State responsibility for climate change under EU and German law[*]

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Abstract

This article compares state responsibility for climate change under EU law and German law and thereby adopts a broad definition of 'responsibility' – it is understood to cover liability for climate damages as well as judicial remedies to enforce state climate protection measures. EU law provides for the possibility of an action for annulment against individual Union acts (as recently sought in the *Carvalho* climate case) but also allows Member States to be held responsible in infringement proceedings or to obtain an interpretation of Union law through a preliminary ruling. While annulment proceedings by individuals are subject to narrow admissibility criteria, German law allows associations to appeal against environmental decisions affecting public interests without individual interests having to be infringed. In terms of liability for damages caused by public authorities, both the Union and the national law require the existence of damage for which the unlawful conduct of a public institution was causal. In Germany, public officials must further have violated an official duty designed to protect individual interests and must have acted with fault. This contribution concludes that although plaintiffs have a variety of possible legal remedies at their disposal, most of them are not suitable for asserting climate protection interests.

1 Introduction

State responsibility under any legal system entails that public entities can be held accountable for their conduct which has caused damage to others. Conditions and consequences of accountability depend, of course, upon the legal fine print of the system in question, i.e., on the concrete rules and principles on how to bring an individual claim and how to go to court to enforce that claim. Previously, we heard about those rules under international law and in different national legal systems. I have been asked by the conveners of this conference to shed some light on how public responsibility could be invoked with regard to climate change under the laws of the European Union and of Germany.

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In addressing this question, I shall take the term 'responsibility' to have a somewhat wider meaning than it usually has in legal doctrine. For the purpose of my presentation, I shall include under this term not only the concept of liability for any damage that has occurred as a consequence of State behaviour, but also the rules of judicial protection that allow certain parties to bring a case before a court for climate protection against the State. Quite a number of such cases have been brought forward in different countries, but, for what is publicly known, their success has been limited – at least outside the Netherlands. We shall see what the prospects are for proceedings in Luxembourg and in German courts.

Since my topic explicitly refers to 'State responsibility', it is limited to claims against public entities and does not address proceedings under private law against private companies. Thus, the well-known case of a Peruvian farmer against the large energy company RWE pending before the appeal court in Hamm (Germany), is not part of my presentation.

2 European Union law

Under the rules of EU law, different courses of legal actions before the Union courts are available against the Union itself and its Member States. In any of those cases, no matter who the applicant is, the crucial questions will always be: Which legal obligation was incumbent upon the respective defendant, and is that obligation precise enough to allow the plaintiff to show that it has been violated?

2.1 Judicial actions questioning the climate policy of the Union

The main instrument to hold the Union legally responsible for its climate policy measures is, of course, the action for annulment under Article 263 TFEU. According to that provision, the applicant must argue an 'infringement of the Treaties or of any rule of law relating to their application', which, pursuant to the Court's jurisprudence, refers to the entire body of EU law. Thus, basically any norm or principle of Union law that is binding for EU organs, and could have a bearing on adopting measures relating to climate policy, could be invoked before the EU courts.

What kind of norms these are becomes apparent when we look at the claims raised in the case of *Carvalho and Others v Parliament and Council*,[1] in which a group of

1 Case T-330/18 *Armando Carvalho and Others v European Parliament and Council of the European Union* (2018) ECLI:EU:T:2019:324; appeal pending as Case C-565/19 P (decided in 2021, see: Case C-564/19 P *Armando Carvalho and Others v European Parliament and Council of the European Union* (2021) ECLI:EU:C:2021:252.

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individuals had brought an annulment action in May 2018 against the greenhouse emissions acts of the EU, adopted in that same year. The action was dismissed for lack of standing by the General Court in May 2019, but nevertheless, the claims raised by the plaintiffs demonstrate quite aptly the range of legal arguments that could be brought against EU climate policy. In a nutshell, the plaintiffs invoked three different bases for their claims: the goals of EU environmental policy laid down in Article 191 TFEU, fundamental rights contained in the EU Charter, and customary international law.

2.1.1 The goals of EU environmental policy

From the outset, it seems very unlikely that the European Court could ever be in a position to grant an annulment under those norms. First, the goals of the environmental policy of the Union set out in Article 191 TFEU are simply that, goals, and they do not contain any precise obligation for the legislative organs to adopt a certain course of action. According to that provision, the Union shall contribute to pursuing certain named objectives, among them 'promoting measures at international level … combating climate change'. By simply taking part in the international agreements under the UN Framework Convention, the EU obviously pursued that objective and, thus, fulfilled the only obligation deriving from Article 191 para 1 TFEU. Also, the requirements under para 2, that the Union policy 'shall aim at a high level of protection' and 'be based on the precautionary principle', are far too vague as to allow a court of law to base the finding of a violation upon them.

2.1.2 EU fundamental rights

Second, as to fundamental rights of EU law, the applicants in *Carvalho and Others* referred, among others, to the right to life and physical integrity, the right to pursue an occupation, the right to property and the rights of children. All those guarantees are laid down in the EU Charter and, thus, binding upon all institutions of the Union. However, the question is if they can be invoked before the EU courts against measures that the EU adopted to combat climate change. To do that, the applicants must argue that the measures adopted were clearly insufficient in order to protect the said individual rights, and therefore, they would have to base their claim on something known as the doctrine of 'positive obligations'. Well-known from the jurisprudence of the European Court of Human Rights, but also established in various domestic legal systems, this doctrine is yet to be adopted by the European Union courts with regard to the fundamental rights of EU law.

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There is some case-law on positive obligations, that is, legal duties to act, with regard to the basic freedoms in the EU internal market (e.g., the *Schmidberger* case of 2003[2]), but, up to now, the Union courts have adopted the dynamic approach of the Strasbourg Court towards protective obligations only with regard to Article 4 of the EU Charter, that is the absolute prohibition of torture and inhuman or degrading treatment, in cases concerning the European arrest warrant.[3] Other than that, especially in the field of environmental policy, the Luxembourg courts have been very reluctant in this respect.

Nevertheless, the argument that positive obligations are, in general*,* part of EU law in the field of fundamental rights can be made in view of Article 52 para 3 of the EU Charter. According to that provision, the Charter rights, which correspond to rights guaranteed by the European Convention, shall be taken to have the same meaning and scope as the Convention rights – they ought to be interpreted and applied in a parallel manner. And since the Convention contains, just as the EU Charter, a right to life, the duty to protect human life can be read into the Charter as a positive obligation incumbent upon the Union. However, this argument does not work with regard to the right to physical integrity since the Convention does not encompass any such guarantee.

Once the positive obligation of EU organs to protect human life by taking preventive measures is established, the question arises if and to what extent that obligation is enforceable in the EU courts. When applying the doctrine of positive obligations, the European Court of Human Rights usually accepts a wide margin of appreciation and freedom of design that States enjoy when fulfilling those obligations. The Court emphasises the primary duty of the State to put in place a legislative and administrative framework designed to provide effective protection against plausible threats to the right to life, but accepts the choice of means in principle to fall within the State's margin of appreciation.[4] Thus, a violation of the positive obligation can basically only be established in court when a State has taken no measures at all against a perceived threat or when the measures taken were manifestly insufficient.

By this standard, it does not seem very likely that the EU actions on reducing the emissions of greenhouse gases, or any other climate policy measure for that matter, would fail the fundamental rights test in the Union courts.

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2 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (2003) ECLI:EU:C:2003:333.

3 See e.g., Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016) ECLI:EU:C:2016:198, paras 84-94.

4 E.g., *Budayeva and Others v Russia*, App no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (ECtHR, 20 March 2008), paras 128-135.

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2.1.3 Customary international law

The third ground on which the plaintiffs in *Carvalho and Others* were basing their action for annulment is 'the customary international law duty prohibiting States from causing harm and to prevent damage'. There can be no doubt today that this duty exists under general international law; the famous dictum in the *Trail Smelter* arbitration (1938/41) has been adopted and extended in the jurisprudence of the International Court of Justice. The Court more than once stipulated the general obligation of States to ensure that activities within their jurisdiction and control 'respect the environment of other States or of areas beyond national control'.[5] And additionally, according to settled case-law of the EU courts, the Union is in principle bound by customary international law and those rules are justiciable in proceedings questioning the validity of EU acts.[6]

However, two questions arise in respect of the customary obligation invoked: First, is it a binding legal duty under international law upon international organisations? The obligation to prevent damage started out in international legal practice as an obligation between neighbouring States bound under international law to control their own territory and responsible for any substantial damage to neighbouring countries originating from that territory. The territorial basis of this obligation was made very clear in the *Pulp Mills* case of 2010 when the International Court of Justice referred to 'activities which take place in its territory, or in any area under its jurisdiction'.[7] And since the European Union, just like any international organisation, does not, in a legal sense, have any territory, it would take a very sophisticated argument to show that it is indeed bound by that legal obligation.

Secondly, even if that argument could be made, the substance of the obligation must be reviewed, as it is established in international practice. Looking at the relevant case law, it becomes apparent that the obligation to prevent harm is simply a duty of due diligence which requires every State 'to use all the means at its disposal' to avoid activities that would cause significant damage to the environment of another

5 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 <https://www.icj-cij.org/en/case/95> accessed 3 November 2021 (226); *Pulp Mills Case (Argentinia v Uruguay)* (Merits) 2010 <www.icj-cij.org/en/case/135/judgments> accessed 3 November 2021 (101).

6 Case C-162/96 *A. Racke GmbH & Co v Hauptzollamt Mainz* (1998) ECLI:EU:C:1998:293, paras 26-27, 45-46; Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* (2011) ECLI:EU:C:2011:864, paras 101-111; Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* (2018) ECLI:EU:C:2018:118, paras 47-48; Case T-115/94 *Opel Austria GmbH v Council of the European Union* (1998) ECLI:EU:T:1998:166, paras 89-95; Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* (2015) ECLI:EU:T:2015:953, para 180.

7 ICJ *Pulp Mills* (n 5) para 101.

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State.[8] Thus, the obligation would only be violated if the relevant actor ignores or neglects the applicable standard of care. In essence, this standard seems similar to the one that is applicable to positive obligations resulting from fundamental rights. Again, it is unlikely at present that the Union could be found in violation of that standard.

2.1.4 International treaties

Besides the obligation under international *customary* law, the EU could before its own courts also be held responsible for violations of its international *treaty* commitments. According to established case law, the validity of any legal act of the Union may be reviewed by the EU courts in the light of international treaty obligations subject to three conditions: first, the Union must be bound by the treaty in question; second, the nature and the broad logic of the treaty must not preclude such a review; and third, the treaty's provisions must appear, as regards their content, to be unconditional and sufficiently precise.[9]

There can be no doubt that the European Union itself is a party to the Kyoto Protocol and the Paris Agreement and is, therefore, bound by the obligations stipulated therein. However, are those obligations unconditional and sufficiently precise?

In the case *Air Transport Association of America and Others* (2011), the European Court of Justice denied this for the Kyoto Protocol because of its inherent flexibility: even though the Protocol imposed quantified greenhouse gas reduction commitments, the parties 'may comply with their obligations in the manner and at the speed upon which they agree'. The relevant provisions of the Protocol were therefore held not to be precise enough to serve as the basis for contesting the validity of the EU directive on emission allowance trading.[10] As to the Paris Agreement, there seems to be widespread agreement among legal scholars that it contains a range of provisions varying in legal character, an exceptional mélange of hard, soft and non-obligations.[11] The majority of the 'hard obligations' seem to relate to mitigation and transparency. Thus, the Parties undertake binding obligations relating to preparing,

8 Ibid.

9 E.g., Case C-308/06 *The Queen on the Application of: International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport* (2008) ECLI:EU:C:2008:312, paras 43-45; Case C-366/10 *Air Transportation Association of America and Others v Secretary of State for Energy and Climate Change* (2011) ECLI:EU:C:2011:864, paras 51-55.

10 ECJ C-366/10 (n 9) paras 73-78.

11 On this and the following Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay between hard, soft and non-obligations' (2016) 28(2) Journal of Environmental Law 337, 347ff <https://doi.org/10.1093/jel/eqw015> accessed 3 November 2021.

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communicating and maintaining national contributions, as well as pursuing domestic measures. However, those obligations contained in Article 4 of the Agreement are only obligations of conduct and not of result; they are coupled with a good faith expectation that Parties intend to achieve their contributions, but there is no explicit requirement to actually do so.

As a result, it seems that the obligations undertaken in the Paris Agreement offer an even higher degree of flexibility than those contained in the Kyoto Protocol. Therefore, it is not expected that the Paris Agreement will lend itself easily to contest the validity of any EU policy measure in the European courts.

All in all, the chances of bringing a successful action for annulment against EU policy measures in the courts of the Union are rather limited.

2.2 Public liability of the Union

As to the Union's liability for damages, any action would have to be brought under Article 268 and Article 340 para 2 TFEU. According to the latter, compensation for damage shall be awarded in accordance with the general principles common to the laws of the Member States if damage has been caused by institutions or servants of the Union in the performance of their duties. This reference to 'general principles' grants the EU courts the authority, and indeed the task, to develop the common rules on EU non-contractual liability in their jurisprudence. In their settled case law, the courts have developed three conditions under which the European Union may incur such liability under Article 340 TFEU: that is the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct and the damage suffered.[12] Regarding the first condition, it is also settled case-law that a sufficiently serious breach of a legal norm intended to confer rights on individuals must be established.[13]

When examining how that state of the law helps with invoking climate change liability, three observations must be made:

First, primary EU law, as it stands today, only provides for liability for illegal conduct, i.e., for breach of law. There is no room for objective or absolute liability, which the Union could incur simply by acting or not acting, thereby creating a specific risk or putting an undue burden on someone. Only unlawful conduct can prompt liability. Up until 2005, some EU court decisions had been pondering if EU liability could also arise from the infliction of 'unusual' and 'special' damage alone, but the Grand Chamber of the Court of Justice ended that reflection phase by holding in

12 E.g. Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank* (2016) ECLI:EU:2016:701, para 64.

13 E.g. ECJ C-8/15 P (n 12) para 65.

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FIAMM (2008) that liability in the case of lawful conduct of the public authorities is not part of the general principles of EU law.[14]

Second, the violation of a legal rule can only give rise to liability of the Union if that rule was intended to confer rights on the individual claiming liability, i.e., if the rule served to protect the interests of a specific group of persons and the claimant belonged to that group. Now, this will be very difficult to show with regard to climate policy measures of the Union, since all legal obligations that could be violated by adopting (or not adopting) such measures will usually be set up to protect the common good, not individual or certain groups' interests. The European courts have accepted obligations under EU environmental law to serve the interests of individuals, if their performance directly impacted human health and if it concerned an identifiable group of persons (such as the standards for the quality of the air or drinking water in a designated area). The same would be much harder to show for global obligations to reduce emissions or other climate policy measures that do not, in a sufficiently direct manner, relate to the health or living conditions of a specific group of people. The EU liability regime focuses on the violation of and damage to individual interests and does not lend a hand to bringing altruistic claims for damage done to the general public or future generations etc.

Third, even if an individual interest protected by a legal norm could be identified, EU law requires that the norm has been violated in a 'sufficiently serious' manner. This requirement has been developed in the case law as a complex normative criterion in order to protect the discretion of EU organs in adopting policy measures. To determine the serious character of a violation, the criterion takes into account, above all, the complexity of the situation to be regulated, and the margin of discretion available to the author of the act in question: Only if the EU institution concerned 'manifestly and gravely' disregarded the limits of its discretion, can the Union incur liability. As we have seen earlier, there is considerable discretion left to the EU policy organs in climate policy matters, which is another reason why the liability regime under Article 340 para 2 TFEU is not a very promising playing field if it comes to exerting pressure on the European Union with regard to its climate change policy.

2.3 Judicial actions against Member States

It might be easier then to bring judicial actions before the EU courts against the Member States since the legal obligations under EU environmental law, which are

14 Joined Cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (FIAMM Technologies) v Council of the European Union and Commission of the European Communities* (2008) ECLI:EU:C:2008:476, para 175.

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binding upon the Member States, are much more concrete and specific than those under international law: For example, individual Member States could be sued for not correctly transposing Directive 2003/87 on the greenhouse gas emission allowance trading system or for not complying with Regulation 2018/842 on binding annual greenhouse gas emission reductions.

The easiest procedure for upholding the law in those cases is, of course, the infringement procedure pursuant to Article 258 TFEU, in which the Commission can apply to the Court to find that the Member State in question has objectively failed to fulfil an ‘obligation under the Treaties’. No specific interest is necessary, and no particular qualification must be shown to exist. And the Commission could, with this procedure, also enforce obligations under international law which, by the EU itself acceding to them, have become obligations under EU law.

Also, other Member States could initiate such an infringement procedure according to Article 259 TFEU, but experience shows that it is very unlikely. States usually prefer to settle disagreements between them by political and diplomatic means rather than before courts of law, and this also holds true within the European Union.

Another possibility to hold EU Member States responsible for violating EU environmental law is the preliminary reference procedure under Article 267 TFEU. Conceptionally, this procedure only establishes a formalised judicial dialogue between a national court and the European Court in the course of which the national judge can enquire about the correct interpretation of acts of EU law. In practice, however, the reference functions as an instrument to assess and, thus, control the conformity of national law with EU law: By interpreting EU law with regard to domestic proceedings in which an act of national law is being questioned, the Court *de facto* rules on whether that act is compatible with EU law. Therefore, the reference procedure can be used to enforce EU climate policy measures against non-complying conduct of Member States.

2.4 Public liability of Member States

In contrast, the chances of holding a Member State liable for insufficient climate policy measures under EU law are rather limited since the liability rules which the Court has developed in its *Francovich* jurisprudence are basically the same as those applicable to the Union itself. Since its ruling in the case *Brasserie du Pêcheur* (1996), the Court has made clear that it wishes to create a coherent system of liability for Union and the Member States alike: the conditions under which the States may incur liability for damage caused to individuals by a breach of EU law, are not sup-

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posed to differ from those governing the liability of the Union in like circumstances.[15]

That means that the difficulties of applying the EU liability rules to Member States conduct with regard to EU climate policy measures are the same as those discussed earlier for the Union itself: in order to be successful, a liability claim would always have to establish that an EU norm protecting specific individual interests has been breached in a sufficiently serious manner.

2.5 Summary

To sum up, under EU law, there are at least two avenues open to have the EU courts determine that a Member State violated a Union measure to fight climate change. It is also possible for certain actors to reach the same finding in respect of the Union itself, but it is much less likely because the legal obligations binding the EU are not very precise. Furthermore, it would be very difficult to have the liability of Union or Member States established under EU law. Both liability regimes require the violation of legal norms protecting specific individual interests, which usually does not apply to climate policy norms.

3 German Law

The picture is, not entirely but, somewhat different when it comes to German law. Here, judicial actions against the conduct of State authorities in environmental matters have been made easier over the last ten years, in particular, due to the need to transpose into national law the Århus Convention and corresponding EU law. On the other hand, the German rules on public liability have not been adapted; accordingly, they are still in a rather inchoate state and in substance very restrictive as to individual claims for altruistic purposes.

3.1 Judicial actions against public entities

As to the first point, the Federal Act on Judicial Appeals in Environmental Matters, enacted in 2006 and amended several times since, gives private associations the right

15 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* (1996) ECLI:EU:C:1996:79, paras 40-47; Case C-352/98 P *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* (2000) ECLI:EU:C:2000:361, para 41.

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to bring appeals in court against certain public decisions that could affect the environment. For such an appeal to be admissible, the association must not assert that its rights, or indeed anybody's individual rights, have been violated. The plaintiff must simply establish before the court that statutory provisions that could be of importance for the public decision are violated and, in most cases, that those provisions relate to the protection of the environment. With this Act, the threshold for bringing judicial actions against State decisions affecting the environment has been lowered considerably, and, of course, this includes appeals alleging that the authorities have neglected legal norms on climate change. However, the Act does only apply to certain enumerated administrative decisions that are provided for in statutes and not to legislative or other acts of climate policy.

Outside the Act on Environmental Appeals, plaintiffs who wanted to engage in climate change litigation would have to argue that their individual rights have been specifically affected by the conduct of public authorities. They could, of course, refer to the doctrine of protective duties under the federal constitution (*Grundgesetz*), but, as in EU law, the Federal Constitutional Court usually accepts a wide margin of appreciation of the State with regard to identifying a possible threat to fundamental rights, as well as to the choice of means designed to contain that threat. This has not been fundamentally changed in the widely discussed decision of the Court of March 2021 in which it held that the federal legislative in Germany violated its duty to protect life and physical integrity of future generations by adopting a partly insufficient Climate Chance Act.[16]

3.2 Public liability of the State

Claims for public liability in climate change matters would have to fit into the private torts (delicts) regime in the Civil Code on which public liability is still based in German law. Claimants would have to show that public officials violated one of their official duties, which was designed to protect individual interests, including those of the claimant itself. Additionally, attribution, specific damage, causality and fault would have to be established, which might prove a daunting task in respect of factors leading to climate change.

16 Case 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 *Neubauer et al. v Germany*, BVerfG Order of the First Senate of 24 March 2021 <https://bit.ly/3NwmyFo> accessed 29 March 2022, 143-172.

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4 Conclusion

In conclusion, there is no doubt that the European Union and the Federal Republic of Germany, both constitutional systems based on the rule of law, provide for, in their respective legal order, a considerable number of judicial remedies which plaintiffs can pursue before a court of law. However, to a large extent, these remedies can only be claimed by private parties if the conduct of public authority specifically affects their individual interests and these interests are protected by law. This will exclude most legal norms that have been adopted concerning climate change. Better prospects might be found for enforcing EU law on climate change as against the Member States since their specific obligations to transpose or implement environmental standards have been established, and Member States can be held responsible in EU courts for fulfilling those obligations. To establish liability for damages, however, will be difficult in both EU and German courts since both liability regimes are only geared towards the violation of individual rights, which, outside the Netherlands, has so far been hard to show in respect of climate policy measures.

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