Shaping EU Energy and Climate Policy Through Litigation

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ABSTRACT

This paper focuses on the long-term consequences for EU regulatory governance of the growing recourse to litigation strategies aimed at challenging EU policies in national or international fora. This is one aspect of the more general debate about the interaction between the EU and global policy regimes. Depending on the presence of internal and external factors, the EU can be an exporter or an importer of policies, standards and rules. In an increasing number of settings, the EU and its Member States are being held legally accountable for their failure to comply with international obligations.

The paper uses four examples of litigation in the energy and climate sector to show that tensions between EU law and international regimes may prompt a retreat to more hierarchical governance mechanisms, aimed at shielding EU internal policies from external pressures. However, this reaction does not provide satisfactory answers to the need of coordinating the internal and external dimensions of the EU energy and climate policy.

1. Introduction: litigation and the dynamics of regulatory governance

This paper discusses four examples of litigation in the energy and climate sector to explore the interplay between EU regulatory governance and international regimes. The main argument is that the legal challenges brought by key trading partners, foreign investors and NGOs may lead the EU
to give up its ambitions to experiment with innovative, non-hierarchical governance schemes and retreat to more traditional hierarchical options.

The four examples relate to different aspects of EU energy and climate policies. The first one deals with WTO disputes which center on the adverse impact of EU energy policies on its neighbors or on global energy supply chains. The second one deals with the attempt to use international investment law to influence both the internal and the external dimension of EU energy policy. The third one deals with the unexpected consequences of the Aarhus Convention for EU energy law. The fourth one has to do with the impact of a surge of litigation on climate policies.

The four examples differ from the point of view of the identity of the parties challenging EU policies, the fora where the legal actions are brought, the bindingness of international regimes, the formal and informal roles of EU institutions, and the substantive content of the disputed rules. However, all the examples share three common traits. Firstly, EU policies are being challenged by players (States, companies and NGOs) who invoke against the EU or its Member States (MSs) a different set of international rules. Secondly, there is a clash between two different regulatory goals:

1) Energy markets integration vs trade liberalization
2) Common commercial policy vs investment protection
3) EU climate change policy vs public participation to environmental decision-making
4) EU climate change policy vs international climate change law

Thirdly, developments in each of the four international regimes may feed back on other international regimes and on EU law. For example, litigation before WTO dispute settlement bodies may be partly replaced by dispute resolution procedures built in regional trade and investment agreements (e.g. Hufbauer and Cimino-Isaacs 2015), the international climate change regime may affect both the interpretation of WTO rules and international investment law, or the international environmental regime may influence the international climate change regime (e.g. Duyck 2015).

These three common traits suggest that the analysis of EU reactions in each case may shed light on the dynamics of regulatory governance. The energy and climate sector is not only one of the most intensely regulated at EU level. It is also among the sectors in which non-hierarchical governance has become more visible (e.g. Sabel and Zeitlin 2008; Eberlein 2010, 2012; Prosser et al. 2010; Eckert 2016). Furthermore, the EU energy sector is intensifying its interactions with international regimes because of the global dimension of many energy markets, supply chains and technology systems (Goldthau 2013; Ekins et al. 2015). Thus, the most interesting questions are
whether the legal challenges against EU energy and climate policies will produce any change in EU regulatory governance and what the direction of such changes could be.

Previous analyses on the global role of the EU have shown that interactions with international regimes take place through different channels and lead to different outcomes. Depending on several institutional variables and policy-related factors, the EU may be an exporter or an importer of policies, or it may try to protect its own policies from external influences (e.g. Lavenex 2014, Müller and Falkner 2014, Young 2015). Moreover, evidence collected in Zeitlin (2015b) shows that the non-hierarchical features of EU policies can be transferred to transnational regimes through many different pathways. In theory, the strong non-hierarchical features of EU energy and climate policy should make it an attractive model for transnational regimes. But the legal challenges discussed in this paper may lead to the opposite conclusion: the EU may not be able to export its energy and climate policy and may not develop governance schemes compatible with the heterogeneity of transnational settings. The four examples should help understand to what extent the peculiar features of EU energy and climate governance can be influential beyond the EU borders.

A focus on litigation provides some methodological advantages. It is the equivalent of an external shock or a crisis which could prompt a policy change. However, not all crises lead to policy changes (Grossman 2015). Moreover, policy changes can be of a radical or incremental type. Both types of reaction can take on different forms. Therefore, the familiar methodological problem of specifying the dependent variable in policy change studies (e.g. Howlett and Cashore 2009) could be addressed by focusing on those changes more directly linked to litigation. The rules whose interpretation or application is disputed may or may not be changed after one or more judgements hold that they do not comply with international obligations. Provided that legislators or regulators are given enough time to pass the required revisions, the link between litigation and policy change in the output dimension could be detected. Output change could also provide some hints on outcome change, that is whether the revisions prompted by litigation had a real impact on the implementation of the policy. However, attention has to be paid to the possibility that litigation does not directly affect the disputed rules, but prompts changes in other parts of EU law. Even more important, litigation may be just one of the factors leading to policy change. Other dynamics internal to the energy and climate sector might justify a revision in the same direction required by the judgements. The multiple causal pathways may be difficult to single out, but litigation on EU’s international obligations is still worth analyzing because it could signal where the major frictions between regulatory goals and regulatory regimes are located. Furthermore, litigation may help address the concerns raised by critics of non-hierarchical governance about its effectiveness in
solving regulatory problems (e.g. Heritier and Rhodes 2011; Börzel 2012; Riles 2013; Saurugger and Terpan 2016).

In the following sections, the analysis of each example of litigation touches upon three aspects:

a) What is the impact of litigation on the output or outcome dimension of EU energy and climate policies?

b) Which hierarchical and non-hierarchical policy elements are involved?

c) Does litigation increase or decrease EU innovation in regulatory governance?

2. Trade litigation

WTO agreements do not include specific rules on energy trade, but they affect some of the most important aspects of the energy and climate regulatory framework (Selivanova 2014). In the last few years, the EU has acted as respondent in three groups of cases which involve both the measures directed at building the Internal Energy Market and EU climate policies (Perišin 2014). All the cases arise from EU’s attempts to regulate beyond its borders. Table 1 provides summary information on the three groups of cases, as well as the type of EU reaction observable so far.

Table 1. WTO energy cases with the EU as respondent.

<table>
<thead>
<tr>
<th>Dispute</th>
<th>Complainant</th>
<th>Subject</th>
<th>Outcome</th>
<th>EU reaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS443</td>
<td>Argentina</td>
<td>Biodiesel</td>
<td>Panel requested</td>
<td>National measures amended</td>
</tr>
<tr>
<td>DS459</td>
<td>Argentina</td>
<td>Biodiesel</td>
<td>Consultations requested</td>
<td>Policy change in opposite direction</td>
</tr>
<tr>
<td>DS473</td>
<td>Argentina</td>
<td>Biodiesel (anti-dumping measures)</td>
<td>Partially upholding claims, under appeal</td>
<td>No policy change</td>
</tr>
<tr>
<td>DS480</td>
<td>Indonesia</td>
<td>Biodiesel (anti-dumping measures)</td>
<td>Panel composed</td>
<td>No policy change</td>
</tr>
<tr>
<td>DS452</td>
<td>China</td>
<td>Renewable Energy</td>
<td>Consultations requested</td>
<td>Settlement on trade defenses</td>
</tr>
<tr>
<td>DS476</td>
<td>Russia</td>
<td>Third Energy Package</td>
<td>Panel composed</td>
<td>No policy change</td>
</tr>
</tbody>
</table>

The first group of cases relates to sustainability criteria for biofuels introduced by the RES Directive 2009/28/EC and to antidumping measures adopted against biofuels from Argentina and
Indonesia, whose tax export policies allowed to sell in the EU at low prices. A panel report has only been published for the antidumping measures against Argentina, partially upholding the claims about the mistaken calculation of the countervailing duties imposed on Argentinian biofuels. However, the claim that the EU antidumping measures were inconsistent with WTO law was rejected. In case DS443, Spain amended the challenged measures on biofuel imports, so termination of the dispute is likely.

Much uncertainty surrounds the compatibility of the sustainability criteria with WTO rules (Leal-Arcas and Filis 2014; Grigorova 2015). Most interesting for our purposes is the extra-territorial dimension of the sustainability criteria. In practice, their effect is to create a global standard that countries interested to export in the EU market have to meet (Ponte and Daugbjerg 2015). However, this kind of unilateral initiatives do not easily match with the basic principles of a multilateral trade regime. WTO rules did affect EU biofuels policy. Social sustainability criteria, related to human rights and labour rights, were kept out of the 2009 RES Directive because of doubts about their compatibility with WTO law (Daugbjerg and Swinbank 2015). Moreover, the EU tried to avoid WTO disputes by negotiating trade agreements with major exporters of biofuels like Malaysia (Poletti and Sicurelli 2016). Therefore, the initial design of EU policies was affected by WTO law, but the latter did not curtail the ambition to extend the effects of such policies beyond the EU borders. Additional support for this strategy comes from the adoption of anti-dumping and anti-subsidy measures on biofuels from important commercial partners like the US. Such measures were not challenged before WTO dispute settlement bodies, but they highlight the lack of cooperation on developing a common approach to sustainability criteria (Jansson and Kalimo 2014). The trade defenses on biofuels could also be understood as an attempt to strengthen the EU’s bargaining position on the energy chapter to be included in the Trans Atlantic Trade and Investment Partnership (TTIP). Moreover, Directive 2015/1513/EU introduced additional requirements to reduce the risk of displacing agricultural production to previously non-cropland like grasslands and forests (indirect land use change or ILUC). These requirements, too, will come under fire because of their doubtful compatibility with WTO rules (Olsen and Rønne 2016, 164 ff.).

The second group of cases relates to RES support schemes adopted by MS. China challenged the local content requirements adopted within such support schemes, as well as the benefits they...

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1 One of the claims upheld refers to EU’s rejection of cost and price information of producers and exporters in the country of origin for the calculation of dumping margins. This issue was also raised by Russia in cases DS474 (panel established on 22 July 2014) and DS494 (consultations requested) with reference to energy costs. Note, however, that in Case T-235/08, *Acron OAO and Dorogobuzh OAO v Council of the European Union*, the General Court upheld the methodology for adjusting energy prices applied to Russian antidumping measures.

conferred to national industries. Ironically, the EU had played the role of complainant in the previous WTO dispute against Canadian RES support schemes. In that case, the WTO dispute settlement bodies held that local content requirements are incompatible with WTO law, but did not reach a conclusion about the compatibility of feed-in tariffs (FITs) (Charnovitz and Fischer 2015; Rubini 2015; Genest 2016). The China-EU dispute is but one episode of the broader trade war on Chinese solar panels. The EU and the US adopted anti-dumping and anti-subsidy measures against the Chinese solar industry. China retaliated back with analogous measures against US and EU companies (Wu and Yang 2015). The Canadian precedent suggests that at least some aspects of EU support schemes might be held incompatible with WTO law. However, the EU accepted not to impose anti-dumping and anti-subsidy measures on Chinese producers that undertook to sell solar cells and solar panels at a price above a minimum import price (EC 2016b). Judging from the fact that the WTO dispute did not make any progress from 2012, this amicable settlement on trade defenses might have succeeded in providing a transitory solution to the trade war on solar products. But a more general issue is how to avoid conflicts between international trade law and climate change policies. It has been observed that WTO challenges against green subsidies are easier than challenges against subsidies for fossil fuels (Asmelash 2015; Meyer 2016). Without a new multilateral agreement, highly unlikely nowadays, conflicts between climate change policies and trade policies cannot be excluded. An alternative route is a reform of unilateral trade defenses. Their negative impact on the environmental benefits of RES support schemes may be much more damaging than WTO law (Wu and Saltzman 2014). Therefore, there would be room to modify EU (as well as US) trade defense instruments which apply to climate-related goods, or to negotiate more specific rules on RES support schemes in the framework of a comprehensive EU-China investment agreement.

The third group of cases relates to EU legislation aimed at completing the Internal Energy Market. The Russian Federation argued that the unbundling and certification requirements for network operators, the third party access requirements in infrastructure-related exemptions, the capacity allocation measures at interconnection points and the measures supporting trans-European energy infrastructures were discriminatory and inconsistent with WTO obligations (Neuwirth and Svetlicinii 2016). All these measures are central to the EU project to integrate the national energy markets. A huge amount of resources is being devoted to their implementation. The Energy Union strategy, launched in February 2015, is clearly aimed at accelerating the integration process. It has even been suggested that the unbundling measures challenged by Russia should be further

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3 The US trade defenses were held incompatible with WTO law in case DS437. Appeals against EU trade defenses are pending before the General Court (Cases T-157/14 and T-158/14).
strengthened (Barrett 2016). The Energy Community Treaty, signed in 2005, was used to extend the EU energy framework to Eastern Europe countries, including Ukraine. The more general context of geo-political tensions in the wake of the Ukrainian crisis and the accompanying EU-US economic sanctions compound the difficulty of finding cooperative solutions. The WTO litigation can be considered a reaction to such situation, as well as to other EU initiatives, in particular the competition investigation against Gazprom (Scholz and Vohwinkel 2016) and the controversies about the South Stream and Nord Stream gas pipelines projects (Belyi 2015). To some extent, Russia had to adapt its export strategy to the new EU regulatory framework (Skalamera and Goldthau 2016). But it remains to be seen how deep and lasting such a change will be.

These three groups of cases show a strong resistance to policy change in the face of WTO constraints and a limited recourse to non-hierarchical governance schemes. In the biofuel disputes only minor concessions, in the form of amendments to Spanish national legislation, were made. May be this was because of the weak retaliatory capacity of Argentina and Indonesia and of their keen interest in accessing the EU market (Bradford 2015). But other countries with stronger retaliatory capacity may challenge the sustainability criteria. For other WTO disputes, it has been argued that the EU might be less willing to settle when the issues are politically salient and less willing to comply with an adverse WTO ruling when there are many veto players in the internal policymaking process (Poletti and De Bièvre 2014). Both factors may be present in the three groups of cases discussed in this section, but they are also likely to be present in most WTO disputes. Moreover, in each group of cases the EU did not limit itself to stubborn resistance, but activated alternative strategies to avoid the negative consequences of WTO litigation. One such strategy was to start negotiating a bilateral trade agreement. Another strategy was to negotiate concessions on trade defenses. The main drawback of these initiatives is that they look more like temporary and case-specific fixes. They do not contribute to the development of a more encompassing strategy aimed at managing the interplay between WTO law and EU law. Hence, these energy disputes seem to highlight the weakness of WTO constraints and their inability to foster significant policy changes in the EU.

Previous literature on experimentalist governance showed that constraints imposed by WTO law may force the EU to take into account third countries’ concerns and develop non-hierarchical and multilateral approaches (Zeitlin 2015a, 345 ff.). But this dynamic seems to be conditioned on the strength of WTO’s constraints. If they are too weak or there is much uncertainty about their interpretation, as appears to be the case for the energy disputes discussed in this section, WTO law
cannot function as a penalty default mechanism which induces third countries to join EU innovative governance mechanisms.

3. Investment litigation

In the last few years several MSs have adopted retrospective changes to RES support schemes. Investors who had relied on this public support reacted by claiming damages before national courts and international arbitration tribunals. This litigation reflected, and to some extent ignited, the debate surrounding the uneasy relationship between EU common commercial policy and international investment law. The Lisbon Treaty extended the EU exclusive competence on commercial policy to foreign direct investments (Article 207(1) TFEU). The Commission was allowed to design an investment policy which could use future trade and investment agreements as vehicles for the transfer of EU policies to third countries. After the failure of the Doha Round negotiations made it clear that multilateral agreements could not be signed in the foreseeable future, the Commission’s investment strategy turned to regional and bilateral agreements. One of the most prominent examples of the new strategy is the EU-Canada Comprehensive Economic and Trade Agreement (CETA), signed in 2014 but waiting ratification by the Council and the European Parliament. Both the CETA and the ongoing negotiation on the TTIP cast a shadow on the possibility to advance the Commission’s investment policy. The investment chapter in the regional agreements is among the most controversial aspects. It introduces new investment protection standards and a new Investment Court System. The latter should replace the traditional decentralized investment arbitration system. Both the standards and the dispute resolution procedure have been criticized. For some authors, they do not remedy the flaws of international investment law and may even decrease the regulatory space available to the EU and its MS (e.g. Van Harten 2016; Poulsen et al. 2015). More fundamentally, the overall approach of the Commission’s investment policy is contested because it does not seem to provide a satisfactory solution to the different problems MS experience when investment protection issues arise in developing and developed countries (Araujo 2016, 232 ff.).

At least under some respects, elements of experimentalist governance can be detected in the EU trade and investment policy. For example, the attempt to design mechanisms of regulatory cooperation in the TTIP could foster mutual learning and the search for regulatory solutions which can be adapted to different institutional contexts (Zeitlin 2015a, 354; Wiener and Alemanno 2015). However, incorporation of non-hierarchical governance schemes might not bear enough persuasive force to overcome the multi-faceted opposition against Commission’s proposals.
Litigation on RES support schemes confirms that EU investment policy has still to find a balance between internal policy objectives and investor’s protection. According to most recent statistics from the International Centre for Settlement of Investment Disputes (ICSID 2016), the electricity, oil and gas sectors have traditionally represented the largest share (43%) of investment disputes brought before this international arbitral institution. But in 2014 and 2015 they came to represent more than half of new cases registered by ICSID (ICSID 2015b, ICSID 2016). Moreover, most cases involved EU MS (ICSID 2015a, UNCTAD 2015). The Energy Charter Treaty (ECT), the only multilateral treaty on investment protection, provided the main legal grounds for these disputes. Investors claimed that retrospective cuts to RES support schemes infringed Article 10 ECT, containing obligations on fair, equitable and non-discriminatory treatment of foreign investments, and Article 13 ECT, ensuring protection against expropriation. However, the retrospective changes to support schemes were partly motivated by budgetary constraints, partly by the need to correct design flaws and avoid overcompensating RES producers. Therefore, these disputes test the limits of the right to regulate in the public interest against the protection of the financial interests of the investors.

So far, the actions brought before national courts and arbitration tribunals have seldom been successful. But the flurry of investment arbitration cases fueled the debate about the relationship between EU law and international investment law. The long-standing position of the Commission is that all the bilateral investment treaties (BITs) agreed between MS should be terminated because only EU law should apply and the EU courts should have exclusive competence on intra-EU investment disputes. Arbitral tribunals have constantly rejected this position, arguing instead for the complementarity between EU law and international investment law. In 2013, the Micula case showed that no compromise was possible between these two positions. After an arbitral tribunal found that the defendant MS was in breach of its BIT obligations toward a European investor, the Commission stated in 2015 that the damage award could not be paid because it amounted to illegal State aid (Chevry 2015). But in early 2016 an ICSID ad hoc Committee confirmed the 2013 arbitral award. Hence, compliance of the MS with international obligations could amount to infringement of EU law and vice versa. Much the same issue will arise in the context of arbitration cases involving retrospective changes to RES subsidies in Spain and Italy. Should the arbitral tribunal award damages to investors, the Commission could hold them incompatible with the internal market (López Rodríguez and Navarro 2016; Bellantuono 2016).

4 The materials related to the Micula case are available at http://www.italaw.com/cases/697. See also Commission Decision (EU) 2015/1470 of 30 March 2015, OJ L232/43 of 4 April 2015, declaring the damage award incompatible with the internal market and ordering recovery of compensation already paid. Appeals against this decision are pending before the EU General Court (Cases T-624/15, T-694/15 and T-704/15).
The conflict between EU law and international investment law reached its apex between 2015 and 2016. In June 2015 the Commission started infringement proceedings against five MS that did not terminate their intra-EU BITs, as well as EU Pilots against other twenty-one MS. In March 2016 the German Federal Supreme Court referred three questions for a preliminary ruling to the EU Court of Justice, asking whether intra-EU BITs are compatible with EU Treaties. In May 2016, five MS (Austria, France, Finland, Germany and the Netherlands) reacted to the Commission’s enforcement initiatives with a proposal aimed at simultaneously terminating all intra-EU BITs, while at the same time introducing a transitory regime for the protection of investors. The proposal also included a new investor-state dispute resolution procedure, to be administered by the Permanent Court of Arbitration. The proposal runs counter the Commission’s policy of eliminating any parallel system of investment protection in the EU, but it cannot be excluded that a compromise will be sought for.

The interplay between EU law and international investment law led to a protectionist reaction. Even though MS did not comply with their obligations toward investors, the Commission wanted to avoid any interference with its policymaking process. The reform of RES support schemes will be pursued both through the requirements of the 2014 guidelines on Environmental and Energy Aid and through the forthcoming revision of the 2009 RES Directive. The conflict arising from the external interference of international investment law was addressed by neutralizing international arbitration and attempting to replace it with alternative dispute resolution procedures. This strategy was pursued through the strongest enforcement powers available to the Commission, that is the investigation powers on State aid and the infringement proceedings for breach of EU law. Thus, external pressure on EU energy policy drove the non-hierarchical aspects of energy governance to recede in the background.

The main problem with this hierarchical reaction is that it only focuses on the internal side of the conflict, but does not address the external consequences of EU investment and energy policy. Even though intra-EU BITs are going to be terminated and investment arbitration between MSs replaced by a different dispute resolution system, the consequences of the new regime for third countries are not clear. The Investment Court that the Commission proposed to include in the CETA and TTIP may be accepted or not, but in the best case will create a separate regime. It cannot be excluded that the negotiation of the two Agreements leads to additional differences. The same could happen for future trade and investment agreements with other important commercial partners. Thus, the proposal to replace investment arbitration arose from the internal EU debate, but it is not clear
whether the alternative dispute resolution procedures fit the needs and interests of developed and developing third countries.

These doubts become even more pressing when the multilateral relationships within the ECT are taken into account (Kleinheisterkamp 2012). The termination of all intra-EU BITs will not prevent investors from using the ECT to start arbitration proceedings against MS or the EU itself. This means that the energy sector could have an investment regime different from the other sectors, in which the alternative dispute resolution procedures should apply. Even worse, the new dispute resolution regime could concur with the ECT regime or apply to those energy disputes which fall outside the scope of the ECT. From the perspective of EU energy policy, this scenario appears highly undesirable because it could lead to marked differences across the EU and ECT regimes and reduce the influence the Commission could have on the revision process of the ECT. More generally, the lack of clear boundaries and contents for each regime could reduce the attractiveness of the EU energy sector for foreign investors.

These unresolved issues prompt the question whether a wider recourse to non-hierarchical governance schemes could better address the frictions between EU law and international investment law. A shift to non-hierarchical governance could mean that the negotiation of bilateral or multilateral agreements is not driven by the goal of exporting an EU model, but of discussing new ways to ensure compatibility across different investment regimes. A more radical approach would lead to turn the current approach upside down and accept that negotiation of agreements with trading partners have to be used to transform the EU investment and energy policy. But there are no signs of such reversal.

4. Environmental litigation

This section deals with the interplay between EU energy and climate law on one hand and an influential piece of international environmental law on the other hand, namely the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Initially conceived of as a vehicle for transferring EU environmental law principles to East European countries (Wetzel 2012), it became a reference point for environmental NGOs and other national and international environmental regimes. With specific reference to EU energy and climate law, it had the unintended effect of introducing some constraints on EU policymaking. Moreover, the interpretation of the Convention by the Court of Justice shifted to MS the burden of implementing the access to justice provisions.
The Aarhus Convention entered into force in 2001 and was ratified by the EU in 2005. All MS are Parties to the Convention, so each of them individually bears responsibility for its implementation. At the same time, the EU bears responsibility for the implementation of the Convention’s principles in EU law, but we shall see that the boundary between EU and MS responsibility is not clear cut.

The Convention grants rights to individuals and organizations in three areas (Lee 2014, 160). Firstly, public authorities shall provide environmental information, broadly defined and also including energy information. Secondly, public participation has to be ensured in various categories of environmental decision-making. Thirdly, review procedures shall be made available with regard to environmental information requests, public participation requirements for decision-making related to projects or activities, and general violations of environmental law.

Before the ratification of the Convention, the EU adopted legislation aimed at implementing the provisions on access to information (Directive 2003/47EC) and public participation (Directive 2003/35/EC for plans and programmes, Directive 2001/42/EC for strategic environmental assessment and (what is now) Directive 2011/92/EU for environmental assessment of projects). Moreover, Regulation (EC) 1367/2006 extended the application of the Convention to EU institutions. In 2003 a Directive on access to justice was proposed but never mustered the required majorities in the Council. The proposal was withdrawn in 2014.

According to the Commission, these legislative measures should have ensured full compliance with the Convention (EC 2008). But in recent years this assumption was called into doubt through two different channels. Firstly, environmental NGOs started to use the review procedure established by the 2006 Regulation to challenge several administrative acts and policy initiatives. All the requests for review were rejected, showing that the procedure only covered a narrow class of administrative acts and omissions. On appeal from the NGOs, both the General Court and Advocate General Jääskinen argued that, because of the limited scope of the review procedure, the 2006 Regulation did not correctly implement the Convention. However, the Court of Justice decided otherwise. It held that the Parties to the Convention enjoyed wide discretion in implementing its access to justice provisions. According to the Court, the 2006 Regulation did not confer individuals

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5 The requests concerned a statement on the use of revenues generated by the auctioning of emission allowances in the EU emission trading system, a Commission’s communication on RES, a Council decision on the allocation of emission allowances, the adoption of the list of Projects of Common Interest for trans-European energy infrastructures, the failure to adopt implementation measures for the Fuel Quality Directive, the 2014 guidelines on State aid for environmental protection and energy, and the list of sectors exposed to the risk of carbon leakage. The complete list of requests for internal review and of the replies by the Commission is available at http://ec.europa.eu/environment/aarhus/requests.htm.
the right to directly invoke the Convention. Moreover, the provisions of the Convention on access to justice were not specific enough, but required the adoption of subsequent measures. Referring to its previous case law, the Court confirmed that, in the absence of EU implementing acts, it is up to MSs to comply with the access to justice obligations.6

Secondly, the Aarhus Convention established a Compliance Committee (ACCC) with the task of reviewing compliance with the Convention. Individuals and NGOs can submit communications, asking the ACCC to check Parties’ compliance. Findings of non-compliance can lead to recommendations to the Meeting of the Parties. The latter can adopt various measures toward the non-compliant Party, including providing advice, making recommendations, asking to submit a strategy regarding the achievement of compliance, issuing declarations of non-compliance or suspending the rights and privileges of the Party under the Convention.

The largest number of communications alleging non-compliance has been submitted in the energy and climate sector. Ten communications concerned non-compliance by the EU. Five of them related to the energy and climate sector. In one of them (ACCC/C/2010/54) the EU was found non-compliant because it failed to provide MS with detailed instructions on public participation requirements for National Renewable Energy Action Plans (NREAPs). The Meeting of the Parties endorsed the ACCC’s recommendations and asked the EU to submit annual reports until 2016 to document the measures undertaken to eliminate non-compliance. Interestingly, this case signals that, according to the ACCC, MS non-compliance may entail a finding of non-compliance for the EU. The UK, too, was found non-compliant with regard to public participation requirements for its NREAP (ACCC/2012/C/68).

What reaction did increasing pressure from the NGOs and the ACCC trigger from EU institutions? As far as the specific issues raised in the previously mentioned cases are concerned, the Commission tended to stick to its policies. No major changes are visible. To be sure, EU energy law is gradually absorbing the Convention’s principles. Information and public participation requirements were introduced in EU energy legislation.7 Moreover, access to justice provisions have been introduced in some parts of EU environmental legislation, but after the failed proposal of 2003 no horizontal approach has been advanced (Hedemann-Robinson 2015). This is surprising

6 Court of Justice of the European Union, Grand Chamber, Joined Cases C-401/12 P to C-403/12 P, judgement of 13 January 2015, Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht; Court of Justice of the European Union, Grand Chamber, Case C-240/09, judgement of 8 March 2011, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky. See comments by Pirker (2016); Garçon (2015).

both because environmental law has offered many examples of innovative non-hierarchical governance (e.g. von Homeyer 2010; Holley et al. 2012) and because the EU tries to play a model role at global level in environmental matters (Lenschow 2015). Despite these favourable conditions for a more expansive interpretation of the Aarhus Convention, it did not move EU law toward a radically new version of environmental democracy (Harlow and Rawlings 2014, 299 ff.).

Significantly, the Commission’s communication on the Environmental Implementation Review initiative aims at improving implementation of EU legislation, but only mentions in passing access to justice (EC 2016a, p. 8). The Court of Justice accepted this restrictive approach, although it opened up opportunities for broader access to justice at MS level. It can be added that the 2015 Paris Agreement on climate change foresees a compliance mechanism (Rajamani 2016) which could be modelled after the ACCC. More generally, there seems to be a growing trend toward the creation of environmental tribunals (Pring and Pring 2015). This means that the restrictive approach so far adopted by the EU may lead to reputational losses and reduce the EU bargaining power in global environmental negotiations.

Two explanations can be given for the EU’s reluctance to invest more resources in the implementation of the Aarhus Convention. Firstly, the Convention’s requirements clash with EU energy and climate policies. Heightened participation requirements and broader access to justice could be perceived as barriers to the smooth implementation of energy and climate objectives. Secondly, the Commission might be unable to implement the most innovative aspects of the Convention because of strong resistance from MSs. Such resistance is prompted by the heterogeneity of the national legal regimes in the areas covered by the Convention. Both factors (conflicting objectives and MSs heterogeneity) call for innovative, and non-hierarchical, governance schemes. However, the new approach to compliance proposed by the Commission in the Environmental Implementation Review could be much more useful in prompting this kind of institutional innovation than environmental litigation in the framework of the Aarhus Convention.

5. Climate litigation

Climate change litigation has been used in several countries both to promote and to oppose the adoption of measures aimed at fighting global warming. The US and Australia are the two jurisdictions in which most cases have been filed (Osofsky and Peel 2015). In the EU the Court of Justice issued about 100 judgements on the interpretation and application of the emission trading system (Van Zeben 2016). In 2015 the Dutch case Urgenda, discussed below, made the headlines all over the world. However, outside the US climate litigation is concentrated in five jurisdictions
(Wilensky 2015). This could mean that it requires institutional conditions only available in a few contexts.

According to some authors, climate litigation is one aspect of the multilevel governance system which is needed to tackle the complexity and scale of the problems (Osofsky and Peel 2015, 13 ff.). Other authors fear that the Paris Agreement could increase the negative aspects of litigation, namely the distorted use of scientific evidence in judicial proceedings and the shift of decision-making powers from democratic institutions to unrepresentative ones (Hartkamp and Stone 2015). What seems already clear today is that the regulatory space which litigation will occupy in climate change regimes will depend on how other hierarchical and non-hierarchical regulatory tools will be employed. For example, the high number of climate cases in US and Australia may be due to two institutional factors. Firstly, both countries belong to the common law family. This means that the judiciary usually plays a central role. Secondly, in both countries comprehensive federal legislation on climate change has been completely missing or of limited scope. Of course, other common law countries did not embrace climate litigation to the same extent. Moreover, the impact of litigation has been more significant in the US than in Australia (Osofsky and Peel 2015, 310 ff.), showing that neither a common law structure nor the lack of comprehensive climate change legislation can explain the role played by litigation. But these observations seem to confirm that the rate and impact of litigation depend to some extent on the performance of other regulatory tools.

What could be the impact of climate litigation in the EU? Challenges brought against the ETS did not stop the implementation of the system, but they did contribute to the revision of its structure for the post-2020 period. Moreover, the ETS cases showed that much controversies were focused on the distribution of competences between the EU and the MS level (Bogojević 2015). This aspect displays some commonalities with climate litigation in the US, where a threshold issue has been whether federal legislation preempts or displaces federal or state common law actions (Hammond and Markell 2014). Even though the EU-MSs relationship on climate change policy and burden sharing is going to remain contentious, political compromises will likely reduce the need to resort to litigation.

Climate litigation before national courts, exemplified by the Urgenda case, may represent a much more serious threat to EU law. In June 2015 the Dutch District Court in The Hague held that, by choosing to implement the EU target of a 17-20% reduction of GHG emissions by 2020, the national government was in breach of its duty of care toward citizens. Therefore, the District Court ordered to adopt measures that could reduce GHG emissions of 25% by 2020. The legal ground for the judgement was the Dutch Civil Code, but the interpretation of the duty of care was explicitly
inspired by international climate change law and human rights law. Although the judgement was appealed, the Dutch government promised to reconsider the national target for GHG emissions. Moreover, a similar action was filed in Belgium (Cox 2016) and the Dutch precedent could have repercussions in other jurisdictions.

This case seems to be an example of a policy change directly caused by litigation. But the Dutch judgement raises complex issues about the role to be played by EU climate policies and the discretion afforded to MS in adopting different targets or policies. No convincing arguments were advanced by the judges on the possibility for a single MS to reduce emissions while participating at the same time to the EU ETS (Van Zeben 2015, Roy and Woerdman 2016, Peteers 2016). Moreover, the reduction of the emissions is dependent on synergies with other climate policies on energy efficiency and RES. None of these policy design problems were, and could be, addressed by the Dutch Court.

It has been observed that the Urgenda judgement was a reaction to an institutional failure to address more effectively climate change issues at EU and national level (Roy and Woerdman 2016, 177). However, litigation can play a significant role if it contributes to solve a regulatory problem, not if it adds complexity to the interplay among levels. Non-hierarchical governance could provide the resources to coordinate decentralized initiatives on climate change. But this approach only works under restrictive conditions (Sabel and Victor 2015). Thus, the role of the courts seems to depend on their sensitivity to those conditions and to coordination needs (Korkea-aho 2015).

6. Conclusions

Table 2 shows the impact and direction of EU policy changes prompted by litigation in the four international regimes discussed in the previous sections.
Table 2. Policy changes and governance reactions following litigation.

<table>
<thead>
<tr>
<th>Energy and climate policy</th>
<th>Litigation outcome</th>
<th>Policy change (output)</th>
<th>Governance reaction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Trade litigation</strong></td>
<td>Pending, possible escalation</td>
<td>Opposite to litigation</td>
<td>Unilateral avoidance of international constraints</td>
</tr>
<tr>
<td><strong>Investment litigation</strong></td>
<td>Conflict with EU law</td>
<td>Displacement of investment arbitration</td>
<td>Hierarchical</td>
</tr>
<tr>
<td><strong>Environmental litigation</strong></td>
<td>Unfavourable to EU</td>
<td>Legislative measures partially addressing non-compliance</td>
<td>Hierarchical</td>
</tr>
<tr>
<td><strong>Climate litigation</strong></td>
<td>Partly unfavourable to EU</td>
<td>No policy change</td>
<td>Hierarchical</td>
</tr>
</tbody>
</table>

The most striking result is that, even in those areas of EU law where non-hierarchical governance has flourished, the reaction to international litigation is almost never to adopt additional or modified non-hierarchical governance schemes. This could mean that exporting innovative governance schemes to international regimes may be more difficult than assumed so far. One factor which could explain a hierarchical reaction is that all the international regimes considered here (WTO law, investment law, environmental law and climate change law) cut across several policy areas. It is possible that the mismatch between international and EU regulatory objectives and policy processes hampers coordination and reduces the channels for mutual feedback learning.

A more subtle observation is that the hierarchical reaction to litigation observed in these four examples only represents a first-level response, but does not preclude more innovative developments. Indeed, none of the policy changes which followed litigation solved in a satisfactory way the tensions between the EU and international regimes. As far as the trade and investment regimes are concerned, the sustainability criteria and the RES support schemes are not necessarily the best options for the EU and third countries, but litigation is creating uncertainty about the process to be employed to select better options. The negative impact of uncertainty on energy infrastructure investments is even clearer in the case of the EU-Russia conflict. The Aarhus Convention could help innovate decision-making processes in the energy and climate sectors, but it can also be used to derail them. Even more unclear is the balance between the costs and benefits of increased climate litigation. Non-hierarchical governance could be usefully deployed to manage
those tensions, but the main question is whether the necessary conditions for its implementation can be identified.

From this point of view, this paper’s focus on litigation as an external shock to EU policies suggests an easy analogy to one of the factors deemed to improve the chances of coordination in non-hierarchical governance schemes. The literature on experimentalist governance has pointed out that a draconian sanction, under the guise of a penalty default rule, is always required to push reluctant players to join a governance scheme under conditions of strategic uncertainty (Sabel and Zeitlin 2008, 2012). However, a penalty default rule can provide adequate incentives if no alternative options are available. In all the examples discussed here, the EU was able to avoid or reduce potential sanctions through alternative strategies. If the penalty default condition was missing, EU’s reactions to frictions with international regimes cannot be expected to move in the direction of non-hierarchical governance.

Though, providing adequate incentives to join a non-hierarchical governance scheme admits more than one solution. Legal rules can be modelled according to different degrees of hybridization with those schemes (Holley 2016). Even though the penalty default option is not available because of weak external constraints, more incremental options may allow EU policies to evolve toward innovative schemes. As is usually the case with institutional incremental change (Mahoney and Thelen 2010), the crucial issue is to identify the strategies available to the players interested in innovating governance schemes. An in-depth discussion of such strategies in the EU energy and climate sector is beyond the scope of this paper. But it seems possible to argue that the problems arising from the lack of coordination between the EU and international dimensions of energy policy will create windows of opportunity for governance innovation in already existing negotiation settings. Bilateral trade and investment agreements, settlements on trade defenses and dialogues with standard-setting organizations provide such settings. Initially, proposed solutions may amount to little more than small adaptations of existing rules, with hierarchical aspects still playing a major role. Over time, such small adaptations could evolve into broader institutional alternatives, working in parallel to or more closely integrated with traditional regulation. Therefore, what started as an experiment with limited scope could transform itself in a scheme incorporating the conditions for successful non-hierarchical governance. This kind of transformation will depend on the existence of favourable conditions that change agents can exploit. But figuring out a possible path toward better coordination of multi-level regimes may help improve the odds of governance innovation.
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