brief overview of EU and US policy approaches to climate change in order to outline the characteristics of the two systems and to situate the role occupied by the high Courts. This overview is in no sense intended as a complete record of American and European polity. The purpose is to give a background to the cases and by a brief comparison identify key characteristics of relevance to climate change litigation.

The main section of the thesis will assess the way in which the Courts contribute to legitimize and thus encourage climate change action. The role and functioning of the US Supreme Court and the European Court of Justice respectively will be described and the case studies analyzed separately under each system.

The final section will compare the findings from the American and European case studies to draw conclusions of a more general application.

[14] Sweet, Alec Stone. 2011. "The European Court of Justice." In *The Evolution of EU Law*, edited by Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press. p. 121
[15] Osofsky, Hari M. 2008. "Is Climate Change 'International'? Litigation's Diagonal Regulatory Role." *Virginia Journal of International Law* 49:3. p. 587

1.3 Method

The method used is initially a traditional dogmatic method, studying both systems separately. This is followed by a comparative analysis. Three cases form the subject of analysis: the American *Massachusetts v. EPA* and *AEP v. Connecticut* cases and the European *ATAA* case. These cases are considered as landmark judgments and have been widely discussed by academia.[16] In their very essence they touch upon the issue of which institutions are best situated as policy-makers.

The materials used to analyze the cases are mainly legal doctrine and related case law. Despite the fairly short history of climate change litigation, a considerable amount of research has been devoted to its characteristics, role and impact, notably in the USA but also more and more in the EU.[17]

1.4 Delimitations

In both the EU and the US the supranational/federal high court judgments represent but a minor share of all litigation. An analysis of cases brought on US state or EU Member State level would give a more comprehensive picture of the state of climate change litigation, but is an undertaking better apt for a dissertation (if even so). The high Court judgments do however give a representative picture of the broad lines of reasoning of the judiciary as a whole. Together with the fact that the high Courts represent the final instance for appeal, and the impact these Court judgments have on the entire

[16] See for instance on Massachusetts: Adler, Jonathan. 2007. "Warming Up to Climate Change Litigation" *Virginia Law Review*, Vol. 93, No. 61; Osofsky, Hari M. 2007. "The Intersection of Scale, Science and Law in Massachusetts v. EPA" in *Adjucating Climate Change: State, National and International Approaches* edited by William C.G. Burns and Hari M. Osofsky, Cambridge: Cambridge University Press. See on AEP: Adler, Jonathan. 2011. "A Tale of Two Climate Cases." *121 Yale Law Journal Online 109.* Accessible at < http://yalelawjournal.org/2011/09/13/adler.html>; Osofsky, Hari M. 2012. "Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of AEP v. Connecticut". *Valparaiso University Law Review* 46 (2):447-457. See on ATAA: Bogojević, Sanja. 2012. "Legalising Environmental Leadership: A Comment on the CJEU'S Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme." *Journal of Environmental Law* 24: 345–56; Fahey, Elaine. 2012. "The EU Emissions Trading Scheme and the Court of Justice: The "High Politics" of Indirectly Promoting Global Standards." In *Special Issue Deciphering Regulatory and Constitutional Competence Between EU Environmental Law and Global Governance* edited by Elaine Fahey and Ester Herlin-Karnell. German Law Journal 13 (11):1147-1268.; Mayer, Benoit. 2012. "Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, with annotation by B. Mayer." *Common Market Law Review* 49 (3).

[17] See footnote 16. See also Bogojević, Sandra. 2013. "EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture." *Law & Policy;* Osofsky, Hari M. 2005. "The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance." *Washington University Law Quarterly* 83:1789

judiciary, the US Supreme Court and the CJEU judgments serve as an appropriate point of departure for this study.

In the cases I have chosen to focus on a few barriers to judicial review (displacement, the political question doctrine) and the way the Courts generally contribute to encourage climate change action. While many other issues were raised in the cases these are excluded due to lack of space. Also important to underline, this thesis does not aim to undertake an analysis of specific legal issues that were invoked in the cases. The purpose is to analyze, in broader terms, the way the Courts contribute to climate change action.

The differences between the US and the EU legal systems and the different points of departure have had an impact on the analysis. Here an important remark on the choice of wording must be made: while the Massachusetts and AEP cases dealt with the question of *enabling* climate change regulations where none such existed, the ATAA case dealt with the legality of already existing regulations (the EU Aviation Directive),[18] which in turn had been adopted in response to an overarching, global regulatory gap. Thus, in the latter case, the Court has a *legitimizing* rather than enabling function.

[18] Directive 2008/101 of the European Parliament and of the European Council amending Directive 2003/87 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3.

2 The Role of the Judiciary in EU and US Approaches to Climate Change – an Overview

In order to introduce the reader into the topic and to situate the court cases in their larger context, a brief overview of the characteristics of climate change policy in the EU and USA respectively will follow. Although many common denominators exist, some major discrepancies influence the way the EU and the USA handle the issue of climate change. Due to the shared social, economic and political foundations, European and American legislation reveal many similarities, and in both regions, environmental protection ranks relatively high on the political agenda.[19] Both the US and the EU have an independent judicial body with two very powerful high courts – the US Supreme Court and the European Court of Justice – which show considerable similarities in goals and institutional characteristics.[20] There are however significant differences between the EU and the USA, both at systemic as well as substance level, which impact on the functioning of the judiciary in the climate change context.

2.1 Polity

To grasp and compare the role of the judiciary in EU and US climate change policy action, some basic understanding of the political structures characterizing both entities is necessary. The US is a Constitution based federal republic. Its legal system is characterized as a common law system at the federal level. So is also the case in all states but Louisiana, whose legal system is based on Napoleonic civil code.[21] The EU is not a federation but a "*hybrid intergovernmental and supranational organization*".[22] The EU

[19] Kimber, Cliona J. M. 1995. "A Comparison of Environmental Federalism in the United States and the European Union." *Maryland Law Review*. 54:1658-1690. p. 1658

[20] Fabbrini, Sergio. 2004. "The EU in American Perspective." In *Restructuring Territoriality: Europe and the United States Compared*, edited by Christopher K. Ansell, Giuseppe Di Palma. Cambridge University Press. p. 184; Juenger, Friedrich. 1984. "Judicial Jurisdiction in the United States and the European Communities: A Comparison." *Michigan Law Review* 82 *Festschrift in Honor of Eric Stein* (5/6):1195-1212

[21] CIA, *United States*.The World Factbook. Accessible at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>. Last updated 7 May 2013.

[22] CIA, *European Union.* The World Factbook. Accessible at <https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_ee.html>. Last updated 6 May 2013. Preliminary statement.

has no constitution in the strict sense, but is described as based on the rule of law, its foundation as having "*constitutional character*"[23] based on the Treaties – and the CJEU as a "*constitutional court*".[24]

Both the EU and the USA are characterized by a *vertical* separation of powers (between the federal government/the EU and the states/Member States) alongside a *horizontal* separation of powers (between institutions at the same hierarchy in the federal system).[25] Both Courts have an important role to play in filling the legal gaps and ambiguities that result from the shared competences of these separate institutions. Fabbrini argues that the many checks and balances that exist in both systems in order to preserve the institutional balance serve to encourage courts *to fill this void.*[26] For instance, the US legislative process requires that new laws pass both houses of the Congress and get signed by the President.[27] In the EU, the most widely used legislative procedure is the ordinary legislative procedure, requiring an accord between the Commission, the European Parliament and the Council of Ministers.[28]

Osofsky has discussed the gap-filling role of litigation in the climate change context specifically, arguing that it will

> remain an important lever within transnational regulation of climate change in part because of the way in which they engage the cross-cutting nature of the problem. Their ability to rescale and to connect people across spatial and temporal scales— together with their interaction with many areas of law, from environmental to corporate to tort to urban planning—makes them an important piece in an ongoing regulatory dialogue.[29]

The courts' role can consequently be found in their very nature– in the precise capacity to accommodate and balance claims from different actors that would otherwise face significant 'transaction costs' in order to debate their claims.

2.2 The Viability of Climate Action

To better understand the cases analyzed, the context in which they rose is of importance – the context of *national* inaction relevant to the US cases, and

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Lenaerts, Koen, Van Nuffel, Piet, *European Union Law*, 3rd Edition, 2011, Sweet & Maxwell. pp. 16 and 25

[23] Ibid. p. 22

[24] Ibid.

[25] Fabbrini (2004) p. 184

[26] Fabbrini (2004) p. 182

[27] US Constitution Art. I

[28] TFEU Art. 289 and 294

[29] Osofsky (2010) p. 28

the *international* inaction relevant to the EU case. For a more thorough outline of EU-internal climate policy, the reader will have to turn elsewhere.

2.2.1 US National Climate Action

The *Massachusetts* and *AEP* claims were brought in a situation where new US legislative action on climate change was not likely to be adopted in a near future. Similarly, the *ATAA* case took place in a situation where the prospect a binding and enforceable international agreement was all but certain. The role of the judiciary must be analyzed against the background of this policy *inaction*.

On the US national level, climate change policy has been characterized as lacking substantive legal content:

> The US federal government has, arguably, abdicated its role as the national leader in many spheres of environmental law, certainly in climate change law and policy.[30]

According to Osofsky, a combination of scientific uncertainties, public skepticism, political division between the legislative and executive branches of the US government, in addition to the dividing line running between the Senate and the House of Representatives following last elections "*limits the viability of new climate change legislation*" in the US.[31] This is combined with a patchwork of different regimes, assigned to different agencies to be handled separately.[32] Overall, these elements contribute to a fragmented drawn-out political process, resulting in climate *inaction.*

The Clean Air Act was passed in the Senate in the 1970s, in a context where environmental concerns was given a much more prominent position on the political agenda than during recent years. Until the *Massachusetts* judgment,[33] the Bush administration argued that GHGs were not '*air pollutants*' as covered by the Act, a stance endorsed by EPA itself.[34] The Obama administration has taken some steps to enhance the combat of climate change, but is also characterized by a major incapacity to take decisive legislative action.[35] For instance, the 2009 ACES[36] energy bill,

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[30] Carlarne, Cinnamon. 2010. *Climate Change Law and Policy: EU and US Approaches* Oxford: Oxford Univ. Press. (2010) p. 35
[31] Osofsky (2012) p.449
[32] Ibid.
[33] *Massachusetts, et Al., Petitioners v. Environmental Protection Agency et Al. v EPA*, 127 S Ct 1438 (2007)
[34] Burtraw, Dallas, Fraas, Arthur G., Richardson, Nathan D. 2011. "Greenhouse Gas Regulation Under the Clean Air Act: A Guide for Economists." *Resources for the Future Discussion Paper* No. 11-08. p. 1
[35] Carlarne (2010) p. 54
[36] H.R.2454 American Clean Energy and Security Act of 2009

proposing a national cap-and-trade system, failed to pass the Senate. The President has also taken part in recent COPs[37] without being able to present concrete commitments on the part of the United States, thus hampering international accord. Absent Congressional support, ambitious climate change objectives are unlikely to be concretized through legislation. Thus the prospect of legislative action remains uncertain, leaving "*any near-future federal action on carbon emissions in familiar hands: the Clean Air Act*".[38]

In this context, the federal administrative agency assigned the protection of human health and the environment – the US Environmental Protection Agency (EPA)[39] – is given a central role. Indeed, federal agencies represent the major source of environmental governance – through regulations, enforcement proceedings or through judicial challenges *against* their actions or omissions. Endowed with both legislative, implementing and enforcing powers, the regulation of GHGs falls to a large extent on the lot of EPA.[40]

For the sake of comparison, there is no supranational administrative environmental agency in the EU. Implementation of EU legislation is instead conducted at national level, to a certain extent subject to the supervision of the European Commission. This often leaves discretion to the Member States in interpreting, implementing and enforcing EU environmental rules, which in turn creates a need upon *national courts* to ensure a conform interpretation and application of Union law.[41]

2.2.2 The International Institutional Failure

In the *ATAA* case, the development on the international level is more relevant. In the words of Preston:

> A comprehensive and action-forcing international treaty, ratified by all the major contributors to global warming, is regarded as the preferable choice to address the global warming phenomenon, as collective action taken by all nation states is what is required in order to meaningfully combat climate change.[42]

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[37] Conference of the Parties to the 1992 UNFCCC
[38] Burtraw (2011) p. 1
[39] EPA, *Our Mission and What We Do* <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do>, accessed 20 April 2013. Last updated 10 April 2013.
[40] *Climate Regulations under Section 111 of the Clean Air Act*, Center for Climate Change Law, Columbia Law School, <http://web.law.columbia.edu/climate-change/resources/climate-regulations-under-section-111-clean-air-act>, accessed 1 March 2013; Carlarne (2010) p. 54
[41] Carlarne (2010) p. 320
[42] Preston, Brian J. 2011. "Climate Change Litigation (Part 1)." *Carbon & Climate Law Review* 5 (1):3-14. p.3

However, such a comprehensive and action-forcing international treaty does not exist. The international community has failed to issue an overarching global framework to effectively combat climate change. Despite decades of international negotiations, the *United Nations Framework Convention on Climate Change* (UNFCCC)[43] lacks binding hard obligations, and the supplementing Kyoto Protocol[44] is characterized by weak enforcement mechanisms, a low compliance among its signatories and commitments that do not correspond to the reductions demanded for by scientists. Major emitters such as the USA, China and India fall outside the reach of binding emission reduction targets.[45]

There are many reasons why international law can be seen as ill-equipped to deal with the problem of climate change. To mention some, climate change is an issue of extreme complexity, with a range of different actors involved, characterized by problems related to collective action. The majority of harm has yet to occur and the causation is non-linear. And finally, the success of the negotiations depends on the willingness of states to accept limitations to their national sovereignty.[46]

In both the European and the North American a context of *inaction* the role of the judiciary will, as will be further developed below, to identify and enable a more viable road to climate action.

2.3 Adversial Legalism – Eurolegalism

Another important element in the comparison of the role played by the judiciary in the EU and US system is the view on court interventions in the development of policies. The notion of '*adversarial legalism*' originates from the American system, where litigation traditionally has a deeply rooted function in the ongoing process of lawmaking.[47] This can be exemplified by the substantial law-making and remedial powers given to the courts, the political selection of judges, right to class action, frequent judicial review, interventions into administrative decisions and strong, punitive legal sanctions. Adversial legalism is even held to reflect deliberate government encouragement of judicial action to help implement public policy.[48]

[43] United Nations Framework Convention on Climate Change, 9 May 1992 [place]31 ILM 849 (UNFCCC)
[44] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997
[45] Osofsky (2009) p. 600
[46] Esty, Daniel C., Moffa, Anthony L. I. 2012. "Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime." *Journal of International Economic Law* 15 (3):777-79. pp. 781
[47] Kagan, Robert A. 2003. "Adversarial Legalism: The American Way of Law." USA: Harvard University Press. 1st edition. p. 4
[48] Carlarne (2010) p. 322

Notably, within the environmental policy field, adversarial legalism has played a prominent role, both to block and enhance environmental protection measures.[49]

The role of litigation in EU climate change policy-making is less pronounced than under the American legal system. On a general level, the notion of '*Eurolegalism*', introduced by Kelemen, denotes

> a mode of governance that relies on detailed rules containing strict transparency and disclosure requirements; legalistic and adversarial approaches to regulatory enforcement and dispute resolution; slow, costly legal contestation; active judicial review of administrative action; and empowerment of private actors to enforce legal norms.[50]

However, in the climate change context specifically, several scholars have emphasized the command-and-control style of EU governance – a "*bureaucratic, impersonal form of legalism, wherein the courts are less intimately involved in the minutiae of law-making*".[51] In a comparison to US litigation, Ghaleigh argues that the CJEU litigation is less impact-oriented and of a more technical character:

> The EU ETS litigation is not concerned with the impacts of climate change (declining snow packs, costs of adaption to sea level rises etc) but rather the finessing of a new market mechanism from the perspective of key market actors within the established confines of EU law.[52]

This view is also shared by Bogojević. In an exposé over recent climate change jurisprudence in the EU, she concludes that the main focus of this litigation has been the boundaries of EU regulatory competences already exercised, rather than the interest of mobilizing climate change action.[53]

What can be concluded is that both Courts share a tradition of intervening in policy development, through their interpretation of law, in order to uphold rule of law and safeguard important societal interests. This tradition however takes different expressions in the EU and the US respectively.

2.4 Litigation Typology

To give a very short overview, the cases brought before the CJEU are predominantly of an administrative character, i.e. claims relating to the validity or interpretation of specific regulations such as the Aviation

[49] Kagan (2003) p. 207-220
[50] Kelemen, R. Daniel. 2012. "Eurolegalism and Democracy." *Journal of Common Market Studies* 50:55-71. p. 56
[51] Carlarne (2010) p. 323
[52] Ghaleigh (2009) pp. 28
[53] Bogojević (2013) p. 5

Directive or the EU ETS. These claims are generally brought by Member States and the European Commission to safeguard the institutional balance of the Union, or, as the *ATAA* case, by private sector parties seeking to limit the scope of restrictions into their economic interests. Due to the pro-environmental objectives of the EU ETS, and the very strict standing requirements for individuals, litigation rarely occurs in order to promote climate change action.[54]

The US court cases are brought mainly as statutory or administrative challenges, such as in *Massachusetts*, and less commonly as common law claims, such as *AEP* (or as constitutional claims). The US judicial system does provide for a possibility for individuals seeking remedies for the effects of climate change within the ambit of common law public nuisance claims. Claims are here primarily brought by environmental NGOs against the federal or state governments.[55]

[54] Butti, Luciano. 2011. "The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America." In *Climate Law Reporter,* edited by Paulo A. Lopes and Melissa Blue Sky. *Sustainable Development Law & Policy* 11(2):32-36. p. 34; Bogojević (2013) p. 19

[55] Markell, David, Ruhl, J.B. 2010. *An Empirical Survey of Climate Change Litigation in the United States*. Environmental Law Reporter 40: 10644–55

3 Climate Change Litigation in the USA

Here will first follow some general remarks concerning the US judicial system. Under the case analysis the doctrine of legislative displacement and the political question doctrine will be treated, as these barriers to judicial review were of particular relevance to the *Massachusetts* and *AEP* cases.

3.1 The Role of the US Supreme Court in Climate Change Action

One may ask what role a court can play in a total absence of enforceable climate change policy. However, as this thesis aims to show, there is an important role to fulfill in the legitimizing and thus promotion of such policy action, in the stages preceding its creation.

The US judiciary is composed of a complex and vast system of state and federal courts existing alongside each other. While state courts – far more numerous – play an active part in the everyday life of citizens, the federal courts' rulings resound through both systems and establish broad legal rules whose impact extends further than to the parties of the case.[56] There are both state and federal trial and appellate courts but the Supreme Court[57] is the highest tribunal for disputes arising under the US Constitution or US laws.

3.1.1 The Power of the Court

Dahl writes that "*[t]o consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system.*"[58] Particular features of this system allows for the Court to play such a unique role. The power to perform a *judicial review* – that is, to interpret the Constitution and assess the constitutionality of federal and state government actions – is not provided for by the Constitution, but has traditionally been the primary functioning of the court.

[56] Baum, Lawrence. 2012. "American Courts: Process and Policy." Cengage Learning. 7th Ed. Printed in the USA. pp. 7-8
[57] Established in 1790.
[58] Dahl, Robert A. 2001. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." Emory Law Journal 50:563-582. p. 563

It can be derived from the *Marbury v. Madison*[59] and *Fletcher* v. *Peck*[60] judgments. It is however also a product of "*a broad liberal tradition*"[61] allowing for the adjudication of high politics.

The Supreme Court can be described as having a broad freedom of action. To begin with, this can be traced to its public legitimacy and a high degree of recognition and compliance by other judges, administrators and the legislator that follows upon its judgments, despite the criticism and debate that surround many of them. The Supreme Court has a long record of interventions into public policy, although periods of increased and reduced activity alternate.[62] It has invalidated legislative acts and regulations, both of state and federal origin, and can thus in some situations be seen as directly opposing the other branches of the government.[63]

Furthermore, although Congress in theory is bestowed with certain institutional powers to cut the Court's freedom of movement, the usage of these is in practice is strongly limited by the often strong political division between the executive branch and the legislative Congress. While the Supreme Court enjoys certain political influence, the judicial process is due to the political appointment of justices[64] also to some extent influenced by politics.[65]

The Supreme Court's has historically encouraged the exercise of federal powers: "*The overwhelming fact of the Supreme Court's political role over the past two hundred years has been its commitment to increasing and validating the power of the national government*."[66] Even though cases exist where the Court has chosen to side with the states – these exceptions mainly serve to confirm the rule.[67]

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[59] *William Marbury v. James Madison, Secretary of State of the United States*, 5 U.S. 137 (1803)
[60] *Robert Fletcher v. John Peck*, 10 U.S. 87 (1810)
[61] Hall, Kermit L. 2005. "Political Process." In *The Oxford Companion to the Supreme Court of the United States*. Oxford University Press. Online version (2012). Accessed 26 May 2013
[62] See for instance *Bush v. Gore* (2000) on the outcome of the Presidential elections, *Griswold* v. *Connecticut* (1965) on birth control laws and the right to privacy and *Brown v. Board of Education* (1954) on non-discrimination for some well-known examples.
[63] Baum, Lawrence. 2003. "The Supreme Court in American Politics." *Annual Review of Political Science.* Vol. 6(1):161-180. p. 161
[64] US Supreme Court Justices are nominated by the President and approved by the Senate. To ensure an independent judiciary the Constitution provides that judges serve during "good Behaviour," which generally has equaled life term. Since the formation of the Court 17 Chief Justices and 100 Associate Justices has served, on an average of 16 years each.
[65] Baum (2003) p.161
[66] Hall (2005)
[67] Ibid.

3.1.2 Jurisdiction

The Supreme Court has '*appellate jurisdiction*' over decisions of lower federal courts and state court decisions when determining issues of federal law. It also has '*original jurisdiction'*, denoting the power to hear a case as the initial instance, in a limited amount of disputes arising between States or between States and the Federal Government.[68]

Article III of the Constitution defines the judicial function and delineates the jurisdiction that Congress can confer on federal courts. Nine types of '*cases and controversies*'[69] fall under federal jurisdiction – either defined by their parties, or by their subject matter.[70]

In the context of climate change, the US judiciary has some important functions: First, it adjudicates the actions of the legislative, executive and administrative branches through its constitutional review. Second, it reviews the compatibility of agency actions with US legislation. And third, it contributes to the law-making process through court-made common law rules and principles.[71]

3.1.3 Common Law

The last of the above-mentioned functions will be further explained here, as it is related to the displacement finding in *AEP* and will have important implications for the future of climate change litigation in the USA. In this case the courts' role as gap-fillers in the absence of regulatory action was questioned and to some extent blocked.

Instead of challenging state or governmental actions on the basis of a public statute or regulation, petitioners (private or public) may bring a public nuisance action against private individuals and companies based on *torts*, alleging that their acts or omissions contribute to climate change, resulting in specific harm to them.[72]

The available legal mechanisms under common law are limited, as neither the US Constitution nor any of its statutes recognize the right to a non-polluted environment. Common-law nuisance cases also represent a relatively small share of all US climate change litigation, but have received significant attention both in academia and in public debate. These cases are generally brought by states as *parens patriae*[73] with a view to push federal

[68] US Judiciary Act of 1789. September 24, 1789. 1 Stat. 73.
[69] Art. III, section 2 US Constitution.
[70] Hall (2005)
[71] Markell (2010)
[72] Gerrard (2012) p. 580
[73] Latin for "parent of his or her country." This concerns the power of the state to act as guardian for those who are unable to care for themselves.

responses to the negative effects of climate change, e.g. concerns about state resources, the lack of federal action and the interest of the citizens of states.[74]

Many obstacles face applicants in these cases, *inter alia* the possibility that climate change legislation or regulations displace private liability causes of action. This issue had a major impact on the outcome in *AEP v. Connecticut* and will be therefore be discussed in more detail below.

First, a distinction must be made between *federal* public nuisance claims, which are exclusively based on *common law*[75] – and *state* public nuisance claims, which can be either court-based or legislated.

Federal common law nuisance actions are intended to apply where – and *only* where – the federal or state legislator has left a judicial gap that needs to be filled.[76] This is due to the fact that federal courts, unlike state courts, are not seen as courts with a general power to develop substantial law and to apply their own rules of decision. Only in two circumstances may federal common law be applied: either when Congress explicitly has assigned the courts power to do so (which is not the case in climate change policies), or, when federal rules need to be developed to protect special interests. The latter situation has been recognized in a number of climate-related disputes, for instance in situations such as the *AEP* case, in which a state sues an emitter outside its own territory alleging that pollution is caused within the state.[77]

Even if this first condition is satisfied, a public nuisance claim may, as already indicated, be *displaced* by a government statute or regulation.

3.1.3.1 Federal common law of public nuisance

In a federal public nuisance cause of action, an "*unreasonable interference with a right common to the general public*" must be established.[78] This includes significant interference with rights to for instance public health, safety, peace, comfort or convenience, or a conduct of a continuing nature that has a significant detrimental effect upon public rights.[79] Due to the ambiguity of the definition, the exact meaning of '*public nuisance*' is often decided by the courts on a case-by-case basis.[80] At any rate, the right relied

[74] May, James. 2008. "Climate Change, Constitutional Consignment, and the Political Question Doctrine." *Widener Law School Legal Studies Research Paper* 59:919-959. *p.* 929

[75] This refers to injuries that cannot be found in any statute but are court-defined.

[76] Gerrard (2012) p. 581

[77] Grossman, David A. 2003. "Warming up to a not so radical idea: Tort-based climate change litigation." *Columbia Journal of Environmental Law* 28:16-27. pp. 33

[78] Restatement (second) of torts § 821a (1979)

[79] Restatement (second) of torts § 821b (1979)

[80] Gerrard (2012) p. 580

upon by the plaintiff must be "*common to the public as a class*",[81] yet individualized. Of importance to the climate change context is that causation can be collective, meaning that any defendant that played a significant role in causing the harm can be held liable.[82]

3.1.3.2 Why turn to federal common law of public nuisance?

A predominant opinion among scholars appears to be that, while legislative measures ultimately are preferable, court-based policy making is nevertheless an important, even necessary *compliment*.[83] It is neither optimal nor capable of addressing climate change problems alone, and it will inevitably fall on the elected branches to enact a comprehensive climate change policy, where all interests – economic as well as environmental – are taken into account: "*In an ideal world, a democratic legislative process to control climate change would be preferable to the decisions of individual judges*."[84] But common law is better than no law.

The potential of common law in the climate change context is hence essentially to be found in its role as a *gap-filler*. This was recognized in the *Milwaukee* case, where the Supreme Court pointed to the fact that "*Illinois did not have any forum in which to protect its interests unless federal common law were created."*[85]

Federal common law is flexible enough to contend with the new and sometimes extreme types of injuries caused by climate change. It serves as a means of petitioning the federal government to take action, and, equally important, it is closely linked to the allocation of responsibility and costs related to the externalities of climate change. It may provide for a basis for compensation for personal or property damages where no such regulation exists; distributing costs from the victims of climate change to the contributors.[86]

3.1.3.3 The doctrine of legislative displacement

The doctrine of legislative displacement was given a decisive role in *AEP v. Connecticut*. A short outline of this procedural requirement will follow.

Under the displacement doctrine, judge-made common law is preempted if legislation authorizes the defendants' behavior, or

[81] Ibid.
[82] Grossman (2003) p. 31
[83] Kaswan, Alice. 2010. "The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?"*University of San Francisco Law Research Paper* 43:39-110. p. 104
[84] Ibid.
[85] *Milwaukee II*, 451 US at 325
[86] Kaswan (2010) pp. 104*;* May (2008) p. 931

comprehensively governs the type of conduct at issue, or speaks directly to the issue at hand.[87]

As previously noted, public nuisance claims are available *only* in situations that are neither covered by state nor federal legislation or regulations. In *Matter of Oswego Barge Corp.* the Supreme Court held that *"separation-of powers concerns create a presumption in favor of pre-emption of federal common law whenever it can be said that Congress has legislated on the subject"*.[88] However, where to draw this line is not all clear-cut. In *Milwaukee*, the Supreme Court maintained that this "*involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law*."[89] It also noted that "*[t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner*."[90]

Overall, the *Milwaukee* judgment showed that the existence of federal statutes or regulations in a certain field doesn't automatically entail preemption. However, the Court applies a strict interpretation of the displacement criteria. Once Congress has pronounced on a matter there is no more room for federal common law.[91]

3.1.4 The Political Question Doctrine

Another aspect of court jurisdiction is the political question doctrine. This doctrine constitutes a barrier to judicial review and was brought to the fore in both *Massachusetts* and *AEP*. It also closely touches upon the issue of the courts' role in climate change action.

The political question doctrine has traditionally been widely discussed in the American legal context, not least in the sphere of climate change litigation. Despite the fact that the US Constitution does not allow for a field of political questions beyond the reach of federal jurisdiction, this *court-created* doctrine provides that courts should abstain from resolving constitutional issues that may interfere with the proper functioning of the other two federal branches.[92]

In essence it is a reflection of the idea of separation of powers, where each branch of the government 'rules the roost' of its own sphere. From the

[87] Grossman (2003) p. 34
[88] *Matter of Oswego Barge Corp* ., 664 F.2d 327 C.A.N.Y. (1981) at 335
[89] *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) at 315
[90] Milwaukee II, 451 US at 325–27
[91] Brownell, F. William. 2010. "State Common Law of Public Nuisance in the Modern Administrative State." *Natural Resources & Environment* 24(4):34-37. p. 35
[92] May, James. 2008. "The Intersection of Constitutional Law and Environmental Litigation." In *Widener Law School Legal Studies Research Paper Series* no. 09-33:359-396. pp. 366

Court's perspective, this can be seen as a precautionary approach – a way of safeguarding the Court's own legitimacy. If a court would adjudicate an issue that encroached on the sphere of the legislative or executive branch, these latter might refuse to comply with its decision, thus damaging the confidence in the judiciary. Therefore, the political question doctrine "*relates not to the power of courts but to their willingness to decide certain kinds of cases.*"[93]

First rooted in the *Marbury v. Madison* case of 1803,[94] it was further specified in *Baker v. Carr*,[95] where the Court outlined typical examples of non-justiciable questions. For instance, foreign relations were identified as one of the areas in which non-justiciable political questions routinely arise.[96]

The development of case law has given reason question the continued validity of the political questions doctrine. The doctrine has been applied only to a few, manifestly politicized cases since its creation.[97] For instance in *Bush v. Gore*[98] the Supreme Court handed down a judgment on the merits in a dispute concerning the presidential election, clearly undermining the principle. May concludes that the evolution of case law points to a rather limited application of the political questions doctrine.[99]

However, contrary to the abovementioned development, the political questions doctrine has been brought to the fore *specifically* in US climate change litigation. Cases concerning greenhouse gas emissions often have clear political aspects, such as the arguments that GHG regulation have been delegated to another branch of government, and that insufficient judicial tools exist to assess questions such as what level of pollution qualifies as a public nuisance.[100]

Gerrard elucidates the inherent dilemma of climate-related tort action:

> how to deal with the fact that the challenged actions (such as extracting oil and coal, and building automobiles) were not only lawful but were encouraged by the Government over a period of many years; how to apportion damages that resulted from the activities of millions of companies all over the world for a period of more than a century; and how to distribute money damages, when the victims number in the billions, are all over the world, and include many who are deceased and many more who are unborn.[101]

[93] Hall (2013)
[94] Marbury v. Madison, 5 U.S. (1 Cranch) 60 (1803)
[95] *Charles W. Baker et al. v. Joe. C. Carr et al., 369 U.S. 186 S.Ct. (1962)*
[96] *Baker v. Carr (1962)* at 217
[97] May (2008) p. 367
[98] *Bush v. Gore*, 531 U.S. 98 (2000)
[99] May (2008) p. 366-367
[100] Gerrard (2012) p. 591
[101] Ibid.

Up until the *Massachusetts* and *AEP* judgments were laid down, federal US courts had dismissed climate change litigation on grounds of non-justiciable political questions. As May explains, the result was that "*the cause of action is dead on arrival. There is no answer, no discovery, no standing, no proof, and no opportunity to prove damages or "unreasonable" harm. Exit the case.*"[102]

When analyzing the cases, the way the Supreme Court handles the displacement and political question doctrines will be further examined. The fact that a certain type of cases never would get judged on their merits would have the effect of limiting the role that courts *can* play in climate change action.

3.2 Case Summaries

The *Massachusetts* and the *AEP* were closely intertwined. The two lawsuits were filed concurrently in 2004, to some extent involving the same applicants and challenging the same basic issue, namely the federal government's failure to act to regulate climate change. While the first case was filed as a statutory claim, the latter was filed under the federal common law of public nuisance. Already from the start it was understood that a successful outcome in *Massachusetts* would weaken the chances of securing the outcome in *AEP*. This was also the case. While the *AEP* judgment reaffirms the authorization of regulatory action as established in *Massachusetts*, and to some extent clarifies its scope, it also narrows the pathway to future action by curbing another type of policy making – that of judicial rule making through common law public nuisance claims.

3.2.1.1 Massachusetts v. EPA

In *Massachusetts v. Environmental Protection Agency,*[103] twelve American States along with several local governments and NGOs challenged EPA's denial of a petition to regulate carbon dioxide and other GHG emissions from new motor vehicles under the CAA, together with an EPA general council memorandum claiming that the agency lacks statutory authority to adopt such regulation.[104] The agency maintained that even if authority was found, the agency would not exercise its authority at the moment.

[102] May (2008) p. 922
[103] Massachusetts v. EPA, 415 F.3d 50, 367 U.S. App. D.C. 282 (2005)
[104] EPA. "Control of Emissions From New Highway Vehicles and Engines". *Federal Registry* 68(173):52922-52933 (8 September 2003). Accessible at <http://www.epa.gov/fedrgstr/EPA-AIR/2003/September/Day-08/a22764.htm>. Accessed 3 May 2013; Fabricant, Robert E. 2003. "EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act." (Memorandum 28 August 2003 from EPA General Counsel to EPA Administrator Marianne L Horinko). Accessible at

The first federal court to hear the case, the District Court of Columbia (DC Circuit) dismissed the claims by a 2-1 vote in favor of EPA.[105]

In the Supreme Court,[106] it was first assessed whether the applicants had standing to challenge EPA's decision not to regulate GHGs. This was answered in the affirmative by the Court.[107] It then proceeded to the merits of the case. Here the question was whether carbon dioxide qualifies as an "air pollutant" within the meaning of the CAA.[108] The Court settled the issue against EPA, authorizing the agency to regulate GHGs as air pollutants under the Act.[109]

As an alternative basis, the EPA had held that it could decline to issue emission standards on the grounds of policy considerations not enumerated in the Act. The Supreme Court dismissed this argument, holding that once an endangerment finding is made, all reasons for inaction must correspond to the authorizing statute. EPA had offered no such "*reasoned explanation*" and the denial of the petition was thus held as arbitrary.[110]

The Supreme Court ruled in favor of the applicants with a 5-4 majority. Four justices dissented (Justices Roberts, Scalia, Thomas and Alito), arguing that the claims were *non-justiciable political questions* and that the applicants lacked standing.[111]

3.2.1.2 AEP v. Connecticut

In *American Electric Power Co. v. Connecticut,*[112] the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin, and the City of New York (collectively "Connecticut") brought claims against a number of power companies, representing the nation's five largest emitters of carbon dioxide.[113] The applicants claimed that the carbon emissions produced by the defendants, by contributing to global warming, "*substantially and unreasonably interfered*

<http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/BC82F18BAC5D89FF852574170066B7BD/$File/UARG%20Attchmnt%20G...43.pdf> Accessed 3 May 2013.

[105] Massachusetts v. EPA (2005) at 15

[106] Massachusetts, et Al., Petitioners v. Environmental Protection Agency et Al. v EPA, 127 S Ct 1438 (2007)

[107] Massachusetts v. EPA (2007) at 526

[108] Massachusetts v. EPA (2007) at 1460

[109] Massachusetts v. EPA (2007) at 528-29

[110] Massachusetts v. EPA (2007) at VII

[111] Massachusetts v. EPA (2007) at 535–49

[112] *State of Connecticut, et al. v. American Electric Power Company, Inc., et al.,* 406 F.Supp.2d 265 (2005)

[113] The American Electric Power Company, Southern Company, the Tennessee Valley Authority, Xcel Energy, and Cinergy (collectively "American Electric")

with public rights",[114] harming the health, safety and well-being of their citizens.

The case was brought under *federal common law* and *state public nuisance law*.[115] All applicants sought injunctive relief requiring the defendants to cap their carbon-dioxide emissions.[116] They also asked the court to "*assess and measure available alternative energy resources*," to be reconciled with US foreign and domestic policy.[117]

The decisive issue in the Supreme Court judgment was whether the applicants could use federal common law to curb the respondents' carbon dioxide emissions as a public nuisance cause, or whether such a measure should be achieved solely through the legislative process.

In brief, while the lower instance Courts gave the political question doctrine a decisive role in determining the scope of its judicial review, the Supreme Court decided the case on grounds of displacement.

In 2005, the US District Court for the Southern District of New York dismissed the claim on the grounds that it raised "*non-justiciable political questions*".[118]

As oral hearings were held in the Second Circuit Court of Appeals,[119] the US Supreme Court issued its landmark decision in *Massachusetts*. The Second Circuit reversed the District Court's findings, concluding both that the applicants had standing and that climate change did not raise political questions.[120] Furthermore, the Second Circuit held the Clean Air Act had not '*displaced'* the federal common law of public nuisance.[121] The Second Circuit concluded that the District Court had erred in dismissing the complaints, and remanded the case back to the District Court for further proceedings.[122]

The US Supreme Court never engaged in the political question issue, contrary to the lower instance Courts. Instead, the defendants' argument that the Clean Air Act displaced the federal common law of public nuisance was taken on by the Court.[123]

On June 20, 2011, the Supreme Court handed down its judgment, reversing by a unanimous vote of 8-0 the Second Circuit's ruling.

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[114] *American Electric Power Company, Inc., et Al., Petitioners v. Connecticut et Al.* 131 S. CT. 2527 (2011) at 268

[115] The alternative claim, whether state nuisance law was applicable to the case, was never addressed by the 2nd Circuit Court, as it admitted the claims already as a federal common law nuisance. The Supreme Court, reversing the lower Court's ruling on this matter, remanding this issue to the 2nd Circuit for further consideration.

[116] *AEP v. Connecticut* (2011) at 270

[117] *AEP v. Connecticut* (2011) at 272

[118] *Connecticut v. AEP* (2005) at 272

[119] *Connecticut v. AEP., Inc.,* 582 F. 3d 309 - Court of Appeals, 2nd Circuit (2009)

[120] *Connecticut v. AEP., Inc.* (2009) at 323-332

[121] *Connecticut v. AEP., Inc.* (2009) at 315, 371-388

[122] *Connecticut v. AEP., Inc.* (2009) at 393

[123] *AEP v. Connecticut* (2011) at 2537

3.2.2 The role of the administration vs. the role of the Court

The *Massachusetts* case has been widely discussed in academia, and somewhat opposing views on its actual significance have been expressed. As pointed out by Watts and Wildermuth – the case does in no sense *order* the EPA to regulate GHG emissions, but merely *allows* for such regulations:

> The ruling, in other words, leaves the EPA free to decide not to regulate, so long as it provides adequate justification for its decision. This means that what the media has touted as the "global warming" case may not actually lead to the regulation of global warming at all under the current CAA.[124]

In a comment, Adler maintains that despite this fact, in practice the judgment "*gives the Agency little option but to regulate*".[125] He predicts that new GHG regulations on various sectors will be adopted as an effect of the case. However, as will be discussed below, it appears from the *AEP* judgment that this latter view is not shared by the Court.

In its assessment whether EPA authorization to regulate GHGs can be found in the CAA, the Supreme Court declares having "*little trouble concluding that it does.*"[126] This stance is taken directly from the text of the Act, which provides that EPA *shall* regulate "*any air pollutant*"[127] from new motor vehicles which can be deduced to endanger public health or welfare. The discord of EPA lies in that carbon dioxide does not qualify as such an '*air pollutant*', but the Court holds the statute to be "*unambiguous*".[128] The Court goes no further than a textual interpretation of the wording of the CAA in its justification of EPA's mandate, and dismisses the agency's interpretation that Congress had *intended* to curtail its power.[129]

AEP v. Connecticut can be seen as a follow-up and a specification of the aforementioned judgment. While it has been described as a major win for 'environmentalists' seen to the Court's opening on standing requirements – and possible opening on the political question issue – its implications for the question of climate change governance is multifaceted.

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[124] Watts, Kathryn A., Wildermuth, Amy J. 2008. "*Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming." *Northwestern University Law Review* : *Colloquy* 102:1-17 p. 1
[125] Adler, Jonathan H. 2007. "*Massachusetts v. EPA* Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth *Northwestern University Law Review* : *Colloquy* 102:32-41 p. 32
[126] Massachusetts, VI
[127] CAA §202(a)(1)
[128] Massachusetts, VI
[129] Massachusetts p. 27

Here the displacement finding serves as the drawing-line between two alternative routes for climate change policy making. While the statutory claim in *Massachusetts*, was decided on the merits and recognized by the Court, *AEP* concerned the prospect of *court made* common law – an option that was firmly rejected by the Court itself, on grounds of barriers to judicial review.

In the *AEP* Opinion, Justice Ginsberg concludes that "*the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.*"[130]

The Court comes to this conclusion by arguing that the Congress, when it enacted the Clean Air Act, pronounced on who should regulate GHG emissions, i.e. EPA. This view had been upheld by the Supreme Court itself in *Massachusetts*, and EPA had followed up on that decision by undertaking new greenhouse gas regulations.[131]

Worth mentioning is that the Second Circuit in *AEP* had come to a different conclusion than the Supreme Court on the displacement issue. The lower Court applied a more flexible standard than the Supreme Court when measuring the amount of overlap that existed between the CAA and the specific request made by the applicants. Referring to the *Milwaukee* case, where it was held that the remedy sought must be "*'within the precise scope of remedies prescribed by Congress*'"[132], the Court concluded that it was competent to review the claims until that time comes when new federal laws or regulations indeed *will* pre-empt the federal common law at stake.[133]

Inter alia, the Second Circuit addressed the fact that the CAA *authorizes* EPA to regulate – but does not *oblige* it to do so. As confirmed in *Massachusetts*, the CAA requires regulation of GHG emissions from new motor vehicles *only* if EPA makes an endangerment finding. Since EPA had not yet actually regulated GHG – only propositions had been made on the part of EPA – the appeals Court found that current regulatory measures did not suffice to "*regulate greenhouse gases in a way that 'speaks directly' to Applicants' problems*".[134] Therefore, the CAA could not be held to displace the plaintiff's remedies under federal common law.

The Supreme Court in *AEP* came to a different conclusion. On the question whether displacement may take place before EPA has exercised its regulatory authority, the Court held that:

> The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power

[130] *AEP v. Connecticut* (2011) at 2537
[131] *AEP v. Connecticut* (2011) at 2538
[132] *Connecticut v. AEP., Inc.* (2009) at 373
[133] *Connecticut v. AEP., Inc.* (2009) at 380
[134] *Connecticut v. AEP., Inc.* (2009) at 379

> plants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing §7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.[135]

This last sentence shows a much stricter analysis of the preconditions for displacement, and implies that even in the case that EPA would remain *inactive*, no other option than the regulatory way is available to interested parties wanting to encourage environmental protection. Even in the case that EPA would renounce to regulate GHG emissions from new motor vehicles, a federal common law suit would stand no chances.

The Supreme Court reaffirms the possibility of civil judicial review. Justice Ginsberg maintains that in the event of an omission by EPA to regulate emissions, States and private parties may petition the agency to act, whereby EPA's response to such a petition will be reviewable by federal courts. The Court concludes that the CAA provides for "*a means to seek limits on emissions of carbon dioxide from domestic power plants*" – and the Court sees "*no room for a parallel track*."[136] Justice Ginsberg very unambiguously notes:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. … Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.[137]

The Court here clearly situates itself in a larger net of different functions when it comes to dealing with climate change. The empowerment of EPA and the enabling of regulatory action first established in *Massachusetts* is upheld by the Supreme Court in *AEP*.

3.2.2.1 Overlapping institutional mandates

While the *AEP* case dealt with EPA's mandate in relation to the Court's own jurisdiction, *Massachusetts* dealt with the agency's mandate in relation

[135] *AEP v. Connecticut* (2011) at 2538
[136] *AEP v. Connecticut* (2011) at 2538-39
[137] *AEP v. Connecticut* (2011) at 2539-40

to other political institutions. EPA had argued that the regulation of carbon dioxide would require improving the fuel economy – a mandate that Congress already had designated the Department of Transportation to hold. Therefore any EPA action on the issue would conflict with this latter mandate, or be superfluous.[138] Furthermore, the agency argued that unilateral EPA action would create a piecemeal result that conflicted with the President's "*comprehensive approach*" and risked "*hampering the President's ability to persuade key developing countries to reduce greenhouse gas emissions*."[139]

The Supreme Court dismissed these arguments, holding that an eventual overlap between different agency mandates "*in no way licenses EPA to shirk its duty to protect the public 'health' and 'welfare'*".[140]

The Court thus empowers EPA as a policy maker *alongside* other political institutions or agencies, recognizing that overlapping mandates may exist and even be necessary.

3.2.3 The Justiciability of Climate Action in AEP and Massachusetts

A second issue dealt with by the two cases was the delimitation between judiciable legal questions and non-judiciable political questions, framed as the *political question doctrine.*

As the *AEP* case rose through the court hierarchy, it underwent a transformation: the District Court and the Second Circuit had emphasized the justiciability issue, however with different conclusions. While the District Court dismissed the applicants' claims, referring to "*the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion*",[141] the Second Circuit conversely concluded that climate change did not raise non-justiciable political questions.[142] The Supreme Court granted *certiori* (granted an appeal) *inter alia* on the delimitation between non-political and political questions. However, during the proceedings, it declined to engage in the political question doctrine, but dismissed the claims on grounds of displacement. The only comment on the issue can be found in Justice Ginsburg's opinion:

> Four members of the Court would hold that at least some applicants have Article III standing under Massachusetts, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions […]

[138] Massachusetts, II
[139] Massachusetts v. EPA, II
[140] Massachusetts v. EPA, VI
[141] *Connecticut v. AEP* (2005) at 272
[142] *Connecticut v. AEP* (2009) at 323-32

> and, further, that *no other threshold obstacle bars review*. Four members of the Court, adhering to a dissenting opinion in Massachusetts […] or regarding that decision as distinguishable, would hold that none of the applicants have Article III standing.[143]

This implies that the four first-mention Justices apparently also rejected the political question defense. Four justices disagreed. However, as Justice Sotomayor had been recused from the case, uncertainties remain as to which opinion she would have sided with, had she been present. This could imply that the Supreme Court opens up for climate change climate change litigation, in line with *Massachusetts*, not holding the political aspects of the cases as barring court review. Only where cases are specifically displaced by the CAA, the Court's jurisdiction will be limited.[144]

As a whole, a decision that manifestly went against the applicants on political question grounds would likely have been far more detrimental to parties seeking to encourage climate change action through litigation than the displacement finding was, as this latter is more limited in terms of the types of litigation covered. In this way, the Court keeps some doors open for its own participation in the development of climate action.

[143] *AEP v. Connecticut* (2011) at 2535 (*emphasis added*)
[144] Gerrard (2012) p. 591

4 Climate Change Litigation in the EU

4.1 The Role of CJEU in Climate Change Action

The *Court of Justice of the European Union* (CJEU) is the judicial institution of the Union.[145] It consists of the *European Court of Justice* (ECJ), which is the highest court, and the General Court (EGC),[146] as well as the Civil Service Tribunal (ECST), dealing with EU staff disputes.[147] There is no specialized environmental court at EU level. This analysis deals primarily with the *ATAA* case, referred to the ECJ. Only aspects of relevance to the research question – the role of the Court in legitimizing and thus promoting climate action – will be studied.

4.2 The Power of the Court

A first observation concerns the status of the CJEU in relation to the Union as a whole. It is recognized as one of the most powerful high courts in the world, with a crucial impact on the European integration and EU policy making.[148] While it is not a separate organization, but one of many EU institutions, it holds a high degree of autonomy and independence.[149] This is also manifest from the, at times, divergent perspectives perceptible in its rulings, compared to that of the Member States: While the EU initially was, and still to a large extent is based on economic integration objectives, the Court has taken into account more nuanced values, such as the rule of law, the political sensitivity of matters and justice arguments. This attitude has also been accepted, even invited, by the Member States, and continue to influence both the internal and external politics of the Union.[150]

[145] Art 19 TEU. The Court was established in 1952 as the Court of Justice of the European Coal and Steel Communities (from 1958 as the Court of Justice of the European Communities (CJEC)).
[146] Established 1 September 1989. Prior to 30 November 2009 known as the Court of First Instance (CFI).
[147] Council Dec. 2004/752/EC of 2 November 2004 establishing the European Union Civil Service Tribunal. OJ L 333 , 09/11/2004 P. 0007 - 0011
[148] Sweet (2011) p. 121
[149] Fahey (2012) p. 1263
[150] Nicolaïdis, Kalypso, Howse, Robert, *'This is my EUtopia …': Narrative as Power*, JCMS 2002 Vol. 40(4):767-92. p. 779

Worth mentioning is that the CJEU alone is not responsible for this adjudication – it relies on a continuous judicial dialogue between the CJEU and the national courts of the Member States.[151]

4.3 Jurisdiction to Interpret and Uphold EU Law

The *ATAA* claims were brought within the ambit of a preliminary reference procedure on the validity of a Union act, the Aviation Directive.[152] The role of the CJEU in such a procedure is to ensure that Union law is applied uniformly by national courts. As the Court so often has emphasized, *"[d]ifferences between courts of the Member States as to the validity of acts of European Union law would be liable to jeopardize the very unity of the European Union legal order and to undermine the fundamental requirement of legal certainty*."[153]

Article 2 TEU states that the Union is founded on, inter alia, the *rule of law*. Furthermore, Article 19 TEU provides that the role of the CJEU is "*to ensure that in the interpretation and application of the Treaties the law is observed*." The CJEU is the authoritative interpreter of Union law and the only court that can declare a Union act as invalid.[154] It is therefore essential that we take notice when the Court speaks on what EU law *is* – what the precise meaning of the Union's environmental protection values is, how the relationship between EU law and the Union's international obligations is to be understood, etc. In upholding the rule of law in the exercise of Union powers, the Court can be seen as legitimizing them.

The competence to interpret and invalidate Union legislation is subject to the limits of jurisdiction conferred on the Court by the Treaties. In exceptional cases it has interpreted its own jurisdiction extensively to exceed the literal scope of the Treaties, e.g. to ensure the coherence and autonomy of the EU legal order, or to avoid gaps in the system of legal protection.[155] In this way, the Court engages actively in interpreting what role it has to play in the development of Union law. So also in the field of climate change policy making.

4.4 Case Summary: C-366/10

On 16 December 2009, three US-based but globally operating airlines – American Airlines, Continental Airlines and United Air Lines, together with Air Transport Association of America, a non-profit trade and service

[151] Kelemen (2012) p. 55
[152] In accordance with Art. 267 TFEU
[153] C--366/10 *ATAA*, para 47
[154] C-366/10 *ATAA*, para. 47-48, C-314/85 *Foto-Frost* [1987] ECR 4199 para. 17
[155] Lenaerts (2011) p. 524-525

association of airlines in the USA – brought claims against a British regulation[156] transposing Directive 2008/101/EC.[157] The defendant was the United Kingdom Minister for Energy and Climate Change as the national authority primarily responsible for the regulation.[158]

In short, the applicants challenged the validity of Directive 2008/101/EC, alleging that the EU had exceeded its powers and violated several principles of customary international law by including, within its emissions trading scheme, those parts of international flights that take place over the high seas or over the territory of a third country.[159]

Moreover, the applicants alleged that the EU had infringed its obligations under the Kyoto Protocol[160] by imposing the regulation unilaterally and not under the auspices of ICAO.[161]

Lastly, the applicants alleged that the emissions trading scheme amounts to a tax or charge prohibited by the principle of freedom of air transportation as laid down in the Chicago Convention[162] and the Open Skies Agreement concluded between the Union and the United States.[163]

The High Court of Justice of England and Wales referred a number of questions for preliminary ruling to the CJEU. First, the submitting Court asked whether the international customary law principles or the international treaty provisions invoked were capable of being relied upon by individuals in order to challenge the validity of the Aviation Directive.[164]

Only certain of the provisions of the Open Skies Agreement were deemed unconditional and sufficiently precise so as to apply directly and immediately to airlines.[165] Similarly, certain principles of customary international law[166] were held as admissible, as they are capable of calling into question the regulatory competences of the Union.[167] However, due to the lack of precision of customary international law, the judicial review on these points was limited to the question whether the EU institutions made

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[156] *The Aviation Greenhouse Gas Emissions Trading Scheme Regulations* 2009 No. 2301. 17 September 2009.
[157] Directive 2008/101/EC
[158] C-366/10 *ATAA* para. 42-43
[159] C-366/10 *ATAA* para. 45
[160] Art 2(2) Kyoto Protocol
[161] C-366/10 *ATAA* para. 45
[162] Art 15(3) The Convention on International Civil Aviation, 'Chicago Convention', Chicago, 7 December 1944
[163] Art 11(2)(c) Air Transport Agreement between the European Community and the United States, concluded 25 and 30 April 2007
[164] C-366/10 *ATAA* para. 45
[165] C-366/10 *ATAA* para. 87, 94 and 100
[166] C-366/10 *ATAA* para. 111 The principle that each State has complete and exclusive sovereignty over its airspace, the principle that no State may validly purport to subject any part of the high seas to its sovereignty and the principle of freedom to fly over the high seas.
[167] C-366/10 *ATAA* para. 107

manifest errors of assessment when applying the principles.[168] All other claims were dismissed due to lack of direct effect.

Proceeding to the merits of the case, the Court assessed the question whether the Directive was invalid based on the invokable international treaty or customary law provisions.

The CJEU concluded that the Aviation Directive neither infringes customary international law principles,[169] nor does it infringe the Open Skies Agreement.[170] The Court thus rejected all complaints, finding that none of the alleged grounds could affect the validity of Directive 2008/101/EC.

4.4.1 Legitimizing the EU as a Global Legislator

When discussing the *legitimizing* role of the CJEU, the first question must naturally be *what is there to legitimize?* The need to legitimize, or justify a certain measure arise only when the right to act is not taken for granted. The challenge to the validity of the Aviation Directive evidently amounts to such questioning. In the case of the Directive, the judicial challenge was also accompanied with a wide amount of other forms of criticism.[171]

By including aviation in the EU ETS, the Union has unilaterally adopted internal measures with far-reaching international effects.[172] The EU defined the geographical scope of its emission trading scheme to cover *all parts* of flights, within or outside EU territory. Fahey comments this tactic:

> The EU ETS aviation rules represent an effort by the EU to engage in rulemaking or standard setting, with effects upon actors and standards outside the EU. Rulemaking enhances the EU's stance as an entity that could set exemplary goals with wide regulatory effects and extend both its legal and political reach beyond what would be possible through ordinary international legal instruments. The EU ETS rules enacted were thus EU rules with global ambitions.[173]

Despite the clear external effects, the CJEU chose to interpret the Aviation Directive as a wholly *internal* regulation (as opposed to *external* environmental measures).[174] Indirectly, the Court expands the Union's competence to regulate air pollution beyond its external borders.[175] In this

[168] C-366/10 *ATAA* para. 110
[169] C-366/10 *ATAA* para. 125-126
[170] C-366/10 *ATAA* para. 145 and 156
[171] See below (4.4.2)
[172] Rajamani, L., Scott, J., 2012. "EU climate change unilateralism." European Journal of International Law 23(2):469-494 p. 469
[173] Fahey (2012) p. 1260 (emphasis added)
[174] Fahey (2012) p. 1254
[175] Bogojević (2012) p. 356

way the Court *legitimized* Union action and the Union's self-assumed role as a global legislator on climate change issues.

This stance is however neither a novelty in the EU context, nor something exclusively European. Examples of *unilaterally imposed legislative acts* can be found, for instance, in US trade restrictions globally imposed on shrimp and tuna fishing to enforce compliance with American environmental protection standards, in US sanctions imposed on public and private actors violating US anti-trafficking legislation, whether these are nationals or foreign,[176] or in the anti-corruption enforcement conducted under the US Foreign Corrupt Practices Act (FCPA), which has had a demonstrable impact on the worldwide behavior of foreign state-owned enterprises also acting in the USA.[177]

In the European context, the imposition of certain oil tanker standards on vessels visiting a port within the EU area, including foreign ones, to prevent oil leakages shows many similarities with the Aviation Directive.[178] And EU environmental legislation on topics such as the management of hazardous substances has had a manifest influence on Chinese, Japanese and South Korean environmental legislation, and has been directly incorporated into Californian law.[179] Bradford here speaks of '*the Brussels Effect*' and deems the EUETS likely to have a spreading effect, due to the European share of the aviation market and spread of corporate standards.[180]

To recapitulate, the ATAA judgment serves to legitimize EU's unilateral action regulating Aviation carbon dioxide emissions. This is not a unique occasion in the Court's history, but deserves some further elaboration.

4.4.1.1 The Court's reasoning

The grounds given by the Court for justifying EU action refers mainly the Union's territorial jurisdiction and to environmental protection grounds.[181]

First, the Court justifies the extended application of the Directive to parts of flights taking place outside Union territory on territorial grounds:

[176] Chuang, Janie A. 2006. "The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking". *Michigan Journal of International Law* 27:437-494.
[177] Matteson, Ellis. 2012. "FCPA Enforcement's Surprising Effect on Foreign SOEs and Why It Matters." *Corporate Compliance Insights.* Accessible at <http://www.corporatecomplianceinsights.com/fcpa-enforcements-surprising-effect-on-foreign-soes-and-why-it-matters/> Accessed 15 April 2013
[178] Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ 2003 L 249/1.
[179] Bradford, Anu. 2012. "The Brussels Effect". *Northwestern University Law Review* 107(1):1-68. p. 29
[180] Bradford (2012) p. 30
[181] C-366/10 *ATAA* para. 117

while the Directive is not intended to apply to international flights that merely fly over EU territory, it is perfectly warranted to apply to flights that have *chosen* to arrive at or depart from an aerodrome situated in a Member State. This "*since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.*"[182]

This despite the fact that the Aviation Directive is in fact designed to promote its incorporated values outside the Union territory. For instance, it provides for the exemption of airlines landing in the EU, provided that these are subject to "*measures which have an environmental effect at least equivalent to that of this Directive*".[183] The EU preserves to itself the exclusive power to determine which third country measures that would qualify as such an 'equivalent measure'.[184]

The extraterritorial ambitions are somewhat toned down the opinion of Advocate General Kokott. Here the fact that the EU measures are not to be seen as a *substitute* to the existing international climate change regime are emphasized.[185] Furthermore, as Bogojević highlights, the AG distinguishes between internal rules with extraterritorial effects and unilateral action, referring the Aviation Directive to the former category, as it does not lay down any concrete rules steering the conduct of third country airlines – it merely gives *incentives* to reduce emissions.[186]

At the same time, and despite the internal framing of the issue, the aims of promoting European standards and values globally is given a prominent position in the Courts justification.[187] The fact that the emission allowances are calculated on the basis of the whole flight, including parts performed over third state territory, is justified with a view to the environmental protection objectives of the Union:

> *as European Union policy on the environment seeks to ensure a high level of protection* in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, 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…*[188]

[182] C-366/10 *ATAA* para. 125
[183] Directive 2008/101/EC, preambel para 17
[184] Ibid. Art. 25a(1)
[185] Opinion of Advocate General Kokott delivered on 6 October 2011, Case C-366/10 The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change. para 153
[186] Bogojević (2012) p. 352
[187] See below, PQD
[188] C-366/10 *ATAA* para.128 (*emphasis added*)

Bogojević argues that this expresses a view that the Union's international obligations and the global institutional failure may justify legislative measures, even in the *absence* of an international legal framework for aviation emissions. The Court thus legitimizes the use of the commercial measures in question – the ETS – as a means to secure compliance to Union standards:

> It shows that the EU's environmental competences can be used to set conditions for commercial activity in the EU. This is a powerful message, as it positions environmental protection at the forefront of economic activities in the EU.[189]

By legitimizing *internal* regulations the Court sanctions the *regulatory* pathway chosen by the Union, which, as opposed to international negotiations, are enforceable against the Member States. Already existing regulations may also be complemented by new once, through a speedier procedure than more protracted international decision-making.

4.4.2 Justiciability of Climate Action in the EU

Climate change litigation is characterized by the intertwining of politics with legal issues, and, as noted above, the intertwining of internal and external politics.

Under the preceding section, the legitimizing role of the Court has been discussed. Hereunder one aspect of this function will be analyzed – namely the Court's role as a safeguard of the Union legal order. This section argues that the *ATAA* case can be seen as an affirmation of a longer development where the Court takes on a *duty to protect* certain fundamental values enshrined in the founding Treaties –cementing its own role as an interpreter of EU law. As stated above, the role of courts will, inter alia, be defined by the scope of its judicial review. An important aspect of this, notably in the context of climate change, is the limits imposed on the judicial review by political questions. Under Chapter 3.3.3 the political question doctrine was discussed in relation to the US Supreme Court cases. Considering the prominent role given to this feature in US climate related litigation, the way in which the CJEU handles the legal-political tension warrants some analysis.

In ATAA, the CJEU remains silent on the legal-political tension associated with the case. This stance may seem controversial seen to the strong political implications of the case, but perhaps less so looking at the development in recent case law.

[189] Bogojević (2012) p. 351

To begin with, a clarification of *what is political about the ATAA case* is of relevance. Apart from the generally highly politicized nature of climate change policy, the *ATAA* case and the Aviation Directive featured strong, opposing economic and political interests: on the one hand a robust lobby industry favoring voluntary market solutions, on the other, the parties defending public interventions in order to safeguard environmental interests deemed worthy of protection. There were trade policy implications, economic concerns in times of recession, transport politics etc. involved. The EU Emissions Trading Scheme and Directive 2008/101 ultimately concerns problems of allocating responsibility and the costs of pollution. In essence the litigation concerned the relationship between two intersecting legal orders – that of the EU and of international law. Furthermore, the reactions triggered by the Commission proposal to regulate CO_2 emissions from aviation[190] provoked heavy counter-lobbying on the part of the airline industry. A coalition of states including the USA, Australia, China, Japan and South Korea petitioned the EU to exclude non-European aircraft from the scope of application.[191] The US House of Representatives also passed the EU ETS Prohibition Act of 2011, prohibiting US airlines from complying with the EU regulation.[192] Following the judgment the China Air Transport Association has threatened the EU to engage in trade war counter-measures if the EU punishes its airlines for the non-compliance.[193]

These are but some examples of many similar steps taken by third countries in reaction to the Aviation Directive. A fair conclusion is that the EU ETS, the Aviation Directive and the ATAA case *do* have strong political implications, not least in relation to the Union's external relations.

As stated above, the Court reviewed the validity of the Aviation Directive without commenting on its own jurisdiction, the contra measures brought by for instance the US legislature, or on the global ambitions of the EU. This silence is not all self-explanatory. For instance, Fahey describes the omission of the Court to pronounce upon its own jurisdiction as a remarkable failure to "*engage in a more explicit dialogue with the EU*

[190] COM(2006)0818 FIN *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community*, adopted 20/12/2006.

[191] Corporate Europe Observatory . 2008. "Climate Crash in Strasbourg: An Industry in Denial, How the aviation industry undermined the inclusion of aviation in the EU Emissions Trading Scheme." Accessible at <http://archive.corporateeurope.org/docs/climatecrash.pdf>, accessed 8 April 2013.

[192] H.R. 2492 European Union Emissions Trading Scheme Prohibition Act of 2011

[193] Leung, Alison, Kotoky, Anurag. 2012. "China ready to impound EU planes in CO2 dispute." Reuters, 12 June 2012.

legislature"[194] and as a missed opportunity "*to explicitly consider its own contribution to the promotion of global standards*."[195]

A comparison to case law touching on the same issue may provide for some guidance on how the Court perceives its own role.

4.4.2.1 To what extent can the Court judge on politically delicate questions?

Is there something similar to a political question doctrine in the EU? While the full picture is complex and no clear-cut guidelines have been given by the Court, the overall conclusion is that no such doctrine limiting the scope of judicial review exists.[196] In a number of cases relating to the legality of sanctions introduced by the EU, or a Member State implementing EU law, as a result of EU's international obligations, the limits of judicial review has been deduced by the CJEU.

In the *Sanctions case*[197] on the legality of Greek trade sanctions against the FYROM, something similar to a political question doctrine was upheld by the Court. Advocate General Jacobs suggested in his opinion that "*the scope and intensity of the review that can be exercised by the Court is severely limited on account of the [political] nature of the issues raised*"[198] and further on that "*there are simply no juridical tools of analysis for approaching such problems*"[199]

This reflects a rather narrow view on court jurisdiction, creating a need to distinguish between questions of a more *political* nature (such as the appropriateness of a Member State unilaterally obstructing EU commercial policy in order to maintain peace and security) – outside the Court's competence, and purely *legal* issues (e.g. rules governing the procedure) – where the Court may carry out a full judicial review.[200]

A similar line of reasoning was upheld in the OMPI ruling, where the Court of First Instance (CFI) ruled on the legality of the Council Decision to freeze the funds of the People's Mojahedin Organization of Iran.[201]

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[194] Fahey (2012) p. 1251
[195] Fahey (2012) p. 1248
[196] Van Elsuwege, Peter. 2010. "Law versus Politics: The Limits of Judicial Review in EU External Relations." p. 11
[197] C-120/94 R, *Commission of the European Communities v. Hellenic Republic*, 1994 E.C.R. 1-3037.
[198] Opinion of Advocate General Jacobs in Case C-120/90, *Commission* v. *Greece*, 1996 ECR I-1513, para. 50.
[199] *Ibid.*, para. 59.
[200] Van Elsuwege (2010)
[201] T-284/08 *People's Mojahedin Organization of Iran v. Council*, 2006 ECR II-4665, para. 159.

Nevertheless, other cases point in the opposite direction, widening the scope of judicial review. The *Werner*,[202] *Bosporus*,[203] *Centro-Com*[204] and the *Kadi*[205] cases all represent an expansion of the Court's jurisdiction to review issues verging on political decisions.[206] In the *Bosporus* case, the Court did not hold the political objective of the sanctions in question as an obstacle to review the legality of the measure, contrary to the *Sanctions* case and the *OMPI* ruling.[207] And in *Centro-Com*, the Court found the necessary prerequisites for a full judicial review in the fact that the measures concerned were adopted within a policy field where relevant EU legislation already existed.[208]

In the *Kadi and Al Barakaat* cases, the CFI and the ECJ came to strikingly different conclusions on the matter. This case is of interest as the Court very explicitly articulates its views on the legal-political issue. Like many of the cases cited above, *Kadi* concerned the relationship between the EU legal order and the UN legal order and the legality of EU measures implementing UN Security Council resolutions. The CFI had dismissed the claims on the grounds that the UNSC resolution takes precedence over EU law, and a review of the EU regulation would imply an indirect review of the lawfulness of the UNSC resolutions.[209] The ECJ set aside the CFI ruling and rejected the inadmissibility claim. The opinion presented by Advocate General Maduro gives a valuable insight in the reasoning on Court's jurisdiction:

> It is true that courts ought not to be institutionally blind. Thus, the Court should *be mindful of the international context in which it operates* and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community. In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. *As a result, the Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled.* […] However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the

[202] C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany*, 1995 ECR I-3189, para. 10.
[203] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, 1996 ECR I-3953, para. 17.
[204] C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, 1997 ECR I-81, para. 21-30
[205] Joined Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities, 2008*
[206] Van Elsuwege (2010)
[207] Van Elsuwege (2010) p. 11
[208] Ibid.
[209] T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, ECR, 2005 II-3649, para. 181 and 225

> basis of the Community legal order and which it has *the duty to protect*.[210]

This shows the balance of interest the Court must carry out when judging upon issues clearly affecting EU external relations: on the one hand, the necessity to take into consideration that the Union is not an island but a part of a bigger world, and on the other, the *duty to protect the fundamental values of the Community legal order*.

The view presented by the AG is that the Court, "*rather than trespassing into the domain of politics* […] *is reaffirming the limits that the law imposes on certain political decisions*."[211] Thus, instead of elevating the concerns surrounding a legal review of a political decision (e.g. democratic accountability, legitimacy etc.), the Opinion focuses on the vulnerability of political process, *necessitating* court intervention.[212]

The ECJ judgment confirmed the Opinion, upholding the Court's jurisdiction to check the validity of EU measures in the light of the fundamental rights that form an integral part of the general principles of Community law. These constitute a condition for lawfulness of EC acts which cannot be precluded by an international agreement.[213]

It can consequently be concluded that no political question doctrine limits the scope of the CJEU's judicial review.

4.4.2.2 Conclusion applied to the ATAA case

A distinction between the foregoing cases and *ATAA* should be made. While the first category concerned the possibility to *neglect* positive international obligations, in order to uphold EU values, the situation is the reverse in *ATAA*. Here the possibility of taking EU measures against the Union's international obligations, possibly violating a negative obligation *not to act* was in question.

The *Kadi* case can be seen as endorsing an order where the scope of judicial review can be established by looking at EU constitutional principles.[214] Fundamental rights evidently form a part of this. The question is whether *environmental* concerns also do. The conclusion that political question do not necessarily limit the scope of judicial review seems to be confirmed in *ATAA*, as the Court itself raises no such concerns. What is

[210] Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 in Case C-402/05 *P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*, para. 44. (*Emphasis added*)
[211] Ibid. para. 45
[212] Ibid.
[213] Joint Cases C-402/05P and C-415/02, *Kadi and Al Barakaat*, para. 326
[214] Joint Cases C-402/05P and C-415/02, *Kadi and Al Barakaat*, para. 281-284

important is that this case elevates *environmental protection values* to the same level in the norm hierarchy as has previously been given to fundamental rights – namely as allowing for derogation from the Union's international obligations.

There is little doubt that the EU itself is a powerful actor in global environmental governance. But what about the European Court of Justice? The *ATAA* case shows that there are reasons to follow the actions of the CJEU more closely. Taking on the '*duty to protect*' certain fundamental values, even in situations where the judicial review will have clear political effects, the Court will have an important role to play in the promotion of EU values outside the Union's external borders.

5 Concluding Analysis

The lead question of this thesis has been *what role the judiciary plays in legitimizing and thus encouraging climate change action.* This question must be answered by looking at case law in the light of the contexts in which they arise. The scope and purpose of the judicial review, the legal instruments available and opted for and the features of the legal-political system are elements that will impact on the role of courts.

Due to the different points of departure, the results of these cases are not fully comparable. While the applicants in the US Supreme Court cases resorted to the judiciary in order to provide concrete action in a situation where they view government regulation as inadequate, or even non-existent, the applicants in the CJEU case *opposed* climate change regulations already adopted. However, the findings of the comparison reveal both interesting similarities and divergences in the Courts' approaches to climate change action.

Among the many different roles played by the judiciary, this thesis has focused on the role of *identifying* and *legitimizing* a specific actor or a means of action. This is of particular importance in the context of climate change. This can be exemplified by the regulatory road to action under the auspices of EPA in the US Supreme Court cases, and by the EU's regional decision-making legitimized in *ATAA.*

The economic costs of climate change are often described as the '*cost of inaction*' due to its adverse impacts on the human and natural environment.[215] The role of judiciary in this is not just to resolve disputes between individual parties – it is focused on a societal interest. In the light of an institutional failure to take action (on an international level in the case of *ATAA*, and on the national level in the case of *Massachusetts* and *AEP*) the judiciary can be seen as the launcher of a movement towards regulatory action.

As has been discussed, some basic features of the polity system of the EU and the US respectively create the necessary preconditions for the judiciary to hold this *action encouraging* function. Of importance is notably the system of separation of powers characteristic of a federal state or supranational entity, creating a demand for courts to fill the gap of the legal lacunas or ambiguities resulting from the political decision making process. The courts function as a rallying point, connecting different areas of law and

[215] EEA, *Climate change: the cost of inaction and the cost of adaptation*. (2007) Technical report No 13/2007. Office for Official Publications of the European Communities. Luxemburg. See also World Bank (2012).

different actors and parties, rescaling them across time and space – thus removing some of the 'transaction costs' of climate change action.

Another element of significance is the view on court interventions in the political process. There are two aspects to this: first, how the role of the court is perceived by society, and second, how it is perceived by the court itself.

In reference to the first aspect, both the US Supreme Court and the European Court of justice are perceived as very powerful entities. They have considerably marked the evolution of various policy fields in the US and the EU respectively. They share a history of adjudication of crucial issues relating to the governance of their respective societies. What is very important is that the interventions of both Courts traditionally have been respected. Even in situations where criticism and public debate have followed on controversial judgments, they are characterized by a high degree of compliance by the political branches. However, a careful balancing act is often undertaken by the Courts, which must be particular about not encroaching too far into the domain of the legislative or executive branches.

The second aspect will be discussed below (5.2).

5.1 Purpose and Impact of the Judicial Review

The US and the EU cases were brought with different purposes in view. The preliminary reference on validity against the EU act aimed at reinforcing a 'world order' where Union climate change action is subordinate to the developments at international level, and where the EU freedom of movement is limited by international law. Its primary focus was thus contrary to the case of *Massachusetts* and *AEP*, which aimed at mobilizing climate change action. However, all three cases concerned in essence the question of which entity that may take legitimate climate change action.

In *Massachusetts* the applicants sought to mobilize a pathway for climate change action which they – quite rightly – conceived as provided for by legislation, but which remained inactivated, or blocked, by EPA's refusal to regulate carbon dioxide emissions. Also in AEP the applicants sought to mobilize concrete action through a legal instrument alternative to the legislative process, i.e. the common law public nuisance cause of action.

The comparison shows that neither the CJEU nor the US Supreme Court is particularly concerned with the *impacts* of climate change, but more with general principles guiding legal proceedings (e.g. the political question doctrine, displacement, the principle of direct effect and principles of institutional balance). Both Courts are general courts and not specialized environmental courts, perhaps unwilling to assess questions of a more

discretionary nature. This naturally goes in line with the assumption that the judiciary merely *interprets* the law, and that it is up to the legislator to correct an unwarranted result of this interpretation.

This does not mean that the role of courts should be neglected – it must be taken into account when setting up the legal framework for climate change. The Court's interpretation will demonstrate the concrete application of the law, including its deficits and shortcomings.

Furthermore, as already indicated, neither the Supreme Court nor the CJEU has refrained from using the 'gaps' of the law to uphold important social values. What the CJEU does in *ATAA* is to 'upgrade' environmental protection objectives to a level in the norm hierarchy at least equal to that of the Union's international obligations. By this legitimization, the Court paves the way for environmental values. This might be a reflection of a public perception more positive towards environmental protection, but it will also enforce such an attitude – of crucial importance to the prospect of environmental governance.

The outcome of the judicial reviews is very different in the two Courts: while the CJEU judgment serves to legitimize climate change action (already taken), the effects of the US Supreme Court judgment is more uncertain. The Supreme Court *enables* EPA regulations on carbon dioxide emissions, but does clearly not *oblige* the agency to do so. In addition, the *AEP* judgment may remove some of the incitements of the agency to undertake regulations, as the possibilities to review a continued negligence are restricted through the judgment. As the Court clarified that even if EPA takes *no* action, opponents of such a decision has nowhere to turn but to the civil judicial review. Whether such a statutory-based claim for action will prove successful depends on the limits to the discretion left with the agency. And which reasons for inaction that would amount to being '*arbitrary, capriccious, an abuse of discretion, or otherwise not in accordance with law*' remains uncertain.[216]

In a comparison, both the CJEU and the US Supreme Court contribute to *enabling* and *legitimizing* climate change action. However, in both cases the definite impacts of the litigations remain yet to be seen.

5.2 The Courts' Justifications

How did the Courts justify the choice to legitimize a specific actor? In *Massachusetts*, the Court's mandating of EPA merely extends to a textual interpretation of the underlying statute and the scientific assessment that carbon dioxide indeed qualifies as an 'air pollutant' in the wording of the

[216] AEP, 131 S.Ct. at 2539.

CAA. In the subsequent *AEP* case the justifications given by the Supreme Court are somewhat more evasive. On the one hand, the reference to the precedent set in *Massachusetts* and the fact that EPA has taken some action in response to the finding does not necessarily amount to a robust justification of why common law should *not* contribute to climate change action. On the other hand, the Court clarifies its reasoning when it expounds on the appropriateness of an '*expert agency*' rather than '*individual district judges*' serving as the '*primary regulator*'. The Court here prefers to act in favor of the responsible public authority, restricting its own scope of review.

The Supreme Court's perception of itself could also be elucidated by the now famous quote uttered by Justice Scalia in the oral argument before *Massachusetts*: "*I'm not a scientist. That's why I don't want to deal with global warming, to tell you the truth.*"[217] Again this underlines how the Court prefers to leave a broad margin of appreciation to the administrative agency appointed by the legislator to take decisive climate action.

In legitimizing the EU as a global legislator, the European Court of Justice departs from a similar point of view. As action is already taken, it is treated as the norm, a *fait accompli*, the criticism to this order of things ignored. This implies that it is the *challenges* to the EU measures that must be legitimate and justified, not the other way around. Consequently, the majority of the applicants' arguments are dismissed on grounds of lack of direct effect, and only the claims that are assessed on their merits give reason to justify the Union action.

5.3 The Courts' Views on their Role in Climate Action

The second aspect of the view on court interventions is that of the Courts' own perception of what role they ought to play. How can this be deduced from the analyzed cases? In the US context, the limits to the scope of judicial review set by the political questions was discussed by the dissenting Justices in *Massachusetts* and by the lower instances in *AEP*. However in none of those cases did the majority of the Supreme Court comment on the issue. On the one hand, this can be seen as an opening for environmentalists, and a confirmation of a development towards the demise of the doctrine, similar to that in the EU. On the other hand, through its *displacement* finding in *AEP*, the Supreme Court manifestly restricts the possibility of court-made common law in favor of administrative regulations.

[217] Transcript of Oral Argument at 22-23, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3431932 at 22-23, quoted in Burns, William C.G., Osofsky, Hari M. *Adjudicating Climate Change: State, National, and International Approaches*,

In *AEP* the Second Circuit saw a possibility to accommodate both the EPA mandate and the Court's common law jurisdiction. The Supreme Court's however did not, and chose to block this means of action.

One must remember that these two means of action serves different purposes. Federal public nuisance law not only provides for a possibility for cost-allocation of climate-related harm, but also represents an important means to petitioning the government to take action, including regulatory such. It is a means for individuals and 'weaker' stakeholders, while regulations often are the result of strong industry lobbyists.

Therefore, the *AEP* judgment might have negative effects both from an environmental justice perspective, and for the prospect of mobilizing climate action. The Court's classification of public nuisance litigation as a "*parallel track*" thus appears as generalizing and somewhat oblivious to the complexities concerning climate change governance.

Similarly, in *ATAA*, the CJEU never commented on the potential criticism to a judicial review seen to the political aspects involved in the case. This stance seems to go in line with earlier case law of the Court. Some interesting remarks can be made in relation to this 'silence' when legitimizing the EU as a global policy maker. After the *ATAA* judgment was handed down, the EU has "*stopped the clock*"[218] – temporarily suspending the Directive's application to parts of flights taking place outside the EU ETS territory.[219] The commission explains this with the fact that the Union seeks to settle a global agreement at ICAO level. Why this change of approach comes *after* the Court's finding, clearly justifying the action, can of course be discussed. It does however point to the fact that the subject matter of the case was, and still is political to such an extent that a comment on this legal-political tension would have been warranted on the part of the CJEU. In line with the more evasive reasoning in for instance the *Kadi* cases, the Court could have commented on its own role.

One could argue that an explicit discussion on the adjudication of climate change action is even more warranted: while *Kadi* and similar cases concerned the question whether the *EU* ought to take a certain action or not, *ATAA* concerned the right of the *world* to comply with EU regulations. In other words, the CJEU judgment – *demanding* action on the part of third countries (which did not have any say in the adoption of the Directive) and not just the Union itself – will have a very broad reach. There are many

[218] European Commission, Climate Action, *'Stopping the clock' to allow more time for a global solution*, accessible at <http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm>, accessed 20 May 2013, last updated 17 May 2013

[219] Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community Text with EEA relevance, OJ L 113, 25.4.2013, p. 1–4

airlines that are to comply. A high rate of non-compliance and extensive criticism risk undermining the Court's own legitimacy outside the Union. Judicial activism only works when the world is ready and willing to comply.

All in all, what the three cases show is the importance of having credible enforcement mechanisms upholding compliance to national and international environmental commitments.

5.4 Final Remarks

Among the numerous uncertainties that surround the future governance of climate change, one *certainty* is that *something* must be done. Precisely therefore, sooner or later something will most likely happen.[220] How this transformation will be manifested remains uncertain. An important role for the judiciary might be to shape it in a certain direction. Expressed differently, the judiciary, just like the legislature and the executive branches of governments, will ultimately be *obliged* to play an increasingly active role, as the impacts of climate change will have more and more perceptible impact on states, corporations and individuals.

After decades of policy debate, climate change governance still struggles with the very fundamental query of where to take decisive action. *Who* – that is which country, which global forum, which national institution – should act? It is not up to the judiciary to measure the costs of action against the costs of inaction – this is a political decision. But by forcing *any* climate change action, courts compel *the legislator* to swallow the bitter pill. To undertake the calculus. Thereby the courts serve to break a political deadlock.

The high Courts of the US and the EU are both the authoritative interpreters of 'the law' of their respective legal systems. The power of these Courts and their deeply rooted traditions of intervening into society in order to uphold the law and safeguard fundamental societal interests create the basis for an important role to play in the legitimization and mobilization of climate change action.

[220] J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental*
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