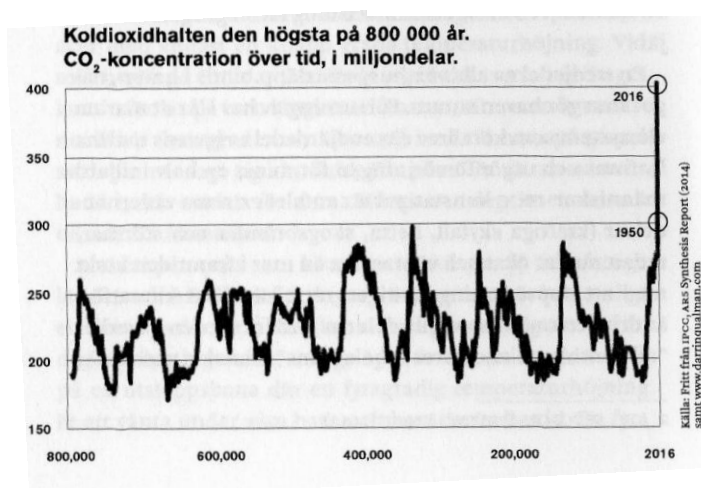


Why the climate must trump the market – A scrutiny of today’s neoliberal EU and the political solutions

Jens Holm, MP the Left Party, Sweden, 2019-03-25

Why are the students not at school? The question was asked all over the world as more than 1 million young students skipped school in 125 countries and took to the streets on Friday 15/3. The climate strike initiator 16 years old Swedish **Greta Thunberg** gave an answer to the question: “Why should we educate ourselves to a future that might not exist? Therefore we are on strike for the climate – and we will continue.” And science is clear on the matter. Never in the latest 800 000 years there has been so much carbon dioxide in the atmosphere. And 85 per cent of the CO₂ concentration has been emitted after the second world war. That means that today’s climate crisis is not the result of a very long geological process, but a result of the way of living during one or two generations after the Second World War. During the decades up to now most parts of world have been dominated by a more and more aggressive capitalist industrialized process with exploitation of labour as well as of nature as the common denominator.



The concentration of CO₂ is the highest within the last 800.000 year.

According to the IPCC we have about 10 years to bend the curve of constantly increasing emissions. More political action is needed but one forgotten aspect of it is that actual legislation is not updated to be in line with what a radical climate transition requires. With my experience as a former member of the European Parliament and eight years in the Swedish Committee of European Affairs in the Swedish Parliament it occurs to me that that the EU treaties and core legislation are clearly biased towards the market. Let me share with you some examples. I will touch upon the Single market, State Aid legislation and the EU international trade agreements.

Ever since the first EU (ECC) treaty the Coal and Steel union 1951, via Maastricht 1993 and to today’s Lisbon treaty the fulfilment of the single market has been one of the core objectives. How do you create a perfect market? Well, you eliminate so called trade distortions. But trade distortions/barriers can be many things; taxes, fees, silly bureaucracy, but also national legislation in order to protect workers, public health and environment. And speaking of the latter there are many examples of member states that have been forced to sacrifice progressive legislation in order to comply with the EU Single market requisites. Denmark used to have an almost perfect system for recollecting bottles from beer and sweet drinks. Pretty much all bottles were part of the national recycling system. But after complaints from German breweries Denmark needed to abolish this successful system at the beginning of 2000s (that banned disposable cans – with *dåseförbudet/dåseförbudet* – for beers and sweet drinks) and permit import of beers in cans from Germany and other countries. The free movement of goods were more important that protecting a successful national recollection system. Before entering the European Union Sweden had bans on several chemicals and additives in food. Most common is our ban on azo colorants (bright colorants usually in sweets and drinks which could cause severe allergic reactions on sensitive persons). Sweden was forced to skip that and many other bans. The free movement of goods was considered more

important than our legislation on public health. If the EU Commission do not manage to correct a member state to adapt to the market rules cases usually end up in the European Court of Justice (ECJ). When I was a member of the European Parliament I looked in to the cases where environmental legislation had clashed with the EU Single market. I got the information that between 2003-2008 no less than 19 cases had been ruled by the ECJ and in all those 19 cases the court had judged to the benefit of the market, at the cost of the environment. 19-0 to the market! The then (ex-Social Democratic) German commissioner **Günter Verheugen** answered me simply: “In all of the 19 cases the Court confirmed that public health or environmental justifications were not sufficient to inhibit the free movement of goods.”

The EU State Aid legislation is fundamental in order to protect the Single market and for this reason it is protected in the Lisbon Treaty in the article 107-109. The articles state that state support is *banned* as the default position. If a member state would like to take financial measures in order to e.g spur renewable energy, create new public enterprises or make other crucial public investments, pre notification and latter permission from the EU commission is needed. In Sweden we have experienced serious difficulties with promoting biogas and other renewable energy sources since the EU states that all energy should be taxed the same and special support is not legal. At the moment the government managed – after lot of struggle with Brussels – to gain temporary acceptance for a lower taxation for renewable fuels such as biogas, but it is only temporary and will expire soon. In the state aid rules some exemptions are allowed, but climate action or environmental protection are not valid grounds for exemptions from the ban on state support. Being a socialist this is extremely problematic. I see the state – and the public sector as a whole – as perhaps *the* main movers when it comes to climate transition. To ban that is to make it impossible to use one of the most efficient tools to transform society.

One could ask, are there not examples where the environment has trumped the market, where member states have been granted more stringent positions in spite of market harmonization? Yes, there are some. But they are exceptions that prove the rule. And although there can be some rooms for manoeuvre a big problem is the uncertainty. As legislators we need to have a clear picture of the conditions. Uncertainties make us reluctant to even consider launching a usually long process of legislative action (with a public investigation, public consultation, committee work, and vote in chamber). And this is in times when we need more political action, not less. Then we cannot have uncertainties that jeopardize the momentum of action.

It doesn't stop within the European Union, when it comes to Free Trade Agreements I'd say that the EU is the most market aggressive part of the world. I do not have a problem with getting rid of trade barriers when it comes to non-needed red tape, some tariffs or taxes. But the problems start, as well inside the EU, when the *non-tariff barriers* are addressed, in other words when legislation is questioned. Once again the space for progressive policy making is in danger. Agreements such as CETA with Canada, TTIP as it was proposed with the US and the FTA with Singapore have the same features; regulatory cooperation in order to streamline new policy making in favour of trade, deregulation as default and investor protection (ISDS). All components are extremely controversial and shrink the policy space for progressive legislative action. The experience of other agreements with ISDS is terrifying. The NAFTA treaty has been in operation since 1994 and has a clause for investor protection. That has made Canada the most sued industrialized country in the world, usually US companies (or Canadians with address in the US) that sue the Canadians for environmental protection. The most infamous case is probably the Lone Pine ISDS suit for the Quebec state ban on fracking. Since 1994 Canada has now been sued 35 times based on ISDS. I'm not proud to mention that the most well-known European ISDS-case probably is the Swedish Vattenfall double investment process against the German government. The first case in 2009 was against the local stringent legislation against the Moorburg coal power plant where the Swedish state-owned energy giant made the Germans loosen up the environmental legislation (!), and the second case not yet settled where Vattenfall demands ludicrous 4,5 billion euro for the German decision to phase out nuclear power. Worth to mention is that the ISDS processes are not carried out in the usual national courts, but at extra judicial litigation tribunals. In the Vattenfall vs Germany-case the World Bank tribunal ICSID is

the place to settle the dispute, not a public court in Germany or Sweden. In some countries, Sweden is one, the investor vs state is settled at tribunals hosted at Chambers of Commerce. (In Sweden at *the Arbitration Institute at the Stockholm Chamber of Commerce, SCC*. The SCC had up to recently as the CEO a well-known politician from the Swedish conservative party, Moderaterna. The Arbitration Institute at SCC boast with their policy of total “confidentiality”; in effect noting is public. That has made them the second most used arena for investors to sue states after ICSID in Washington). I know all this might sound as a fringe left conspiracy; but it is not.

And according to the United Nations trade body UNCTAD the number of ISDS cases are on the rise. Since the start a couple of decades ago some 855 cases where investors sue states have been documented up until 2018, with 70 cases only in 2015 as a record year (and 65 in 2017). In 60 per cent of the ISDS-cases that were decided on the merits the investor has won. Many of the cases deal with environmental matters where corporations challenge national action in this area. That shows clearly that the investors have a lot to win in taking states to investor tribunals, but nature and progressive legislation is the big loser.

To call CETA, TTIP and other Free Trade Agreements “free trade agreements” is in other words misleading since the purpose is to encompass most policy areas and make those trade friendly (*nota bene*; the CETA treaty is a “comprehensive” agreement as the name says and TTIP is both trade and “investment” agreement, just to mention two clear examples). And as mentioned before what is good for trade is not always the best for climate action.

When I have debated these issues even people on the far end of the liberal spectrum of politics agree that today’s investment regime is giving corporations all rights and no duties and that this is not about free trade but about protecting corporations both from competition as well as from national legislation. And from a climate change perspective it is absolutely crucial that this must change. Corporations should no longer trump climate change action, to paraphrase **Naomi Klein**. Countries like Indonesia, India and Brazil (before **Bolsonaro**) have adopted trade strategies where investor protection is no longer part of the game. That goes also for Australia and New Zealand that do not want to have another Philip Morris case to deal with (Philip Morris sued Australia 2012 in an investment tribunal for legislating on plain packages). The NAFTA has recently been revised and it’s interesting that the ISDS component has been removed between the USA and Canada, but not with Mexico. This shows that investment protection is controversial indeed and if the ISDS can be removed in NAFTA it can be erased all over (in Mexico for a start). After a judgement in ECJ – the European Commission has decided that all intra-EU-ISDS agreements should be scrapped (and that includes too the International Energy Charter that Swedish Vattenfall used twice against Germany). So the timing is good for the Left and environmental movement to call for a new trade regime without corporate investment protection.

To sum up. In the shorter perspective the Left should:

- Challenge the market fundamentalism in the EU treaties and legislation. Member states should always be permitted to legislate for higher ambitions than the EU on environmental and public health grounds.
- Challenge CETA, JEFTA, TTIP and other neo-liberal treaties and struggle for a fairer trade without special corporate protection.
- Climate policies in line with Paris are anti-capitalist *per se*. That could be:
 - More ambitious targets
 - Restrictions on industries
 - Ban fossil fuels
 - Phase out environmentally harmful subsidies
 - Restrict transport (challenge just-in time ideology)
 - Train cooperation – not competition
 - Restriction on plastic and other materials or commodities
- The European Elections in May could be a good start for a more coordinated red-green movement around this.

Jens Holm

Jens Holm is also author of the book “Om inte vi, vem? Politiken som räddar klimatet och förändrar vänstern” (Sjösala, 2017)

In English: If not us, who? Politics that saves the climate and change the left. The book is only available in Swedish.