



*DOTTORATO DI RICERCA
IN DIRITTO E IMPRESA
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**CLIMATE CHANGE REGULATION:
COMPARING THE EU AND THE US
LEGAL APPROACHES**

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ABSTRACT

Climate change is undoubtedly one of the biggest challenges of our century since it threatens both the natural and the human environment. It has been scientifically proven that anthropogenic emissions of greenhouse gases (GHGs) are changing the earth's climate disastrously.

The World Economic Forum, held in Davos in January 2016, calculated the cost of climate change for the global economy and its last report stated that the climate crisis is now the number one risk for the global economy. The risk with the greatest potential impact in 2016 was found to be the failure of climate change mitigation and adaptation. This is the first time since the report was first published in 2006 that an environmental risk has topped the ranking.

Aside from being a scientific phenomenon, climate change also represents a legal phenomenon: we are surrounded by climate change legislation, ranging from national to global legislation.

The climate change legislator has been intervening through regulation to tackle climate change, considering that climate change represents a market failure.

Thus, legal scholars have the duty to study this phenomenon and bring it to the attention of the legal community.

This thesis aims at defining the importance of climate change regulation on both a national and a global level, identifying its possible benefits and drawbacks in two specific jurisdictions: the EU and the US. These two "countries" are two of the biggest GHG polluters as well as two fundamental political players, whose participation, *inter alia*, in the international scenario can cause the success or the defeat of climate change regulation. Furthermore, in these two countries climate change regulation

has been in the forefront of the legal debate among administrative and environmental legal scholars. Finally, both the EU Member States and the US states receive legally binding directives and regulations (EU) or acts and rules (US) regarding environmental legislation, from central governments - although differences appear between the US, a federation, and the EU, not a federation but a “collaboration” of 28 states.

In order to achieve this goal, I divided the thesis into five chapters, each of which represents a particular step in constructing a complex legal pathway. The five chapters follow a specific logic.

The first chapter aims at understanding the importance of regulation as the most efficient tool in tackling climate change from a scientific, economic and legal viewpoint.

Chapter two aims first at reconstructing the historical background in the EU and US, this comparative historical reconstruction is new to legal literature, where the only comparative works focused mainly on the international aspect of climate change policy and legislation. The importance of this comparative historical reconstruction is twofold: on the one hand, it is chronologically and logically necessary to understand why and how climate change policy and legislation developed; on the other hand, careful study of it demonstrates the realization of a ‘climate change regulatory state’. Having analyzed the historical background in which climate change legislation and regulation developed, I deemed it necessary to study the legal principles that inform the subject in the two jurisdictions. This analysis was indispensable before dealing with the identification of EU and US regulators and their activities. In my in-depth analysis of climate change regulators as creators of climate change regulation, I studied and compared the administrative procedures related to the rule-making, rule-implementing and rule-enforcing activities carried on respectively by the

EU Commission in the form of the DG Clima (through proposals, consultation activity, comitology strategy, delegation of acts, impact assessment in the form of risk assessment and CBA) and by the US executive administration in the form of the Environmental Protection Agency – EPA (through the APA rules, OIRA review, delegation doctrine, impact assessment in the form of risk assessment and CBA). Despite the divergence of the two jurisdictions in terms of legal category and constitutional settings, the comparison provided revealed incredible similarities and possible drawbacks to be avoided.

Chapter three gives the reader two core examples of climate change regulation: the EU Directive Emission Trading Scheme and the US Rule, the Clean Power Plan. This comparison represents a window into the process by which European and American regulation takes shape. This comparison, apart from outlining key similarities and differences in the regulatory methodologies concerned, showed, on a broader level, which is the best entity for providing regulation and which is the best regulation technique for tackling climate change.

Chapter four deals with the climate change litigations which occurred in the EU and US because of the climate change regulation analyzed in the previous chapter. In particular, this chapter aims at underlining the importance of litigation in shaping climate change regulation. This chapter carries on a detailed analysis of the challenges brought against the two regulations which aims on the one hand at pointing out the importance of regulation through litigation and on the other at raising several questions related to substantial and procedural legal issues.

Finally, chapter five analyzes the global dimension of the climate change issue. The global aspect of the scientific and legal phenomena involved is undeniable and recognized by the most influential scholars who

adopted and first explained the concept of global administrative law in general. This final chapter represents one of the first works on this specific issue and analyses the global regulation of climate change investigating, the UNFCCC as a global regulator, and the new - and possibly threatened - Paris Agreement, through the typical tools used by administrative legal scholars.

This thesis should be placed among the first legal works on the study of the legal regimes and instruments - from an administrative and environmental law viewpoint - which directly regulate or can be used to regulate climate change in the EU and US.

In addition, this thesis should be ranked with the scholarship that seeks to contribute to the emerging field of comparative environmental law.

Climate change regulation represents a relatively new field in which academics and practitioners are still working to define the boundaries, principles, and norms of the discipline. So, the aim of this thesis is twofold: on the one hand it can serve as a desk reference on administrative and environmental legal issues related to climate change, which lawyers or policymakers in the environmental field might find useful and informative; on the other hand, it hopes to participate in the realization of a new legal field of scholarship setting a small brick in the construction of this vast and complex pathway.

This thesis represents a four-year journey in learning, part of which was spent studying, experiencing and talking with the main experts in the administrative and environmental legal fields in the United States, at the New York University School of Law. Thanks to this long educational opportunity, I was able to discover the new horizons of administrative and environmental law as a legal scholar, and was granted the possibility of dealing with the vital issue of climate change.