Transnational Administrative Law and Climate Change in the Age of the Green Deals: Introduction to the Special Issue

*Maurizia De Bellis**

TABLE OF CONTENTS

1. Climate change and public law..325
2. Remedies for ineffective climate action and the adoption of the Green deals: the risk of fragmentation.............................327
3. Transnational administrative law and climate change in the EU and beyond...331
4. The contributions in this special issue..334

1. Climate change and public law

Climate change is the existential challenge of our age. Moreover, while in the long-term climate change raises an existential threat to humankind, in the short term its effects are increasingly perceived, through form of heat waves, droughts, wildfires and extreme precipitations[1].

The magnitude of this challenge requests efforts from a number of disciplines. In such a context, law, as the crucial instrument to regulate society, protect rights and establish obligations[2], is also called to give its contribution[3]. More than so, the peculiar features and the urgency of climate change put

---

* Associate Professor of Administrative Law, University of Rome "Tor Vergata". The author would like to thank Edoardo Chiti for his comments to a first version of this introduction, as well as Jean-Bernard Auby, Giacinto della Cananea, Martina Conticelli and all the participants to the workshop "Climate change and Transnational administrative law", University of Rome "Tor Vergata", 27-28 April 2023.

[1] For the most recent report Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023 Synthesis Report Summary for Policymakers* (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf; see also, Copernicus Climate Change Service (C3S), *European State of the Climate 2023*, htttp://climate.copernicus.eu/ESOTC/2023.

[2] H.L.A. Hart, *The concept of law* (1969).

[3] F. Fracchia & M. Occhiena (eds.), *Climate Change: La Risposta del Diritto* (2010).

traditional legal paradigms under pressure, demanding innovative efforts[4].

Measures needed in order to address climate change, as science requires to do, have long been known. Efforts intended to put in place collective action towards this end have been significant; however, effective action is still insufficient.

The current international climate regime is the result of a long process that started in 1988, when the Intergovernmental Panel on Climate Change (IPCC), an expert body, was set up. In the 1992 Earth Summit in Rio de Janeiro, the United Nations Framework Convention on Climate Change (UNFCCC), the first international legal regime on climate change, was adopted. While the Kyoto Protocol, setting forth obligations for the reduction of greenhouse gas (GHG) emissions for the period 2008-2012 (but only for industrialized countries), was adopted in 1997, the agreement concerning the post-2012 period was reached in the conference of the parties (COP) 21st meeting held in Paris in 2015.

With the Paris agreement, States committed to keep the increase in the global average temperature to well below 2° and preferably 1.5° compared to pre-industrial levels; however, such commitments are based on nationally determined contributions (NCDs), to be determined on the basis of common but differentiated responsibilities. The Paris agreement is hence based on a multilevel approach, as the agreement sets objectives and procedural requirements, but the substance of the commitments is to be determined by the States[5]. The violations of the commitments, however, is not assisted by a specific mechanism of sanctions. The lack of enforcement was both the result of a compromise meant to bring on board a large number of countries and of an approach intended to reach flexibility, taking into account the failure of the Kyoto Protocol, despite its binding compliance mechanisms.

[4] J.-B. Auby & L. Fonbaustier, *Climate Change and Public Law Dossier: Introduction*, 1 French Y.B. Pub. Law 25 (2023).

[5] S. Maljean-Dubois, *Climate change in international law. The Paris agreement: a renewed form of States' commitment?*, 1 French Y.B. Pub. Law 25 (2023).

2. Remedies for ineffective climate action and the adoption of the Green deals: the risk of fragmentation

The lack of adequate action to meet the target for GHG reduction agreed upon at the international level has led to different types of responses.

On the one hand, there is a growing response from civil society and judges to make States meet their obligations. As further discussed in this special issue, while in the first decade of the 2000s it was considered that the only effective instrument to tackle climate change could come from international agreements and policies and that the role for courts would be negligible[6], due to States' lack of effective action despite international agreements there is a growing trend of climate litigation cases, in which individuals and NGOs resolve to courts to have government's climate inaction declared unlawful and asking courts to condemn States to adopt effective mitigation measures. Since the historic *Urgenda* decision of 2015, in which for the first time a court affirmed that a Government was responsible to protect its citizens from climate change, ordering it to reduce GHG emissions in line with scientific recommendations[7], several other courts have followed, notably, in 2021, the Federal Constitutional Court (FCC) of Germany, which, in the *Neubauer* case, declared some of the provisions of the German Federal Climate Change Act determining the annual emissions amount allowed until 2030 incompatible with the claimants' fundamental rights. In April 2024, the European Court of Human Rights (ECHR), in the *Klimaseniorinnen* case, has for the first time condemned a State – Switzerland – for its failure to fulfill its positive obligations to protect individuals from the adverse effects of climate change on their life and health, hence violating their right to private life protected under art. 8 ECHR[8].

---

[6] J. Peel & H.M. Osofsky, *Climate Change Litigation*, 16 Ann. Rev. Soc. Sci. 21 (2020), 22.

[7] Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, 2019, which confirmed *Urgenda Foundation v. The State of The Netherlands*, judgment of 24 June 2015, District Court of The Hague (ECLI:NL:RBDHA:2015:7196). See J. Verschuuren, *Climate Change and the Individual in the Netherlands*, in F. Sindico & M.M. Mbengue (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (2021).

[8] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others V. Switzerland*, Application no. 53600/20, 9 April 2024. For a first comment, M.A. Tigre & M. Bönnemann, *The Transformation of European Climate Change Litigation:*

On the other hand, several regional or national efforts inspired to the Green New Deal (GND) are emerging, meant to enact economic policy programs intended to pursue an ecologic transition. Using an expression that evokes the "New Deal" developed in the United States by President Franklin Delano Roosevelt in the aftermath of the 1929 crisis and inspired to Keynesian economic theory, this expression was first used in a manifesto produced in 2008 by a British group of experts[9].

In the last decade, this project – which departed quickly from the origin, still connected with the financial crisis of 2008, and is based on a novel combination of public intervention and private initiative[10] – has gained broad support, both at the international level (in particular within the *United Nations Environmental Program – UNEP)* and at the national one[11]. In the US, the Inflation Reduction Act (IRA) has been adopted in 2022, subsidizing the production of renewable energies, upon condition that the production takes place in the US[12]. With the European Green Deal (EGD), the EU has intended to position itself as a first runner[13]. With the Communication of 11 December 2019, the von der Leyen Commission launched a comprehensive and ambitious strategy aimed at enacting a deep transformation of its economy, as decoupled from resource use[14].

Introduction to the Blog Symposium, 9 April 2024, https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium. For some preliminary remarks on the three climate litigation cases decided by the ECHR 9 April 2024, see Section 4.

[9] *A Green New Deal. Joined-up policies to solve the triple crunch of the credit crisis, climate change and high oil prices*, 2018, https://base.socioeco.org/docs/a_green_new_deal_1.pdf.

[10] For its features, J. Rifkin, *The Green Deal: Why the fossil fuel civilization will collapse by 2028, and the bold economic plan to save life on Earth* (2018); N. Chomsky, R. Pollin & C.J. Polychroniou, *The Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet* (2020).

[11] J.J. Monast, *The Ends and Means Of Decarbonization: The Green New Deal In Context*, 50 *Environmental Law* 21 (2020).

[12] B. Marchetti, *Le politiche di decarbonizzazione statunitensi tra il Green New Deal e la giurisprudenza della Corte Suprema*, 1 Riv. Reg. Mercati (2023).

[13] On the novelty of the EGD, see E. Chiti, *Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process* 19 Common Mkt. L. Rev. 59 (2022).

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal* (COM/2019/640 final).

The EGD entails the approval of a number of different acts, as further clarified in the "Fit for 55" strategy[15]. Regulation 2021/1119/EU (so called European Climate Law) makes the goal of climate neutrality by 2050 (i.e. net zero greenhouse gas emissions), at first set forth in the EGD 2019 Communication, legally binding, providing the same legal effect for the intermediate target of reducing emissions of at least 55% by 2030, compared to 1990[16]. In this way, the climate neutrality objective has been made for the first time legally binding, an objective affecting a number of different policies. Similarly to the Paris agreement, the EGD entails a multilevel approach: it sets objectives to be reached, but the specific content of the measures will need a fundamental role from the States[17].

These two trends – increasing role of the courts in obliging the States to take climate action and the surge of Green deal policies, intended to foster a green transition – advance significantly the path towards the target of GHG reduction. Yet, both present some limitations.

As for the trend towards climate litigation, there is a limit to what the courts can identify as a necessary action to be taken by the governments, stemming from the principle of separation of powers[18]. Such issue has been constantly addressed in the momentous judgments recalled above. As the ECHR was very careful in clarifying in the latest *Klimaseniorinnen* case, Courts can identify the violation of the obligation to protect fundamental rights affected by climate change and can condemn States to take action to address a specific target, defined on the basis of international agreements and the best available science, but they

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '*Fit for 55': Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality*, COM(2021) 550.

[16] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[17] For a comprehensive analysis, E. Chiti & D. Bevilacqua, *Green Deal. Come costruire una nuova Europa* (2024); D. Bevilacqua, *Il Green New Deal* (2024).

[18] M. Payandeh, *The role of courts in climate protection and the separation of powers*, in W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021).

cannot (and should not) identify the specific measure to be adopted[19].

As for the trend towards the adoption of the green deals, different national parallel efforts could foster convergence towards a decarbonization path, setting the scene for experimentalist governance overcoming the limits of global climate diplomacy[20]. However, while the respect of the Paris agreement would require policy coordination between the largest GHG emitters (together with the EU, the US and China)[21], these initiatives could also result in a regulatory competition (implicit in the subsidization of national green industries) and in a geopolitical clash[22].

Because of these limitations, there is a high risk of fragmentation in the efforts to address climate change.

Fragmentation is all but new to the area of international cooperation in the environmental area, due to the fact that international agreements deal separately with single issues (climate change, biodiversity, waste, chemical products)[23]. The regime complex for climate change is also highly fragmented and polycentric[24]. The two trends recalled do not address the problem of fragmentation, but are to be framed within this context and, for the reasons discussed above, risk magnifying such problem. This is why this special issue focuses on transnational mechanisms, as a means to overcome fragmentation.

[19] ECHR, Grand Chamber, *Verein Klimaseniorinnen*, cit. at 9, paras. 412-3, 457, 543-554 and 657.

[20] C.F. Sabel & D.G. Victor, *Fixing the Climate. Strategies for an Uncertain World* (2022).

[21] M. Siddi, *The European Green Deal: Assessing its Current State and Future Implementation*, FIIA Working Paper (May 2020).

[22] E. Chiti & D. Bevilacqua, *Green Deal. Come costruire una nuova Europa*, cit. at 18, 129.

[23] H. Van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 Int'l L. Pol. 1205 (2012).

[24] K.W. Abbott, *The Transnational Regime Complex for Climate Change*, 30 Env't Plan. Gov't Pol'y 571 (2012).

3. Transnational administrative law and climate change in the EU and beyond

Transnational environmental law has long been discussed as an emerging trend in environmental regulation. In this sense, it is conceived as one of the cases of transnational regulatory regimes, involving public bodies, private actors acting under a public mandate, civil society organizations, networks of public and private actors[25]. According to this perspective, transnational environmental law is one form of global regulation[26].

Within the broad range of norms regulating cross-border relations across a variety of public and private actors considered from the transnational environmental law perspective, fall also mechanisms of cross-border administrative cooperation[27]. Moreover, transnational administrative law principles, acts and forms of cooperation can be found not only within soft law settings (which are usually examined within the transnational environmental law perspective of research), but find their basis also within binding legal frameworks[28].

For purpose of this special issue, the focus is on *transnational administrative law* principles, measures and forms of cooperation, both within EU and international settings[29]. Environment is one of the areas in which transnational administrative law has been emerging more clearly and dates back to several decades[30]. The principle not to cause transboundary environmental damage (or «no harm rule») - placing an obligation on States to prohibit activities within its territory, that may cause

[25] V. Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (2018).

[26] V. Heyvaert, *The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation*, 6 Transnat'l Env'l L. 205 (2017).

[27] O. Dilling & T. Markus, *The Transnationalisation of Environmental Law*, 30 J. Env.l L. 179 (2018), 189-191.

[28] See the examples examined in this special issue.

[29] For this approach, see J.-B. Auby, E. Chevalier, O. Dubos, & Y.Marique (eds.), *Traité de droit administratif transnational* (forthcoming). In a similar sense, see Y. Marique, *"Transnational" Climate Change Law. A case for reimagining legal reasoning?*, 1 French Y.B. Pub. Law 69 (2023).

[30] S. Jolivet, *La transnationalité administrative en matière environnementale*, in J.-B. Auby, E. Chevalier, O. Dubos, & Y.Marique (eds.), *Traité de droit administratif transnational*, cit. at 30.

damage to other States or areas beyond its national jurisdictions[31] – was set forth at the global level in Principle 21 of the Stockholm Declaration on the Human Environment in 1972[32]. The need to prevent and address the consequences of transboundary environmental harm is one of the oldest reasons for transnational administration.

An example of a transnational administrative procedure stems from Principle 19 of the 1992 Rio Declaration, according to which a State shall provide prior notification and consultation with neighbouring States when deciding on activities that may have a significant adverse transboundary environmental effect[33]. This means that the guarantee that a State other than the one that has started an administrative procedure, shall be heard when such a procedure is going to result in the adoption of an administrative act that is going to produce a transboundary harm, has long been recognized[34]. Moreover, the extension of the procedural obligations stemming from States' obligation to prevent transboundary environmental damage has been recognized several times via case law, notably by the International Court of Justice (ICJ)[35].

The United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context, usually referred to as 'the Espoo Convention', from the Finnish town where the Convention was signed in 1991, sets forth a framework of a transboundary

---

[31] U. Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles and Rules*, in D. Bodansky, J. Brunnée, & E. Hey (eds.), *Oxford Handbook of International Environmental Law* (2008), 439.

[32] Stockholm Declaration of 1972 (Declaration of the United Nations Conference on the Human Environment), Report of the Conference A/CONF.48/14/Rev.1

[33] Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I). See also Principle 24 of the Stockholm Declaration of 1972.

[34] See more extensively M. De Bellis & R. Lanceiro, *Les procédures administratives transnationales: principes, taxonomie, problèmes*, in J.-B. Auby, E. Chevalier, O. Dubos, & Y. Marique (eds.), *Traité de droit administratif transnational*, cit. at 30.

[35] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica),* I.C.J. Reports (2015). For a comment, M. Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule*, PluriCourts Research Paper No. 14-17 (August 25, 2014), https://ssrn.com/abstract=2486421

Environmental Impact Assessment (EIA)[36]. The EIA procedure includes an obligation for the State of origin to notify any State which it considers may be affected by the activity as early as possible, the minimum content of such a notification, the time limit for the potentially affected state to respond whether it intends to participate in the EIA, and an obligation for the initiating state to provide sufficient information[37].

Several examples of transnational administrative law mechanisms and procedures, both emerging from international agreements and EU law, will be examined in the contributions of this special issue. However, *environmental* law does not identify with transnational *climate* law. As recently recalled by the ECHR in *Klimaseniorinnen* case, there are key differences of characteristics among the two areas: in the context of climate change, there is no single or specific source of harm, as GHG emissions arise from a multitude of sources and the harm derives from aggregate levels of such emissions, so that the chain of effects is both complex and difficult to predict[38]. Not only there are differences among the two areas, but there can also be contrast between policies adopted for environmental protection and for climate action, to the point that it has been asked whether conflict among them is inevitable[39]. One recently debated case of such clash is the one concerning the construction of renewables plants, which, on the one hand, is essential for GHG mitigation, while, on the other hand, has an impact on landscape.

Nevertheless, fundamental differences among the two areas mean that it would not be adequate to follow an approach consisting in a direct transposal of patterns and mechanisms

[36] On the history of the Espoo Convention, R.G. Connelly, *The UN Convention on EIA in a Transboundary Context: A Historical Perspective*, 19 Env.l Impact Assessment Rev. (1999) 37. For a general overview of thirteen different systems of transboundary environmental impact assessment, see K. Bastmeijer & T. Koivurova (eds.), *Theory and Practice of Transboundary Environmental Impact Assessment* (2008).

[37] Espoo Convention, articles 3-5.

[38] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz And Others V. Switzerland*, cit., paras. 415-422.

[39] O. Woolley, *Climate Law and Environmental Law: Is Conflict Between Them Inevitable?*, in B. Mayer & A. Zahar (eds.), *Debating Climate Law* (2021). For the need of a transition from environmental to ecologic law, K. Anker, P. D. Burdon, G. Garver, M. Maloney, & C. Sbert (eds.), *From Environmental to Ecological Law* (2021).

developed for the purpose of environmental protection to the context of climate change; however, inspiration can be drawn from existing principles and instruments, in building an approach better tailored to address the specific characteristics of climate change. How far can we build on existing patterns of transnational administrative mechanisms for environmental protection in order to address climate change? Or do we need new paradigms? Does transnationality in the climate area follow the same path of the environmental one?

4. The contributions in this special issue

The symposium aims at exploring transnational administrative law mechanisms both stemming from international agreements and established under EU law; moreover, the scope of the special issue extends to how these mechanisms have emerged beyond the EU and it explores whether there is scope for transnationality beyond policy, and more specifically also in climate litigation.

The first contributions in the special issue examine transnational administrative mechanisms under EU law. The article of Rui Lanceiro provides a taxonomy for the different mechanisms of transnational administrative cooperation between States in the environmental field. These mechanisms stem from the duty of inter-State cooperation in environmental matters and cover a wide range of arrangements, ranging from a simple obligation of prior information to specific transnational composite procedures. It shows that the various mechanisms examined may serve as a laboratory to experiment cooperation mechanisms to be exported to other policy areas.

The contribution of Luca De Lucia focuses specifically on transnational acts provided for in legislative measures issued in the EU's environmental policy. The author shows that, in this area, transnational acts have significantly different features from those provided in the context of policies aimed at the establishment and functioning of the internal market. Hence, the concept of transnational acts, far from being unitary, is in fact highly complex and must necessarily also be looked at in the light of the relevant provisions of the Treaty. The author further demonstrates that the importance of these types of acts is bound to grow, also in view of

the European Green Deal, as developments in the area of energy show.

The article of Dario Bevilacqua focuses on one of the main novelty of the European Green Deal: the Carbon Border Adjustment Mechanisms (CBAM), with which the EU imposes a tax on goods produced outside the EU and imported into it, with a high carbon footprint. Besides its impact on decarbonization, as a regulatory tool towards climate neutrality, CBAM can work as a transnational measure, with a potential harmonizing effect, despite its unilateral origin. In this case, trans-nationalization is not the product of cooperation mechanisms or of the adoption of transnational acts, but it could be the result of the potential capacity of the Union to condition global markets with a provision applying also to foreign operators.

With the contribution from Anna Maria Chiariello, the symposium moves from focusing on transnational mechanisms in the EU legal order to the ones set forth in the international one. More specifically, the article focuses on whether and how transnational administrative law could protect biodiversity, identifying the different characteristics and sources of transnational administrative law instruments intended to safeguard biodiversity. In so doing, the article analyzes the interactions between the instruments intended to protect biodiversity and those designed to fight climate change.

The contribution of Jacques Papy offers an examination of transnational administrative law patterns in a regional area different from the one of the EU. It focuses on Ontario's brief participation and sudden departure from the Western Climate Initiative (WCI) common carbon market in 2018, reviewing the mechanisms of cooperation within the WCI framework and the legal repercussions of Ontario's withdrawal. Finally, it draws insights into the dynamics of the WCI cooperative model, highlighting its resilience but also its vulnerability to regulatory risks, which can undermine the stability of the common carbon market.

In the last contribution, I explore the growing body of climate litigation cases that are *strictu sensu* transnational, directed against foreign corporations or foreign governments. In some cases, courts adopted an approach open to reconsider well established principles: in the *Neaubauer* case, the German constitutional court did not rule out the responsibility of Germany

in fulfilling its positive obligations to protect fundamental rights of foreign citizens, while the Inter-American Court on Human Rights and the UN Committee on the Rights of the Child opened to the possibility of diagonal human rights protection in climate litigation. In the recent *Duarte* case, on the contrary, the ECHR declared inadmissible the complaint directed by some Portuguese youths against States other from Portugal, limiting the recognition of the extraterritorial protection of fundamental rights.