Climate Change Litigation before the Belgian Constitutional Court

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Competences of the Belgian Constitutional Court
• Review of Acts of the Federal and Regional Parliaments
• Against the Constitution, International & European Law
• By way of direct action (6 m)
• In the form of preliminary rulings
• No concrete cases
  (Verfassungsbeschwerde, Amparo...)

  ◦ No discrimination of steel companies comp. with non-ferrous, chemical...
  ◦ First commitment period – largest emitters
  ◦ Climate change policies justify limitations on Freedom of enterprise, Property rights
  ◦ No violation of Freedom of establishment
  ◦ Compare: ECJ, 16 December 2008, Société Arcelor Atlantique and Others

Emission Trading Scheme (1)
• Judgment n° 33/2011, 2 March 2011, twice confirmed – Walloon and Flemish Acts transposing ETS Amendment (Aviation)
   ◦ Federal Government should be involved (regulation of civil aviation, navigation above territorial sea)
   ◦ Acts not respecting territorial limitations of the regions
   ◦ A Co-operation Agreement is necessary
   ◦ Upholding effects of annulled acts to allow for negotiation and conclusion of such an Agreement
   ◦ Has been done (no agreement about repartition of the proceeds..)

Emission Trading Scheme (2)

• Various judgments concerning “green certificates”
   ◦ There is a need to reduce greenhouse gas emissions
   ◦ Support for the development of renewable energy fits in that purpose
   ◦ Width margin of appreciation of the legislators
   ◦ Techniques and related economy is rapidly changing
   ◦ Room for trial-and-error, but respect for principle of legal certainty (investment decisions taken under the previous scheme)

Renewable Energy Support Schemes
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- Fixed administrative fines per missing green certificate (comp. with missing tradable permits in the ETS) not unconstitutional
  - Not only a sanction
  - Also an economic incentive
  - This has an impact on the proportionality test

- Development of off shore wind energy justifies higher support than land based – extra costs

Biofuels and Parking Places

- Obligation to blend fossil fuels with a growing percentage of biofuels
  - No violation of Freedom of religion
  - No violation of various EU directives (Preliminary ruling ECJ)
  - No violation Freedom of enterprise
  - No violation Free movement of goods

- Reduction/limitation of car parking places in the Brussels Capital Region in the framework of environmental permits is justified
Conclusion

- Nearly all cases brought by industry
  - Unhappy with climate change obligations
  - Seeking more support for their type of renewable energy production

- Climate change policy is an overriding public interest, that justifies restrictions on various rights and liberties

- Differences in treatment can relatively easy be justified especially in the earlier stages of policy development

Conclusion

- Emerging climate change law can be construed in a manner that is compatible with fundamental principles of the rule of law

- Constitutional Court is a “negative” legislator – room for positive law making is limited

- No Urgenda type of remedies are available to the Court