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Climate Change in the Courts - Emerging Patterns

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Scoping Climate Change Litigation

- Wifi
- Network: “central”
- U/name: “g004d6788”
- P/w: “j5khvx7f”



Scoping Climate Change Litigation

- The weird and wonderful world of CC litigation
- EU ETS
 - volume of caselaw
 - volume of caselaw
 - MS (Art 230) challenges: zones of contestation
 - Private party (Art 230) challenges - an oddity?
- Emerging typologies



Litigation Typology - Michael Gerrard

Administrative/ Statutory Claims

Statutes requiring government/agencies to take/not action
e.g. EU ETS - challenges to national allocation plans
CAA (US), *Massachusetts v. EPA (2007)*

Common Law Claims

Typically nuisance/tortious or claims otherwise actionable at common law.

Connecticut v. American Electric Power Co. (2006/9)

PIL petitions filed with international commissions
Inuit Petition to Inter-American Commission on HRs
Claims under Kyoto NCP

PIL Claims



Litigation Typology - Tim Stephens

Progressive PIL Claims

Wide(r) availability of public interest litigation
Absence of legislative activity
“Bad judicial regulation might be better than none”

Regressive Claims

Jurisdictional heterogeneity - stymying gaps
Forum shopping (*Swordfish* WTO/LOSC)
EU ETS litigation presumably

Administrative Claims

Kyoto Protocol NCP
Compliance period I end
Canada, Croatia, Greece



Poland v. Commission T-183/07

EU ETS Basics

- DIR 2003/87/EC establishes scheme for GHG emission allowance trading w/i EU
- 5 year periods for which MSs develop NAP (Q of allowances it intends to allocate for the period, and how)
- Based on objective and transparent criteria, inc. those in DIR, taking account of comments of public
- Commission may reject all/aspects of NAP if incompatible with listed criteria
- Allocation cannot commence until Commission approval.



Poland v. Commission T-183/07

- CFI annuls Com Dec of 2007 (Polish/Estonian NAPs incompatible with criteria of DIR)
- Commission had claimed NAPs methods (and therefore data) were unreliable and thereby substituted own.
- Imposed allowance ceilings above which NAPs regarded as incompatible with assessment criteria
- Lowering of NAP emissions by 26.7% and 47.8% annulled.
- Regressive?



Poland v. Commission T-183/07

Article 249 EC

- Form and method for achieving a particular result?
- Freedom of action of MSs as to how to achieve that result
- Burden of proof on Commission



Poland v. Commission T-183/07

Article 5 EC

- Rare reference to Art 5 EC - binding on EU institutions
- Does 'scale' require Community action?
- For Commission to demonstrate the MS freedom of action limited by DIR criteria



Poland v. Commission T-183/07

MS Powers

Arts 9(1), (3) & 11(2)

- Drafting of NAP for MS alone
- Final decision on total Q and allocation for MS alone
- MS enjoys certain room for manoeuvre in choosing methods to attain prescribed result



Poland v. Commission T-183/07

Commission Powers

Arts 9(3)

- Drafting of NAP for MS alone
- Final decision on total Q and allocation for MS alone
- MS enjoys certain room for manoeuvre in choosing methods to attain prescribed result



Poland v. Commission T-183/07

Application

- Mere doubts = exceeding powers
- No power to substitute data from own methodology
- Single (Commission's) methodology?
- Ceilings



Re/Progressive CC Litigation

First Order

- Annulling of significant NAP reductions = regressive

Second Order

- Offset against other 'progressive' norms
 - public consultation rights
 - subsidiarity
 - procedural right to sound administration
 - *locus standi* (and assoc. outputs)



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Conclusion

It's Complex

(doh)