Interview with Ms. Doerte Fouquet, Partner at BBH
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Q1. Could you provide us with an overview of the recent trends in climate legislation in Europe, and how it compares to the US situation?

In fact, the United States of America used to have progressive environmental legislation in the past. They were one of the first country worldwide to have the Clean Air Act for instance. But that's 30 or more years ago. They worked on this basis, they created the Federal Environmental Protection Agency, etc. But in the past few years, and especially under the outgoing government, they have backpaddled, to say the least. As you know, yesterday it became effective that the United States left the Climate Paris Agreement. Also, the US has created a senseless investment bubble in the fracking of fossil gas. And there are many areas where they have curbed down the power of the environmental protection agency. Of course, there are also the states governments, not only the Federal government, and some have strong environmental legislation. But the message to the outside world during the last years was quite detrimental. In Europe on the contrary, it was also not an easy pathway, but Europe has been serious and honest about coming to terms with Greenhouse gases emissions, and about following the Paris Agreement to strive to reach the 1.5 limit of temperature rise.

In Europe energy and environment are the joint responsibility of the European Union and the Member States. So, in order to reach international targets, they have to be translated first into European climate regulations, which by the way is unique for such a transnational organization in the world. Then many Member States have also adopted their own climate legislation. Germany, for example, has a Climate Act and we talked at the conference about other countries as well. So, to conclude, I think the difference between the US and Europe is that we have a momentum for positive change in Europe, which has not been there, on the national level at least, in the United States.

问题一：您可以向我们介绍一下最近气候立法在欧洲的发展趋势吗，这和美国的情况有哪些异同呢？

事实上，美国过去曾有过先进的环境立法，例如，他们曾经是世界上首批颁布清洁空气法案的国家之一，但那是 30 多年前的事了。在此基础上他们一直在努力，比如创建了美国国家环境保护局。但在过去的几年中，尤其是在这一届即将卸任的政府的领导下，美国不进反退。如你们所知，昨天美国正式退出《巴黎协定》的决议生效。同时，美国国内的化石气燃料行业出现了毫无意义的投资泡沫。在很多领域内，之前正常独立运行的环境保护主管机构的权力受到了限制。当然，除了联邦政府，美国的州政府也能在环境保护方面起到一些作用，其中部分州有严格的环境立法。但在过去的几年里，他们向外界传递的信息是比较负面的。在欧洲，环境保护的道路也并不轻松，不过不同的是，欧洲对于达成温室气体排放协议以及依据巴黎协议努力实现低于 1.5 摄氏度的控温目标持认真和坦诚的态度。

在欧洲，环境保护和能源议题是欧盟和各成员国间的一项共同责任。为了实现国际目标，这些目标必须首先被转化成欧盟的气候规章，这在国际上对于一个跨国组织而言是很独特的。随后，许多成员国通过了国内的气候立法，比如德国颁布了一项气候法案，我们在会议中也谈到了其他国家的例子。总结来看，我认为美国和欧洲的不同之处在于，欧洲有推动积极变化的势头，但这在美国国家层面上还没有形成。

Q2. In your presentation at the conference, you emphasized on issues of legal standing to bring climate lawsuits at the EU level. Could you share your analysis of this hurdle?

It's a special problem related to access to court at the European level. The principle in European procedural regulation is as follows: Everybody, be it a Member State, an industry, the European Commission itself when it is not her own decision, or an individual citizen, all can bring cases to the European Court, especially with the so-called annulment plea, against the decisions issued by a European Institution. The problem is that an individual or an NGO have to prove that themselves or their members are directly and individually impacted by the decision

in question. This is the so-called Plaumann formula[1]. The problem here is that proving that you are directly and individually impacted is always very difficult, because normally, a law or regulation is addressed to all. It's not an individual decision. But even in cases where we had a Commission decision (not a regulation) and the plaintiffs thought they were effectively affected by it, standing was denied by the court because they were not individually addressed by the decision, which was addressed to the Member States. This jurisprudence makes it very difficult for individuals and civil society groups to get pass the hurdle of admissibility.

I can give you a recent example from my own practice. There was a decision issued by the European Commission to the government of the United Kingdom, authorizing it to give state aid for the construction of a new nuclear power plant. My clients, the plaintiffs, were German independent power producers and Greenpeace Energy, which is also a registered corporate power supplier in Germany. They asked me to go to court against the decision because they claimed that when so much nuclear power would come into the interconnected grid, it would affect the energy market in Germany as well. So, we went to court, but we could not cross the hurdle of admissibility. For the court, the decision was addressed to the UK and so it was not direct enough.

Let me turn now to this European Climate case brought by families from Europe, Kenya, Fiji and a youth association of indigenous people in northern Scandinavia[2]. In May 2018, they introduced their case to the European Court of first instance, which we call the General Court, referring to the protection of their fundamental rights. We have basic rights provisions in the European Charter of Human Rights, which can be used as a legal basis to challenge EU legislation in the European Courts. We also have articles in European treaties providing for high standards of environment protection, and we also have articles in the various member states jurisdictions for the protection of the environment, and in some Member State even at the level of the fundamental rights.

So this group of families went to the European Court, because they argued that the European parliament and the Council of the European Union had not put into place climate protection objectives that were strong enough to help curb down temperature increase by 2030. And here again, unfortunately, following the logic I just described, the general court refused admissibility on standing grounds.

It is interesting to read the reasoning of the general court to issue this non-admissibility decision. They said: "it is true that climate change is affecting the plaintiffs one way or the other. But they are not individually concerned in the legal sense of our procedural setting in the European Court." It is not a question of the intensity or severity of the impact on the plaintiffs, but of exclusivity, in the sense that the EU decision would have to single out this group of people, as being individually and directly concerned, as opposed to the whole population. So in my view, it is now a dead end jurisdiction, if I may say. Because under these admissibility conditions, with the climate damage, we will never have standing before the European court. The plaintiffs have appealed this decision to the higher level, the European Court of Justice. We will see what the European Court of Justice will decide on this issue of individual concern when they rule on the admissibility of the case. The appeal was introduced in July 2019, so I think this decision should come out within the next 6 months.

问题二：您在会议中的演讲中强调了欧盟层面提起气候诉讼的资格问题，请问您可以和我们分享一些您对于诉讼资格作为障碍的见解吗？

我认为这是出现在欧洲层面的一个特殊问题。欧洲的程序性规章的原则是这样的：任何一方，不论是某一成员国、某一产业、欧盟委员会（当所涉案件不是其本身的决议时）、或是某一个人，都可以在其他欧洲机构宣判申诉无效时向欧洲法院提起诉讼。关键是，当你作为个人或是一家非营利组织提起诉讼时，你必须证明自己或是这个组织的成员直接受到了涉案决议的针对个人的负面影响。这就是我们所说的普劳曼（Plaumann）测验方式[3]。这里的问题是，要证明你受到了直接的、针对个人的影响总是很

[1] In 1965, Plaumann and Co, a German corporation doing import business brought a lawsuit against the European Commission, requesting the annulment of its decision to refuse the partial suspension of custom duties on fresh mandarins and clementines. The European Court of Justice decided that Plaumann and co did not have standing to sue under EU law because it was not concerned by the Commission's decision in a distinctive and personalized manner. This very restrictive interpretation of "individual concern" is now known as the "Plaumann test".

[2] Ten families and an indigenous group filed the Armando Carvalho case, also known as "People's Climate case" in 2018 against EU institutions, arguing that the EU's climate goals and policies were inadequate to prevent climate change and therefore violated their fundamental rights of life, health, occupation, and property. However, the court dismissed the case on the basis that the plaintiffs lacked standing, since they could not prove that they were uniquely and directly affected by EU's climate policies. The plaintiffs appealed the decision in 2019. Decision by the European Court of Justice is pending.

[3] 1965 年，名为 Plaumann and Co 的一家从事进口业务的德国公司提起了针对欧盟委员会的诉讼，要求其撤销一项拒绝对新鲜柑桔减免部分关税的决定。欧洲法院裁定，Plaumann and co 并无根据欧盟法律提起

困难的，因为通常法律法规适用于所有人。法规并不是一个只针对个人的决定。但是即使在原告方认为自己被委员会的某一项决议（而非规章）影响时，法院也可能宣判原告方没有诉讼权，因为该决议不是单独针对这些个体的，而是针对欧盟成员国的。这条法理使得个人和民间社会团体难以克服诉讼可受理性的障碍。

我可以给大家举一个我最近在处理的案子作为说明。欧盟委员会向英国政府发表了一个决定，授权该成员国发放国家补助金补贴英国国内新建核电站。我的客户，也就是这个案件的原告方，是一些德国独立电力生产商，以及绿色和平能源（Greenpeace Energy），绿色和平能源是一家在德国注册的供电企业。他们请我向法庭提出反对这个决议，因为他们认为，当大量的核电站进入互联的电网时，德国的能源市场会受到影响。所以，我们向法院提起了诉讼，但我们还无法克服案件诉讼案件可受理性的的障碍。对法院来说，该决议是针对英国的，这对原告产生的影响不够直接。

现在我来谈一个由来自欧洲、肯尼亚、斐济的家庭以及来北部自斯堪的纳维亚半岛土著居民（indigenous people）的青年组织提起的欧洲人民气候案[4]。2018 年 5 月，他们向欧洲法院的普通法庭针对自身基本权利的保护提起了一审诉讼，《欧盟基本权利宪章》规定人们拥有人权，而这可以作为在欧洲法院质疑欧盟立法的法律基础。在欧盟条约中我们有关于高标准环境保护的条款，在欧盟各个成员国中，也有大多数国家有关于环境保护的条款，其中一些国家将这些权利列于基本权利层面。

这些家庭在欧洲法院提起诉讼，因为他们认为欧洲议会和欧盟理事会还没有制定出足够有力、能帮助我们在 2030 年之前遏制气温上升的保护目标。这里要再次提及的是，很遗憾，与我刚才描述的逻辑一致，欧洲普通法院拒绝在诉讼资格方面承认这个案件的可受理性。

普通法院对于案件不可受理性的论证很有趣。他们说：“气候变化确实以这样或那样的方式影响着原告。但是，他们不是法律意义中欧洲法院审判流程中所关注的个体。”也就是说这无关原告方所受影响的严重程度的问题，而是排他性的，欧盟决议将这群人从受到个人和群体影响的部分中排除出去，同时这也与社会全体相对立。这在我看来就是司法中的死胡同。因为在这样的诉讼资格要求之下，在气候变化领域，我们这些个人在欧洲法院中永远不会有诉讼资格。这些原告向上一级的欧洲法院提起了上诉。我们将看到，当涉及案件的可受理性时，欧洲法院将如何就这些个人关切作出裁定，他们在 2019 年 7 月提出了这个案件。我认为他们应该会在 6 个月内做出裁决。

Q3. As you have mentioned fundamental rights as legal grounds for climate litigation in Europe, could you expand on the sources of rights which may be considered in the member states courts and European courts?

As a lawyer, I would say there is a whole concert of articles you should combine. We do not have a specific article on climate protection in one of our European treaties. But we have fundamental rights, we have the European Charter of Fundamental Rights. For example, there is a right to a sustainable livelihood. We also have many articles on the protection of the environment in the Treaty on the European Union. So I don't think it is difficult to find enough legal ground. The problem we have is to be able to go into the reasoning on the merits of cases.

问题三：正如您所提到的，在欧洲，基本权利是气候诉讼的基础。请问欧洲法院和各成员国法院认可的权利来源还有哪些呢？

作为一名律师，我认为我们需要考虑很多不同的条款。在欧盟的条约中，没有专门针对气候保护的条款。但我们有基本权利，有《欧盟基本权利宪章》。比如，你有维持可持续的生活的权利。我可以给你列一些条款，我们在欧盟条约中也很多关于环境保护的条款。因此我认为找到足够的法律支持并不困难。我们所面临的问题是是否能够根据案件的案情展开论证。

诉讼的资格，因为欧盟的该项决议并非针对其一家公司。此种对“个人针对”的严格判读被称为“普劳曼测验”。

[4] 由十户家庭和一个本土机构在 2018 年对欧盟发起的 Armando Carvalho 案也被称为“人民气候案”，原告声称欧盟应对气候变化的目标和政策不足，并因此侵犯了他们的生命健康权，且威胁到他们的家庭收入和财产。法院以原告无法证明其承受了的气候变化影响与他人不同而驳回原告诉求。原告已于 2019 年对该裁决提出上诉，欧洲法院对此案仍在审理中。

Q4. In many climate cases, we see difficulties with causality, that is how to prove that the damage is cause by climate change rather than other factors. How would you approach that issue?

This issue is not only for the judge to decide, but also an issue of who is responsible to prove the causality link. For example, many years ago, there were several cases concerning high levels of leukemia among young children living in the vicinity of nuclear power stations. People flighted for many years, but they could not pass the burden of proof. They could never get through because they could not prove that "this power station is killing my child". But since then, the legislation on the burden of proof has evolved and become a little bit easier in many Member States. Now if there is pollution and damage, it is for the other side (the polluter) to prove they have not caused the damage. This is a very important progress.

问题四：在很多气候案件中，我们发现证明因果关系的过程中存在一些困难，也就是说在如何证明伤害是由气候变化而不是其他因素造成的方面存在阻碍。您是如何处理这个问题的呢？

关键问题不仅是如何审判的问题，也是谁有责任去证明危害因果关系的问题。比如很多年之前，有很多案件都与发生在核能站附近的儿童白血病患者有关。人们抗议了很多年。但他们无法摆脱举证的责任。他们永远无法证明"这个电厂正在杀死我的孩子"。但自那之后，关于举证责任的立法逐渐发生了演变，在很多成员国这比之前容易了一些。现在面对污染和环境破坏，是被告方（污染者）需要证明他们没有造成这些破坏。这是非常重要的进步。

Q5. There are now also climate cases brought to European judges involving transnational groups of plaintiffs, including some from outside the EU. In your presentation you talked about one of these cases brought to German courts involving plaintiffs from Nepal and Bangladesh. Could you introduce this case and its potential to spur future climate litigation globally?

In Germany, foreign citizens can bring cases to the Constitutional Court on several grounds, because there are universal rights in the constitutions. There are rights that only Germans can claim, and there are universal rights that everybody can claim. The rights to the integrity of person and the right to health are such universal right. So it was not difficult for non-Germans to join this case. This case has claimants from Peru, and so forth. There is also another case targeting coal power plants brought by nine youth from several regions of Germany, who make claims similar to the plaintiffs before the European court; i.e. they claim that the German climate legislation is too weak, that it does not enough to protect their rights. Both cases will be heard together by the Constitutional Court. And the interesting thing is that we have observed signs of an openness of the part of the Constitutional Court to consider the merits of these cases. Because, as I said at the conference, the Constitutional Court is now collecting comments and questions from the German government and from the German parliament on these cases.

This issue speaks to the role of the Constitutional Court and the role of courts in general, in climate policymaking. The judicial system in the European Union and its Member State, and so also in Germany, is based on the separation of power between three pillars: the judiciary, the executive, and the legislative. The justiciary is completely independent from the legislator and from the administration. That is very important, and therefore, the Constitutional Court of Germany has been able to issue many decisions on many issues, stating that certain laws failed to comply with the constitutions and had to be reformed. In these cases, often the Court will give a timeline to enable the legislator to come up with improved legislation. So, this could also happen in these two climate cases pending before the Constitutional Court. There have been intensive debates about it. I could foresee the Constitutional Court setting some indicators of sufficient climate action. They would have to acknowledge that the German government has adopted climate targets, but then the question is: can the court really judge whether these climate targets are strong enough? I think they may go into this direction, and the court could at least decide that the German government has to bring more scientific evidence to prove that their targets and their pathway to reach this target is sound.

问题五：有一些跨国团体向欧洲的法官们提起了诉讼，这其中包括了一些来自欧盟以外地区的原告方。例如您在演讲中提到了有来自尼泊尔和孟加拉国的原告方向德国法院提起了诉讼，您可以介绍一下这个案例吗，并且介绍一下其在全球范围内促进未来气候诉讼案的潜力？

在德国，外国公民也可以根据宪法中的一些普遍权利，基于不同理由向宪法法院提起诉讼。

有一些权利只赋予了德国人，也有一些权利是赋予所有人的。人格权和健康权就是这样赋予所有人的权利。因此外国公民在加入这个案字并不难。该案有来自秘鲁等国家的发起人，另一个案件是由来自德国几个地区的九个年轻人发起的，他们针对燃煤发电厂提起了诉讼，在欧洲法院提出与先前的原告相似的观点，如德国的气候立法过于薄弱，不足以保护其权利。这两起案子会一起由宪法法庭同时审判，

有意思的是，我们观察到宪法法院对这些案件案情进行审理的迹象。因为，正如我在会议上所说，宪法法院现在正在收集德国政府和德国议会对这些案件的评论和问题。

这可以说明宪法法院和一般法院在气候决策中的作用。欧盟及其成员国（包括德国）的司法制度，都以司法、行政和立法三大支柱之间的权力分立为基础。司法权是完全独立的，不受立法者和行政系统的干预。这很重要，正是因为这个原因，德国宪法法院可以在很多事情上做出决定，宣判立法机构通过的法律违背宪法，必须进行改革。这种情况下，法院通常会给出一个时间表，使立法机构能够改善所涉立法。这种情况也有可能在宪法法庭审判这两个气候案例中发生。这已经引发了激烈的讨论。我的预判是，宪法法庭会为充分有力的气候行动设定指标，他们会认可德国政府的确采纳了气候目标，不过问题是，法院真的可以判断这些目标是否足够有力吗？我认为讨论可能会就此展开，同时法院至少可以裁定，德国需要更多的科学证据来证明这些目标和路径是合理的。

Q6. You have also mentioned in your presentation that failed climate cases may still be useful to mobilize society and the political arena. Can you explain how you see litigation playing a role in building momentum and ambition for global climate governance?

I cannot pinpoint to you that it is because the families went to court or because we have these various climate litigation cases. But what is clear is that people are no longer silent; they have become very active, they have become as active as what you could see with environmental movements against pollution and health issues in the 1970s, especially in Germany, which I know best. So we have seen such movements in the past, and now they've started again, with "Fridays for Future" and all these things together. It is a creative situation, with lots of criticism and courage displayed, which I think partly explains why the current president of the European Commission, Ms. Von Der Leyen, put forward this Green Deal. She certainly felt encouraged by the public and by these litigation cases.

Noticeably, the Commission has also proposed a new Climate Law. In fact, the Commission had issued a first proposal, and some weeks later, it amended its own proposal with an even more stringent target, which is the 55% emissions reduction target by 2030 that we have now. The European Parliament went even further than that and initially proposed a 60% reduction target. So, I think these climate cases before the court have been heard by politicians.

问题六：您在演讲中也提到了，败诉的气候案例在社会和政治领域仍有动员作用。您如何看待诉讼在全球气候治理中建设动力和雄心方面发挥的作用？

我没办明确地指出这种作用是源于这些家庭上诉至法院或是源于一系列的气候诉讼案例。但是很明确的是，人们不再沉默，人们变得非常活跃，就像你在十二世纪七十年代时能看到的一样，人们在环境污染和健康领域内非常活跃，尤其是在德国，这是我最了解的。我们在过去已经看到过这种情况，而现在它又重现了，例如"为了未来的周五"（"Friday for Future"）等一系列运动。这是一个全新的局面，这种局面所面对的批评和应对其所需要的勇气是欧盟委员会现任主席冯德莱恩（Von Der Leyen）女士采纳欧洲绿色新政（European Green Deal）这种方法的部分原因。她必然受到了公众和这些案例的鼓舞。

值得注意的是，欧盟委员会还提出了新的气候法。实际上，委员会在首次提出了提案的几周后修改了自己的提案，将其中的减排目标定得更严格了，就是现在 2030 年前实现温室气体排放降低 55%的目标。欧洲议会最初提出了比之更高一些的减排 60％的目标。因此，我认为政客已经了解了这些法院审理过的气候案件。