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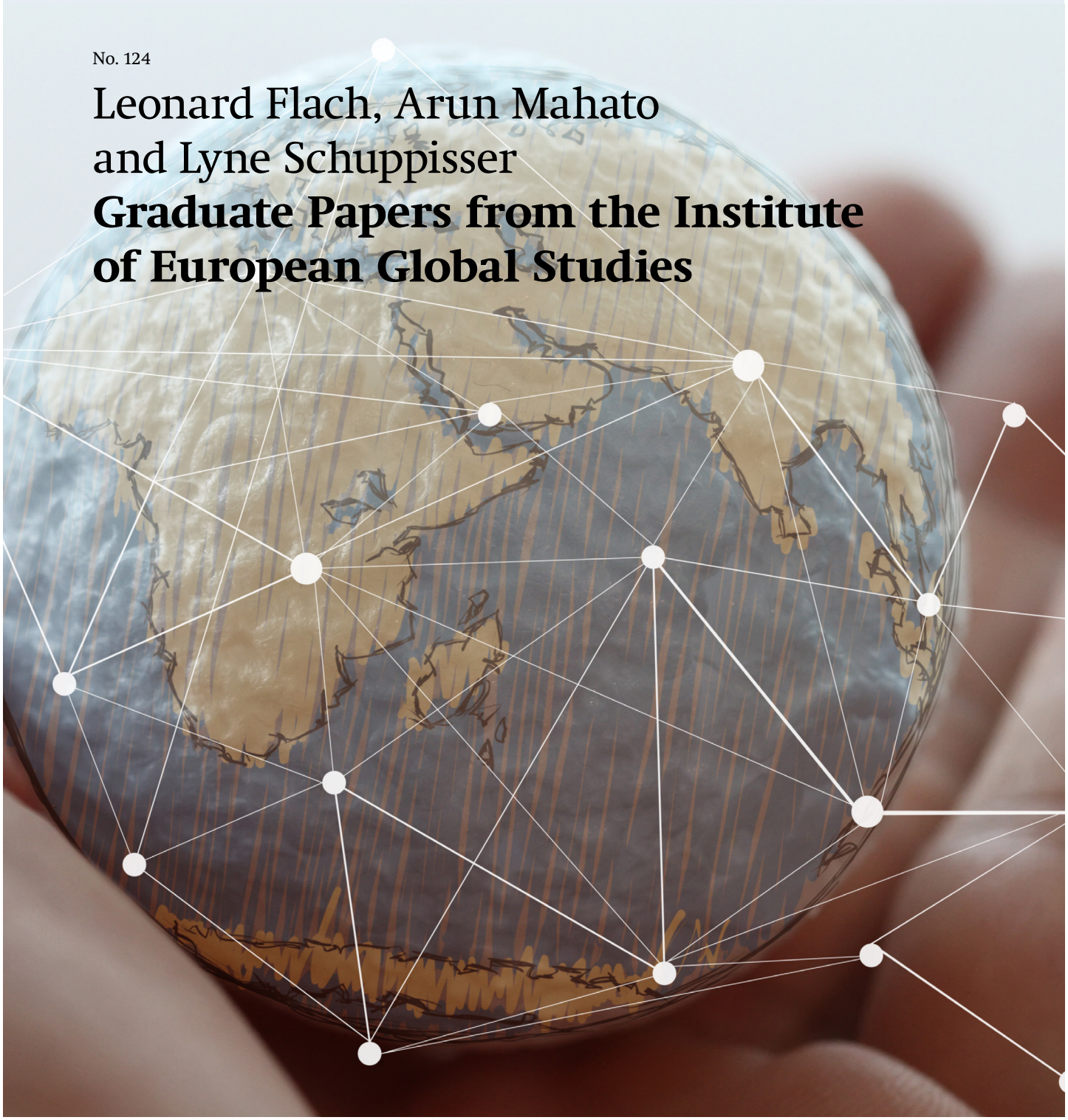

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Leonard Flach

Mitsprache oder Mitbestimmung?
Die Rolle der Bundesversammlung in der schweizerischen Aussenpolitik am Beispiel der Aushandlung des institutionellen Rahmenabkommens mit der Europäischen Union

Decision-Shaping or Decision-Making?
The Role of the Federal Assembly in Swiss Foreign Policy Using the Example of the Negotiation of the Institutional Framework Agreement with the European Union

Abstract: This article addresses the questions of the foreign policy competencies of the Federal Assembly and how it made use of them in the negotiation of the institutional framework agreement with the EU. After a historical classification and a discussion of the relevant legal basis, the author undertakes a computer-aided content analysis of the parliamentary debates on the agreement in the Official Bulletin of the Federal Assembly. The results are then analyzed with recourse to previous insights. In doing so, he shows that there is an interplay between the expansion of parliamentary powers and diminishing opportunities for shaping them and that the Federal Assembly strives to fulfill its partial responsibility for foreign policy. In his conclusions, the author states that the increasing internationalization challenges the cooperation between the Federal Assembly and the Federal Council and that the rights to information and consultation play a key role in this debate.

Key Words: Legislature, Federal Assembly, Swiss Foreign Policy, Institutional Framework Agreement, European Union

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Einleitung

Dem Bundesrat (BR) steht grundsätzlich die Führung in der schweizerischen Aussenpolitik zu, doch auch die Bundesversammlung (BVers) wirkt dabei mit. Eine starre Kompetenzaufteilung existiert nicht.[1] Besonders relevant wurde dieser Umstand im Fall der Aushandlung des institutionellen Rahmenabkommens (InstA) mit der Europäischen Union (EU). Nach Jahren der Diskussion brach der BR am 26. Mai 2021 die entsprechenden Verhandlungen ab. Den Mitgliedern der BVers wurde hierbei keine Mitbestimmungsmöglichkeit gewährt. Es entbrannte eine Diskussion um die Kompetenzordnung und namentlich die Rolle der BVers in der schweizerischen Aussenpolitik. Bundeskanzler Walter Thurnherr sieht die Spannungen zwischen den Institutionen in Zusammenhang mit einer unklaren Ausgangslage unter dem geltenden Recht:

> „Es heisst zwar klar in der Bundesverfassung: ‚Der Bundesrat besorgt die auswärtigen Angelegenheiten' (BV Art. 184 Abs. 1). Aber dann geht es gleich weiter mit den Worten: ‚unter Wahrung der Mitwirkungsrechte der Bundesversammlung'. Was ‚Mitwirkung' in diesem Zusammenhang genau bedeutet, ist nicht ohne Weiteres verständlich, aber dass die Bundesversammlung bei der ‚Willensbildung über wichtige aussenpolitische Grundsatzfragen und Entscheide mitwirkt', steht dann wieder schwarz auf weiss im Parlamentsgesetz (ParlG Art. 24 Abs. 1)."
> Bundeskanzler Walter Thurnherr, Zürich am 30.01.2020[2]

Insbesondere die Verlagerung politischer Entscheidungen von der nationalen auf die internationale Ebene scheint einen Einfluss auf das Zusammenwirken von BR und BVers im Bereich der Aussenpolitik zu haben.[3] Der nachfolgenden Untersuchung liegt die Hypothese zugrunde, dass durch eine zunehmende Internationalisierung[4] die parlamentarischen Gestaltungsmöglichkeiten verringert werden, weshalb die BVers versucht, ihre Stellung im Bereich der Aussenpolitik zu verbessern. Darauf aufbauend fragt der Autor: Über welche aussenpolitischen Kompetenzen verfügt die BVers und inwiefern machte sie davon anlässlich der Aushandlung des InstA mit der EU Gebrauch?

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1 Bernhard Ehrenzeller, *Legislative Gewalt und Aussenpolitik: Eine rechtsvergleichende Studie zu den parlamentarischen Entscheidungskompetenzen des deutschen Bundestages, des amerikanischen Kongresses und der schweizerischen Bundesversammlung im auswärtigen Bereich* (Basel: Helbing Lichtenhahn, 1993), 133–35.

2 Bundeskanzlei, *Referat von Bundeskanzler Walter Thurnherr*.

3 Denise Brühl-Moser, *Die schweizerische Staatsleitung: im Spannungsfeld von nationaler Konsensfindung, Europäisierung und Internationalisierung: mit Bezügen zu Belgien, Deutschland, Frankreich, Grossbritannien und Österreich* (Bern: Stämpfli Verlag, 2007), 173–74.

4 In der Literatur wird der Begriff meist mit einer Zunahme von internationalen Verflechtungen, die eine Verwischung der Grenzen zwischen Innen- und Aussenpolitik und einen Bedeutungszuwachs des Völkerrechts bewirkt, in Verbindung gesetzt.

Methodologie

Hierfür werden in einem ersten Schritt die geschichtlichen Entwicklungen und die aktuell relevanten Gegebenheiten dargestellt. Im Anschluss daran befasst sich eine juristische Analyse mit den staatsrechtlichen Grundlagen und der Einordnung der parlamentarischen Kompetenzen im Bereich der Aussenpolitik. Einerseits wird dafür der ausschlaggebende Verfassungsgrundsatz der parlamentarischen Mitwirkung an der Aussenpolitik juristisch ausgelegt. Andererseits werden weitere relevante Bestimmungen der Bundesverfassung (BV) und des Parlamentsgesetzes (ParlG) hinsichtlich der Forschungsfrage nach einer Systematik von Lanz respektive Moeri[5] untersucht. Basierend auf diesen Erkenntnissen wird eine Inhaltsanalyse nach Mayring respektive Kuckartz[6] durchgeführt. Diese befasst sich mit quantitativen und qualitativen Daten aus den Aufzeichnungen von Debatten und Geschäften im amtlichen Bulletin der BVers, die die Aushandlung des InstA betreffen. Letzterer Schritt baut auf den vorangehenden Erkenntnissen auf und wird mittels computergestützter Inhaltsanalyse von forschungsrelevanten Geschäften ab der Erteilung des Verhandlungsmandats 2013 bis zur Sondersession im Mai 2022 durchgeführt. Die verschiedenen Forschungsmethoden und Ergebnisse werden in einer abschliessenden Diskussion interpretiert.

Geschichte

Die Rolle der BVers in der Aussenpolitik hat sich seit der Gründung des schweizerischen Bundesstaates mehrfach gewandelt. So stand die Frage nach den entsprechenden parlamentarischen Kompetenzen immer wieder zur Diskussion. Bis zum Zweiten Weltkrieg kann eine verhaltene Aussenpolitik beobachtet werden. Die internationalen Beziehungen waren von einer starken Zurückhaltung und einigen wenigen Sachgeschäften geprägt.[7] Trotzdem sprach die BV sowohl dem BR wie auch der BVers aussenpolitische Kompetenzen zu. Eine trennscharfe Kompetenzzuschreibung bestand nicht.[8] Gegen Ende des 19. und zu Beginn des 20. Jahrhunderts eignete sich der BR jedoch eine stärkere Führungsposition an. Die Aussenpolitik wurde vermehrt als eine Verwaltungsaufgabe betrachtet. Die Gesetzgebung spielte dabei eine untergeordnete Rolle.[9] So beobachtet auch Kreis, dass der parlamentarische Einfluss in der Aussenpolitik Anfang

5 Matthias Lanz, *Bundesversammlung und Aussenpolitik: Möglichkeiten und Grenzen parlamentarischer Mitwirkung* (Zürich: Dike Verlag, 2020), Rz. 159 respektive Jacqueline Béatrice Moeri, *Die Kompetenzen der schweizerischen Bundesversammlung in den auswärtigen Angelegenheiten* (Diss. St. Gallen, 1990), 31.

6 Philipp Mayring, *Qualitative Inhaltsanalyse: Grundlagen und Techniken* (Basel: Beltz, 2010); Udo Kuckartz, *Qualitative Inhaltsanalyse: Methoden, Praxis, Computerunterstützung* (Weinheim, Basel: Beltz Juventa, 2018), 13–28.

7 Georg Kreis, „Geschichte der schweizerischen Aussenpolitik 1848–1991: Von der Gründung des Bundesstaates bis zum Ersten Weltkrieg“, in: Alois Riklin, Hans Haug, Raymond Probst (Hrsg.), *Neues Handbuch der schweizerischen Aussenpolitik: Nouveau manuel de la politique extérieure suisse* (Bern: Haupt, 1992), 27–37.

8 Hansjörg Seiler, *Gewaltenteilung: Allgemeine Grundlagen und schweizerische Ausgestaltung* (Bern: Stämpfli Verlag, 1994), 434–35.

9 Ebd., 465.

des 20. Jahrhunderts weniger stark ausgeprägt war als zuvor.[10] Gründe für die erstarkte Position der Exekutive sieht Seiler bei einer Überlastung der BVers aufgrund der zunehmenden Anzahl von Bundesaufgaben sowie im damaligen internationalen Kontext, der zu einem wachsenden Bedürfnis nach einer starken Regierung führte.[11] Mit dem Ende des Zweiten Weltkrieges schien die Schweiz sich aus der aussenpolitischen Isolation zu lösen und sich von der bisher verhaltenen Aussenpolitik zu verabschieden. Ab den 1960er-Jahren engagierte sich die Schweiz vermehrt im Rahmen eines multilateralen Systems, das international immer mehr an Bedeutung gewann.[12] Diese vorsichtige Öffnung war von einer aussenpolitischen „Monopolstellung" des BR geprägt.[13] Gleichzeitig ermöglichte die Abwesenheit einer in Stein gemeisselten Kompetenzordnung verschiedene Reformschübe, die als Reaktion auf die Verlagerung politischer Entscheidungen von der nationalen auf die internationale Ebene zu verstehen sind.[14] Dadurch konnte die parlamentarische Beteiligung im Bereich der Aussenpolitik über Jahrzehnte zunehmen. Neben einer gesteigerten demokratischen Legitimation führte dies in Verbindung mit einer Neuausrichtung der Schweizer Aussenpolitik um die Jahrtausendwende zum „aussenpolitischen Erwachen" der BVers.[15] Im Rahmen der Totalrevision der BV sowie des ParlG erlangte die BVers zusätzliche Kompetenzen, insbesondere in Form von Informations- und Konsultationsrechten, womit das Parlament dem Bedeutungszuwachs der Aussenpolitik gerechter werden und auch aussenpolitische Expertise aufbauen konnte. Die Monopolstellung des BR im Bereich der Aussenpolitik wich somit einer ausgebauten Kooperation zwischen der Legislative und der Exekutive.

Unter geltendem Recht

Nachfolgend wird die rechtliche Ausgestaltung der aussenpolitischen Beteiligung der BVers untersucht. Nach einer Erläuterung des verfassungsmässigen Grundsatzes der parlamentarischen Mitwirkung an der Aussenpolitik wird eine Auflistung der Interventionsmöglichkeiten vorgelegt, die allgemeine und spezielle Kompetenzen umfasst.

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10 Georg Kreis, „Konkurrenz oder Kooperation? Zur Entwicklung der parlamentarischen Zuständigkeit in der Aussenpolitik (1920–1992)," *Traverse*, 25, no. 3 (2018): 60.

11 Seiler, *Gewaltenteilung*, 443–44.

12 EFTA (1960), Europarat (1963), GATT (1966), FHA mit EWG (1972), EMRK (1974), KSZE/OSZE (1975).

13 Zaccaria Giacometti, Fritz Fleiner, *Schweizerisches Bundesstaatsrecht* (Zürich: Schulthess, 1949), 526; vgl. auch Bernhard Ehrenzeller, Benjamin Schindler, Rainer J. Schweizer, Klaus A. Vallender, (Hrsg.), *Die Schweizerische Bundesverfassung: St. Galler Kommentar*, 3. Auflage, (Dike: Zürich/St. Gallen/Basel/Genf: 2014), Art.166, Rz. 6.

14 Kreis, Konkurrenz oder Kooperation?, 61–72; Kreis identifiziert bis zur Jahrtausendwende verschiedene Reformschübe. Damit einhergehend betont er unter anderem die Schaffung der aussenpolitischen Kommissionen sowie die Abschaffung der zuvor bestehenden Amtszeitbeschränkung der BVers. Somit gewann die Legislative an aussenpolitischer Expertise und entwickelte sich zur relevanten Ansprechpartnerin für die Exekutive.

15 Robert Baumann, *Der Einfluss des Völkerrechts auf die Gewaltenteilung: am Beispiel Deutschlands, Frankreichs, des Vereinigten Königreichs, der Vereinigten Staaten von Amerika, Schwedens und der Schweiz* (Zürich: Schulthess, 2002), 369.

Art. 166 Abs. 1 BV lautet wie folgt: „Die Bundesversammlung beteiligt sich an der Gestaltung der Aussenpolitik […]“. Um den konkreten Sinn dieser Norm zu ermitteln, muss sie ausgelegt werden.[16] Die Auslegung des ersten Halbsatzes von Art. 166 Abs. 1 BV führt zum Ergebnis, dass die Verantwortung für die Aussenpolitik von BR und BVers gemeinsam getragen werden sollte. Dabei ist ein kooperatives Zusammenwirken zu betonen. Der Sinn und Zweck der Bestimmung besteht aus einer rechtzeitigen, aufrichtigen und sinnvollen Mitwirkung der BVers. Die BVers hat sogar die Pflicht, sich einzubringen und die Aussenpolitik mitzugestalten, soweit dies sachgerecht und verfassungsrechtlich, namentlich zur demokratischen Abstützung von Entscheiden, geboten ist. Dies steht auch vor dem Hintergrund der zunehmenden Internationalisierung, die bei Willensbildung zu Grundsatzfragen eine erhöhte demokratische Legitimation respektive ein Mitwirken der BVers verlangt. So steht Art. 166 Abs. 1 im Rahmen der Totalrevision auch für eine gewisse Akzentverschiebung hin zu einer stärkeren Stellung des Parlaments. Dies geschah jedoch ohne Absicht des Verfassungsgebers, eine fundamentale Gewichtsverlagerung anzustossen.[17] Die Grenzen der parlamentarischen Mitwirkungsmöglichkeiten finden sich dort, wo die funktionale Eignung der BVers endet. Für die Mitwirkung an der Aussenpolitik soll die BVers die ihr zur Verfügung stehenden Instrumente nutzen.

Rechtsetzung bedeutet den Erlass von Bestimmungen, die in generell-abstrakter Weise verbindliche Pflichten und Rechte sowie Zuständigkeiten festsetzen (vgl. Art. 22 Abs. 4 ParlG). Die Rechtsetzung ist die Stammfunktion der BVers.18 In Anbetracht des erhöhten aussenpolitischen Einflusses des BR kommt der Rechtsetzung eine „Legitimations- und Integrationsfunktion in der Aussenpolitik“ zu.19 Volksinitiativen und das Letztentscheidungsrecht von Stimmvolk und Ständen machen insbesondere die Verfassungsgebung allerdings nicht zum geeigneten Mitwirkungsmittel der BVers zur Gestaltung der Aussenpolitik.20 Die *Oberaufsicht* (Art. 169 Abs. 1 BV) ist ein weiteres Instrument, das der BVers zur Mitwirkung im Bereich der Aussenpolitik zur Verfügung steht. Sie soll die politische Verantwortlichkeit des BR garantieren.21 Sie verlangt nach einem Informationsfluss vom BR hin zur BVers, umfasst Empfehlungen und stösst teilweise

16 Ulrich Häfelin, Walter Haller, Helen Keller, Daniela Thurnherr, *Schweizerisches Bundesstaatsrecht*, (Zürich: Schulthess, 2020), Rz. 80; die Bestimmungen wurden nach dem Wortlaut (grammatikalisch), nach der Gesetzessystematik (systematisch), der Entstehungsgeschichte (historisch), der Norm respektive ihrem Sinn (geltungszeitlich) und dem Zweck (teleologisch) ausgelegt.

17 Ehrenzeller et al., *SG Komm. BV*, Art. 166, Rz. 19.

18 René Rhinow, Markus Schefer, Peter Uebersax, *Schweizerisches Verfassungsrecht* (Basel: Helbing Lichtenhahn, 2016), Rz. 2340; Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft* (Bern: Stämpfli, 2016), § 33, Rz. 4.

19 Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 161.

20 Ebd., Rz. 171.

21 Giovanni Biaggini, *BV Kommentar: Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2. Auflage, (Zürich: Orell Füssli, 2017), Art. 169, Rz. 2.

Massnahmen an. Ein zentrales Element im Rahmen der Oberaufsicht sind die verschiedenen Berichte, die der BVers vonseiten des BR zu unterbreiten sind. Als spontane Instrumente der Oberaufsicht kommen die individuellen Auskunftsrechte der Mitglieder der BVers und die Informationsvorstösse hinzu. Letztere bestehen aus Anfrage, Interpellation sowie Frage und werden allesamt in der Fragestunde des Rates wahrgenommen.[22] Sie stellen hinsichtlich der Kooperation und Koordination von BR und BVers in der Aussenpolitik sowie einer Artikulations- und Kommunikationsfunktion ein wichtiges Mitwirkungsmittel dar.[23] Auf Art. 171 Abs. 1 BV basierende Postulate und Motionen, auch *Aufträge* genannt, sind weitere Instrumente der parlamentarischen Mitwirkung. Sie haben gegenüber der Oberaufsicht eine weitreichendere Wirkung. Interessanterweise hat sich der Anteil der aussenpolitischen Postulate an allen eingereichten Postulaten im untersuchten Zeitraum mehrheitlich vergrössert.[24] Im Vergleich dazu weist die aussenpolitische Motion ein gewisses Konfliktpotential auf: Da Motionen dem BR Massnahmen mit engem Spielraum auftragen können, kann insbesondere im Bereich der Aussenpolitik ein Spannungsverhältnis mit der gewollt kooperativen Beziehung entstehen.[25] Dies ist insbesondere bei sogenannten Massnahmen-Motionen der Fall.[26] Bei der *politischen Planung* geht es wiederum darum, politische Vorentscheide zu fällen und damit die mittel- und langfristige Orientierung der Staatstätigkeit im Grundsatz festzulegen.[27] Das Gewicht der parlamentarischen Beteiligung ist hier allerdings fraglich. Denn die aussenpolitische Strategie wird höchstens in den aussenpolitischen Kommissionen (APK) behandelt und ansonsten, ähnlich wie nicht-periodische Berichte zur Europapolitik, lediglich zur Kenntnis genommen.[28] Die Konsultation der APK fällt schliesslich auch unter die Mitwirkung an der politischen Planung.[29] Zudem stellen die *Finanzkompetenzen* der BVers ein starkes Instrument dar. Erwähnenswert sind die Vorgaben bei der Kreditbewilligung. Auf diese Weise konnte die BVers beispielsweise bei der Festlegung der Bedingungen für die zweite sogenannte Kohäsionsmilliarde Einfluss nehmen.[30]

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22 Postulat und Motion haben Überschneidungen zur Oberaufsicht, stützen sich aber auf das Auftragsrecht nach Art. 171 Abs. 1 BV.

23 Martin Graf, Cornelia Theler, Moritz von Wyss, (Hrsg.), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG) vom 13. Dezember 2002* (Basel: Helbing Lichtenhahn, 2014), Art. 28, Rz. 35; Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 234.

24 Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 242.

25 Ebd., Rz. 269.

26 Graf, Komm. ParlG, Art. 120, Rz. 1 ff.; Philippe Mastronardi, Benjamin Märkli, SG Komm. BV, Art. 171, Rz. 14; Moeri, Kompetenzen, 116, 259.

27 Adrian Mattle, *Mitwirkung des Parlaments an der politischen Planung* (Diss. Zürich, 2011), 2–3.

28 Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 273.

29 Graf, Komm. ParlG, Art. 28, Rz. 12.

30 Lanz spricht diesbezüglich von einem „aussenpolitischen Pfand gegenüber der EU – entgegen dem Willen des BR“ und der parlamentarischen „power of the purse in der Aussenpolitik“. Vgl. Lanz, Bundesversammlung und Aussenpolitik, Rz. 304.

Unter die Mittel, die der BVers speziell im Bereich der Aussenpolitik zur Verfügung stehen, fallen die nach Art. 24 Abs. 2 ParlG statuierten Kompetenzen, den Abschluss, die Änderung oder die Kündigung von *völkerrechtlichen Verträgen* zu genehmigen, sofern nicht der BR zum selbstständigen Abschluss befugt ist. Dennoch liegt der Entscheid über die Aufnahme von Verhandlungen sowie die Erteilung des Verhandlungsmandats im Zuständigkeitsbereich des BR.[31] Die BVers muss aufgrund ihrer *Informations- und Konsultationsrechte* indes frühzeitig involviert werden. So müssen nach Art. 152 ParlG die APK konsultiert und „über den Fortgang der Verhandlungen" informiert sowie zu „wesentlichen Vorhaben" und „Richt- und Leitlinien zum Mandat für bedeutende internationale Verhandlungen" konsultiert werden.[32] Der BR muss allerdings nicht das eigentliche Verhandlungsmandat vorlegen, es genügt eine Zusammenfassung. Es besteht kein Mitentscheidungs- oder Weisungsrecht. Der BR hat sich aber ernsthaft mit entsprechenden Stellungnahmen auseinanderzusetzen. Petrig und Sinz bekräftigen, dass diese grundlegenden Informations- und Konsultationsrechte einen Dreh- und Angelpunkt der parlamentarischen Mitwirkung an der Aussenpolitik darstellen, da die parlamentarische Teilhabe so gesichert werde.[33] Schliesslich kann sich völkerrechtliches Handeln auch ausserhalb klassischer Verträge namentlich durch „Soft Law", internationale Beziehungen oder Erklärungen der BVers abspielen.[34]

Parlamentarische Geschäfte

Um den zweiten Teil der Forschungsfrage in Bezug auf das InstA zu beantworten, wird eine Inhaltsanalyse mit Codierung der parlamentarischen Debatten aus dem amtlichen Bulletin durchgeführt. Ziel ist es, herauszufinden, welche der ihr zur Verfügung stehenden Mittel die BVers anlässlich der Aushandlung mit der EU eingesetzt hat. Dies geschieht auch hinsichtlich der aufgestellten Hypothese, wonach die BVers versucht, ihre Stellung im Bereich der Aussenpolitik zu verbessern, weil aufgrund einer zunehmenden Internationalisierung die parlamentarischen Gestaltungsmöglichkeiten verringert werden. Zur Bearbeitung des Materials im Sinne der Forschungsfrage wird eine qualitative Inhaltsanalyse nach Mayring[35] angewendet. Sie kombiniert quantitative und qualitative Elemente.[36] Hierzu werden Weiterentwicklungen nach Kuckartz verwendet, die sich über Mayrings Ansatz hinaus besonders für eine fallorientierte

31 Künzli, BS Komm. BV, Art. 184, Rz. 18; Schwendimann et al., SG Komm. BV, Art. 184, Rz. 16.
32 Die „wesentlichen Vorhaben" sind unter Art. 5b RVOV erfasst. Ausserdem steckt Art. 24 Abs. 1 ParlG die Mitwirkung auf „wichtige" Aspekte der Aussenpolitik und „bei der Willensbildung über wichtige aussenpolitische Grundsatzfragen und Entscheide" ab.
33 Petrig und Sinz, *Rechtsgutachten*, 13, 22–3
34 Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 408.
35 Mayring, *Qualitative Inhaltsanalyse*.
36 Ebd., 22.

Perspektive eignen.[37] Dies lässt sich optimal computergestützt mit der Software MAXQDA 2022 umsetzen.[38] Die *deduktive Kategorienbildung*[39] stützt sich in der vorliegenden Arbeit auf die Auflistung der Interventionsmöglichkeiten gemäss der juristischen Untersuchung. In einem zweiten Schritt werden die Daten mittels induktiver Kategorienbildung[40] eingeteilt. Basierend auf der Forschungsfrage lassen sich die Kategorien dabei direkt aus dem Material in einem Verallgemeinerungsprozess ableiten.[41]

Ab dem Zeitpunkt konkreter Diskussionen zur Verabschiedung des offiziellen Verhandlungsmandats wurden vom Autor insgesamt 243 parlamentarische Geschäfte identifiziert, die in einem eindeutigen Zusammenhang mit der Aushandlung eines InstA stehen. Davon liessen sich 86 Geschäfte teilweise oder vollständig dem induktiv erstellten Kategoriensystem zuordnen. Ausserdem zeigt die quantitative Analyse auf, welche Instrumente bei welchen thematischen Schwerpunkten eingesetzt wurden.

Es wird ersichtlich, dass die meisten Stellen in den untersuchten Dokumenten, nämlich 27,1 Prozent, dem „*Verlangen nach Einsicht*“ zugeordnet werden können. Inhaltlich bezogen sich diese Verlangen in erster Linie auf den Fortschritt und Inhalt der Verhandlungen beziehungsweise das Verhandlungsmandat.[42] Neben einzelnen Treffen wurde in zahlreichen Fällen die Einsicht in die mittel- bis langfristige Planung des BR thematisiert. In mehreren Fällen wurde dies auch mit den Informations- und Konsultationsrechten der BVers beziehungsweise der APK in Zusammenhang gestellt.[43] Die „*Thematisierung der Legitimation*“ tauchte in den Geschäften und Debatten mit 23,6 Prozent als zweithäufigster Schwerpunkt auf. Mehrere Vorstösse fragten nach der Entscheidungshoheit sowie insbesondere danach, ob der BR von einem obligatorischen Referendum ausgehe.[44] In diesem Zusammenhang wurde auch eine stärkere Legitimierung von völkerrechtlichen Verträgen mit verfassungsmässigem Charakter angesprochen.[45] Die

37 Kuckartz, *Qualitative Inhaltsanalyse*, 6.
38 Ebd., 174–200.
39 Mayring, *Qualitative Inhaltsanalyse*, 83.
40 Ebd., 83.
41 Bei der Sichtung der Daten entstand folgende Einteilung in thematische Schwerpunkte: „Verlangen nach Einsicht“, „Versuch der Einflussnahme“, „Aufruf zu bestimmtem Vorgehen“, „Auswirkungen auf Kompetenzordnung“ und „Thematisierung der Legitimation“. Die Kriterien dieser Kategorien sind im Anhang der Arbeit mit den jeweiligen Definitionen und entsprechenden Beispielen aufgeführt.
42 Vgl. beispielsweise Frage, Estermann 13.5462; Interpellation, Glättli, 18.3522 wie auch Frage, Riklin, 15.5574; Frage, Köppel, 16.5509; Frage, Chiesa, 16.5247; Interpellation, Hess, 18.4347.
43 Vgl. beispielsweise Interpellation, FDP-Liberal Fraktion, 18.3743; Motion, Minder, 21.4184.
44 Interpellation, Fraktion der Schweizerischen Volkspartei, 13.3676; Frage, Imark, 16.5225; Debatte, 20.9011.
45 Motion, Caroni, 15.3557; Geschäft des Bundesrats, 20.016.

BVers stand hinter bestimmten Vorstössen betreffend die Zuständigkeiten,[46] so etwa bei einer Motion der Kommission für Wirtschaft und Abgaben des Ständerats (WAK-S), die den BR beauftragte, mit der EU Zusatzverhandlungen zu führen.[47] Besonders im Nachgang zum offiziellen Verhandlungsabbruch fällt eine wachsende „Thematisierung der Legitimation" in den Debatten auf: Einige Fraktionen sprachen vom Übergehen demokratischer Institutionen und Rechtsgrundlagen.[48] Textsegmente zu potentiellen „*Auswirkungen auf [die] Kompetenzordnung*" wurden im untersuchten Material mit 21,2 Prozent am dritthäufigsten codiert. Dabei fielen insbesondere Befürchtungen, eine institutionelle Lösung bringe eine automatische Rechtsübernahme mit sich, ins Gewicht. So wurde der BR mehrfach nach den Auswirkungen auf die demokratischen Institutionen und Prozesse gefragt.[49] Um dabei das Mitspracherecht, insbesondere der BVers, zu gewährleisten, wurde der BR anhand mehrerer Motionen verpflichtet, im Falle eines Vertragsabschlusses[50] eine gesetzliche Grundlage zu prüfen beziehungsweise auszuarbeiten.[51] Parlamentarische „*Aufruf[e] zu bestimmte[n] Vorgehen*" sind in der Literatur zwar umstritten,[52] doch stellten sie im untersuchten Zeitraum mit 18,7 Prozent keine Seltenheit dar. Schon vor und auch nach Verabschiedung des offiziellen Verhandlungsmandats riefen verschiedene Motionen zu einem Moratorium beziehungsweise einem Unterlassen von Verhandlungen über institutionelle Fragen auf.[53] In einzelnen Fällen wurde der BR meist erfolglos dazu aufgerufen, anstelle oder neben des InstA auch weitere Freihandelsabkommen, den Beitritt zum Europäischen Wirtschaftsraum oder gar Beitrittsverhandlungen mit der EU anzustreben.[54] Unterstützung fanden hingegen zwei Motionen der WAK beider Räte, die den BR beauftragten, mit der EU Zusatzverhandlungen zu führen beziehungsweise andere geeignete Massnahmen zu ergreifen.[55] Ähnliche Forderungen liessen sich mit einem Anteil von 9,4 Prozent des untersuchten Materials auch unter dem thematischen Schwerpunkt „*Versuch der Einflussnahme*" sammeln. Ein konkretes Beispiel stellte die Subkommission für die Umsetzung des InstA dar. Sie wurde durch die APK-N eingesetzt und sollte im Hinblick auf den allfälligen Vertragsabschluss die parlamentarischen Mitsprache- und

46 Motion, Minder, 18.4165; Postulat, Nussbaumer, 18.3059.
47 Motion, WAK-S, 19.3416.
48 Motion, Lombardi, 19.3170; Frage, Nussbaumer, 21.7453; Frage, Friedl, 21.7454; Debatte, 21.9007.
49 Geschäft des Bundesrats, 16.016; Parlamentarische Initiative, Fraktion der Schweizerischen Volkspartei, 16.465; Frage, Imark, 16.5225; Motion, Föhn, 19.3746; Motion, Molina, 21.3811.
50 Teilweise gingen die Aufträge auch über den Abschluss des Rahmenabkommens hinaus und antizipierten die Sicherung des demokratischen Prozesses „auch bei kommenden Verträgen dieser Art". Vgl. Motion, Lombardi, 19.3170; Motion, WAK-S, 19.3416.
51 Postulat, Nussbaumer, 18.3059; Motion, Die Mitte-Fraktion, 19.3167; Motion, Lombardi, 19.3170; Motion, WAK-S, 19.3416.
52 Vgl. Graf, Komm. ParlG, Art. 120, Rz. 1 ff.; Philippe Mastronardi, Benjamin Märkli, SG Komm. BV, Art. 171, Rz. 14.
53 Motion, Fraktion der Schweizerischen Volkspartei, 12.3531; Motion, Fraktion der Schweizerischen Volkspartei, 19.3717; Motion, Föhn, 19.3746.
54 Geschäft des Bundesrats, 19.078; Debatte, 21.9007; Motion, Molina, 21.3811.
55 Motion, WAK-N, 19.3420; Motion, WAK-S, 19.3416.

Entscheidungsrechte sicherstellen. Zusätzlich sprach sich die Mehrheit der Abgeordneten dafür aus, dass die BVers „frühzeitig mitwirken [kann], bevor die Schweiz in den Verhandlungen über gewisse Geschäfte eine verbindliche Stellungnahme abgibt“.[56]

Bewertung der Mitwirkung

Die Analyse der historischen Entwicklungen und die Untersuchung der geltenden aussenpolitischen Kompetenzen der BVers haben den Rahmen der parlamentarischen Mitwirkung im Bereich der Aussenpolitik abgesteckt. Namentlich wurde gezeigt, dass die BVers eine aussenpolitische Teilverantwortung im Sinne des „Verhältnisses zu gesamter Hand“ und dem „Modell der kooperierenden Gewalten“ innehat. Die Inhaltsanalyse hat demonstriert, dass sie diese über ihre demokratische Vertreterrolle gegenüber dem BR und in der Regel mit Bedacht auf die „gestufte Organkompetenz“ ausübt.

Die Instrumente der *Oberaufsicht* wurden von der BVers in Bezug auf die Aushandlung des InstA am häufigsten angewendet: Über die Hälfte der qualitativ untersuchten Geschäfte liessen sich als Informationsvorstösse einordnen. Diese Erkenntnis deckt sich auch mit Erkenntnissen aus der Literatur, die in den vergangenen Jahren insbesondere betreffend Anfragen, Fragen und Interpellationen einen Anstieg feststellen. Der Autor interpretiert dies als aktives Engagement der BVers im Bereich der Aussenpolitik beziehungsweise in der Aushandlung des InstA mitzuwirken. Aktiv zeigte sich die BVers auch in der Nutzung von *Aufträgen*. Postulate beispielsweise wurden oft genutzt und schienen eine geeignete Möglichkeit der Beteiligung darzustellen. Sie stehen grundsätzlich im Einklang mit der Gewaltenteilung. Denn das Postulat ermöglicht neben einem Informationsfluss auch Anregungen, ohne bestimmte Aktionen zu fordern. So zeigte sich auch, dass Postulate in den untersuchten Fällen am häufigsten als „Verlangen nach Einsicht“ verwendet wurden, also in einer Weise, die nur eine geringe Gefahr einer Kompetenzüberschreitung birgt. Im Unterschied dazu präsentieren sich die Grenzen der parlamentarischen Beteiligung bei Motionen anders: Die juristische Analyse zeigte auf, dass Motionen die funktionale Organeignung der BVers übersteigen können.[57] Folglich sollten Motionen kritisch beurteilt werden, wenn beispielsweise operativ in die Aussenpolitik, insbesondere in Verhandlungen, eingegriffen wird. Die Inhaltsanalyse verdeutlichte, dass diese Diskussion in Bezug auf sogenannte Massnahmen-Motionen auch in der BVers stattfand. Allerdings fand eine Motion eine Mehrheit, die 2019 vom BR Zusatzverhandlungen mit der EU forderte. Eine andere

56 Motion, Lombardi, 19.3170 und ähnlich auch Parlamentarische Initiative, APK-N, 21.480.
57 Vgl. hierfür auch Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 233.

Möglichkeit der Einflussnahme im Bereich der Aussenpolitik besteht für die BVers im Rahmen der *politischen Planung*. Die Auslegung in der juristischen Analyse zeigte, dass die BVers in die Willensbildung zu Grundsatzfragen und bei wichtigen Entscheiden einzubeziehen ist beziehungsweise für die BVers eine Pflicht zur Mitwirkung besteht. Allerdings konnte die Grenze dieser Beteiligung nicht abschliessend geklärt werden. Es spricht wohl einiges dafür, dass die erwähnte Forderung der parlamentarischen Initiative der APK-N zu einem strukturierten politischen Dialog mit der EU über die Weiterführung der Beziehungen hierunter fallen würde. Die BVers übt zudem über die *Genehmigung von völkerrechtlichen Verträgen* Einfluss auf die Aussenpolitik aus. Die Grenzen dieser Kompetenz wurden kürzlich mit den Änderungen von Art. 24 Abs. 2 ParlG neu gezogen und scheinen in den Diskussionen um das InstA einige Unklarheiten hervorgerufen zu haben. So wurde der BR in den untersuchten Dokumenten des amtlichen Bulletins mehrfach nach der Entscheidungshoheit gefragt. Daraus lässt sich möglicherweise schliessen, dass die Kompetenzordnung von einigen Mitgliedern der BVers nicht als eindeutig empfunden wird. Eine weitere äusserst wichtige Möglichkeit der parlamentarischen Beteiligung im Bereich der Aussenpolitik sind die *Informations- und Konsultationsrechte*, beispielsweise zu Mandaten für bedeutende internationale Verhandlungen. Es liegt nahe, dass ihr Nutzen stark mit dem Vertrauen zwischen BVers und BR zusammenhängt. Genau ein solches Vertrauensverhältnis scheint dem Autor in Bezug auf die Aushandlung des InstA allerdings nicht immer gegeben gewesen zu sein: Die Inhaltsanalyse legte offen, dass in mehreren Fällen unter ausdrücklichem „Verlangen nach Einsicht“ Kritik betreffend Einbezug der parlamentarischen Ansichten geäussert wurde. Diese ist nach Ansicht des Autors ein Indikator dafür, dass die in der BV und im ParlG vorgesehene Möglichkeit beziehungsweise Pflicht zur aussenpolitischen Beteiligung allenfalls nicht deckungsgleich mit den realpolitischen Ansprüchen ist.[58] Hier besteht somit auch weiterer Forschungsbedarf.

Die laufende Akzentverschiebung zugunsten der parlamentarischen Zuständigkeiten über die Zeit hat die aussenpolitische Kompetenzordnung in der Vergangenheit zwar nicht komplett verändert, aber an ihr gerüttelt. Der Anteil der BVers an der Staatsleitung im aussenpolitischen Bereich konnte so auch aufgrund kleinerer Kompetenzerweiterungen in den letzten Jahrzehnten stetig zunehmen. Die „Parlamentarisierung des auswärtigen Bereichs“[59] wurde von einer immer wieder aufflammenden Debatte über die Kompetenzordnung und die parlamentarischen

58 In diesem Sinne äusserte sich die Aussenpolitische Kommission des Ständerats im Frühjahr 2023. Sie will „vom Bundesrat konsultiert werden, bevor Entscheide über allfällige Verhandlungen mit der EU getroffen werden.“ Diese Haltung resultiere daraus, dass man sich in der Vergangenheit zu wenig einbezogen fühlte. Vgl. SRF, Ständeratskommission will im EU-Dossier mitreden.

59 Ehrenzeller et al., *SG Komm. BV*, Art. 166, Rz. 7.

Gestaltungsmöglichkeiten begleitet. Der vorliegende Beitrag deutet darauf hin, dass im aussenpolitischen Kontext die Anerkennung der sich verändernden Rolle der BVers angezeigt ist. Um der Verschiebung von Politikräumen und Veränderung der Politikgestaltung Rechnung zu tragen, werden nach Ansicht des Autors die parlamentarischen Mitwirkungsrechte weiterentwickelt und diese Weiterentwicklung sollte vorangetrieben werden. In dieser Hinsicht lassen sich beispielsweise die eingeführte dringliche Kündigung völkerrechtlicher Verträge, bei der eine Zusage beider APK eine Kündigung durch den BR auch bei wichtigen Abkommen ermöglicht, oder Art. 152 Abs. 3 bis Satz 2 ParlG, welcher der BVers ein Vetorecht bei der vorläufigen Anwendung von Verträgen einräumt, erwähnen. Der Autor teilt die Ansicht von Lanz, dass die BVers teilweise nicht in ihrer traditionellen Rolle verbleiben kann, da sie ansonsten ihrer demokratischen Mitwirkungspflicht nicht mehr gerecht würde.[60] Hierbei ist ein passendes Gleichgewicht zwischen der durch die BVers vorgesehenen Legitimation völkerrechtlichen Handelns und der internationalen Handlungsfähigkeit des BR anzustreben. Die Inhaltsanalyse konnte veranschaulichen, dass die BVers ihre Beteiligung in erster Linie mit „Verlangen nach Einsicht" gestaltet. Es liegt nahe, dass so die Kompetenzordnung eingehalten wird. Allerdings weist die Untersuchung darauf hin, dass daraus bestimmte Forderungen erwuchsen, die auf einen Eingriff in die Kompetenzordnung abzielten. Ausserdem wurde der BR anhand mehrerer Motionen dazu verpflichtet, im Falle eines Abschlusses des InstA eine gesetzliche Grundlage zum Mitspracherecht der BVers zu prüfen beziehungsweise auszuarbeiten. Der Autor ist der Ansicht, dass derartige Beispiele darauf hindeuten, dass eine Tendenz zur Inanspruchnahme von Handlungsfähigkeit beziehungsweise Kompetenzen in der Aussenpolitik durch die BVers zu erkennen ist. Die untersuchten Geschäfte und Debatten liefern Anzeichen dafür, dass diese Tendenz mit einer begrenzt wachsenden Unzufriedenheit seitens BVers betreffend die Europapolitik des BR zusammenhängt, zumindest im Hinblick auf die Entwicklungen rund um das InstA. In diesem Sinne veranschaulicht die Annahme einer Motion, die vom BR Zusatzverhandlungen mit der EU verlangt, den Willen der BVers, den BR zu kontrollieren beziehungsweise ihre Mitwirkungsbefugnisse relativ weit auszulegen.

Wie in der Arbeit aufgezeigt, stiess der einseitige Abbruch der Verhandlungen im Mai 2021 auch ausserhalb der BVers auf Kritik: So bezichtigt Cottier den BR, seine Kompetenzen überschritten zu haben, und er kritisiert die fehlende Zustimmung der BVers bei einer staatsleitenden

60 Vgl. Lanz, *Bundesversammlung und Aussenpolitik*, Rz. 100; 326.

Entscheidung mit grosser Tragweite.[61] Cottier sieht in dieser Situation die Symptome eines Strukturwandels in der „Aussenwirtschaftspolitik", dem heutige parlamentarische Kompetenzen nicht genügend entsprechen. So befürwortet er eine frühere Einbindung in die Bestimmung von Zielen und Leitentscheidungen.[62] Entsprechend stellt die Lehre bei der parlamentarischen Beteiligung vermehrt auf die Wichtigkeit der Geschäfte ab.[63] Es bleibt vorerst jedoch offen, was die auch eingangs dieser Arbeit von Bundeskanzler Walter Thurnherr zitierten «wichtige[n] aussenpolitische[n] Grundsatzfragen» miteinschliessen.

Fazit

Aus Sicht des Autors zeigt sich hinsichtlich des Einflusses der Internationalisierung insgesamt ein Wechselspiel zwischen dem Ausbau parlamentarischer Kompetenzen und abnehmenden Gestaltungsmöglichkeiten der BVers. Anhand der Untersuchung der parlamentarischen Geschäfte und Debatten wurde jedoch ersichtlich, dass sich die BVers eines potenziellen Bedeutungsverlustes ihrerseits durch die Internationalisierung bewusst ist und Versuche unternommen werden, diese Entwicklungen zu adressieren. Die aussenpolitischen Kompetenzen der BVers sollten im Sinne eines zukunftsorientierten Ansatzes bei fortlaufender Internationalisierung weiterentwickelt werden, um die parlamentarische Mitwirkung sicherzustellen.

61 Thomas Cottier, „Rahmenabkommen Schweiz–EU: Der Bundesrat hat am 26. Mai 2021 seine Kompetenzen überschritten", *Jusletter* vom 28. Juni 2021, 1. Cottier plädiert sogar für die Reorganisierung der gesetzlichen Grundlagen im Bereich des Aussenwirtschaftsrechts, um das Vorgehen des BR künftig unterbinden zu können. Vgl. hierzu Ebd., 17.
62 Thomas Cottier, „Der Strukturwandel des Aussenwirtschaftsrechts", *Swiss Review of International and European Law* 29 (2019): 223–24.
63 Thürer und Isliker, SG Komm. BV, Art. 166, Rz. 60; Epiney, BS Komm. BV, Art. 166, Rz. 13.

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Arun Mahato

EU Sanctions Policy Vis-à-Vis Russia – A Case of Normative Power?

Abstract: This research piece investigates the role of norms in European Union (EU) sanctions policy towards Russia in the context of the Russia-Ukraine War. It aims to answer the research question of the extent to which the EU's foreign policy in this particular case can be interpreted as having normative power. As an analytical lens, the Normative Power Europe (NPE) framework is used. In order to tackle the question, this study deploys an interdisciplinary approach drawing from EU law and social sciences. It combines EU legislation and case law of the European Court of Justice on the one hand, with a qualitative content analysis of official EU press releases on the other. The first part of the analysis focuses on the doctrinal legal analysis of the relevant EU law in order to account for the normative-legal basis and legitimacy of EU autonomous sanctions. The second part investigates if the EU in this particular case is guided by international norms (milieu goals) or economic interests (possession goals) and which foreign policy instruments it uses to pursue its objectives. The study finds that the EU is committed to its normative identity.

Key Words: EU Sanctions Policy, EU Foreign Policy, Russia-Ukraine War, Interdisciplinary Analysis, Normative Power Europe (NPE)

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Introduction

Context of the Conflict and International Reaction

On 21 March 2014, following the Euromaidan protests and the military intervention by Russian special forces in February, the president of the Russian Federation, Vladimir Putin, signed a municipal law[1] enabling the de facto annexation of Crimea and the city of Sevastopol.[2] Previously, there was a declaration of independence of the Republic of Crimea on 11 March 2014, which was not recognized by the international community[3], and a controversial regional referendum was held on 16 March in the absence of international observers.[4] The annexation constituted the first case of such a claim by a permanent member of the Security Council of the United Nations against another member state of the international organization.[5] As a consequence of the annexation, a violent conflict broke out in the Donbas region between pro-Russian separatists and Ukrainian armed forces.[6] Several attempts to find a peaceful solution through dialogue and diplomacy within the framework of multilateral formats were subsequently instituted. Despite some progress made by the signing of the Minsk agreements[7], the conflict could not be resolved and eventually led to the Russian military invasion of Ukraine in February 2022, constituting a massive threat to European and international peace and security and causing a humanitarian crisis.[8] The reaction of the international community was diverse, reflecting the continuous tension between norms and values on the one hand, and economic and strategic interests on the other. For instance, China refused to openly condemn Russia's aggression, instead emphasizing its bilateral relations and criticizing the West for imposing sanctions.[9] India's reaction has been characterized as "publicly neutral" and "subtle pro-Moscow".[10] The European Union (EU) was among the first actors to gradually impose sanctions, which have come to exhibit unprecedented scope and intensity, targeting trade, finance and energy sectors. Moreover, the EU decided to apply autonomous sanctions because United Nations (UN) Security Council measures were blocked

1 President of the Russian Federation, "Laws on admitting Crimea and Sevastopol to the Russian Federation," March 21, 2014, http://en.kremlin.ru/acts/news/20625.

2 Thomas D. Grant, "Annexation of Crimea," *American Journal of International Law* 109, no. 1 (2015); Sabine Fischer, "The Donbas Conflict," *Stiftung Wissenschaft und Politik* 10 (2019): 5.

3 United Nations, "General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region," news release, 27 March 2014, https://press.un.org/en/2014/ga11493.doc.htm.

4 Grant, "Annexation of Crimea," 85.

5 Ibid, 68.

6 Samy Westfall and Claire Parker, "Why Is Ukraine's Donbas Region a Target for Russian Forces?," *Washington Post*, May 3, 2022.

7 OSCE, "Protocol on the results of consultations of the Trilateral Contact Group," 5 September 2014, www.osce.org/home/123257; United Nations Peacemaker, "Package of measures for the Implementation of the Minsk agreements," 12 February 2015, https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf.

8 Nataliya Katser-Buchkovska, "The Consequences of the War in Ukraine Will Be Far-Reaching," *World Economic Forum*, April 22, 2022.

9 Mercy A. Kuo, "China's Ukraine Response Is All About the US (Not Russia)," *The Diplomat*, April 5, 2022.

10 Ashley J. Tellis, "'What Is in Our Interest': India and the Ukraine War," *Carnegie Endowment for International Peace*, April 25, 2022.

by Russia's veto.[11] Given the EU's high dependency on Russian energy imports especially when it comes to crude oil, natural gas and solid fossil fuels,[12] it is surprising that it imposed such comprehensive sanctions regimes that go against its own energy security interests. Following this line of thought, the research question is introduced in the next subchapter.

Research Question

This study focuses on the EU's sanctions policy towards Russia within the context of the Russia-Ukraine War since 2014. More specifically, it investigates the EU's commitment to norms. In so doing, the following research question is addressed: *"To what extent can the restrictive measures imposed by the EU against Russia be considered a case of normative power?"*. Considering the external threat posed by Russia's military aggression, this question is crucial, because it addresses the challenges the EU faces to its normative identity. Moreover, given the increasing contemporary geopolitical tensions, the question of the relationship between EU sanctions and EU normativity is expected to be of increasing relevance to academia and policymakers alike. Importantly, the conflict is still ongoing at the time of writing, which is why the EU's policy is constantly adapting according to the developments on the ground.[13]

Literature Review

There is a body of literature dealing with the purpose, objective and effectiveness of international sanctions.[14] Legal scholars have emphasized several challenges for the practical application of sanctions policies, *inter alia* the importance of granting the individual targets the fundamental right to judicial review.[15] Moreover, the Lisbon Treaty has rendered the European Council a

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11 United Nations, "Russia Blocks Security Council Action on Ukraine." news release, 26 February, 2022, https://news.un.org/en/story/2022/02/1112802.

12 European Council, "Infographic – Where Does the EU's Energy Come From?", 16 April 2023, https://www.consilium.europa.eu/en/infographics/where-does-the-eu-s-energy-come-from/.

13 This contribution is based on the master's thesis by the author, written at the Institute for European Global Studies. Hence, data used for the analysis is considered until April 2022.

14 David A Baldwin, "The Sanctions Debate and the Logic of Choice," *International Security* 24, no. 3 (1999): 82; Thomas J. Biersteker and Clara Portela, "EU Sanctions in Context: Three Types," (European Union Institute for Security Studies, 2015); Gary C. Hufbauer, Jeffrey J. Schott, and Kimberly A. Elliott, *Economic Sanctions Reconsidered: History and Current Policy*, vol. 1 (Washington DC: Institute for International Economics, 1985); Robert A. Pape, "Why Economic Sanctions Do Not Work," *International Security* 22, no. 2 (1997); Dursun Peksen, "Autocracies and Economic Sanctions: The Divergent Impact of Authoritarian Regime Type on Sanctions Success," *Defence and Peace Economics* 30, no. 3 (2019); Iain Cameron, "Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play," (2008); Anna-Sophie Maass, "The Actorness of the EU's State-Building in Ukraine-before and after Crimea," *Geopolitics* 25, no. 2 (2020); Clara Portela et al., "Consensus against All Odds: Explaining the Persistence of EU Sanctions on Russia," *Journal of European Integration* 43, no. 6 (2021); Viljar Veebel, "European Union as Normative Power in the Ukrainian-Russian Conflict," *International Politics* 56, no. 5 (2019).

15 Peter Van Elsuwege, "The Adoption of 'Targeted Sanctions' and the Potential for Inter-Institutional Litigation after Lisbon," *Journal of Contemporary European Research* 7, no. 4 (2011): 489.

central EU institution regarding the decision-making in this field and norms influence these decisions.[16] The notion of *European norms* in international relations has been described as ambiguous due to its double meaning as "a sort of European virtue claiming universal validity" and a tool for the advancement of its proper interests.[17] Norms-based foreign policy and the soft-power capacity linked to the EU are juxtaposed to notions of *realpolitik* most prominently promoted by China, India and Russia. In the absence of hard power capabilities, the EU arguably relies on norms or economic leverage in order to advance its proper interests in the international system.

Theoretical Framework

EU Foreign Policy and External Action

EU Foreign Policy is "the area of European policies that is directed at the external environment with the objective of influencing that environment and the behavior of other actors within it, in order to pursue interests, values and goals."[18] Integral to the EU's foreign policy is the Common Foreign and Security Policy (CFSP), responsible for "developing and implementing the political and diplomatic dimension of EU foreign policy."[19] The European Council represents the heads of state or government of the 27 member states and is tasked with defining the Union's strategic interests, objectives and guidelines in the field of the CFSP. Importantly, the EU's objectives in its external relations influence both the internal developments and the EU's identity as an international actor.[20] The EU's commitment to norms and values as well as its strategic interests are codified in Treaty on European Union (TEU) articles, such as Art. 3(5) TEU and Art. 21 TEU. They highlight the fundamental guiding principles for EU external actions.[21]

16 Viktor Szép, "New Intergovernmentalism Meets EU Sanctions Policy: The European Council Orchestrates the Restrictive Measures Imposed against Russia," *Journal of European Integration* 42, no. 6 (2020).
17 Zaki Laïdi, *EU Foreign Policy in a Globalized World*, (New York: Routledge, 2008): 1.
18 Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (London: Bloomsbury, 2022), 1.
19 Ibid., 12.
20 Ramses A. Wessel and Joris Larik, *EU External Relations Law: Text, Cases and Materials* (London: Bloomsbury, 2020), 9–11.

What Are Sanctions and What Are They Good for?

Sanctions have been defined in various ways by scholars from the social sciences, humanities and international law.[22] Objectives may include punishment or compliance, and they may serve to bring about a normative or behavioral change in the target. With respect to actors, next to states, international organizations have become increasingly important.[23] Sanctions can be grouped into different types, such as institutional, economic or targeted sanctions.[24] Economic sanctions are "measures of an economic – as contrasted with diplomatic or military – character taken to express disapproval of the acts of the target or to induce that [target] to change some policy or practices or even its governmental structure."[25] They refer to embargoes and restrictions, which can be of a rather general kind or directed towards trade in certain sectors, goods or services, such as arms or oil embargoes.[26] Targeted measures are directed against individual legal or natural persons and they include for instance asset freezes or travel bans. The EU has the possibility to adopt three different kinds of restrictive measures, which may be categorized according to their respective relationship to UN sanctions.[27] EU autonomous sanctions are imposed by the EU in the absence of UN measures and serve as a foreign policy tool with the purpose of "expressing concern about what is believed to be unacceptable behavior and to reaffirming EU values on the international scene."[28] This study focuses on autonomous, economic and targeted sanctions. It does not provide an assessment according to international law. Regarding sanctions purposes, a nuanced typology by Cameron distinguishing between eight different categories serves as a basis. For instance, *compliance* means "the sanctioning party's intention is that the receiver ought to change some aspect of its foreign or domestic policy." Another example is *symbolism*, which refers to a case where "the sanctions provide the domestic audience of the sender, international constituencies (such as NGOs) and the receiver itself with evidence of disapproval but without inflicting serious material damage."[29] Based on these definitions, the following working definition of *sanctions* is developed for the present study:

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22 See inter alia Johan Galtung, "On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia," *World Politics* 19, no. 3 (1967): 379; Jean Combacau, "Sanctions," *Encyclopedia of Public International Law*, ed. Rudolf Bernhardt (Amsterdam: North Holland, 1992), 337–338; Clara Portela, *European Union Sanctions and Foreign Policy: When and Why Do They Work?* (London: Routledge, 2012); Jonathan Law and Elizabeth A. Martin, "Sanction," *A Dictionary of Law* (Oxford University Press, 2022); Vera Axyonova, "The Effectiveness of Sanctions and Regime Legitimacy in Central Asia: Examining the Substance of EU Sanctions against Uzbekistan," *L'Europe en formation*, no. 1 (2015): 22; Nicholas Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (New Haven: Yale University Press, 2022).

23 Barry E. Carter, "Economic Sanctions," online in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2011).

24 Tom Ruys, "The European Union Global Human Rights Sanctions Regime (Eughrsr)," *International Legal Materials* 60 no. 2 (2021): 2.

25 Andreas F. Lowenfeld, *International Economic Law* (Oxford University Press, 2003), 698.

26 Ruys, "The European Union Global Human Rights Sanctions Regime (Eughrsr)," 6.

27 Biersteker and Portela, "EU Sanctions in Context: Three Types."

28 Ibid., 2.

29 Iain Cameron, *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Cambridge: Intersentia, 2013), 6–7.

> Sanctions are a foreign policy instrument that is used by a state or international organization (sender) against another state, non-governmental entity or individual (target) in reaction to violations of international norms or principles with either one or several of the following purposes: making the target comply, symbolic condemnation, solidarity with friendly states, signaling consequences, limiting or stabilizing a conflict, punishment, or deterrence.

Normative Power Europe (NPE)

The EU arguably constitutes a *normative power* as opposed to *military power* or *hard power*.[30] The Union's distinctive identity derives from the fact that constitutional principles such as democracy and respect for fundamental human rights are legally enshrined, for instance in the TEU.[31] It is this identity that "predisposes it to act in a normative way in world politics."[32] Similarly, *soft power* refers to a form of influence based on attraction, persuasion and cooptation rather than coercion or inducement.[33] The NPE has been interpreted "as a lens through which to understand the EU's external actions […]".[34] Manners emphasized the power of ideational factors in shaping world politics. However, in practice a clear separation between normative and hard power is not straightforward. The former is "often used together with material incentives and/or physical force",[35] which is why NPE may encompass both dimensions. Tocci et al. advanced NPE for empirical analysis and defined "'normative' as being strongly based on international law and institutions, and thus the most 'universalizable' basis upon which to assess foreign policy."[36] Drawing from the operationalization of the NPE by previous researchers,[37] three dimensions form the basis of the present analysis. The first one groups together interests, goals and intentions. The second one includes the types of foreign policy instruments used and the actions taken. The third is concerned with the results or the effect of a given policy. First, discourse is compared with the real-world behavior and effects in order to analyze interests. For instance, the EU's Russia policy prior to 2014 serves as an example of how energy security poses an impediment to principled

30 Ian Manners, "Normative Power Europe: A Contradiction in Terms?," *JCMS: Journal of Common Market Studies* 40, no. 2(2002): 235.
31 Ibid., 240–41.
32 Ibid., 252.
33 Joseph S. Nye Jr., *Soft Power: The Means to Success in World Politics* (New York: PublicAffairs, 2004), 7.
34 Vicki Birchfield, "A Normative Power Europe Framework of Transnational Policy Formation," *Journal of European Public Policy* 20, no. 6 (2013): 908.
35 Ian Manners, "The Concept of Normative Power in World Politics," *Danish Institute for International Studies Brief* (2009): 4.
36 Natalie Tocci, "Profiling Normative Foreign Policy: The European Union and Its Global Partners," in *Who Is a Normative Foreign Policy Actor? The European Union and Its Global Partners*, ed. Natalie Tocci (Brussels: Centre for European Policy Studies, 2008), 1.
37 Ibid.; Arne Niemann and Tessa De Wekker, "Normative Power Europe? EU Relations with Moldova," *European Integration Online Papers* 14, no. 1 (2010).

action.[38] Hence, accounting for material interests related to trade or energy security is crucial.[39] Scenarios in which norms are at odds with such interests and the former are prioritized over the latter would constitute a strong case for authentic normative foreign policy. Another common analytical distinction with reference to normative goals is the one between milieu goals and possession goals.[40] Milieu goals are associated with the shaping of the external environment of a state, whereas possession goals refer to "the enhancement or preservation of one or more of the things to which it [the state,] attaches value" and are "generally pursued to the exclusion of others".[41] Second, a foreign policy qualifies as normative only if it has been implemented by normative means,[42] defined as "instruments (regardless of their nature) that are deployed within the confines of the law."[43] This legal dimension on the one hand refers to "the legal commitments of a foreign policy actor towards itself", meaning that in its actions it upholds internal legal principles such as democracy, transparency and accountability.[44] On the other hand, the actions shall be taken on a multilateral basis, seeking UN approval and in accordance with external legal principles deriving from international law.[45] Another criterion for the assessment of the normativity of foreign policy means is the absence of double standards.[46] The third dimension of the framework accounts for the actual effectiveness of a given policy, which is central because otherwise the element of *power* would be lacking. Without influencing Russia's behavior in the desired way, the actions of the EU can hardly be classified as powerful. In sum, a normative foreign policy actor justifies its actions by referring to milieu goals and international normative principles rather than possession goals.[47] It uses means in respect of international and domestic legal obligations rather than violating them. To be considered a normative power in a specific field, the policy must be effective in reaching the normative goals. It is to be tested if the EU in its sanctions policy towards Russia has pursued normative goals by using normative means. And if so, to what degree these policy goals have been achieved.

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38 Birchfield, "A Normative Power Europe Framework of Transnational Policy Formation," 916; Thomas Diez, "Constructing the Self and Changing Others: Reconsidering Normative Power Europe," *Millennium* 33, no. 3(2005): 916.

39 Niemann and De Wekker, "Normative Power Europe? EU Relations with Moldova," 8.

40 David Cadier, "Continuity and Change in France's Policies Towards Russia: A Milieu Goals Explanation," *International Affairs* 94, no. 6 (2018); Tocci, "Profiling Normative Foreign Policy: The European Union and Its Global Partners," 7; Elisabeth Johansson-Nogués, "The (Non-) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor," *European Political Economy Review* 7, no. 2 (2007).

41 Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore: Johns Hopkins Press, 1962), 73., as cited in Cadier (2018).

42 Tocci, "Profiling Normative Foreign Policy: The European Union and Its Global Partners," 8.

43 Ibid., 10.

44 Ibid., 10.

45 Ibid., 11.

46 Niemann and De Wekker, "Normative Power Europe? EU Relations with Moldova," 8.

47 Tocci, "Profiling Normative Foreign Policy: The European Union and Its Global Partners," 11.

Interdisciplinary Approach

Interdisciplinarity as a research approach may be interpreted in different ways. For instance, in EU Law, Tobler suggests starting with the values enshrined in the TEU before selecting a specific field in which the Union is competent to act in order to analyze the functioning of the system and how it contributes to the realization of the overall aims.[48] Weber emphasizes the role of concepts and the development and combination of new analytical tools for the resolution of academic or politico-economic problems.[49] The approach for the present analysis may be best defined as a multidisciplinary juxtaposition of two disciplines. First, the legal analysis incorporates and describes the relevant primary law, namely applicable articles from the Treaties, and secondary law, in particular Council decisions and regulations published in the Official Journal of the EU. Moreover, case law developed by the European Court of Justice (CJEU) serves as an additional source to account for the legal practice and rulings. The qualitative content analysis of official press releases by EU bodies forms the second and main part of the analysis. It follows the lines of a case study design, which may be defined as "the detailed and intensive analysis of a single case".[50] The EU's sanctions policy towards Russia in the context of the Ukraine crisis forms the case. Two instances are considered, namely the EU's reaction to the 2014 annexation of Crimea and the war in Donbas on the one hand, and the reaction to Russia's military aggression against Ukraine in February 2022 on the other. The case is selected on the basis of its extraordinary political relevance and because it is expected to provide valuable insights into the EU's foreign policy behavior and commitment to norms in contexts of crises and military threat. This is the larger phenomenon to which this research aims to contribute. The chosen time period is from February until December 2014 and from February until April 2022, respectively. Secondary sources are consulted to assess the possible effects. By combining concepts, data and methods from legal analysis, EU law and political science this piece provides an innovative contribution regarding the investigation of the EU's normative power in its sanctions policy towards Russia. Addressing the present research question in this way illustrates the added value of analyzing complex contemporary phenomena through an interdisciplinary lens.

48 Madeleine Herren et al., "A Discussion on European Global Studies," *Global Europe – Basel Papers on Europe in a Global Perspective* 116 (2018): 8.
49 Ibid., 9.
50 Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2016), 60.

Legal Analysis

Judicial Review and Accountability of EU Legal Acts

In the Treaty on the functioning of the European Union (TFEU), Art. 263 (1) specifies the competence of the CJEU to review the legality of acts by EU institutions. Art. 263 (2) TFEU provides for the right to challenge such acts before the General Court. In several instances, the CJEU has ruled to recognize this right also regarding restrictive measures.[51] This is important, because according to Art. 24 (1) TEU and Art. 275 TFEU, the CJEU does not in principle have jurisdiction in the area of the CFSP. These restrictions imposed on the Court on the basis of the Treaties are an expression of the political nature of the CFSP which renders it "[…] difficult to reconcile judicial review with the separation of powers."[52] However, Art. 275 TFEU provides for restrictive measures against natural or legal persons to constitute an exception from this rule, attributing the CJEU *exceptional judicial competence*.[53] This exception is the result of several court decisions,[54] which established that "[…] the principle of effective judicial remedies meant that a listed entity or person must have the right of appeal to the court."[55] These progressions signify the general trend towards a *legalization* of the CFSP.[56]

EU Legal Acts in the Context of the Russia-Ukraine War

On 17 March 2014, the Council of the European Union adopted a first decision concerning restrictive measures with regard to actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.[57] It includes the listings of persons, entities or bodies involved in the actions mentioned and provides for travel restrictions and an asset freeze. The corresponding regulation[58] was adopted by the Council on the basis of Art. 215 TFEU. The regulation emphasizes that it respects fundamental rights and particularly "[…] the right to an effective remedy and to a fair trial […]." On 23 June and 31 July 2014, decisions and corresponding regulations on several economic measures were adopted, including restrictions on goods originating in Crimea or

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51 See Lonardo and Cairo (2022: 1): "Previously, the Court recognized standing to challenge restrictive measures for natural persons (GC 30 November 2016, Case T-720/14, Rotenberg), companies (ECJ 6 October 2020, Case C-134/19 P, Bank Refah Kargaran v Council), including companies controlled by third countries (ECJ 28 March 2017, Case C-72/15, Rosneft, GC 30 November 2016, Case T-89/14, Export Development Bank of Iran), and holders of public offices in third countries (Azarov, Yanukovych)."

52 A.G. Wathelet's Opinion, EU:C:2016:381, para. 52. In: Sara Poli, "The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law," *Common Market Law Review* 54 (2017): 1799.

53 Cameron, *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, 34.

54 See Cameron (2013:34): "Joined Cases C-354/04 P and C-355/04 P Gestoras Pro Amnistia and others and Segi and others v. Council of the European Union [2007] ECR I.1579."

55 Ibid.

56 Poli, "The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law," 1800; Paul James Cardwell, "The Legalisation of European Union Foreign Policy and the Use of Sanctions," *Cambridge Yearbook of European Legal Studies* 17 (2015).

57 Council Decision (CFSP) 2014/145 of 17 March 2014.

58 Council Regulation (EU) No 269/2014 of 17 March 2014, "Whereas" section, para. 6.

Sevastopol, in response to the illegal annexation of Crimea and Sevastopol[59] and restrictive measures in view of Russia's actions de-stabilizing the situation in Ukraine. The measures imposed by the Council in 2014 are largely still in place and have been renewed, amended and extended on a regular basis. In particular, the increase in tensions and eventual outbreak of the war in February 2022 led to the adoption of several decisions by the Council amending decision 2014/512/CFSP.[60] On 8 April 2022, a series of exemptions for humanitarian purposes were introduced.[61]

Judicial Review by the Court of Justice of the European Union

Case law by the CJEU provides insights into the EU's functioning in terms of norm affirmation through law and how the rule of law may enhance the legitimacy of the EU's CFSP. Given the exceptional judicial competence of the CJEU when it comes to restrictive measures, its role is decisive. On the one hand, two individual cases against natural persons are analyzed. Rotenberg v. Council[62] constitutes one of the few exceptions when the General Court ruled to annul the sanctions against a targeted Russian.[63] In Kiselev v. Council, the applicant's claim was declined by the General Court because the Council would otherwise be "[…] unable to pursue its policy of exerting pressure on the Russian Government by addressing restrictive measures […]".[64] On the other hand, several major Russian companies from the energy, defense and financial industries were sanctioned.[65] The contested acts were Council Decision (CFSP) 2014/512 and Council Regulation (EU) 833/2014. Their claims for annulment were all dismissed by the EU General Court. For instance, in *Gazprom Neft PAO v. Council,*[66] the Court underlined the non-punitive objectives of the measures imposed and established that there was a logical connection between sanctioning the Russian oil sector and the objective of the measures "[…] to increase the costs of [Russia's] actions to undermine Ukraine's territorial integrity, sovereignty and independence, and to promote a peaceful settlement of the crisis."

59 Council Decision (CFSP) 2014/386 of 23 June 2014 and Council Regulation (EU) No 692/2014 of 23 June 2014; Council Decision (CFSP) 2014/512 of 31 July 2014 and Council Regulation (EU) No 833/2014 of 31 July 2014.

60 See Council Decision (CFSP) 2022/264 of 23 February 2022, Council Decision (CFSP) 2022/327 of 25 February 2022, and Council Decision (CFSP) 2022/335 of 28 February 2022.

61 See Council Decision (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP and Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014.

62 General Court, 30 November 2016, *Rotenberg v. Council*, T-720/14, ECLI:EU:T:2016:689.

63 Celia Challet, "Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union," *College of Europe's Research Papers in Law* 4 (2020): 4.

64 General Court, 15 June 2017, *Kiselev v. Council*, T-262/15, ECLI:EU:T:2017:392, para. 113.

65 See Rosneft (case T-715/14), Gazprom (T-735/14 and T-799/14), Sberbank (T-732/14), VTB Bank (T-734/14), Vnesheconombank (T-737/14), PSC Prominvestbank (T-739/14), Denizbank (T-798/14), and Almaz-Antey v. Council.

66 General Court, 13 September 2018, *Gazprom Neft PAO v. Council*, T-735/14 and T-799/14, ECLI:EU:T:2018:548, para. 135.

Qualitative Content Analysis

Speech

Codes	Explanation	Year	Frequency	Example
Call for compliance	A statement that calls for compliance or change in behavior	2014 2022	9 18	*Words must be translated into actions.* *We urge Russia, as a party to the conflict, to reverse the recognition, uphold its commitments, abide by international law and return to the discussions within the Normandy format and the Trilateral Contact Group.*
Call for dialogue	A statement that calls for dialogue	2014 2022	15 6	*The EU remains ready to engage in constructive dialogue with all parties.* *Tensions and conflict should be resolved exclusively through dialogue and diplomacy.*
Signaling	A statement that signals measures in case of non-compliance	2014 2022	13 12	*In the absence of de-escalating steps by Russia, the EU shall decide about consequences for bilateral relations between the EU and Russia.* *So, summing up, the grave violations that Russia is committing will not go unanswered. They are not going unanswered.*
Naming and Shaming	A statement that names persons or entities and assigns responsibility for an unlawful act and its consequences	2014 2022	– 22	 *Russia bears full responsibility for this act of aggression and all the destruction and loss of life it will cause.*
Solidarity	A statement that expresses solidarity with or support for Ukraine	2014 2022	13 22	*EU stands by Ukraine.* *Ministers reaffirmed their unity, resolve and the EU solidarity's with Ukraine.*
Symbolism	A statement that disapproves of or condemns certain actions	2014 2022	18 18	*It is meant as a strong warning: illegal annexation of territory and deliberate destabilisation of a neighbouring sovereign country cannot be accepted in 21st century Europe.* *The European Council condemns in the strongest possible terms the Russian Federation's unprovoked and unjustified military aggression against Ukraine.*

Table 1: Own depiction

Goals

Type of goal	Codes	Year	Frequency	Example
Normative/ Milieu	peace and/or security	2014	11	*We are firmly convinced that there needs to be a peaceful solution to this current crisis.*
Normative/ Milieu	promotion of democracy	2014	6	*The Council welcomed the holding of parliamentary elections on 26 October and called for the rapid formation of a new government.*
Normative/ Milieu	respect of international law	2022	8	*The European Union demands that Russia ceases its military action and withdraws all forces and military equipment from the entire territory of Ukraine immediately and unconditionally, and fully respects Ukraine's territorial integrity, sovereignty and independence within its internationally recognized borders.*
Possession	security of energy supply	2014	1	*The security of supply and transit of natural gas*

Table 2: Own depiction

Foreign Policy Means

Foreign policy means (FP means) are subdivided into four analytical categories, which differ in terms of whether they provide or withdraw something (positive/negative) and whether they inflict material costs (soft/hard). The positive/negative distinction hereby refers to an analytical frame in the sense of presence/absence rather than a normative one of good/bad.[67]

positive	negative	
provision of material support e.g. delivery of military equipment to Ukraine	withdrawal of benefits, coercive effect, infliction of high material costs e.g. economic or individual sanctions against Russia	**hard**
provision of immaterial support e.g. symbolic speech, dialogue	withdrawal of immaterial benefits, moderate material costs e.g. suspension of bilateral talks with Russia	**soft**

Table 3: Own depiction

Effects of EU Sanctions on Russia's Behavior in 2014 and 2022

The Council criticized Russia's practical non-compliance despite the commitments it had made. It states for instance that "[o]ur call has been, in practice, left unheeded. Arms and fighters continue flowing into Ukraine from the Russian Federation."[68] Overall, the EU arguably lacks a clear strategy for assessing the effectiveness of the sanctions it imposes.[69] Domestically, the measures imposed in 2014 nevertheless had several unintended effects. First, they contributed to an increased popularity of Putin, illustrated by the high approval ratings among Russian constituencies since March 2014, which have been above 80 percent over the following four years.[70] Second, sanctions were ineffective in weakening the Russian elite because they found ways to successfully "reallocate resources".[71] Third, between 2014 and 2015 military expenditure in Russia

67 The basic idea of this distinction is drawn from Jonna Nyman, "What Is the Value of Security? Contextualising the Negative/Positive Debate," *Review of International Studies* 1 (2016): 29.
68 Statement by the President of the European Council, 29 July 2014.
69 Andreas Beyer and Benno Zogg, "Time to Ease Sanctions on Russia," *CSS Policy Perspectives* 6, no. 4 (2018): 1.
70 Levada Center, "Putin's approval rating," last accessed 16 April 2023, https://www.levada.ru/en/.
71 Richard Connolly et al., "The Impact of EU Economic Sanctions on Russia," in *On target?*, ed. Iana Dreyer and José Luengo-Cabrera (Paris: European Union Institute for Security Studies, 2015).

grew from 4.1 percent to 4.9 percent of GDP.[72] In a similar vein, Russian oil production was at a post-Soviet record high in 2014.[73] However, in terms of finance, Russian companies indeed came under pressure because of the ban on the access to EU capital markets.[74] As a consequence, they started to rely more on Russian banks and the state. Moreover, the duration of sanctions against the Russian Federation which were adopted earlier were linked to the full implementation of the Minsk agreements.[75] Afterwards, they were extended and prolonged numerous times,[76] suggesting that the objectives were not met. Moreover, countermeasures by Russia against the EU in the form of import bans on different food products were imposed, indicating that despite the agreements, Russia decided not to comply.[77]

In 2022 the situation deteriorated drastically despite the measures that were already in place before 24 February. Moreover, Russia imposed countermeasures against EU nationals and parliamentarians in the form of an entry ban into Russian territory.[78] The vast majority of the Russian population is feeling the intensified negative effect of the war, in particular low-income strata.[79]

72 World Bank. "Military expenditure (% of GDP) – Russian Federation," last accessed 16 April 2023, https://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?end=2020&locations=RU&most_recent_year_desc=true&start=1992&view=chart.

73 Vladimir Soldatkin, "Russia Oil Output Hits Post-Soviet High, Small Firms Help," *Reuters*, 2 January 2015.

74 Connolly et al., "The Impact of EU Economic Sanctions on Russia," 34.

75 European Council Conclusions, 20 March 2015, https://www.consilium.europa.eu/media/21888/european-council-conclusions-19-20-march-2015-en.pdf.

76 Note: For an overview of the extensions and amendments after 2014, see: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/.

77 Connolly et al., "The Impact of EU Economic Sanctions on Russia," 38.

78 European External Action Service, "Russia: Statement by the High Representative on the retaliatory sanctions against EU nationals," 1 April 2022, https://www.eeas.europa.eu/eeas/russia-statement-high-representative-retaliatory-sanctions-against-eu-nationals_en.

79 Evgeny Gontmakher, "Russia under Sanctions," *Geopolitical Intelligence Services, 31 May 2022*, https://www.gisreportsonline.com/r/russia-sanctions/.

Discussion and Conclusion

The internal legal standards and accountability mechanisms presented in the legal analysis suggest that EU sanctions are not arbitrary but rather justified by law. They are deployed in pursuit of normative goals deriving from international law, which increases their legitimacy. Despite the trend towards a legalization of the CFSP, it is still largely a politicized field. In the present case, the CJEU is consequentially influenced by the external political circumstances, illustrating the interlinkages between law and politics.

EU actions are guided by the norms codified in Art. 21 TEU. It officially condemned Russia's actions, assigned responsibility and called for compliance while showing solidarity with Ukraine. Such official statements are to be considered as more than mere lip service, given that they contain significant political and symbolic weight and demonstrate the EU's normative standpoint. Moreover, the Council started to impose sanctions as early as March 2014, followed by macro-financial packages to Ukraine in April. This accounts for the material dimension of the solidarity and suggests consistency of official communication and policy action. The analysis found that the EU's approach includes both individual targeted sanctions as well as economic sanctions. In 2014, EU sanctions were generally not as comprehensive and directed towards certain sectors and areas. They were imposed due to the involvement in and active support of actions that threaten international law principles with the aim to enforce the EU's non-recognition policy, to signal consequences and to promote a change in Russia's behavior. With the escalation of the conflict in 2022, ever more and far-reaching measures have been imposed that affect the Russian economy more broadly. Under these conditions, the official EU rhetoric has become more aggressive, focusing on a punitive and retaliatory tone, indicating that the reactions of the EU have been decisively influenced by the developments on the ground. Interestingly, unlike economic sanctions on trade and finance, wider restrictions on the Russian energy sector, namely on coal and other solid fossil fuels, were introduced only on 8 April 2022. The EU's interest in securing the delivery of gas from Russia through Ukraine classifies as a possession goal. These factors suggest that the EU's generally high dependency on Russia in these sectors did influence its policy decisions, indicating a priority of possession goals over milieu goals. Consequently, one could criticize that norms did not constitute the most important basis upon which the EU decides, constituting a double standard. However, two points are worth considering. First, as illustrated by the case law, the EU did sanction major individual Russian energy companies in 2014, whereas it refrained from imposing measures against the whole energy sector at that time. It was only after Russia's military aggression in February 2022 that the EU decided to significantly expand the measures, suggesting that the EU's reactions have been adjusted in proportion to the violations. Second, given the EU's overall energy dependency on Russia and the concomitant vested interests, it might

also be surprising that the Union gained the necessary consensus among the Member States and imposed sanctions on this sector at all. The fact that it did so, even if gradually, supports the view that normative guiding principles influence its actions. When assessing the normative *power*, the unintended effects on Russia's domestic politics and economy, Russian countermeasures, as well as the repeated extensions and amendments of EU sanctions, may indicate their overall ineffectiveness. The present case challenges the conceptualization of the EU's normative power as 'soft' and emphasizes the necessity to account for the international context as a critical factor influencing the EU's opportunity structure as well as its actions. CFSP-sanctions constitute hard norm enforcement methods which may readily be deployed in order to safeguard the normative principles and objectives codified in the TEU. The present analysis of the EU's sanctions policy vis-à-vis Russia in the context of the Ukraine crisis provides an added value to the research on sanctions and on the NPE framework. However, the normative objectives the policy was supposed to accomplish, namely to bring about a change in behavior in the target and bring about peace, could not be realized. Moreover, even though a double standard seems unlikely, the fact that certain sectors were sanctioned before others and the references to security of energy supplies suggest some tensions with respect to the EU's foreign policy objectives. Considering Russia's military aggression and violation of international law as an expression of broader geopolitical power shifts and increased assertiveness of authoritarian regimes, it remains to be seen to what extent the EU will be able to safeguard international norms in the future and what the implications for its normative actorness are. Chances are it will become increasingly difficult for the EU to rely solely on soft methods to influence other international actors. Nevertheless, it will remain crucial for the EU to uphold in its actions the very ideals to which it commits itself and which it aims to promote externally.

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Lyne Schuppisser

Judging Climate Change
A Comparative Legal and Political Analysis of the KlimaSeniorinnen Schweiz and the Urgenda Cases

Abstract: Since global and national political efforts to tackle climate change are failing, climate change litigation is on the rise worldwide. In climate change litigation, claimants try to legally advance climate protection in manifold ways. In particular, strategic, rights-based climate change litigation is becoming more common in which claimants use a human rights-based approach in their attempt to advance social change. While a rights-based claim filed by Urgenda in the Netherlands succeeded, a similar Swiss case brought by KlimaSeniorinnen Schweiz, failed. Why did the two cases have different outcomes despite the similarity of the cases and the countries? This paper seeks an answer by comparing the legal and political systems of the countries as well as by conducting expert interviews. In sum, the Urgenda and KlimaSeniorinnen cases differed because Dutch law has more generous procedural rules about the admissibility of claims than Swiss law. Furthermore, the Swiss highest court is more hesitant to engage in politically controversial questions compared to the Dutch highest court.

Key Words: Climate Change Litigation, Urgenda, KlimaSeniorinnen, Comparative Law, Comparative Politics

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List of Abbreviations

APA	Federal Act on Administrative Procedure of 20 December 1968, SR 172.021, (Administrative Procedure Act)
AR	Assessment Report (of the Intergovernmental Panel on Climate Change)
AR4	Fourth Assessment Report of the Intergovernmental Panel on Climate Change
AR5	Fifth Assessment Report of the Intergovernmental Panel on Climate Change
AR6	Sixth Assessment Report of the Intergovernmental Panel on Climate Change
CCL	Climate Change Litigation
COP	Conference of the Parties
CO2	Carbon Dioxide
CO2 Act	Federal Act on the Reduction of CO2 Emissions of 23 December 2011, SR 641.71 (CO2 Act)
DC	Constitution of the Kingdom of the Netherlands of 2018, English version available at: https://www.government.nl/binaries/government/documenten/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf, (Dutch Constitution)
DETEC	Swiss Federal Department of the Environment, Transport, Energy and Communications
DSC	Dutch Supreme Court
ECHR	European Convention on Human Rights of 4 November 1950, English version available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf
ECtHR	European Court of Human Rights
FAC	Federal Administrative Court
FC	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101
FSC	Federal Supreme Court
GHG	Greenhouse Gas
HCA	The Hague Court of Appeal
HDC	The Hague District Court
IPCC	Intergovernmental Panel on Climate Change
KlimaSeniorinnen Schweiz	Senior Women for Climate Protection Switzerland
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, English version available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf
MSSD	Most Similar Systems Design
NDCs	Nationally Determined Contributions
NGO	Non-Governmental Organisation
Paris Agreement	Paris Agreement to the United Nations Framework Convention on Climate Change of 12 December 2015, English version available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change of 9 May 1992, English version available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf

Introduction

Climate change is an unprecedented threat to the world. Since global and national political efforts to tackle climate change are failing, climate change litigation (CCL) is on the rise worldwide. In CCL, claimants try to legally advance climate protection in manifold ways: For example, by pushing states to reduce greenhouse gas (GHG) emissions, holding corporate actors accountable for contributing to climate change, or by opposing the construction of coal-fired power plants. Increasingly, CCL lawsuits are based on human rights, indicating a *rights turn* in CCL.[1] A major step in human rights-based CCL was the 2015 Urgenda[2] judgement in which the Hague District Court (HDC) in the Netherlands allowed the non-governmental organization (NGO) Urgenda and 886 individual plaintiffs' claim and ordered the Dutch state to increase GHG emissions reduction efforts – representing the first case of a court ordering a government to do so. The Hague Court of Appeal (HCA)[3] and the Dutch Supreme Court (DSC)[4] later confirmed the judgement. In 2019, the DSC found that the Dutch state has an obligation to take suitable measures to prevent dangerous climate change under the fundamental right to life in Article 2 of the European Convention on Human Rights (ECHR)[5] and right to family and private life (Art. 8 ECHR).[6]

Inspired by Urgenda, Greenpeace Switzerland decided to initiate a similar claim in Switzerland.[7] In the KlimaSeniorinnen Schweiz case, the association Senior Women for Climate Protection Switzerland (KlimaSeniorinnen Schweiz) and four individual elderly women filed a claim with the Federal Council and four administrative authorities for their failure to pursue adequate climate protection policy, thereby failing to protect their right to life and right to family and private life based on the Federal Constitution (FC)[8] and the ECHR. Three instances denied their claim: First the Federal Department of the Environment, Transport, Energy and Communications

1 Jacqueline Peel and Hari M. Osofsky, "A Rights Turn in Climate Change Litigation?" *Transnational Environmental Law* 7 (2018): 37–67.
2 The Hague District Court, *Urgenda Foundation v. The State of the Netherlands*, Judgement of 24 June 2015, No. C/09/456689 / HA ZA 13-1396, ECLI:NL:RBDHA:2015:7196.
3 The Hague Court of Appeal, *Urgenda Foundation v. The State of the Netherlands*, Judgement of 9 October 2018, No. 200.178.245/01, ECLI:NL:GHDHA:2018:2591.
4 Supreme Court of the Netherlands, *Urgenda Foundation v. The State of the Netherlands*, Judgment of 20 December 2019, No. 19/00135, ECLI:NL:HR:2019:2006.
5 European Convention on Human Rights of 4 November 1950, English version available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 5 October 2023).
6 Therese Karlsson Niska, "Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?" *The Journal of World Energy Law & Business* 13 (2020): 335.
7 Cordelia Bähr et al., "KlimaSeniorinnen: Lessons from the Swiss Senior Women's Case for Future Climate Litigation," *Journal of Human Rights and the Environment* 9 (2018): 194–221.
8 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101.

(DETEC)[9], secondly the Federal Administrative Court (FAC)[10] and lastly the Federal Supreme Court (FSC)[11] in 2020.[12] The FSC considered the case an illegitimate *actio popularis*, alleging that the KlimaSeniorinnen were attempting to pursue a public, instead of an individual interest. To pursue their interests, the FSC directed the KlimaSeniorinnen to the field of politics. The KlimaSeniorinnen case is currently (March 2023) under consideration at the European Court of Human Rights (ECtHR).[13]

In the Urgenda and KlimaSeniorinnen case, two NGOs filed human rights-based claims in support of individuals to force their governments to take more ambitious action to protect individuals from harms incurred by climate change.[14] Politically, Switzerland and the Netherlands share similar structures, as they are both consensus/consociational democracies[15] with multiparty systems.[16] Legally, Switzerland and the Netherlands are both countries with a civil law tradition,[17] and they are two of the few countries without formal constitutional review (*Verfassungsgerichtsbarkeit*).[18]

Given the various similarities of the lawsuits and the countries where the cases were issued, this article asks: Why were the outcomes of the two similar strategic, rights-based CCL cases brought by Urgenda and KlimaSeniorinnen different? To answer the question, I first describe the context in which CCL is embedded: dangerous, man-made climate change and CCL as a response to

9 DETEC. *Verfügung betreffend Begehren vom 25. November 2016 der Gesuchstellenden KlimaSeniorinnen Schweiz und andere*. 2017. https://ainees-climat.ch/wp-content/uploads//2019/01/Verfu%CC%88gung_UVEK_KlimaSeniorinnen.pdf (accessed 6 April 2022).

10 Judgement of the Swiss Federal Administrative Court A-2992/2017 dated 27 November 2018.

11 Judgement of the Swiss Federal Supreme Court 1C_37/2019 dated 5 May 2020.

12 Ursula Brunner and Cordelia Bähr, "Climate Change and Individuals' Rights in Switzerland," in *Comparative Climate Change Litigation: Beyond the Usual Suspects*, ed. Francesco Sindico and Makane Moïse Mbengue (Cham: Springer Nature Switzerland, 2021), 119–32.

13 ECtHR. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, Communicated Case, 17 March 2021, relinquishment to the Grand Chamber on 26 April 2022; KlimaSeniorinnen Schweiz. "Aktuell." 2023. https://www.klimaseniorinnen.ch/unsere-klage-am-egmr/ (accessed 27 March 2023).

14 Karlsson Niska, "A Strategic Next Step?," 337; Bähr et al., "Swiss Senior Women's Case," 214.

15 Consensus democracies are distinguished from majoritarian democracies. Majoritarian democracies (e.g. the US oder UK) concentrate power in the hands of the majority (e.g., in a two-party system) while consensus democracies share, disperse, and restrain power in many hands (e.g., with a multi-party systems). Consensus democracies developed because the political elite consolidated the power in pluralistic societies with sharp religious, social, linguistic divisions. Lijphart, "Patterns of Democracy," 31–33.

16 Hans Keman and Paul Pennings, "Comparative Reserach Methods," in *Comparative Politics*, ed. Daniele Caramani (Oxford: Oxford University Press, 2017), 55; Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven & London: Yale University Press, 2012).

17 Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci, "Climate Change Litigation: Global Perspectives. An Introduction," in *Climate Change Litigation: Global Perspectives*, ed. Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (Leiden & Boston: Brill, 2021), 21; Daniele Caramani, *Comparative Politics* (Oxford: Oxford University Press, 2017), 473.

18 Sascha Kneip, "Verfassungsgerichte in der Vergleichenden Politikwissenschaft," in *Handbuch Vergleichende Politikwissenschaft*, ed. Hans-Joachim Lauth, Marianne Kneuer, and Gert Pickel (Wiesbaden: Springer VS, 2016), 368.

failing political efforts to tackle climate change. Then I recap the literature review, which yields that CCL cases are being decided very differently due to varying legal and political contexts. Thus, a comparative design is needed to grasp the different outcomes of CCL, which I explain in a next step. Finally, I summarize the systematic comparison and conclude the paper.

An Unprecedented Threat

As early as the 19th century, scientists supposed that anthropogenic emissions of carbon dioxide (CO_2) may cause global warming.[19] But it was not until the 1980s with the founding of the Intergovernmental Panel on Climate Change (IPCC) in 1988, that increased attention was drawn to that possibility.[20] The IPCC assesses the science related to climate change, contributes to an international consensus on the scientific facts on climate change and informs policy makers.[21] In the past three decades, the IPCC has produced six extensive Assessment Reports (AR) and various special reports.[22] The Fourth (AR4)[23] and Fifth Assessment Report (AR5)[24] underlined the anthropogenic character of climate change and the urgency to act[25] – confirmed and amplified by the newest AR6.[26] In fact, we live in a world which is already 1.1°C warmer than in 1850–1900.[27] Industrialized countries are historically and presently emitting most of the worldwide GHG emissions.[28] However, harmful effects of climate change[29] disproportionally affect the most vulnerable people and systems.[30]

19 Alogna, Bakker, and Gauci, "An Introduction," 7.
20 Ibid.
21 IPCC. *The Intergovernmental Panel on Climate Change*. 2022. https://www.ipcc.ch/ (accessed 12 April 2022).
22 Alogna, Bakker, and Gauci, "An Introduction," 7.
23 IPCC, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Rajendra K. Pachauri and Andy Reisinger (Geneva: IPCC, 2007).
24 IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Rajendra K. Pachauri and Leo A. Meyer (Geneva: IPCC, 2014).
25 Alogna, Bakker and Gauci, 2021, 7; C/09/456689, para. 2.18.
26 IPCC, *AR6 Synthesis Report: Climate Change* 2023. https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (accessed 31 March 2023).
27 IPCC, "Summary for Policymakers," in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Valérie Masson-Delmotte et al. (Cambridge & New York: Cambridge University Press, 2021), 4–5.
28 IPCC, "Summary for Policymakers," in *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Priyadarshi. R. Shukla et al. (Cambridge & New York: Cambridge University Press, 2022), 13.
29 IPCC, "Climate Change 2022: Impacts, Adaptation, and Vulnerability," in *Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Hans-Otto Pörtner et al. (Cambridge & New York: Cambridge University Press, 2022), 10.
30 Ibid., 7, 12.

Internationally, the three most important legal instruments to combat climate change are the 1992 United Nations Framework Convention on Climate Change (UNFCC)[31] with 197 signing Parties, the 1997 Kyoto Protocol[32] (192 Parties) and the 2015 Paris Agreement[33] (193 Parties).[34] In addition, there are various decisions and resolutions adopted in international climate negotiations (for example, at the Conference of the Parties (COP) to the UNFCCC[35], the supreme decision-making body of the UNFCCC) which deal with the implementation of aspects of these instruments.[36] The main problem of these instruments is that they do not contain legally binding GHG emissions reduction targets due to a resistance of states to submit to such obligations – a problem which can be seen generally in international law.[37]

Despite the scientific certainty about climate change and political agreements to tackle it, climate action is characterized by "weak promises, not yet delivered".[38] Under Art. 3 Paris Agreement, states determine their own contributions, the NDCs, to achieve the long-term goal of *well below 2°C* and *1.5°C* respectively.[39] However, the current updated NDCs fail to achieve the temperature goal of the Paris Agreement: If we are to continue on this path, global temperature will rise to 2.7°C compared to pre-industrial levels by the end of the century.[40] That is why in the last two decades, individuals and groups, NGOs and states around the world have increasingly turned to courts to accelerate action against climate change.

31 United Nations Framework Convention on Climate Change of 9 May 1992, English version available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.
32 Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, English version available at: https://unfccc.int/process-and-meetings/the-kyoto-protocol/history-of-the-kyoto-protocol/text-of-the-kyoto-protocol.
33 Paris Agreement to the United Nations Framework Convention on Climate Change of 12 December 2015, English version available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.
34 Sandrine Maljean-Dubois, "Climate Change Litigation," in *Max Planck Encyclopedia of International Procedural Law*, ed. Hélène Ruiz Fabri (Oxford: Oxford University Press, 2018), para. 4; UNFCCC. *Process and Meetings*. 2022. https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states (accessed 13 July 2022).
35 Julia Hänni and Tienmu Ma, "Swiss Climate Change Law. International and European Context," in *Swiss Energy Governance. Political, Economic and Legal Challenges and Opportunities in the Energy Transition*, ed. Peter Hettich and Aya Kachi (Cham: Springer, 2022), 23–24.
36 Alogna, Bakker, and Gauci, "An Introduction," 10.
37 Hänni and Ma, "Swiss Climate Change Law," 26.
38 UNEP, Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered (Nairobi: UNEP Copenhagen Climate Centre (UNEP-CCC), 2021), XV, available at: https://wedocs.unep.org/handle/20.500.11822/36990;jsessionid=8066582C0B31D66B9E5366278785C07B (accessed 16 May 2023).
39 Hänni and Ma, "Swiss Climate Change Law," 27.
40 UNEP, Emissions Gap Report 2021, XVI.

Climate Change Litigation

CCL cases are "lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organizations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts".[41] Starting in the 1990s with sporadic cases in the United States and Australia[42], CCL expanded to Europe and was used to fill a gap in the absence of legally binding international climate action.[43] Current CCL (2015 to date) marks a growing expansion and diversification in the type of claim, the amount of cases, the defendants, and the jurisdictions in which CCL cases are launched.[44] Since 2015, the number of climate change-related cases has more than doubled: in 2022 there were 2,002 pending or concluded CCL cases worldwide.[45] In particular, strategic CCL is on the rise.[46] Strategic litigation is "the strategic use of a lawsuit as a tool to pursue interests".[47] In strategic cases, "claimants' motives for bringing the cases go beyond the concerns of the individual litigant and aim to bring about some broader societal shift".[48] A lot of recent CCL cases have invoked human rights and/or have been brought before human rights treaty bodies.[49]

Methodology and Methods

As mentioned before, the two CCL cases filed by Urgenda and KlimaSeniorinnen are remarkably similar with regards to the content of the lawsuit but also the political and legal system in which they were issued. However, in the Netherlands, Urgenda was successful whereas the KlimaSeniorinnen case was rejected.

How different courts in different countries react to strategic, rights-based CCL varies and depends largely on the context.[50] That is why a comparative approach is needed to understand the differences

41 Joana Setzer and Catherine Higham. "Global Trends in Climate Change Litigation: 2021 Snapshot," London School of Economics and Political Science, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London, 2022, 8.
42 Jacqueline Peel and Hari M. Osofsky, "Climate Change Litigation." *Annual Review of Law and Social Science* 16 (2020): 23.
43 Setzer and Higham, "2021 Snapshot," 23.
44 Ibid.
45 Setzer and Higham, "2021 Snapshot," 1.
46 Setzer and Higham, "2021 Snapshot," 5.
47 Alexander Graser, "Strategic Litigation – oder: Was man mit der Dritten Gewalt sonst noch so anfangen kann," *RW Rechtswissenschaft* (2019): 319.
48 Setzer and Higham, "2021 Snapshot," 12.
49 Setzer and Higham, "2021 Snapshot," 32.
50 Mehrdad Payandeh, "The Role of Courts in Climate Protection and the Separation of Powers," in *Climate Change Litigation: A Handbook*, ed. Wolfgang Kahl and Marc-Philippe Weller (München, Oxford, Baden-Baden: Beck Hart Nomos, 2021), 62–80.

of judicial outcomes in CCL.[51] Even though domestic courts have an important role to play in strategic, rights-based CCL, comparative interdisciplinary research on them is lacking.[52] Thus, the article put a special focus also on the highest national courts as important actors in these cases.

For the comparison of the cases, the comparative political and legal method was chosen. Comparative politics looks at "differences and similarities between countries and their institutions, actors and processes through systematic comparison".[53] The two cases called for a paired comparison ("Paarvergleich") for the study design.[54] The logic behind the comparison is a Most Similar Systems Design (MSSD). In a MSSD, typically the outcome varies, even though the cases are very similar with respect to their macro level context. Keeping macro factors constant helps find explanatory factors (X) responsible for the outcome (Y).[55] So the goal was to find possible explanations (X) for the different outcomes (Y) of the Urgenda and KlimaSeniorinnen cases which are not explained by macro level factors. Within this design, comparative law was applied in order to compare the legal aspects of the Urgenda and KlimaSeniorinnen cases. The comparative legal method allows us to find out how different jurisdictions react to shared social or economic problems (for example, climate change).[56] In the article, specific legal aspects of the Urgenda and KlimaSeniorinnen cases (procedural rules, etc.) were compared between two jurisdictions, the Netherlands and Switzerland.[57]

In a paired comparison, two cases are systematically compared with each other regarding their similarities and differences led by previously explanatory factors.[58] The explanatory factors were found and evaluated via extensive literature research and expert interviews. The interviewees were: the lawyer of the KlimaSeniorinnen case, a member of the KlimaSeniorinnen association, two legal experts on the KlimaSeniorinnen Case and CCL. Unfortunately, none of the representatives from Urgenda could be interviewed. However, the article benefited from a wealth of sources for this internationally renowned case.

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51 Anna-Julia Saiger, "Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach," *Transnational Environmental Law* 9 (2020): 37–54.
52 Peel and Osofsky, "Climate Change Litigation," 28–29.
53 Daniele Caramani, "Introduction to Comparative Politics," in *Comparative Politics*, ed. Daniele Caramani (Oxford: Oxford University Press, 2017), 3.
54 Susanne Pickel, "Methodologische Grundlagen des Vergleichs und Vergleichsdesigns," in *Handbuch Vergleichende Politikwissenschaft*, ed. Hans-Joachim Lauth, Marianne Kneuer, and Gert Pickel (Wiesbaden: Springer VS, 2016), 33.
55 Keman and Pennings, "Comparative Research Methods," 57.
56 Stephan Seiwerth, "Einführung in die Methodik des Rechtsvergleichs," *Juristische Ausbildung* 38 (2016): 598–99.
57 Seiwerth, "Einführung," 596.
58 Ibid.

Comparing the Cases

First, the Urgenda and the KlimaSeniorinnen cases were examined regarding their broader legal and political system in order to rule out the possibility that these macro factors substantially explain the outcomes of the two cases. In sum, both countries' legal systems are grounded in civil law[59], they represent consensus democracies with multiparty systems[60] and have no constitutional review.[61] The first part of the analysis thus confirmed that – despite minor differences – the key political and legal structures surrounding the cases resemble each other. In a second step, the cases were compared in terms of the following explanatory factors.

Procedural Rules

Procedural rules can be understood as gatekeepers to courts, as they determine access to them. Whether a plaintiff can launch a CCL case depends on whether the plaintiff has "legal standing" in the specific context.[62] Usually, the plaintiff must do so by showing that there is an impact on their individual right or legally protected interest.[63]

The strict procedural rules in the KlimaSeniorinnen case and the rigid interpretation of the FSC versus the more open and generous procedural rules in the Netherlands explain the different outcome of the Urgenda and KlimaSeniorinnen case well. Urgenda was initiated based on a class action[64] which makes it easier for claimants to sue. Urgenda pursued its claim on behalf of the interests of the current Dutch inhabitants who are threatened by dangerous climate change. The DSC accepted this.[65] Dutch procedural rules and the legal nature of the claim did not require the claimants to be individually affected in a causal way by the defendant's omission, which is difficult to prove in terms of climate change.[66]

59 Jan M. Smits, "Chapter 50: The Netherlands," in *Elgar Encyclopedia of Comparative Law*, ed. Jan M. Smits (Cheltenham, UK: Edward Elgar Publishing, 2012), 620; Pascal Pichonnaz, "Chapter 69: Switzerland," in *Elgar Encyclopedia of Comparative Law*, ed. Jan M. Smits (Cheltenham, UK: Edward Elgar Publishing, 2012), 852.
60 Lijphart, *Patterns of Democracy*, 33, 244.
61 Art. 120 of the Constitution of the Kingdom of the Netherlands of 2018, English version available at: https://www.government.nl/binaries/government/documenten/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf; Art. 190 of the Swiss Civil Code of 10 December 1907, SR 210.
62 Hans-Heinrich Jescheck et al., "Procedural Law," in *Encyclopedia Britannica*, 11 August, 2023, https://www.britannica.com/topic/procedural-law (accessed 14 August 2023).
63 Payandeh, "The Role of Courts".
64 Article 3:305a Civil Code of the Netherlands of 1992, English version available at: http://www.dutchcivillaw.com/civilcodegeneral.htm.
65 DSC, 19/00135, para. 2.2.1.
66 Chris Backes and Gerrit van der Veen, "Urgenda: the Final Judgment of the Dutch Supreme Court," *Journal for European Environmental & Planning Law* 17 (2020): 310.

In contrast, the KlimaSeniorinnen had to show that they have an individual legal interest in the claim, by proving how they were individually and specially affected by climate change.[67] The KlimaSeniorinnen tried to show that they were specifically and individually affected by providing scientific evidence and medical certificates demonstrating the excess mortality rate and suffering of elderly women during climate change-induced heat waves.[68] The FSC argued that the KlimaSeniorinnen are not yet affected with the intensity required to fulfil the procedural requirements.[69] Thereby, the FSC interpreted the already high requirements of the procedural rule very narrowly.[70] Interviewees underlined that the FSC could also have accepted the KlimaSeniorinnen's legal standing since the KlimaSeniorinnen provided strong grounds for their individual affectedness and that the FSC had been more generous about procedural requirements in a past case. The narrow interpretation leads to a failure to provide effective legal protection of fundamental rights.[71] The fact that the FSC focused so intensely on the discussion of procedural requirements might also be interpreted as an attempt to avoid engaging in the complex, politically sensitive matter of the claim (for example, state duties to protect individuals from climate change)[72] – a strategy which the FSC had applied in a different case too.[73]

Procedural rules raise fundamental questions about effective legal protection in the context of climate change.[74] Since climate change affects all people, but not everyone in the same way, proving individual affectedness and fulfilling a required intensity of affectedness when harm materialises in the long run is tricky – and risks effective rights protection being forsaken.

67 Art. 25a Federal Act on Administrative Procedure of 20 December 1968, SR 172.021, The Administrative Procedure Act allows claimants to challenge executive or administrative acts, but they must prove that they are individually and specially affected, FSC, 1C_37/2019, paras. 4.1–4.2.

68 KlimaSeniorinnen Schweiz, "Request to stop omissions in climate protection pursuant to Art. 25a APA and Art. 6 para. 1 and 13 ECHR," *KlimaSeniorinnen Schweiz*. 2016. https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf (accessed 10 May 2022).

69 FSC, 1C_37/2019, paras. 5.3–5.5.

70 Johannes Reich, "Bundesgericht, I. öffentlich-rechtliche Abteilung, 1C_37/2019, 5. Mai 2020; zur Publikation in der amtlichen Sammlung vorgesehen," *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBI)* 9 (2020): 502–03.

71 Mirina Grosz, "Grundrechte und Klimaschutz: Nationale Perspektive," *Aktuelle Juristische Praxis AJP* 11 (2021): 1361–63; Patricia Kaiser, "Rechtsschutzlücken im Rahmen von Realakten," *SJZ – Schweizerische Juristen-Zeitung* 147 (2020): 147–56.

72 Grosz, "Grundrechte und Klimaschutz," 1362; Kaiser, "Rechtsschutzlücken," 156.

73 Thomas Bernauer et al., "Die Judikative," in *Einführung in die Politikwissenschaft*, ed. Thomas Bernauer et al. (Baden-Baden: Nomos, 2018), 423.

74 Lorenz Kneubühler and Dominique Hänni, "Umweltschutz, Klimaschutz, Rechtsschutz. Ein Plädoyer für eine Verbandsbeschwerde im schweizerischen Klimarecht," *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht ZBI* 9 (2021): 479–502.

The Competences of Courts

Courts have certain competences formally prescribed by the constitution which can be encompassing or not (for example, whether a court can rule on the constitutionality of legislative acts or not).[75] But courts can also choose to a certain degree whether or not to make use of these formal competences, depending on their domestic role.[76]

Regarding formal competences, the FSC and DSC resemble each other as neither are constitutional courts and both are primarily responsible for ensuring the uniformity of their legal order.[77] Neither court is very powerful or politicized.[78] However, the DSC is more powerful in its political system than the FSC, since the EU membership of the Netherlands has generally strengthened national courts of EU member countries.[79] Also, in contrast to the FSC, the DSC has engaged in politically controversial questions in the past, such as abortion or euthanasia.[80] In Switzerland, the parliament solves these contested societal issues, as an interviewee remarked.[81]

Courts and Science

In CCL, courts are confronted with complex climate science which can be challenging, for example with regards to the assessment of the harm caused by climate change.[82] Also for the plaintiffs, especially in rights-based CCL, proving a causal link between government (in)action and harms related to climate change is very difficult.[83]

Science played an important role in both the Urgenda and KlimaSeniorinnen judgments. The DSC used IPCC reports in combination with other sources to establish that there is an international consensus about the reduction targets industrialized countries such as the Netherlands must

75 Payandeh, "The Role of Courts," 73.
76 Eva Maria Belser, Thea Bächler, and Sandra Egli, *Recht auf Umwelt. Eine Untersuchung der geplanten Anerkennung eines Rechts auf Umwelt durch die UN und ihrer Folgen für die Schweiz* (Bern:Schweizerisches Kompetenzzentrum für Menschenrechte (SKMR), 2021), 77.
77 Nick Huls, "The Dutch Hoge Raad: Judicial Roles Played, Lost, and Not Played," in *Consequential Courts: Judicial Roles in Global Perspective*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge: Cambridge University Press, 2013), 181–98; Bundesgericht, "The Swiss Federal Supreme Court – The Third Power within the Federal State," *Rechtspflege – Wissenswertes zum Bundesgericht* (Lausanne & Luzern: BGer, 2021), Seitenzahl(en) im PDF?.https://www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/BG_Brosch_Inhalt_A4_21_eng.pdf (accessed 20 May 2022).
78 Lijphart, *Patterns of Democracy*, 215; Nicos C. Alivizatos, "Judges as Veto Players," in *Parliaments and Majority Rule in Western Europe*, ed. Herbert Döring (Frankfurt a. M., New York: Campus/St. Martin's, 1995), 575.
79 Huls, "The Dutch Hoge Raad," 195.
80 Huls, "The Dutch Hoge Raad," 186–87.
81 Beleg Interview.
82 Joana Setzer and Lisa Vanhala, "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance," in *Wiley Interdisciplinary Reviews on Climate Change* 10 (2019): 10.
83 Ibid.

pursue to prevent dangerous climate change.[84] In the KlimaSeniorinnen case, the FSC used an IPCC special report to underline that dangerous climate change has not yet materialized, which is why the rights of the KlimaSeniorinnen were not yet sufficiently affected to be legitimated to claim.[85] Thus, the DSC and FSC both interpreted the science in a way that meant it upheld their decisions: in Urgenda to order the Dutch State to act immediately, and in the KlimaSeniorinnen case to justify not entering the substantive treatment of the case.

Substantive Law and the Legal Order in General

Another important explanatory factor is how courts weigh substantive legal principles and rules of the claim. CCL which aims to correct mitigation efforts is more likely to be successful when there are legally binding mitigation obligations under international or national law.[86]

Substantive law and the legal order in general were decisive for the DSC's judgement in the Urgenda case. The DSC approved the lower courts' decisions that the Dutch State has a duty of care based on human rights to increase Dutch climate protection.[87] The courts extensively interpreted the duty of care as well as the scope of human rights obligations.[88] The DSC's judgement was majorly informed by international law even though the DSC acknowledged that no direct obligation to a specific reduction target could be derived from international law: Rather, the DSC made a detour via international law, climate science and political statements to underline what the Dutch state must pursue to adhere to its human rights obligations.[89] Generally, the Dutch legal order and legal tradition is very open to its surroundings[90], which may provide a more open space for an innovative judgment about duty of care and positive obligations in climate change. Such discussions are less established in Switzerland, as an interviewee observed.

Legal Culture / Legal Environment

A general challenge in environmental law which also manifests in CCL is the legal culture. [91] Legal culture helps us understand the context of courts' decision-making, the courts' role in the national system and its self-conception.[92]

84 DSC 19/00135, paras. 7.2.1–7.6.2.
85 FSC 1C_37/2019, paras. 5.3–5.4.
86 Payandeh, "The Role of Courts," 73.
87 DSC, 19/00135, paras. 8.3.5, 9.
88 Christine Bakker, "Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond," in *Climate Change Litigation: Global Perspectives*, ed. Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (Leiden: Brill, 2021), 212–13, 221.
89 DSC, 19/00135, paras. 7.2.8, 7.4.4.
90 Huls, "The Dutch Hoge Raad," 193.
91 Kleoniki Pouikli, "Editorial: A Short History of the Climate Change Litigation," *ERA Forum* (2022), 581.
92 Saiger, "Domestic Courts and the Paris Agreement," 53.

The FSC is very reserved towards federal politics, even with judgements that have only signalling effect.[93] Switzerland attaches high value to popular participation and direct democracy, even to the extent that past popular initiatives, such as the "Minarett Initiative" which wanted to ban new constructions of minarets, conflicted with fundamental rights (in the minaret initiative, this concerned religious freedom).[94] This might explain why the FSC told the KlimaSeniorinnen to pursue their interest via political means.[95] In contrast, Dutch legal culture is more open to the discussion of problems and even accepts judicial solutions to contested topics.[96] However, the interviewees were careful about drawing definitive conclusions about the impact of legal culture on the varying outcomes of the cases. The interviewees were more concerned with what a jurisdiction's procedural and substantive law allows courts to do.[97]

Political Power Structures

Courts are not isolated actors: The judiciary will consider what decision is possible within a social and political setting. The domestic and international political context can influence the outcome of a CCL.[98]

How political power structures influenced the DSC's verdict could not be fully assessed, as additional background knowledge was not accessible due the fact that interviews could not be conducted with Urgenda. Neither the literature nor the interviews revealed a clear indication of how political power structures influenced the FSC's judgement. What can be said is that the DSC's judgement did not back the Dutch State and its current climate protection policies, and the Dutch State increased its climate action after the verdict.[99] The FSC on the other hand relinquished making a judgement in order to underline the importance of ambitious climate policy to the parliament, which was at the time of the judicial proceedings negotiating the new CO_2 Act.[100] With or without intent, the FSC's judgement preserved the status quo.

93 Belser, Bächler, and Egli, *Recht auf Umwelt*, 113, 128, 135.
94 Bernauer et al., "Die Judikative," 422.
95 FSC, 1C_37/2019, paras. 5.5, 7.
96 Smits, "The Netherlands," 623; Huls, "The Dutch Hoge Raad," 183–84.
97 Belege Interviews.
98 Payandeh, "The Role of Courts," 75–76.
99 Backes and van der Veen, "Urgenda," 321.
100 Federal Act on the Reduction of CO2 Emissions of 23 December 2011, SR 641.71 (CO2 Act); Mirina Grosz, "Bundesgericht, I. öffentlich-rechtliche Abteilung, Urteil vom 5. Mai 2020 (1C_37/2019); BGE-Publikation," *Umweltrecht in der Praxis (URP)* 4 (2020): 414.

Public Opinion

Courts are also sensitive to their social environment. The judiciary may be more willing to advance climate protection when the broader society pushes for action.[101] How public opinion explains the different judgments by the DSC and FSC is unclear, either from literature or the interviews. Urgenda successfully mobilized civil society for their claim.[102] The Urgenda case was from the beginning surrounded by tremendous international and national public, media and scholarly attention. From information collected during the interviews, it seems media attention on the KlimaSeniorinnen case was rather low until the FSC's judgment. The topic of climate change has generally become more prominent, also due to weekly protests by students and climate activists worldwide.[103]

Judges' Attitudes

Ideological preferences or attitudes may influence judges, especially when they decide on contentious policy questions like climate policy.[104] Many courts react conservatively to contentious policy questions.[105]

Information on how judicial attitudes maybe have influenced the DSC's judgement was not accessible due to a lack of relevant data. The interviewees in the KlimaSeniorinnen case could only report from their subjective perception and with reference to certain statements of the Swiss courts. They believed that the Swiss judiciary did not appear to take the KlimaSeniorinnen seriously and were skeptical about their case being a strategic one.[106]

101 Payandeh, "The Role of Courts," 75–76.
102 Marjan Minnesma, "Not slashing emissions? See you in court," *Nature* 7787 (2019): 379–81.
103 Kneubühler and Hänni, "Umweltschutz, Klimaschutz, Rechtsschutz," 480.
104 Jasmina Nedevska, "An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges," *Sustainability* 13 (2021): 3.
105 Peel and Osofsky, "Climate Change Litigation," 33.
106 Belege Interviews.

Conclusion

The outcomes of the Urgenda and KlimaSeniorinnen cases mainly differed because Dutch law has more generous procedural rules about the admissibility of claims than Swiss law. Swiss procedural law places high requirements on claimants to be able to sue. In the KlimaSeniorinnen case, the FSC further applied a narrow interpretation of already strict procedural requirements. Furthermore, the FSC is not a court that has been known to intervene in politically contested questions, while the DSC even solved these questions. Dutch law and the Dutch legal order also offer more room for innovation than Swiss law. Other factors may have also played a role, but their influence was not as clear as the abovementioned.

The Urgenda judgment has shown that courts can be significant actors in the achievement of stronger climate protection despite the lack of internationally legally binding and concrete GHG emission targets.[107] Meanwhile, the final judgement in the KlimaSeniorinnen case at the ECtHR is awaited with suspense.[108] It is the court's first case in which it has to determine the applicability and scope of human rights in climate change – and has the potential to become a landmark ruling.[109]

Thereby, CCL contributes to the continuous development of law and legal adaption to climate change in the long run. Even if CCL cases fail, they create societal consciousness and political pressure.[110] Similar to strategic litigation, strategic, rights-based CCL is generally one of many tools used to achieve necessary climate policy and behavioral change, and works effectively when combined with other tools of political and social mobilization.[111]

107 Bakker, "Climate Change Litigation," 221.
108 KlimaSeniorinnen Schweiz. "Aktuell." 2023. https://www.klimaseniorinnen.ch/unsere-klage-am-egmr/ (accessed 27 March 2023).
109 Johannes Reich, Flora Hausammann, and Nina Victoria Boss, "Climate Change Litigation Before the ECtHR: How Senior Women from Switzerland Might Advance Human Rights Law," *VerfBlog*, 16 May 2022, https://verfassungsblog.de/climate-change-litigation-before-the-ecthr/ (accessed 31 March 2023).
110 Heather Colby et al., "Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change," *Oslo Law Review* 7 (2020): 184.
111 Peel and Osofsky, "Climate Change Litigation," 34.

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IPCC. "Summary for Policymakers." In *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, edited by Priyadarshi R. Shukla et al. Cambridge & New York: Cambridge University Press, 2022.

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