

The (limits of) transferability of climate change litigation to Denmark

Sine Rosvig Sørensen and Kateřina Mitkidis***

Abstract

This paper takes the Danish decision to host international highly energy-demanding data centres as a starting point to explore the possibility of bringing successful climate change litigation (CCL) before the Danish courts. We discuss potential legal bases, the rules on standing, and the use of international law in the Danish setting.

Our analysis confirms concerns expressed by others that the transferability of legal arguments and strategies among jurisdictions and the potential of legal win in CCL might be overstated. Instead, we see the largest potential of CCL in its indirect and other-than-legal effects, particularly in constitutionalising the climate change issue and mobilising climate change actions at different levels.

1. Introduction

1.1 Introduction to climate change litigation

Within the past 20 years, there has been an increase in the adopted national, regional, and international laws addressing climate change.¹ This has happened on the background of growing scientific certainty about the causes and ef-

fects of climate change,² leading to an increased sense of urgency to fight the growing average global temperature and the consequences thereof.³ While the scope of the problem is being continuously clarified, the policies and laws often lag behind, unable to capture the complexity, changing nature, and magnitude of the issue.⁴ The intensified regulatory activity on the one hand and the dissatisfaction with its outcomes on the other, prompted litigation 'addressing the causes and consequences of climate change' (climate change litigation, CCL).⁵ CCL may aim e.g. to fill the gaps of the laws, to push for corporate action to tackle climate change, or to pressure

² IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, October 2018, available at: <https://www.ipcc.ch/sr15>, accessed 10 March 2020.

³ The sense of urgency has permeated the general public debate leading to new movements, especially led by the young generation (<https://time.com/person-of-the-year-2019-greta-thunberg/>, accessed 9 January 2020), as well as the political debate (<https://www.euronews.com/2019/05/26/green-wave-has-climate-change-impacted-the-european-elections>, accessed 9 January 2020).

⁴ J Peel, 'Issues in Climate Change Litigation' (2011) 5(1) *Carbon & Climate Law Review* 15, 15. Further on the complexities faced by decision-makers when they (try to) regulate climate change: H M Osofsky, 'The continuing importance of climate change litigation' (2010) 1(1) *Climate Law* 3, 10-11 and 13.

⁵ J Setzer and L C Vanhala, 'Climate Change Litigation: a Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *Wiley Interdisciplinary Reviews: Climate Change* e580, 1.

* PhD fellow at the Department of Law, Aarhus University.

** Associate Professor at the Department of Law, Aarhus University.

¹ United Nations Environment Programme (UNEP), *The Status of Climate Change Litigation – A Global Review*, May 2017, 6; M Nachmany and J Setzer, *Global trends in climate change legislation and litigation: 2018 snapshot*, LSE policy brief, 2.

decision-makers to be more ambitious regarding climate change mitigation and adaptation⁶ – the two last litigation ‘types’ known as ‘strategic CCL’.⁷

While many countries around the globe have already seen such cases,⁸ CCL can still be described as an emerging tendency. With an increasing number of CCL around the world, the Danish government has, so far, not been challenged for non-ambitious climate policy or decisions undermining the achievement of climate goals.⁹ Due to the small size of the country, and an open but relatively small economy, the country’s contribution to global climate change remains also limited. Moreover, Denmark has been intensively developing renewable energy production and stands, in general, at the forefront of the EU’s climate action ambition.¹⁰

Yet, the country has been pursuing some policies and adopting some decisions that are controversial from a climate point of view. One of the recent controversial decisions is to host highly energy-demanding international data

centres of tech giants such as Apple, Facebook, and Google.¹¹

There are strong indications that the newly built data centres will increase the use of electricity in Denmark considerably, thus endangering the achievement of Denmark’s 2030 goals regarding greenhouse gas (GHG) emission reductions and the share of energy from renewable sources in the total energy mix. Despite this, Danish (local and state) authorities have permitted the construction and operation of several data centres in Denmark and attempt to attract more data centres to the country.¹² In this way, Denmark is potentially opening up to a threat of CCL, similar to cases seen in, for example, Austria¹³ and the Netherlands.¹⁴

1.2 Aim of the paper

Though the number of CCL grows globally, there have only been few cases decided in favour of a stronger climate change response (especially true for strategic CCL). Procedural rules, the political question doctrine, and rules related to the causal relationship between the challenged activity and suffered damage have been some of

⁶ UNEP, n 1, 6. It must be noted, that there is a considerable amount of case law, namely in the EU and the USA, where climate change policies and laws are challenged for being too ambitious/stringent/disproportionate (occasionally referred to as ‘negative’ CCL). Usually, such claims are brought by corporate entities having interest in lowering the burden imposed on them by national climate change laws and policies. These cases form a separate group of CCL that will not be considered in this paper.

⁷ J Setzer and R Byrnes, *Global trends in climate change litigation: 2019 snapshot*, LSE policy report, 2 (2019), available at: <http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/> (‘LSE 2019 snapshot’).

⁸ LSE 2019 snapshot, 3.

⁹ LSE 2019 snapshot, 3 and 5.

¹⁰ In December 2019, the Danish government has reached a broad agreement on the adoption of a new Climate Act with the goal of 70% reduction in CO₂e emissions by 2030 in comparison to the 1990 levels.

¹¹ F O’Sullivan, ‘Denmark’s Carbon Footprint Is Set to Rise Sharply’, CITYLAB, 25 June 2018, <https://www.citylab.com/environment/2018/06/denmarks-carbon-footprint-is-set-to-rise-sharply/563486/> accessed 31 January 2020.

¹² See further in section 2.2.1 below.

¹³ Austria’s Federal Administrative Court, BVwG Wien, W109 2000179-1/291E, 2nd of February 2017 (‘Vienna Airport, first instance’) and Austria’s Constitutional Court, VfGH E 875/2017-32, E 886/2017-31, 29th of June 2017 (‘Vienna Airport, second instance’).

¹⁴ *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015), the Hague District Court (‘Urgenda, first instance’) (upheld by the Hague Court of Appeal, ECLI:NL:GHDHA:2018:2610, 9 October 2018 (‘Urgenda, second instance’), and the Supreme Court, ECLI:NL:HR:2019:2007, 20 December 2019 (‘Urgenda, third instance’)) (altogether as the ‘Urgenda case’).

the major hinders to overcome.¹⁵ Yet, inventive legal strategies of the plaintiffs and the existing successes¹⁶ have sparked hopes for their transferability to other jurisdictions. Legal scholars have engaged in this transferability discussion, pointing to both the possibilities and limitations.¹⁷ Non-governmental organizations (NGOs), legal practitioners, and the public (especially the young generation) have also shown interest in borrowing legal arguments and strategies across borders, and consequently, more CCL is initialized in various jurisdictions.¹⁸

By exploring the possibility of commencing a CCL before the courts in Denmark and the prospect of its successful outcome, this paper adds to the discussion on the transferability of legal strategies used in CCL among jurisdictions. We take the two above-mentioned cases – the *Urgenda* and *Vienna Airport* cases – and examine the transferability of selected legal argu-

ments and strategies of the parties to the Danish context in order to assess whether such litigation would be feasible in Denmark. To keep the discussion focused and topical, we build the analysis around the example of the decision to attract and host major international data centres (also termed ‘hyperscale data centres’) in Denmark.

2. Setting the scene

Before analysing the possibility of commencing a CCL in Denmark, we firstly introduce the country’s climate policy, hyperscale data centres, and the predictions in respect to the effects hyperscale data centres will have on the country’s climate and energy goals.

2.1 Introduction to the Danish climate policy

Denmark is a small Nordic country with a reputation of being climate and sustainability conscious.¹⁹ The Danish climate policy comprises of climate goals decided at multiple levels. A substantial part of the Danish climate change policy is stipulated at the European Union (EU) level. Of particular importance are the targets regarding GHG emission reductions (‘climate targets’) outlined in the effort sharing legislation (ESD and ESR)²⁰ and the targets regarding the

¹⁵ These questions have been discussed in most of the CCL cases, including *Greenpeace Nordic Ass’n and Nature and Youth v. Ministry of Petroleum and Energy*, 16-166674TVI-OTIR/06 (upheld by the appeal court, Borgarting Lagmannsrett, 23 January 2020, 18-060499ASD-BORG/03); *Thomson v. Minister for Climate Change Issues*, [2017] NZHC 733; and cases in the USA supported by the Our Children’s Trust, <https://www.ourchildrenstrust.org/juliana-v-us> accessed 9 January 2020.

¹⁶ E.g. *Urgenda* case; *Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/201; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

¹⁷ See e.g. G Corsi, ‘The New Wave of Climate Change Litigation: a Transferability Analysis’, ICCG Reflections No59/October 2017; S Roy and E Woerdman, ‘Situating *Urgenda v the Netherlands* Within Comparative Climate Change Litigation’ (2016) 34(2) *Journal of Energy & Natural Resources Law* 165.

¹⁸ E.g. the plaintiffs in the *Friends of the Irish Environment v. Ireland* case state on their website that ‘This case is inspired by other climate cases globally, including for example a case brought by an NGO and 900 Dutch citizens who filed a successful case against the Dutch Government (*Urgenda* case)’, <https://www.climatecaseireland.ie/climate-case/#documents> accessed 9 January 2020. See also Greenpeace Climate Justice and Liability Campaign, *Holding your Government Accountable for Climate Change: A peoples’ Guide* (2018).

¹⁹ The SDG Index and Dashboards Report 2018, available at <https://sdgindex.org/reports/sdg-index-and-dashboards-2018/>, accessed 16 January 2020.

²⁰ Decision No 406/2009/EC of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community’s greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136, (‘ESD’), Article 3(1) and Annex II, and Regulation (EU) 2018/842 of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, p. 26 (‘ESR’), Article 4(1) and Annex I. The ESD and the ESR regulate EU Member States’ GHG emissions from non-ETS sectors (sectors not covered by Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ L

increase in the share of energy from renewable sources in the total energy consumption ('energy targets').²¹ Moreover, Danish climate change policy is influenced by internationally determined goals and ambitions, as Denmark is a party to the UN Framework Convention on Climate Change (UNFCCC),²² the Kyoto Protocol (KP),²³ and the Paris Agreement (PA).²⁴

Under the ESD and ESR, Denmark is obligated to reduce its GHG emissions from non-ETS sectors by 20% by 2020,²⁵ and by 39% by 2030²⁶ compared to 2005 emission levels.²⁷ Regarding the energy targets, Denmark must ensure that by 2020 30% of the total Danish energy consumption is covered by energy from renewable sources.²⁸ In June 2018, the former Danish government and all the parties of the Danish Parliament adopted an Energy Agreement, which contains a target of achieving a share of renewable energy of (approximately) 55% by 2030.²⁹

The Danish Energy Agency (DEA) has estimated that Denmark will meet and exceed its

climate and energy targets for 2020,³⁰ but most likely fail to deliver on the national 2030 targets.³¹ Still, Denmark has the potential to remain at the forefront of the EU climate ambition but to maintain this status and to achieve its climate and energy targets for 2030 the country must adopt further measures.

2.2 Data centres in Denmark

A hyperscale data centre is a big facility housing a large number of computer servers. It can supply data services, e.g. cloud computing solutions, to the whole world provided that the data centre has access to adequate electricity supplies and optical fibre connections.³² In Denmark, three hyperscale (and multiple smaller) data centres are expected to be in operation by the end of 2021.³³

Hyperscale data centres have an average capacity of 150 MW per data centre.³⁴ The Danish green think tank CONCITO estimated that the yearly energy consumption of Facebook's data centre near Odense would be 1.3 TWh, corre-

275, 25.10.2003, p. 32 (EU ETS)) for the periods 2013-2020 and 2021-2030, respectively.

²¹ Renewable Energy Directives no. 2009/28/EC (OJ L 140, 5.6.2009, p. 16), stipulating targets for 2020, and no. (EU) 2018/2001 (OJ L 328, 21.12.2018, p. 82), stipulating targets for 2030 (RED).

²² United Nations Framework Convention on Climate Change, 1771 UNTS 107.

²³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997.

²⁴ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015.

²⁵ ESD Article 3(1) and Annex II.

²⁶ ESR Article 4(1) and Annex I.

²⁷ Furthermore, the Danish industries covered by the EU ETS must comply with the ETS directive. However, the EU ETS does not contain any specific GHG emission reduction targets for Denmark as the emission reductions achieved through the ETS are set and controlled at the EU level.

²⁸ RED Article 3(1) and Annex I, part A.

²⁹ <https://en.efkm.dk/energy-and-raw-materials/energy-proposal/>, accessed 10 March 2020.

³⁰ Danish Energy Agency (DEA), Denmark's Energy and Climate Outlook 2019, October 2019 (DECO 2019), 59. See also European Environment Agency (EEA) report no. 16/2018, Trends and projections in Europe 2018 – Tracking progress towards Europe's climate and energy targets, 26-27 and 39 (2018).

³¹ DECO 2019, n 30, 19 and 62. For instance, Denmark will be ca. 14% short of its non-ETS climate targets for 2030.

³² DEA, Denmark's Energy and Climate Outlook 2018: Baseline Scenario Projection Towards 2030 With Existing Measures (Frozen Policy), July 2018 (DECO 2018), 23; COWI (for the DEA), Temaanalyse om store datacentre, February 2018, 9.

³³ Facebook has opened a data centre near Odense in September 2019. Apple is currently constructing a data centre near Viborg. Moreover, Google has acquired a plot of land near Fredericia to build a data centre. For a map of data centres in Denmark, see <https://datacenterindustrien.dk/data-center-map/>, accessed 14 January 2020.

³⁴ DECO 2018, n 32, 23; COWI, n 32, 12.

sponding to the yearly energy consumption of 330,000 households.³⁵

2.2.1 Predictions about implications of data centres for Danish climate and energy targets

The DEA has estimated that the Danish gross energy consumption and final energy consumption will increase from 2020 to 2030.³⁶ One of the key factors in causing this increase is the hyperscale data centres, which are estimated to account for 15% of the total Danish electricity consumption in 2030.³⁷ In its 2018 report, the DEA estimated that the increase in gross energy consumption would raise the usage of fossil fuels for energy production after 2021, which would in turn increase the Danish GHG emissions (unless new measures to counter this development were implemented).³⁸ This estimation has been toned down in the DECO 2019 report, expecting 'that consumption of fossil fuels by industry and services will fall up to 2024 and then level off.'³⁹

Yet, these numbers are only estimates based on multiple assumptions, such as the 'frozen policy scenario'⁴⁰ and, thus, subject to significant uncertainties. However, they highlight that the introduction and operation of hyperscale data centres in Denmark pose insecurity about Denmark's ability to meet its climate and energy

targets for 2030 unless new measures are introduced.⁴¹

Despite the outlined negative influence of hyperscale data centres on the achievement of the climate and energy targets, Denmark has been welcoming them. The mayors of the municipalities that are hosting the three planned hyperscale data centres have expressed great excitement about the development, and highlighted the promise of new jobs and a boost to the local businesses.⁴² However, not only the municipalities try to attract data centres to Denmark. The Ministry of Foreign Affairs of Denmark has also been an active player in catching the attention of the tech giants. On its website, the Ministry tries to secure the choice of Denmark as a location for new data centres by listing the advantages of choosing Denmark. These advantages include among others a reliable power grid, a mild climate that allows low-energy cooling all year round, and 72% of power supply from renewable energy sources.⁴³ In the course of time, however, it might no longer be possible to guarantee some of these listed advantages due to global warming effects and Denmark's inability to achieve its climate and energy targets.⁴⁴

³⁵ Statement of director of CONCITO, Torben Chrintz, to the Danish newspaper *Information*, 6 October 2016, <https://www.information.dk/indland/2016/10/facebook-datacenter-bruge-el-svarende-330000-husstande>, accessed 18 July 2019.

³⁶ DECO 2019, n 30, 21-22.

³⁷ DECO 2019, n 30, 23-24; see also Denmark's Draft Integrated National Energy and Climate Plan under the Regulation of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action, Ares(2019)16924, 3 January 2019, 76.

³⁸ DECO 2018, n 32, 21-22, 29-30 and 57-58.

³⁹ DECO 2019, n 30, 35.

⁴⁰ See DECO 2019, n 30, 11; and DECO 2018, n 32, 11.

⁴¹ DECO 2019, n 30, 57; and specifically, regarding the energy targets, see analysis from The Danish Council on Climate Change (Klimarådet), *Store datacentre i Danmark*, 6 (2019).

⁴² See e.g. statement to national media regarding Google's data centre in the Fredericia municipality: <https://www.jv.dk/erhverv/Nyt-gigacenter-Google-opfoerer-datacenter-til-45-milliarder-ved-Fredericia/artikel/2663647>, accessed 14 January 2020.

⁴³ The Ministry of Foreign Affairs of Denmark, <https://investindk.com/set-up-a-business/cleantech/data-centers> accessed 14 January 2019.

⁴⁴ We nevertheless acknowledge that from a global climate change perspective, Denmark is a better solution for placement of data centres than other locations where the share of renewable energy is not that high or the climate so mild, and where the operation of data centres would, thus, entail higher GHG emissions than what will likely be the case in Denmark.

2.3 Notes on methodology

This paper discusses potential CCL in the Danish context. In our analysis, we focus on the possibility to bring CCL before the Danish courts. However, it should be noted that Denmark has a tradition for establishing specialised administrative appeals boards within many areas of administrative law, including environmental law.⁴⁵ The administrative appeals boards deal with and review administrative decisions brought before them by plaintiffs⁴⁶ and may, thus, be a relevant avenue for some types of CCL. Such tradition for administrative appeals boards may not be common in many other jurisdictions. In order to add a relevant contribution to broader discussions on transferability among jurisdictions, we have therefore chosen to focus on the court system.

To keep the analysis relevant, we chose to work with a fictitious scenario – a case against the public authorities' decisions and actions to host hyperscale data centres. We have selected two court cases from other jurisdictions, which guide our analysis and help us to structure the discussion. However, we do not employ a traditional comparative methodology, as no strategic CCL, in fact, exists in Denmark. Rather, taking the Danish perspective, we present a positivistic view on climate litigation cases in other jurisdictions and the feasibility of their transfer to the Danish context.

The chosen cases are the *Urgenda* and the *Vienna Airport* cases.⁴⁷ Both are from EU Mem-

ber States, i.e. states that are under the same EU climate change law as Denmark, though the national climate and energy goals differ. In both cases, it is a state agency/authority that is sued, which would also be the case in our data centres scenario. Furthermore, each of the cases bears a specific relevance to our research.

The choice of the *Urgenda* case is rather straightforward. The case has been labelled a 'global precedent',⁴⁸ suggesting its transferability to other jurisdictions. It should be noted that in this context precedent is not understood as a court decision that must be followed by courts in the same jurisdiction, but more broadly as 'a previous judicial decision that has normative implications beyond the context of a particular case in which it has been delivered.'⁴⁹

In the *Urgenda* case, the plaintiffs (the *Urgenda* Foundation) challenged the Dutch government claiming that its unambitious climate policy exposes Dutch citizens to foreseeable harm, as it is insufficient to prevent dangerous climate change. The legal basis for the claim is found in the Dutch Civil Code/tort law and firmly rooted in Dutch case law concerning the state's duty of care. However, the plaintiffs used international law – both written law and principles of law – to fill in the abstract concept of the national legal obligation of duty of care. The case was famously decided in favour of the plaintiffs in 2015 by the Hague District Court. Subsequently the decision was confirmed in 2018 by the Hague Court of Appeal and in 2019 by the Dutch Supreme Court, both finding that the legal basis for the claim can be deduced directly from the European Convention on Human Rights (ECHR).⁵⁰

⁴⁵ European e-justice portal, Access to justice in environmental matters – Denmark ('European e-justice portal'), II. Judiciary, available at https://beta.e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?DENMARK&member=1#II, accessed 11 March 2020.

⁴⁶ European e-justice portal, n 45, II. Judiciary. For more on appeals boards, see section 3.1.2.4.

⁴⁷ In relation to both cases, we have worked with the English translations available at <http://climatecasechart.com> accessed 30 March 2020.

⁴⁸ Roy and Woerdman, n 17, 166.

⁴⁹ J Komarek, 'Reasoning with Previous Decisions' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012) 67.

⁵⁰ See further section 3.1.

While the *Urgenda* case does not deal with an administrative decision as we do in our studied data centres scenario, there are interesting aspects seen from the Danish point of view. One is the treatment of international law within national litigation and the fact that it is even used as a legal basis for the case. Another is the question of the standing of an NGO. Possibly the most resonating outcome of the case is the understanding of the state's duty to protect its citizens against the harmful consequences of climate change as a legal obligation stemming directly from international human rights law, and not only as a legal obligation stemming from national law, a political/policy question, or a moral obligation.

The other selected case – the *Vienna Airport* case – then bears many factual similarities to our hypothetical scenario. In this case, an administrative decision allowing a construction project was under adjudication. Concerned citizens and NGOs challenged the approval of the Lower Austrian government to build a third runway at the Vienna-Schwechat Airport. The plaintiffs used arguments rooted in both national and international law. The Austrian Federal Administrative Court ruled in 2017 in favour of the plaintiffs, after it engaged in a detailed balancing exercise according to § 71 (1), (2) of the Austrian Aviation Act between the economic benefits and the negative environmental impacts of the third Vienna Airport runway. The same year, the decision was overruled by the Austrian Constitutional Court, which found that the decision in the first instance 'involved climate protection and land consumption in an unconstitutional way in its weighing of interests.'⁵¹

The first of the major similarities of the *Vi-*

enna Airport case to our scenario is the use of administrative law as a legal basis for CCL. As Danish courts are traditionally reluctant to decide on matters deemed to belong to the legislator⁵² and to review the discretionary elements of administrative authorities' decisions, the ruling of the Austrian Constitutional Court may prove to be a similarity between the *Vienna Airport* case and the scenario studied in this paper. The second similarity is that the question of standing of the respective plaintiffs is answered before engaging with the facts of the case. The third one then is the refusal of the Austrian Constitutional Court to consider international law as a source of direct obligations within the national context and as a source of interests to be balanced by an administrative body. This would likely resonate with the opinion among the Danish judiciary.

The *Vienna Airport* case is not as prominent in the CCL academic and popular discourse as the *Urgenda* case is, but has still been discussed in multiple academic publications.⁵³

Thus, the selection of cases was guided by the geographical and jurisdictional closeness to Denmark, the prominence of the cases within international CCL discourse, the factual relevance and similarity to the studied scenario, and the accessibility of the relevant case documents.

⁵² M Wind, 'Do Scandinavians Care About International Law? A Study of Scandinavian Judges' Citation Practice to International Law and Courts' (2016) 85 *Nordic Journal of International Law* 281, 286.

⁵³ See e.g. B Hollaus, 'Austrian Constitutional Court: Considering Climate Change as a Public Interest is Arbitrary – Refusal of Third Runway Permit Annulled' (2017) 11(3) *Vienna Journal on International Constitutional Law* 467; J Peel and H M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37.

⁵¹ Constitutional Court President Gerhart Holzinger, <https://www.reuters.com/article/flughafen-wien-court-idUSL8N1JQ1X1>, accessed 10 March 2020.

3. Analysis

3.1 Legal basis

Identifying the right legal basis is crucial for a successful legal claim. It determines the procedural rules that apply to the specific situation and the scope of the parties' arguments. Various legal bases have been used for pursuing climate change mitigation goals in courts. The selection of the legal basis/bases depends on the specific characteristics of the legal order in which the proceeding takes place as well as on the outcome and/or remedy the plaintiffs seek. There are three broad groups of legal bases used most frequently within CCL: constitutional claims, including human rights-based claims, administrative claims, including planning law and industrial permissions-related claims, and private law claims, including tort law claims.⁵⁴ However, the legal basis is considerably nuanced in every single case, as will be shown below.

3.1.1 Constitutional claim/human rights-based claim

The *Urgenda* case is often classified as a tort law case, but can also be categorized as a constitutional (human rights-based) claim. The plaintiffs relied on several legal stipulations in their petition. Firstly, they purported that the state failed to protect the environment and thus keep the country habitable. This obligation stems from Article 21 of the Dutch Constitution. The state's failure amounted to, according to the plaintiffs, hazardous negligence, thus breaching the state's duty of care which is established in Book 5, Section 37 and Book 6, Section 162 of the Dutch

Civil Code. Both the constitutional and the tort law duty of care of the state is worded vaguely, and thus the plaintiffs relied on written and customary international law to detail the vague language. According to the plaintiffs, the state's climate policy breached Articles 2 and 8 of the ECHR, was against the 'no-harm' principle, and was not in line with the Dutch obligations under the UNFCCC and the PA. While the Hague District Court agreed with the plaintiffs that international law can be used as an interpretational tool when concretizing obligations under national law,⁵⁵ it also declared that the plaintiffs could not derive any positive obligations of the state towards them from international human rights law. Moreover, the Court based this part of the decision on the lack of standing under ECHR Article 34.⁵⁶ The latter assessment was amended by the Hague Court of Appeal, which grounded their reasoning directly on ECHR Articles 2 and 8. The Court stated that '[...] the State has a positive obligation to protect the lives of citizens within its jurisdiction under ECHR Article 2, while Article 8 creates the obligation to protect the right to home and private life [...] If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.'⁵⁷ Furthermore, the Court of Appeal stated that the conditions for standing in ECHR Article 34 only apply to the access to the European Court of Human Rights (ECtHR), but they are not applicable to the access to Dutch courts.⁵⁸

The decisions in the *Urgenda* case have been taken as evidence of the 'human rights turn'⁵⁹ in

⁵⁴ M Clarke et al., 'Climate change litigation: A new class of action', White&Case, 13 November 2018, available at <https://www.whitecase.com/publications/insight/climate-change-litigation-new-class-action>, 4 February 2020; for other classification see e.g. M Dellinger, 'See You in Court: Around the World in Eight Climate Change Lawsuits', 42(2) William & Mary Environmental Law and Policy Review 525.

⁵⁵ *Urgenda*, first instance, paras. 4.43 and 4.46; this use of international law is detailed further below in section 3.3.

⁵⁶ *Urgenda*, first instance, paras. 4.42 and 4.45.

⁵⁷ *Urgenda*, second instance, para. 43.

⁵⁸ *Urgenda*, second instance, para. 35. This has been confirmed by the Supreme Court, *Urgenda*, third instance, para. 5.9.3.

⁵⁹ Peel and Osofsky, n 53.

climate litigation cases, i.e. basing claims in CCL on national and international human rights instruments.⁶⁰ Corsi perceives the use of human rights claims as highly transferable among jurisdictions.⁶¹ He purports that environmental rights are protected in constitutions of over 100 countries globally, although in various degrees of concretization.⁶² As one of the most active NGOs in the area, Greenpeace also considers human rights as an especially viable tool for bringing CCL against national governments.⁶³ It is thus relevant to consider this avenue in our scenario.

Originating in 1849 and last amended in 1953, the Danish Constitution does not guarantee the protection of citizens' environmental rights.⁶⁴ Therefore, we are not likely to see truly constitutional CCL in Denmark. However, Denmark is a party to the ECHR. As such, there is a theoretical possibility to use the construction of state's duty of care stemming from ECHR Articles 2 and 8, as found by the Court of Appeal and the Supreme Court in the *Urgenda* case, to build up a human rights-based claim. However, this avenue may face the question of Danish sovereignty in general and the question of the position of international law within the national legal system especially.

The Danish legal system is dualistic.⁶⁵ Thus, international law is not part of it unless it is incorporated by the Danish legislator into Danish law. The dualistic character of the Danish legal

system is somehow relaxed by an unwritten principle of the so-called 'rule of interpretation', according to which 'Danish law – to the fullest extent possible – is to be interpreted in accordance with Denmark's obligations under international law.'⁶⁶ However, once an international convention is incorporated into the national legal system, it is to be applied by the courts as an integral part thereof. The ECHR was incorporated into the Danish legal order in 1992.⁶⁷ As such, it is directly applicable. However, building our scenario case primarily on the ECHR would face several obstacles.

Firstly, Danish courts would need to accept the existence of the state's duty of care. While the ECHR has been a part of the Danish legal order for years, Danish courts have been reluctant to set aside public decisions that could breach the Convention, where there is no corresponding case law from the ECtHR.⁶⁸ While the ECtHR has interpreted the Convention as providing a gradually higher degree of environmental protection, the link to states' climate policies have not yet been discussed. Thus, the Danish courts would most likely not deliver such an independent interpretation of the ECHR.

Secondly, a specific right that is being breached would need to be identified. This would likely be the broad right to life secured by Article 2(1) of the ECHR stating that '[e]veryone's right to life shall be protected by law. [...]'. According to the ECtHR, the article provides both positive

⁶⁰ Setzer and Vanhala, n 5, 10-11.

⁶¹ Corsi, n 17, 4-5.

⁶² Corsi, n 17, 4-5.

⁶³ Greenpeace, n 18.

⁶⁴ The Constitutional Act of Denmark of 5 June 1953, available in English at http://www.stm.dk/_p_10992.html, accessed 4 February 2020.

⁶⁵ Justitsministeriet, Betænkning om inkorporering mv. inden for menneskeretsområdet, Betænkning nr. 1546, available at <http://www.justitsministeriet.dk>, accessed 2 October 2019.

⁶⁶ Supreme Court of Denmark, ACA Europe seminar – December 18, 2013, Notes on the hierarchy of norms, 3, available at <http://www.aca-europe.eu/seminars/Paris2013bis/Danemark.pdf>, accessed 17 January 2020; Justitsministeriet, n 65, 47; J Christoffersen and M R Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights' (2011) 80(3) *Nordic Journal of International Law* 257, 265.

⁶⁷ Lovbekendtgørelse 1998-10-19 nr. 750 om Den Europæiske Menneskerettighedskonvention.

⁶⁸ Betænkning nr. 1220/1991 om Den Europæiske Menneskerettighedskonvention og dansk ret, 3.9.

and negative obligations of the state. The positive ones being: '(a) the duty to provide a regulatory framework; and (b) the obligation to take preventive operational measures.'⁶⁹ However, the state is only obliged to take a positive action if it knows or ought to have known at the time of 'the existence of a real and immediate risk to the life' and if the positive action does not place an 'impossible or disproportionate burden on the authorities'.⁷⁰ As the choice of operational measure is left to the individual state, the Danish state would possibly claim to take preventive measures in the climate change area through its strong climate policy (in line with and even exceeding EU climate goals), climate law,⁷¹ and other specialized laws. Any substantial negative impact of its decision to host hyperscale data centres on its ability to achieve the policy goals would only be obvious in the future, thus posing a question mark to the requirement of a 'real and immediate risk' to life. The Court of Appeal decided on this issue in the *Urgenda* case and found that the dangerous situation caused by climate change is imminent.⁷² The legal analysis was, however, different in the judgement of the Borgarting Court of Appeal in Norway.⁷³ This was a case on the legality under ECHR Article 2 of granting new oil drilling licenses in 2016. The court concluded that the decision to issue the oil licenses itself cannot be found to pose a 'real and imme-

diate risk' to life. We expect that a Danish court would rule in line with its Norwegian counterpart. We base this expectation on the documented lack of internalization of international human rights law in Scandinavian countries⁷⁴ as well as the factual difference of challenging the whole national climate policy, as done in the *Urgenda* case, and challenging a specific decision, as done in the Norwegian and our scenario cases. This discussion leads to the third issue – the causality and cross-temporal challenges.⁷⁵

The causality challenge in human rights-based strategic CCL is a well-known obstacle.⁷⁶ The plaintiffs need to prove the causal link between the governments' action/inaction and the negative impact on a specific human right. In our scenario, we would thus need to prove the causal link between the decision of the Danish state and/or its institutions/bodies to host hyperscale data centres and an appropriate right based in the ECHR, probably the right to life. The right to life as understood under the ECHR encompasses the right of individuals to be protected against negative environmental impacts caused by human activities.⁷⁷ However, if the state is challenged on its decision to host hyperscale data centres, it may furnish an argument that the decision is only a part in its economic, social, and environmental policies, and that its negative impact on the right to life must be seen in the context of other state obligations. If any such decision is interpreted as breaching the right to life, it could open up floodgates for cases against most of the state's decisions. A possible distinction can be drawn in this regard between the *Urgenda* case and our scenario. The *Urgenda* Foundation challenged the broad Dutch climate policy goals affecting the state and its citizens

⁶⁹ Council of Europe/ECtHR, Guide on Article 2 of the European Convention on Human Rights – Right to life, 2019, 8.

⁷⁰ ECtHR, *Osman v. the United Kingdom*, § 116.

⁷¹ The Danish Climate Change Act, Act No. 716 of 25 June 2014. The Act established an independent, academically based Climate Council and the obligation to annually prepare a Climate Policy Report by the Danish government, see B E Olsen and H Tegner Anker, 'Nordic countries: A. Denmark' (2016) 25(1) *Yearbook of International Environmental Law* 347. A new and more ambitious Climate Act is planned to be adopted within 2020.

⁷² *Urgenda*, second instance, para. 71.

⁷³ *Greenpeace Nordic Ass'n and Nature and Youth v. Ministry of Petroleum and Energy*, n 15.

⁷⁴ Wind, n 52, 282.

⁷⁵ Setzer and Vanhala, n 5, 10.

⁷⁶ Setzer and Vanhala, n 5, 10.

⁷⁷ Council of Europe/ECtHR, n 69, 11 et seq.

as a whole, while we work with only one decision that can be seen as a part of broader state policies. A counter-argument would have to be based upon the severity of the impact on the right to life. Climate change is happening and is threatening human survival and every contribution to it counts. As the court in *Urgenda* puts it: 'The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emissions contribute to climate change.'⁷⁸ The courts in all instances then refused the state's argument regarding the 'waterbed effect' and 'carbon leakage.'⁷⁹ However, even if the causality is established, we could still hit the wall of the cross-temporal challenge, which captures the difficulties with overcoming the time-span between cause and effect. Most climate-related impacts on the right to life are only predicted, as they are to appear in a (relatively distant) future. This might in itself not be a hurdle for the application of ECHR Article 2, since the ECtHR acknowledged that the article also covers risks that may materialize in a longer term; however, the risks must be rather concrete.⁸⁰ The risks to life that would materialize through the aggravation of a global climate change stemming from a decision to host hyperscale data centres on Danish territory will most probably not fulfil this requirement. Both the global advantages of placing such data centres in a cooler location with possible available sources of renewable energy and the quickly advancing technological progress will most certainly be

⁷⁸ *Urgenda*, first instance, para. 4.90; this reasoning was confirmed by the Court of Appeal and developed further by the Supreme Court (*Urgenda*, third instance, paras. 5.7.6 and 5.7.7).

⁷⁹ *Urgenda*, first instance, para. 4.81 and *Urgenda*, second instance, para. 56. See also similarly, *Gloucester Resources Limited v. Minister for Planning*, NSWLEC 7, 2019, paras. 534-545.

⁸⁰ ECtHR, 30 November 2004, no. 48939/99 (*Öneryildiz/Turkey*), paras 98-101.

taken into consideration. Thus, we are looking not solely for preventive, but also precautionary measures. While the obligation of the state to take action even if the materialization of the danger in question is not certain has been recognized by the ECtHR case law on some occasions,⁸¹ in most cases, precautionary measures are not required by the court. As such, they would most probably not be required by Danish courts either.

To summarise, while it is theoretically possible to base CCL in the data centres scenario on the ECHR, as the convention has been incorporated into Danish law, there are several obstacles to the success of such a case. Firstly, the national courts are known to be reluctant to extend the interpretation of the ECHR beyond interpretation confirmed by the ECtHR.⁸² Secondly, the right to life as secured by the ECHR is arguably protected by the national climate change policy and law, which forces us to view the decision to host hyperscale data centres in a broader context. Thirdly, the decision is interrelated with other national policies and measures in environmental, social, and economic areas, making it difficult to ascertain the causal relationship between this decision and the negative impact on the right to life of Danish citizens.

3.1.2 Administrative claim

The *Vienna Airport* case is an example of CCL based in administrative law. In this case, the plaintiffs challenged the administrative approval (issued by the Lower Austrian government) to construct the third runway at the Vienna-Schwechat Airport. The plaintiffs claimed that the deciding authority failed to balance the public eco-

⁸¹ ECtHR, 30 November 2004, no. 48939/99 (*Öneryildiz/Turkey*), paras 98-101; ECtHR 20 March 2008, no. 15339/02 (*Budayeva et al./Russia*), paras. 147-158; ECtHR, 28 February 2012, no. 17423/05 (*Kolyadenko et al./Russia*), paras. 165 and 174-180.

⁸² Christoffersen and Madsen, n 66, 271.

conomic interest in the construction against 'other public interests' as they were required to by § 71 (1), (2) of the Austrian Aviation Act. When defining the 'other public interests', the plaintiffs and the court of the first instance used various sources of law, including international (the PA), European (the Charter of Fundamental Rights Article 37), and national law (the Climate Protection Act, national and state constitutions).⁸³

In the first instance, the Federal Administrative Court carefully weighted the various public interests against each other, especially noting the urgency of the climate protection measures in light of Austria's international commitments. It ruled that the public interests with respect to the environment (and public health) outweighed the public economic interests and decided in favour of the plaintiffs.⁸⁴

However, the decision was soon annulled by the Austrian Constitutional Court. The Constitutional Court did not dispute that a balancing exercise is necessary in order to issue a permit for the airport enlargement. At the same time, it ruled that the weighted interests are to be found exclusively within the Aviation Act.⁸⁵ As the Aviation Act was adopted in 1957, it does not include environmental (climate) interests to be considered in the balancing exercise but refers to economic interests only. The Constitutional Court also refused that constitutional norms, such as the Federal Constitutional Act on Sustainability,⁸⁶ could be used to read 'other public interests' into the Aviation Act. The Constitutional Court ruled that such norms, external to the Aviation Act, could only be used to inter-

pret environmental interests-related provisions already existing in the Aviation Act.⁸⁷ This reasoning was quite surprising,⁸⁸ inter alia because the court basically undermined its law interpretation powers.

Using administrative law as a legal basis could potentially be a good avenue in our scenario. In relation to the administrative procedures of permitting the construction and operation of a hyperscale data centre in Denmark, we identify three decisions that could involve climate change considerations and which could be challenged; (i) adoption/amendment of the local and/or municipal plan, (ii) environmental assessment of the local/municipal plan, and (iii) environmental assessment, including a subsequent development consent, of the specific project of building a data centre.

3.1.2.1 *Planning law*

First, we examine whether the planning decisions related to the construction and operation of a data centre could be challenged in court for the lack or inadequate consideration of climate change impacts.

Under Danish law, the construction of such a large project usually requires an adoption or amendment of the local plan for the area in which the project is to be located⁸⁹ and, sometimes, even an amendment of the municipal plan.⁹⁰ Ac-

⁸³ *Vienna Airport*, first instance, part 4.5.1.

⁸⁴ *Vienna Airport*, first instance, Ruling.

⁸⁵ *Vienna Airport*, second instance, part 4.

⁸⁶ Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Water and Food Supply Safety and Research, BGBl. I No. 111/2013, 11 July 2013.

⁸⁷ G Kirchengast, V Madner et al., 'VfGH behebt Untersagung der dritten Piste' (2017) 6 *Recht der Umwelt* 252, 258.

⁸⁸ Hollaus, n 53.

⁸⁹ The Planning Act Section 13(2). For instance, 'Permits under the Building Act [...] cannot be given until the local plan has been finally adopted or approved', cf. E M Basse, *Environmental Law in Denmark* (2nd ed., DJØF Publishing, 2015), 413.

⁹⁰ Local plans must comply with the overall framework of the municipal plan but only local plans are directly binding towards the citizens of the municipality. See H Tegner Anker, 'Planloven med kommentarer' (Jurist- og Økonomforbundets Forlag, 2013), 337.

ording to Section 1 of the Danish Planning Act, both the municipal and local planning should synthesize public interests into land use (e.g. interests in economic growth and development) with the protection of the environment, 'so that sustainable development of society with respect for people's living conditions and the conservation of wildlife and vegetation is secured'.⁹¹ The Planning Act thus, similar to the Austrian Aviation Act, calls for balancing various public interests when the public authorities adopt or amend plans.

Climate interests are not specifically mentioned in Section 1 of the Planning Act and are, thus, not to be found explicitly within the main interests to be considered by the authorities when they exercise their competences under the Act. However, as mentioned above, the Planning Act provides that planning activities should forward 'sustainable development' – a concept that arguably accommodates climate protection. Thus, climate protection can reasonably be considered a relevant interest to take into account when adopting and amending municipal and local plans.

Whether authorities *must* consider climate change in planning activities and how it is to be weighted against other factors, is, however, not stipulated in the Act. When adopting or amending plans, the municipalities have a wide margin of discretion in regards to the balancing of relevant interests. Due to the strong division of powers characteristic of the Danish democracy, the courts generally do not subject discretionary elements of administrative authorities' decisions to intensive judicial review.⁹² The courts' review of administrative decisions is usually limited to a 'legality review', i.e. review of the authorities'

factual findings, their interpretation of the relevant statutory rules, their compliance with procedural rules, their compliance with fundamental principles of administrative law, and whether the relevant authority exceeded the limits of its discretionary powers.⁹³ In other words; the courts will determine whether an administrative decision is unlawful but not whether it is appropriate.⁹⁴ Thus, it would pose a significant challenge for CCL plaintiffs to attain a court ruling that a municipal planning authority did not attribute enough weight to climate protection when it balanced the different interests at stake.

Another challenge of using planning law as the legal basis for CCL is that local plans are not aimed at the regulation of national or global issues. Plaintiffs would therefore have to convince the courts that climate change is a local matter that is appropriately addressed at the local level.

Finally, the Planning Act concerns *land use* and is not aimed at regulating polluting or environmentally challenging *activities*. The climate change issues that arise from hyperscale data centres stem from the operation of the installation and the accompanying GHG emissions, i.e. the climate change consequences are caused by an activity rather than by the specific location of the facility. Thus, challenging a local plan to address the broader issue of climate change may not be the most appropriate, or successful, choice.

Instead of directly challenging the local plan, plaintiffs could challenge the environmental assessment of that plan or the environmental assessment of the specific data centre project for lack or insufficient consideration of climate change impacts.

⁹¹ The Planning Act in Denmark, Consolidated Act No. 287 of 16 April 2018 with subsequent amendments.

⁹² Basse, n 89, 453; European e-justice portal, n 45, II. Judiciary.

⁹³ Basse, n 89, 453-454; European e-justice portal, n 45, II. Judiciary.

⁹⁴ European e-justice portal, n 45, IV. Access to Justice in Public Participation.

3.1.2.2 *Assessment of environmental impacts of the plans*

According to the Danish Environmental Assessment Act (the EA Act),⁹⁵ a municipal or local plan adopted under the Planning Act (with the purpose of creating the necessary legal planning basis for allowing the construction of a large project) must be subjected to an environmental impact assessment before its final adoption.⁹⁶ The EA Act adopts a broad understanding of the term 'environment', which includes inter alia climate and climatic factors and which applies to environmental impact assessments of both plans and concrete projects.⁹⁷ Plaintiffs that challenge the construction of a hyperscale data centre could argue that the municipality did not, in its environmental assessment of the municipal or local plan, sufficiently take into account the problem of increased GHG emissions from energy production caused by the extensive energy consumption of the hyperscale data centre. The success of such a lawsuit is, however, unlikely because of the reluctance of the Danish courts to review discretionary elements of administrative decisions. As mentioned above, the adoption of local or municipal plans involves a significant level of discretion on the part of the municipalities. Deciding on what actions to take based on the findings from an environmental impact assessment of the plan, including deciding what weight to attribute to these findings, is also part of the municipalities' discretionary decision-making and, thus, only subject to limited judicial review. Moreover, a win may not necessarily bring plaintiffs the result they hope for. If the plan is subject to an environmental impact assessment before its adoption, the EA Act only

⁹⁵ Consolidated act no. 1225 of 25 October 2018 on environmental assessment of plans and programs and of concrete projects.

⁹⁶ EA Act Section 2(1), (1).

⁹⁷ EA Act Section 1(2).

requires the administrative authorities to carry out this assessment and take it into account when deciding on the adoption and content of the plan.⁹⁸ As such, the environmental impact assessment is procedural in nature and the EA Act does not demand that the administrative authorities discard the plan in case the assessment uncovers significant environmental impacts. Moreover, a different result is not guaranteed even in the unlikely event that a court concludes that a plan is invalid due to insufficient consideration of climate change impacts in the environmental impact assessment. It is likely that the court in such a situation will refer the matter back to the municipality for reconsideration in light of the court's findings. On reconsideration, the administrative authority could lawfully reach the same overall result even after it had paid more attention to climate change impacts.

3.1.2.3 *Assessment of environmental impacts of a project*

Instead, plaintiffs could challenge the environmental impact assessment of the concrete data centre project. However, this is only an option if such an assessment is required and/or carried out.

According to the EA Act, certain projects can only be realized if development consent is obtained.⁹⁹ If an environmental impact assessment of the project is required pursuant to the EA Act, the relevant authority can grant a development consent after the assessment has been carried out.¹⁰⁰ The EA Act distinguishes between two types of projects; projects, which are always

⁹⁸ EA Act Section 13.

⁹⁹ EA Act Section 15 (implementing Article 2(1) of the Environmental Impact Assessment (EIA) Directive (directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1)).

¹⁰⁰ EA Act Section 25.

subject to an environmental impact assessment (listed in Annex 1), and projects, which are subject to an assessment if the individual project is deemed likely to have significant effects on the environment (screening decision)¹⁰¹ (listed in Annex 2).¹⁰² Both a screening decision and a final decision regarding the development consent can be brought before the courts.¹⁰³

A hyperscale data centre (the installation as such) is a type of facility that is neither included in Annex 1 nor Annex 2 of the EA Act. Thus, no obligation to carry out an environmental assessment for such a project exists. However, if the project developer conducts an environmental assessment on a voluntary basis, the requirement for a development consent applies to the project.¹⁰⁴ This makes challenging the environmental impact assessment of the project a less attractive avenue for CCL, as plaintiffs depend on the developer to voluntarily choose to apply for an assessment.

If an environmental impact assessment of the specific data centre project actually *is* carried out, and a development consent is granted by the municipality, another hurdle for CCL plaintiffs arises. The decision to grant development consent entails a significant element of discretion as the relevant authority conducts a holistic assessment of the environmental impacts of the project based on the developer's application, the environmental impact assessment report, any available additional information, and the information stemming from the involvement of the public.¹⁰⁵ As explained above, it is unlikely that the Danish courts will review the discretionary

elements of the decision, which limits the scope and intensity of the judicial review.

It should be noted that *parts* of a data centre, for instance, an emergency power facility,¹⁰⁶ or the *construction works*¹⁰⁷ involved with building a data centre could be subject to requirements of permits under the EA Act or other elements of Danish environmental law. However, we do not focus on these elements. The reason is that the major climate change concern caused by the data centres is the *operation* of the centres, i.e. the extensive energy consumption involved in their operation and the GHG emissions related to the production of the necessary energy. The construction phase is limited in time and an emergency power facility is only in operation during tests and (rare) blackouts. These elements, therefore, do not entail significant GHG emissions (compared to the emissions related to the operation of the centre) and are, thus, not central to the climate change problems connected to a data centre.¹⁰⁸

¹⁰⁶ This was e.g. the case with Apple's data centre near the city of Viborg. Its emergency power facility (consisting of 14 diesel-fueled electricity generators) was subject to a requirement of a screening decision pursuant to Section 16 (in conjunction with Annex 2, section 3 a) of the EA Act. In addition, the facility also needed an environmental permit pursuant to Section 3 of the Ministerial Order No. 1534 of 9 December 2019 on activities requiring environmental permits under Section 33 of the Environmental Protection Act (Consolidated Act No. 1218 of 25 November 2019 with subsequent amendments, 'EP Act').

¹⁰⁷ Such construction works are projects in their own right and must be subjected to a screening decision and perhaps an environmental assessment (if deemed necessary after the screening process and decision), cf. EA Act Section 16 and Section 21 and Annex 2, section 10.b), to the EA Act.

¹⁰⁸ As part of the permitting process in relation to Apple's data centre in Viborg, an environmental report was prepared. Concerning climate and energy aspects of the data centre project, the report stated that the construction phase of the data centre project would only cause limited GHG emissions and only insignificantly affect environment and climate. In relation to the continuous

¹⁰¹ EA Act Section 16 and Section 21.

¹⁰² Annex 1 and 2 of the EA Act corresponds to Annex I and II of the EIA Directive, respectively.

¹⁰³ European e-justice portal, n 45, IV. Access to Justice in Public Participation.

¹⁰⁴ EA Act Section 15(1), (3).

¹⁰⁵ EA Act Section 25.

3.1.2.4 Conclusion on administrative claims

From the above analysis, it becomes clear that the decisions of the administrative authorities regarding planning and environmental impact assessments are characterised by extensive discretionary elements. Thus, it would be very difficult to convince a court to rule that too little attention was paid to climate change impacts in the administrative balancing exercises related to planning and environmental impact assessments of plans and projects. Only if the interest balancing or environmental impact assessment is clearly and legally flawed – e.g. if the administrative authority includes interests that are not relevant according to the law – could it be possible to succeed with the case. Yet, it is likely that the court would ‘only’ invalidate the administrative decision and return the matter to the administrative authority to adopt a new decision.

A possible remedy for these challenging circumstances could be for plaintiffs to utilise the administrative appeals system (introduced above in section 2.3) instead of bringing the case before the courts. The appeals boards can submit administrative decisions to a full review unless such a review is explicitly limited by law.¹⁰⁹ This means that in most cases, including many (but not all) environmental law cases, the appeals board will review not only the legality but also the discretionary elements of the administrative

operation of the data centre, however, the report concluded that the energy consumption of the operation of the data centre would lead to a level of GHG emissions that significantly affects environment and climate (pages 121-124 and 126-127 of the environmental report of February 2016 concerning Apple’s data centre in Viborg). These findings are, however, not mentioned in the subsequent environmental permit for the data centre (granted pursuant to the EP Act) or in the development consent for the data centre project (granted pursuant to the EA Act) issued by Viborg Municipality on 1 June 2016. In fact, neither of these two municipality decisions mention GHG emissions at all.

¹⁰⁹ European e-justice portal, n 45, II. Judiciary.

decision.¹¹⁰ This makes the administrative appeals system a more attractive avenue for climate plaintiffs who rely on an administrative law legal basis for their claim. As mentioned earlier, this article focuses on CCL brought before *courts* and therefore this avenue will not be explored any further. It should, however, be mentioned that the law *does* expressly limit the review of the relevant appeals boards in cases concerning municipal and local plans, the screening decisions and environmental impact assessment of such plans, and potential screening decisions regarding specific projects.¹¹¹ Thus, in most of the administrative decisions addressed above, the extent and intensity of the appeals boards’ review are the same as that of the courts.

3.2 Standing

To initialise CCL and obtain a court decision on the substantial climate change questions of the case, plaintiffs must be entitled to standing before the court. The procedural hurdle of gaining the right to standing has been highlighted as a general challenge for plaintiffs in CCL across different jurisdictions.¹¹²

This section of the paper addresses the possibility to gain standing before the Danish courts and the transferability of the standing-related arguments and circumstances in the *Urgenda* and *Vienna Airport* cases.

3.2.1 General standing

To be entitled to standing before the Danish courts, a plaintiff must have a ‘legal interest’ in bringing the case.¹¹³ This requirement is not stip-

¹¹⁰ European e-justice portal, n 45, II. Judiciary and IV. Access to Justice in Public Participation.

¹¹¹ EA Act Section 49(1), cf. Section 21.

¹¹² UNEP, n 1, 27-29.

¹¹³ U R Bang-Pedersen et al., *Den Civile Retspleje* (4th ed, Pejus, 2017) 122; European e-justice portal, n 45, VII. Legal Standing.

ulated in statutory law but is based on principles derived from case law.¹¹⁴ The, somewhat vague, concept of ‘legal interest’ entails a requirement that the plaintiff has a significant and individual interest in the outcome of the case.¹¹⁵ If, for instance, a plaintiff seeks to challenge a decision made by an administrative authority in court, the requirement entails that the plaintiff ‘must be protected by the rules according to which’ the decision was adopted, and must be ‘affected by the decision in a manner that is significant as compared to other citizens’.¹¹⁶

If an *Urgenda*-like case (i.e. a case where plaintiffs challenge the general climate change policy and ambition of the state) was attempted in Denmark, we would not expect Danish courts to apply the standing requirements under ECHR Article 34 in the domestic settings, even if the claims were based on human rights protection offered by the ECHR.¹¹⁷ Instead, both individual citizens and NGOs would have to fulfil the above-described general standing requirement in order to gain standing before the courts.

Yet, there is a clear difference between the *Urgenda* case and our scenario. In the *Urgenda* case, special rules were at play and because of this, the plaintiff – the Urgenda Foundation (an NGO¹¹⁸) – did not encounter any significant problems regarding standing. All three court instances found that the Urgenda Foundation was

entitled to standing pursuant to Book 3, Section 305a of the Dutch Civil Code.¹¹⁹ This provision of Dutch law allows organizations to bring a case aimed at protecting inter alia public interests, if the particular interests are connected to the objectives formulated in the organization’s by-laws.¹²⁰ Danish law does not contain a similar provision and NGOs are, thus, not in a privileged position according to a written rule of national law.

Based on the (scarce) Danish case law on standing for environmental NGOs, it is possible to derive some requirements that such an organization will probably have to fulfil to prove that it has a ‘legal interest’ in the case and, thus, gain standing.

Firstly, the organization must have a certain fixed structure, probably with a board and membership fees, in order to act as a party in the case.¹²¹ Secondly, it counts towards gaining standing if the purpose of the organization is recognized in or protected by law and if the objective is relevant to the matter under adjudication.¹²² As will be further elaborated below in section 3.2.2, an organization is more likely to be granted standing if it is entitled to bring complaints regarding specific administrative decisions within the administrative appeals system,¹²³ because this shows a societal recognition of the role of the organization in environmental matters. Lastly, the organization must also have a concrete interest in the matter under adjudication in the sense that ‘it has suffered financial

¹¹⁴ Bang-Pedersen et al., n 113, 121; Basse, n 89, 454; European e-justice portal, n 45, VII. Legal Standing.

¹¹⁵ Basse, n 89, 454; European e-justice portal, n 45, VII. Legal Standing.

¹¹⁶ Basse, n 89, 455.

¹¹⁷ The same as the Court of Appeal in the *Urgenda* case did, n 58.

¹¹⁸ In *Urgenda*, first instance, paras. 2.1 and 2.2, the Urgenda Foundation is described as a Dutch citizens’ platform established in January 2008, which aims to ‘stimulate and accelerate the transition processes to a more sustainable society’ and which ‘is involved in the development of plans and measures to prevent climate change’.

¹¹⁹ *Urgenda*, first instance, paras. 4.6. and 4.9.; *Urgenda*, second instance, paras. 36-38; *Urgenda*, third instance, paras. 5.9.2-5.9.3.

¹²⁰ K J de Graaf and J H Jans (2015) ‘The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change’ 27(3) *Journal of Environmental Law* 517, 518 (FN 5).

¹²¹ Basse, n 89, 456; Bang-Pedersen et al., n 113, 50-51.

¹²² Basse, n 89, 456.

¹²³ Basse, n 89, 456.

loss or [...] its rights have been infringed in a way that is comparable to an infringement of an individual's legal position'.¹²⁴

This illustrates that it is not impossible for an environmental NGO to gain standing before Danish courts in an *Urgenda*-like case but it is by no means an easy task. Even though legal literature seems to have detected a general trend towards wider access for plaintiffs to challenge the legality of decisions and actions of administrative authorities,¹²⁵ organizations still do not have general access to bring cases on matters within their expressed purpose to court.¹²⁶

3.2.2 *Enhanced standing chances in administrative law*

As briefly indicated above, if an organization is entitled by law to bring a complaint within the administrative appeals system, it may influence the chances of gaining standing before the courts. In fact, such entitlement to bring administrative appeals may constitute a specially enhanced avenue for gaining standing. This avenue is an option in administrative law-based cases and, therefore, this section takes the *Vienna Airport* case as its starting point.

In the *Vienna Airport* case, a variety of plaintiffs challenged a decision made by national administrative authorities pursuant to national law. The plaintiffs include an environmental organization (NGO), the city of Vienna, several citizens' initiatives, and individual citizens.

The Austrian Federal Administrative Court denied standing for two of the plaintiffs (one citizens' initiative and one individual) but otherwise entitled the rest of the plaintiffs to judicial review of their complaints. The issue of standing was not addressed by the Austrian Constitution-

al Court, which focused on other aspects of the case. In the following analysis of the transferability of the arguments and the legal circumstances in the *Vienna Airport* case to the Danish context, we will focus on standing for individuals and NGOs as these are the most likely plaintiffs in our data centres scenario and the group of plaintiffs that raise the most interesting legal issues.

In order to initialize a case challenging administrative decisions before Danish courts, plaintiffs must, as a starting point, fulfil the general standing requirement described in section 3.2.1 above. However, when a claim is based on administrative law, it could potentially be somewhat easier for individuals and organizations to establish that they have a sufficient 'legal interest' in the outcome of the case.

Commonly, Danish administrative law contains specific provisions that determine who have access to bring a complaint within the administrative appeals system. This is also the case for much of the legislation relating to environmental matters. As described above, administrative appeals boards are not courts. However, this access to bring administrative appeals is still important because, to some extent, there is a correspondence between the individuals and the organizations that have a right to file a complaint within the administrative appeals system and the individuals and organizations that are entitled to standing before the courts.¹²⁷ This correspondence entails that the individuals and the organizations that have a right to bring administrative appeals are also generally considered to fulfil the requirement of having a sufficient 'legal interest' in bringing that same case to the courts.¹²⁸

¹²⁴ Basse, n 89, 456.

¹²⁵ Bang-Pedersen et al., n 113, 133, 143.

¹²⁶ Bang-Pedersen et al., n 113, 143.

¹²⁷ Basse, n 89, 455.

¹²⁸ European e-justice portal, n 45, VII. Legal Standing.

The Danish EA Act and the Planning Act¹²⁹ both contain (very similar) provisions on who can bring a complaint before the relevant administrative appeals boards. Firstly, anyone with a 'legal interest' in the outcome of the case has the right to bring a complaint before the appeals board.¹³⁰ Note that this 'legal interest'-criterion is, in substance, different from the general standing requirement (described in section 3.2.1 above) although it is linguistically similar. The 'legal interest'-criterion is not necessarily understood and interpreted in the same way in the EA Act and the Planning Act, and – moreover – the interpretation of the criterion differs depending on the circumstances of the case. However, the addressee of an administrative decision is normally considered to have a 'legal interest' in filing a complaint.¹³¹ Additionally, the criterion may at times be interpreted to include those that are individually and significantly affected by the decision (e.g. neighbours of the addressee) or even a broad group of citizens (in some types of cases, for example, the Planning Act opens the possibility to complain for many citizens).¹³² Thus, the conditions for bringing administrative complaints are – in some instances – easier to fulfil for individuals compared to the conditions for gaining standing before the courts.

Secondly, both the EA Act and the Planning Act contain a provision that grants organizations the right to bring a complaint within the administrative appeals systems provided that they 1) are nationwide, 2) have nature and environment protection as their purpose, 3) have bylaws or similar that document their purpose, and 4) have

at least 100 members.¹³³ The provisions do not require the organizations to have an individual, significant, or concrete interest in bringing the complaint. It is sufficient that the organizations fulfil these four formal requirements. It is therefore quite easy for the organizations to fulfil the conditions to bring an administrative appeal.

Because of the correspondence between the access to administrative appeal and the access to the courts described above, the (slightly less strict) conditions for bringing administrative complaints, in turn, makes it easier for individuals and (especially) NGOs to bring the case to the courts.

However, using the right to initiate administrative appeal as a stepping stone to gain standing before the courts also has its limitations. Firstly, this approach to standing is only relevant when the case that is brought before the courts concerns particular administrative decisions, not if the aim is to challenge the general climate change policy of the Danish state. Thus, this standing approach would not provide a route to challenge the efforts of The Ministry of Foreign Affairs of Denmark to attract more data centres to Denmark as these efforts do not entail any specific administrative decisions. Secondly, even though it might be somewhat easier to gain standing in claims based on administrative law, it might not be of much use as the courts are generally reluctant to review the discretionary elements of an administrative decision.¹³⁴

In conclusion, to be entitled to standing before the Danish courts is – both for individuals and NGOs – quite challenging but yet possible.

¹²⁹ The two main administrative law legal bases identified and analysed above in section 3.1.2 as relevant to our studied data centre scenario.

¹³⁰ EA Act Section 50(1) and Planning Act Section 59(1).

¹³¹ European e-justice portal, n 45, VII. Legal Standing.

¹³² European e-justice portal, n 45, VII. Legal Standing.

¹³³ EA Act Section 50(1) and Planning Act Section 59(2).

¹³⁴ Section 3.1.2.1 above.

3.3 The use of international environmental law

In strategic CCL at national/regional courts, which aims to strengthen climate actions of state entities, plaintiffs regularly refer to international environmental law (both written (conventional) law and principles of law) to describe the context and to specify the obligations of the state entities.¹³⁵

3.3.1 International conventions on climate change

From written sources, the parties mostly refer to the UNFCCC, KP, and PA. In contrast to international human rights law that might be used as a legal basis of CCL,¹³⁶ the relevance of the international environmental law sources stems mostly from their overall aims and the principles they are built on, rather than from specific obligations, they prescribe.¹³⁷ This is logical as they are international law instruments binding among states; private parties cannot derive any positive obligations of the state towards them from international environmental law.¹³⁸ Yet, they have been invoked both by the parties to argue their CCL cases and by the courts to substantiate their rulings. The treatment of international environmental law by courts largely depends on the legal tradition of the specific country, which is illustrated by the two cases studied in this article.

All three instances in the *Urgenda* case used written international environmental law to establish the scope of the state's obligations in mitigating climate change. While the court of the first instance recognized the inability of the

plaintiffs to derive concrete rights directly from the international conventions, it acknowledged that international law has a 'reflex effect' in national law.¹³⁹ As such, it can be used by the court 'when applying and interpreting national law open standards and concepts [...]'¹⁴⁰ as is the case when to determine 'the minimum degree of care the State is expected to observe' according to the Dutch tort law duty of care.¹⁴¹ The Court of Appeal and the Supreme Court diverted from this line of reasoning, as they did not rely on tort law, but on the human rights legal basis to decide the case. Still, they used international environmental law to support their arguments. Namely, they turned to the PA to determine the existence of a 'real and imminent' threat to life brought by climate change and the necessity of more ambitious climate policy to avoid the threat.¹⁴² Such application of written sources of international law was possible as the Netherlands is a monist country that gives priority to international law over domestic law.¹⁴³

The two courts in the *Vienna Airport* case adopted largely varying positions towards the use of written international law. The Federal Administrative Court agreed with the plaintiffs that the international climate change conventions were relevant in interpreting the Federal Aviation Act. As the Aviation Act did not specify the 'other public interests' to be balanced against the economic interests in the proposed project, those 'other public interests' should be found through the interpretation of positive law. Since the constitution for Lower Austria of 1979 states that environmental and climate protection

¹³⁵ P De Vilchez Moragues, 'Broadening the Scope: the Urgenda Case, the Oslo Principles and the Role of National Courts in Advancing Environmental Protection Concerning Climate Change' (2016) 20 Spanish Yearbook of International Law 71, 76.

¹³⁶ Section 3.1.1 above.

¹³⁷ De Vilchez Moragues, n 135, 76.

¹³⁸ *Urgenda*, first instance, para. 4.44; *Vienna Airport*, second instance, part 2(a).

¹³⁹ *Urgenda*, first instance, para. 4.43.

¹⁴⁰ *Urgenda*, first instance, para. 4.43.

¹⁴¹ *Urgenda*, first instance, para. 4.52 (in general).

¹⁴² *Urgenda*, second instance, paras. 49, 50, 66; *Urgenda*, third instance, especially section 7.

¹⁴³ A Cassese, *International Law in a Divided World* (Clarendon Press, 1992) 17 (citing G J Wiarda).

is of particular significance, the positive law of reference should include international environmental law. The Constitutional Court, however, refused the interpretative value of the constitution for Lower Austria and thus also the interpretative value of the international environmental law in respect to the Federal Aviation Act.¹⁴⁴ Moreover, the Constitutional Court stated that international environmental law is not immediately applicable in the national setting. The final instance thus rejected not only direct applicability of international environmental law, but also its 'reflex effect' in Austrian federal law. This is perhaps not surprising, as Austria has been described as 'moderately' monist country in the literature.¹⁴⁵ 'Moderate' meaning that 'national law conflicting with international law will not be invalidated as such, but rather may give rise to international responsibility.'¹⁴⁶

As already stated, Denmark is a dualistic country.¹⁴⁷ The relationship between national and international law is not governed by the Constitution,¹⁴⁸ which obscures the possibility of the use of international law within national litigation. The 'rule of interpretation' of national law in line with the state's international obligations applies to international environmental law the same as to human rights law.¹⁴⁹ However, the international climate conventions have not been incorporated into the Danish legal system, as the ECHR has been, and thus their use for in-

terpretation of national legislation may be close to impossible in situations of their direct or indirect conflict with national rules.¹⁵⁰ National law adopted by the Danish Parliament is central in the Danish legal order, which is inter alia characterized by the absence of a constitutional court and the absence of a strong tradition for constitutional review.¹⁵¹ Danish judges generally see themselves as those who apply only positive law, they do not create any rules.¹⁵² Given the architecture of Danish majoritarian democracy which is absent of strong judicial review on the one hand and the dualistic setting of the legal order on the other, we must presume that the use of international environmental law conventions by Danish courts in the review of administrative decisions, such as those related to hyperscale data centres' location and operation, is highly unlikely.¹⁵³

3.3.2 *Environmental law principles*

Besides international environmental conventions, parties in CCL make regular use of well-established environmental principles to support their claims. Many environmental law principles were referred to in the first instance in the *Urgenda* case. Those included the principle of prevention, the no-harm principle, the precautionary principle, the intergenerational equity principle, the common but differentiated responsibilities principle, and, more generally, the fairness principle. The Supreme Court then primarily used the no-harm principle to substantiate the obligation of the state to adopt preventive and precautionary measures in order to avoid the threats posed by climate change.¹⁵⁴

¹⁴⁴ *Vienna Airport*, second instance, part 4.

¹⁴⁵ A Epiney and B Hofstötter, 'The Status of "Europeanised" International Law in Austria, Switzerland and Liechtenstein' in J Wouters, A Nollkaemper and E de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States* (T.M.C. Asser Press, 2008), 10 in version available at <https://doc.rero.ch/record/10679/files/Beitrag99.pdf>, last accessed 31 January 2020.

¹⁴⁶ *Ibid.*

¹⁴⁷ N 65; Wind, n 52, 290.

¹⁴⁸ Christoffersen and Madsen, n 66, 265.

¹⁴⁹ N 66.

¹⁵⁰ Christoffersen and Madsen, n 66, 266.

¹⁵¹ Wind, n 52, 286 and 299.

¹⁵² Wind, n 52, 300.

¹⁵³ Wind, n 52, 292.

¹⁵⁴ *Urgenda*, third instance, 5.7.1–5.7.9.

In the *Vienna Airport* case, the Austrian Federal Administrative Court used the principle of sustainable development to support its finding that the administrative bodies failed to weight climate change interests against economic interests when they approved the construction of the third runway at the Vienna Airport. However, rather than referring to the basis of this principle in international environmental law, the court used the expression of the principle in national legislation, namely the Constitution of Lower Austria and the Federal Constitutional Law for Sustainability. Reviewing this decision, the Constitutional Court refrained from commenting on the use of environmental law principles in the case. In fact, the word ‘principle’ does not appear in the decision even once. The Constitutional Court remained strictly within the positivistic attitude towards the interpretation and application of national laws.

Considering the dualistic character of the Danish legal system and the dogmatic approach of the Danish judicial branch,¹⁵⁵ it seems highly unlikely that principles of international environmental law could be used independently as a source of the state authorities’ obligations. Yet, they may be used as a source of law in situations where they have been articulated in national legislation.¹⁵⁶ Such disregard for independent use of environmental law principles might be striking at first in a country with a strong environmental protection pedigree, but it should be considered in the context of the whole legal system. When exercising competences under the Planning Act, administrative authorities are both guided and

restricted by legal principles. Environmental law principles fall mostly under the guiding principles, while administrative law principles, such as the legality principle, have a more restricting function.¹⁵⁷ Thus, while the principle of fairness has a prominent position at Danish courts when, for example, commercial law disputes are decided,¹⁵⁸ it is of less importance in administrative law, which is strictly positivistic.

4. Conclusion

The analysis above demonstrates that several factors pose challenges to bring and succeed with CCL concerning hyperscale data centres in Denmark. These include the difficulties in finding an appropriate legal basis for plaintiffs’ claims, the fulfilment of the requirements for standing, and the reluctance to use international legal sources by national courts. On the example of the Danish legal system, we thus show that the transferability of legal arguments and strategies used in CCL among jurisdictions is not straightforward. Due to differences in national legal orders and their political foundations as well as factual differences among individual CCL, no one case is transferable in its entirety. Yet, individual arguments and strategies from foreign judgements can be used on a ‘pick and choose’ basis, allowing plaintiffs to use them as puzzle pieces to build up a new case fit for the specific factual and legal circumstances of their jurisdiction. In that sense, the growing number of CCL globally ‘arms’ the plaintiffs. However, they also ‘arm’ the defendants and underpin the courts’ reluctance to decide on topics, so far, considered to be within the political realm. The

¹⁵⁵ J Vedsted-Hansen, ‘The absence of foreign law in Danish asylum decisions – quasi-judicial monologue with domestic policy focus?’ in G S Goodwin-Gil and H Lambert (eds.), *The Limits of Transnational Law* (CUP, 2010), 182-184.

¹⁵⁶ An example can be found in Sections 9i-9r of the EP Act reflecting the polluter-pays-principle.

¹⁵⁷ E M Basse (ed.), *Miljøretten 1, Almindelige emner* (Jurist- og Økonomforbundets Forlag 2006, 2nd ed.) 113.

¹⁵⁸ K Mitkidis and T Neumann, ‘Entire Agreement Clauses: Convergence between US and Danish Contract Law?’ (2017) 2017/2 *Nordic Journal of Commercial Law* 180, 205.

partial transferability of CCL thus brings along not only positive effects.

In line with this, our analysis shows that although relevant legal bases do exist and although gaining standing and the use of international law is not completely ruled out, to bring *successful* CCL in Denmark seems to be more a theoretical than a practical possibility. However, this does not mean that bringing CCL in Denmark will have no influence or effects at all.

CCL may have a multitude of indirect or other-than-legal effects. In addition to the obvious effects of publicising and creating awareness about the cause, CCL may bring to light specific climate change impacts or specific mitigation and adaptation failures,¹⁵⁹ thus making the problem, the need for action, and the urgency more tangible. Moreover, CCL and the courts may provide a forum for changing the discourse and the understanding of the climate change problem,¹⁶⁰ and for changing the tone of the debate, thereby enabling and enhancing the public political debates on climate change.¹⁶¹ The Danish public debate on climate change has been intensified with the new Climate Act planned to come into effect during 2020¹⁶² as well as with the adoption of the proposal for a European Climate Law.¹⁶³ This might be a sign of the constitutionalisation

of the climate change issue in Denmark,¹⁶⁴ which moves climate change from being *only* a political issue towards being a constitutional and, thus, a legal matter.¹⁶⁵ It would follow that courts might be able to – legitimately – make decisions on climate change without being at odds with the principle of separation of powers.¹⁶⁶ However, only time will tell whether this development will take place in Denmark, a country that is characterized by a strict division between the legislative and judicial powers.

The ‘informal’ effects of CCL may have an indirect regulatory impact in the sense that they may lead to a shift in the ‘regulatory environment for addressing climate change’ and stimulate different (policy or regulatory) choices.¹⁶⁷ Through informal and indirect effects of CCL, attention could be drawn to relevant administrative and political decisions and their potential inconsistency with the Danish government’s broader climate change policies. Thus, CCL could spark important debates and, perhaps, action on aligning policies across different fields, which would lead to a more coherent climate change response. Such effects would also suggest that even the challenge of one concrete decision (e.g. a decision adopted by a municipality on the local plan) has the potential of constitutional strategic CCL.

We would also like to highlight that even though this paper has taken a specific data cen-

¹⁵⁹ N S Ghaleigh, ‘“Six honest-serving men”: Climate change litigation as legal mobilization and the utility of typologies’ (2010) 1(1) *Climate Law* 31; Peel and Osofsky, n 53, 67.

¹⁶⁰ Osofsky, n 4, 8.

¹⁶¹ S Bogojevic, ‘EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture’ (2013) 35(3) *Law & Policy* 184, 187.

¹⁶² N 71.

¹⁶³ Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), 4.3.2020 COM(2020) 80 final.

¹⁶⁴ This tendency is already observed on the global scale. See L Burgers, ‘Should Judges Make Climate Change Law?’ (2020) 9 *Transnational Environmental Law* 55, 71.

¹⁶⁵ Burgers, n 164, 71-73, 75. Burgers bases her analysis on the political theory on deliberative democracy of the German philosopher and sociologist J Habermas (*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Reig tr, John Wiley & Sons, 2015)).

¹⁶⁶ Burgers, n 164.

¹⁶⁷ J Peel and H M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 24-25, 47-48.

tre scenario as its focus, many of the legal findings, discussions, and considerations are more general. This extends the relevance of this paper beyond the (somewhat) hypothetical climate problems related to the estimated future number of hyperscale data centres in Denmark. It demonstrates that no jurisdiction is immune to CCL. Even though Denmark is often considered a 'green' and climate-conscious country, concrete decisions in different policy areas may not be perfectly in line with this perception of Denmark and the state's central climate policies.

Yet, it becomes relevant to ask whether the national perspective is the most useful one for

judging climate change topics. While the decision to host hyperscale data centres in Denmark might endanger the achievement of the national climate change targets, it seems like a sound decision from the global perspective.¹⁶⁸ This brings the widely-researched topic of the multi-level governance of climate change¹⁶⁹ and the efforts of aligning the various levels of legal regulation into the centre.

We thus call for more research into the position of national CCL within the multi-level legal order and exercising more caution from legal scholars when they suggest the transferability of CCL among jurisdictions.

¹⁶⁸ N 44.

¹⁶⁹ E.g. J Scott, 'Climate Change Governance: Policy and Litigation in a Multi-Level System' (2011) 5(1) *Carbon & Climate Law Review* 25; J Peel, L. C. Godden and R. Keenan, 'Climate Change Law in an Era of Multi-Level Governance' (2012) 1(2) *Transnational Environmental Law* 245; M Jänicke, 'The Multi-level System of Global Climate Governance – the Model and its Current State' (2017) 27(2) *Env. Pol. Gov.* 108; M Di Gregorio et al., 'Multi-level governance and power in climate change policy networks' (2019) 54 *Global Environmental Change* 64.