Blue Jeans, Chewing Gum, and Climate Change Litigation: American Exports to Europe

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BLUE JEANS, CHEWING GUM, AND CLIMATE CHANGE LITIGATION: AMERICAN EXPORTS TO EUROPE

A Study Concerning Whether the American Model of Climate Change Litigation Can Take Root in the European Union

Daniel Hare*

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Introduction

Debate may still be raging over how serious the effects of climate change may be\(^1\) and over how significant the impact of human activities

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are as a cause of climate change, but what cannot be debated is the increasing number of climate change disputes becoming enmeshed in the legal system. In the United States (U.S.), climate change litigation has evolved into a somewhat consistent model where state governments generally bringing suit as parens patriae plaintiffs on the common law ground that polluter-defendants, through their conduct, are contributing to climate change, a recognized public nuisance. In other words, American climate change litigation tends to be tort-based claims brought by governments in their role as quasi-sovereigns, on behalf of the citizenry, for an illegal interference with a public interest.

Europe, on the other hand, uses a predominantly civil law-based system that relies heavily on legal code provisions and considers case law precedent of secondary importance. The European Union (EU) and its member states have extremely limited case law with governments acting as parens patriae in any context, and little-to-no precedent in the climate change field. This article proposes that while, for various reasons, the EU or its Member States will likely not adopt the American climate change litigation model in its exact form, it is certainly possible that other types of climate change litigation—albeit founded in statutes and regulations—might emerge via both parens patriae action and under other theories, influenced by similar litigation models that have occurred across the Atlantic, in the U.S.

Although this article will assess and evaluate the possible success rate of different proposed causes of action, its true purpose is to identify and analyze realistic methods to bring climate change lawsuits which might follow the path blazed by American litigators. Part I discusses

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2 *Compare Gabriele C. Hergerl et al., Intergovernmental Panel on Climate Change, Climate Change 2007: Working Group I: The Physical Science Basis, § 9.4 702–03 (S. Solomon, et al. eds. 2007) (explaining that “[i]t is very unlikely that the 20th-century warming can be explained by natural causes” and that “human influence on climate very likely dominates over all other causes of change in global average surface temperature during the past half century”), with Nicola Scafetta, *Climate Change and Its Causes: A Discussion About Some Key Issues, Sci. & Pub. Pol’y Institute* 4–5 (Mar. 18, 2010), http://scienceandpublicpolicy.org/images/stories/papers/originals/climate_change_cause.pdf (observing that over 30,000 scientists in the United States (among them 9,029 PhDs) “recently signed a petition stating that [claims of human activities being the main cause of climate change] are extreme, that the climate system is more complex than what we now know, several mechanisms are not yet included in the climate models considered by the IPCC [Intergovernmental Panel on Climate Change], and that this issue should be treated with some caution because incorrect environmental policies could also cause extensive damage”).


4 Other strands of this American-style climate change litigation have included a class action by private citizens and a suit by a self-governing Native American tribe. See infra Part I. D.

5 See infra note 19.
the historical foundation of the American climate change litigation model, clarifies how this article construes the term *parens patriae*, and summarizes the legal background—including the relevant Supreme Court decisions—that exists in the public nuisance and climate change domains. Part II attempts to resolve the question of why there are essentially no *parens patriae*-like, tort-based climate change lawsuits yet in the EU, examining a number of structural factors and impediments. Part III sets out and justifies the reasoning behind this author’s belief that *parens patriae*-like climate change lawsuits of the American mold may be poised to make an entrance onto the European judicial scene. Part III also clarifies how this article differentiates between *parens patriae* actions and purely regulatory remedies.

Part IV analyzes the first of several potential causes of action for harms caused by climate change, which involves applying EU Directive 2004/35/EC (drafting the “polluter pays” principle into law for environmental issues). Part V studies how lawsuits by governmental plaintiffs might proceed under EU Directive 2003/87/EC (adopting a greenhouse gas emissions trading scheme for the European Community) for injuries or imminent damage stemming from climate change. Part VI examines the potential for climate change litigation via various techniques in individual nations—including those from both the common law and civil law traditions—and presents case studies from France, Germany, and the United Kingdom. Finally, in Part VII, this article proposes that treaties are another viable option for government entities to bring *parens patriae*-type actions in the name of their citizens and explores how to use the Aarhus Convention and Alpine Convention in this regard.

I. History of the American, Tort-Based, *Parens Patriae* Climate Change Litigation Model

To determine if attorneys in the EU could use American-style climate change litigation, it is important to first define “American-style climate change litigation.” Given the current state of case law in
the U.S., American climate change actions can be roughly outlined as *parens patriae* lawsuits brought mostly by state or local government and founded in the tort of public nuisance. Public nuisance cases in the environmental field trace their roots back to early 20th century lawsuits between American states. This precedent has helped to shape *parens patriae* standing in the U.S.

**A. The U.S. Supreme Court Defines the *Parens* Patriae Doctrine**

The Supreme Court has very broadly defined *parens patriae* standing as an action in which the State asserts injury to a quasi-sovereign interest—an adequately concrete interest which causes a real controversy between the State and the defendant, where the State is looking out for the well-being of its citizens. If a State is only a nominal party—that is, if it does not have any of its own real interests at stake—a court will not grant *parens patriae* standing. A State may, however, assert a right when “the matters complained of affect her citizens at large,” a cause of action which generally arises in public nuisance contexts. These quasi-sovereign interests range from citizens’ physical and economic health and well-being to ensuring that the

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17 See infra notes 54–71 & accompanying text.
19 From Latin, meaning “parent of his or her country.” The doctrine developed from Roman law where the emperor stood as the physical embodiment of the state. *Black’s Law Dictionary*, 1144 (8th ed. 2004). *Black’s Law Dictionary* further defines the term as “(1) the state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves . . . [or] (2) a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen . . . .” *Id.* *Parens patriae* has also been described as “an ancient common law prerogative which is inherent in the supreme power of every state . . . [and is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.” (internal quotations omitted); see also Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 352–58 (2nd Cir. 2009) *rev’d*, 131 S. Ct. 2527 (2011) (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890)).
20 See *Climate Change and the Public Law Model of Torts*, supra note 18 at 245 (noting that the Supreme Court’s language in *Snapp* is possibly its “most important *parens patriae* opinion . . . [and provides an expansive understanding of *parens patriae* standing”).
22 *Id.* at 600. The opinion later clarifies *parens patriae* standing requires the State to “articulate an interest apart from the interests of particular private parties,” but cautions that such interests must be assessed on a case-by-case basis and defy formal definition. *Id.* at 607.
23 *Id.* at 602–03. The Court cites an entire line of cases developed where states successfully sued to enjoin public nuisances on behalf of their citizens: North Dakota v. Minnesota, 263 U.S. 365 (1923); Wyoming v. Colorado, 259 U.S. 419 (1922); New York v. New Jersey, 256 U.S. 296 (1912); Kansas v. Colorado, 206 U.S. 46 (1907); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Kansas v. Colorado, 185 U.S. 125 (1902); Missouri v. Illinois, 180 U.S. 208 (1901).
24 *Snapp*, 458 U.S. at 607.
State is not unfairly denied its rightful position within the American federal system to guarding the State’s natural resources, territory, and environment. An important and overlapping justification for applying the expansive definition of *parens patriae* to climate change litigation in the U.S. and EU is a State’s interest in securing for its inhabitants the rightful benefits which stem from the State’s participating in a federal-type political structure. In addition to their right to defend their quasi-sovereign interests in territory, natural resources, and environment, States “need not wait for the [central] Federal Government to vindicate the State’s interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce.” In both the U.S. and EU, when the central government passes a law that generates benefits or alleviates disadvantages, such legislation also engenders a quasi-sovereign interest that States will aim to secure for their residents so as to remain on equal footing with fellow States.

To help clarify when a State may seek relief in federal court as *parens patriae*, the Supreme Court suggested treating situations in the American states as if they had occurred in independent countries, indicating that *parens patriae* actions could be broadly construed in contexts worldwide. In an instance where the “health and comfort” of a State’s residents are threatened, the State may take on the *parens patriae* role of general representative of the public, because in the federalist system, individual States have surrendered their powers of diplomacy and war-making—powers which they might have employed on behalf of their citizens had they remained completely sovereign nations. Through forming a union, the states mutually rejected the use of force as a means to solve their disagreements and relinquished their right to engage in diplomacy directly with foreign nations, so *parens patriae*
suits in federal court filled in as a viable alternative.\textsuperscript{33} Justice White, writing for the \textit{Snapp} Court, described how an instructive factor in determining whether a State would have \textit{parens patriae} standing to sue would be assessing “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”\textsuperscript{34}

**B. A Broad Construction of \textit{Parens Patriae}**

Given this background, this article construes \textit{parens patriae} actions equally, if not more broadly, to include both straightforward \textit{parens patriae} climate change-focused tort cases and instances that stretch the definition of \textit{parens patriae} climate change-focused tort cases. Accordingly, this extended interpretation of \textit{parens patriae} will comprise several \textit{parens patriae}-like actions—namely, (1) actions brought by American states or EU members against other (state or federal) governments/agencies or private defendants, and (2) actions brought by the federal government or EU Commission on behalf of citizens against state governments/agencies or private defendants. Additionally, it is important to acknowledge that the concept of \textit{parens patriae} does not make as much sense in a civil law setting as it does in a common law context, but is nonetheless still very relevant and valuable to U.S.–EU climate change litigation comparisons. To be sure, neither the elasticity of this \textit{parens patriae} definition, nor the slight incompatibility between the \textit{parens patriae} theory and civil law in any way detract from the analysis and comparison.

**C. Public Nuisance—the Ambiguous “Ill-Defined Tort”\textsuperscript{36}**

Defining the common law tort of public nuisance, which most American climate change cases have employed as their tort of choice, has confounded courts, legislatures, and scholars alike. One scholar


\textsuperscript{34} \textit{Snapp}, 458 U.S. at 607. Importantly, the EU system resembles that of the U.S. federal system to some degree. While the EU Member States ultimately retain much of their sovereignty (more so than American states), some is ceded to the central European Union government to adopt EU laws which take precedence over national laws. Somewhat like the U.S. Supreme Court, the European Court of Justice guarantees that EU law is observed, “ensures that Member States comply with obligations under the Treaties,” and helps mediate disputes that arise between states and other Member States or foreign entities over which the individual nation does not have jurisdiction. The Institution [European Court of Justice], \textit{General Presentation}, CVRIA Jan. 13, 2011, available at http://curia.europa.eu/jcms/jcms/jf02_6999/. See also \textit{What is EU Law?}, \textit{EUROPA} Jan. 13, 2011, http://ec.europa.eu/eu_law/introduction/treaty_en.htm.

\textsuperscript{35} “Federal” in the EU context would mean lawsuits against the EU Commission.

has maintained that, “no other tort is as vaguely defined or poorly understood as public nuisance.” Litigators have used public nuisance to find tort liability for activities as incredibly dissimilar as releasing untreated sewage, a street gang’s behavior, violation of public morals, and storing coal dust, among others. The Restatement (Second) of Torts imprecisely defines public nuisance as “an unreasonable interference with a right common to the general public.” The Restatement further explains that the following factors are helpful to determine where interference with a public right is unreasonable, thus leading to a public nuisance:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The Rhode Island Supreme Court outlined the tort in a somewhat different, yet equally hazy manner:

The essential element of an actionable nuisance is that persons have suffered harm or are threatened with injuries they ought not have to bear. Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than unreasonable conduct. Thus, plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury.

Although the definition of the tort of public nuisance is ambiguous and obscure, there is little doubt that this definition offers the most appropriate cause of action for climate change litigators. Certainly it is

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37 Id.
38 Id. at 776 (citing Miotke v. City of Spokane, 678 P.2d 803 (Wash. 1984)).
39 Id. (citing People ex rel. Gallo v. Acuna, 929 P. 2d 596 (Cal. 1997)).
41 Id. (citing Comet Delta, Inc. v. Pate Stevedore Co., 521 So.2d 857 (Miss. 1988)).
42 Restatement (Second) of Torts § 821B (1979).
43 Id.
44 Public Nuisance as a Mass Products Liability Tort, supra note 36 at 774 (quoting Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) (internal quotations omitted)).
one of the most popular torts\(^{45}\) under which such actions to defend and preserve the environment have been, and will continue to be, pursued.

**D. PARENS PATRIAE IN ACTION: EVOLVING INTO A COHERENT MODEL (1906–2010)**

Modern-day *parens patriae* climate change actions developed out of public nuisance lawsuits generally brought by state-level governments so as to defend their natural environments from undue harm. In the early 20\(^{th}\) century, the Supreme Court allowed, in two separate cases, suits brought by states as quasi-sovereigns alleging a public nuisance in the environmental context. In *Missouri v. Illinois*,\(^{46}\) the state of Missouri brought suit against the state of Illinois and the sanitary district of Chicago for discharging sewage into a canal, which emptied into the Illinois River.\(^{47}\) The Illinois River in turn emptied into the Mississippi River sending “great quantities” of sewage downstream and “poison[ing] the water of [the] river, upon which [many of Missouri’s] cities, towns, and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing purposes.”\(^{48}\) The court ultimately dismissed the action because the plaintiff failed to establish that the sewage from Chicago was in fact causing the injury to Missouri.\(^{49}\) Nevertheless, *Missouri v. Illinois* provided a basis for other, similar suits to follow.\(^{50}\)

Just over a year later, the Supreme Court decided *Georgia v. Tennessee Copper Co.*,\(^{51}\) in which the state of Georgia, as *parens patriae*, sued two companies from Tennessee to enjoin them from “discharging noxious gas [a public nuisance] from their works . . . over plaintiff’s territory,” causing a “wholesale destruction of forests, orchards, and crops,” among other injuries.\(^{52}\) Significantly, the Court recognized this case as a *parens patriae* action, explaining that it involved “a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all

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\(^{45}\) The torts of trespass (see, e.g., Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959)) and private nuisance (see, e.g., Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904)) have also been applied in the name of environmental protection and defense.

\(^{46}\) 200 U.S. 496 (1906).

\(^{47}\) *Id.* at 517.

\(^{48}\) *Id.*

\(^{49}\) *Id.* at 525–26 (noting that “it is necessary for St. Louis to take preventive measures . . . against the dangers of the plaintiff’s own creation or from other sources than Illinois”).

\(^{50}\) Importantly, the Court also noted that the “Constitution extends the judicial power of the United States to controversies between two or more states . . . and gives this court original jurisdiction in cases in which a state shall be a party.” *Id.* at 519.

\(^{51}\) 206 U.S. 230 (1907).

\(^{52}\) *Id.* at 236.
the earth and air within its domain." The Court also acknowledged
the value of the case on the merits, seemingly indicating that it would
be willing to hear future tort-based environmental cases brought by
parens patriae regarding a public right.

Missouri v. Illinois and Tennessee Copper set the stage for a spate
of climate change lawsuits commencing in 2007 and continuing to
this day. In Massachusetts v. Environmental Protection Agency, one
hundred years after its “parent” suits, the majority reinforced the
parens patriae right of states to sue as sovereigns on behalf of their
citizens, highlighting Justice Holmes’s opinion in Georgia v. Tennessee
Copper. Writing for the majority, Justice Stevens analogized that “[j]ust as Georgia’s ‘independent interest . . . in all the earth and air within
its domain’ supported federal jurisdiction a century ago, so too does
Massachusetts’ well-founded desire to preserve its sovereign territory
today” from worsening flooding damage as a result of climate change.

Concluding that in its parens patriae role, Massachusetts meets the
criteria for standing— injury, causation, and remedy—the Court
proceeded to rule that the Clean Air Act authorized the Environmental
Protection Agency (EPA) to regulate tailpipe greenhouse gas emissions
from new motor vehicles “in the event that it forms a ‘judgment’ that
such emissions contribute to climate change.” Although Massachusetts
v. EPA was neither a public nuisance lawsuit, nor an action against
a private defendant, but rather a statute-based suit against a federal
agency, the standing analysis remains crucial in permitting states to
bring lawsuits as quasi-sovereign parens patriae.

Circuit reversed the district court in a public nuisance, parens patriae case
brought by the state of Connecticut (and several other states), ruling
that the states had standing to bring the suit on a parens patriae basis.

53 Id. at 237.
54 See id. at 238 (observing that “[i]t is a fair and reasonable demand on the part of a sovereign that
the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the
forests on its mountains, be they better or worse, and whatever domestic destruction they have
suffered, should not be further destroyed or threatened by the act of persons beyond its control,
that the crops and orchards on its hills should not be endangered from the same source”).
56 Id. at 518–19 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)).
57 Id. at 519 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).
58 Id. at 521.
59 Id. at 523.
60 Massachusetts v. EPA, 549 U.S. at 525.
61 Id. at 528.
2527 (2011).
63 Id. at 334–36.
and that they properly stated a claim under the federal common law of nuisance. Here, Connecticut and several other state and non-state parties brought action against six electric power companies operating coal-fired power plants, seeking abatement of the defendants “ongoing contributions” to the public nuisance of global warming. The Second Circuit reasoned that because the states met the *Snapp* test for state parties as *parens patriae* as well as the additional requirement imposed by the Second Circuit—that “‘individuals [upon whose behalf the state is suing] could not obtain complete relief through a private suit,’” they were granted standing. The court found, that as a result of the alleged damages caused by global warming, the “grievances suffice to allege an ‘unreasonable interference’ with ‘public rights’ within the meaning of [Restatement (Second) of Torts] § 821B(2)(a).” The court distilled the public nuisance claim, noting that “States have additionally asserted that the emissions constitute continuing conduct that may produce a permanent or long lasting effect, and that Defendants know or have reason to know that their emissions have a significant effect upon a public right.” Hence, the States “have properly alleged public nuisance . . . and therefore have stated a claim under the federal common law of nuisance” and may pursue their lawsuit on the merits.

The Supreme Court ultimately overruled the Second Circuit, reasoning that the Second Circuit had erred in holding that “federal judges[,] by deciding public nuisance suits[,] may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits.” Nonetheless, the Supreme Court was quick to point out that the “EPA’s judgment . . . would not escape judicial review” because federal courts are permitted to “review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted.”

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64 Id. at 352–58.
65 Id. at 316.
66 Id. at 335–36 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 603 (1982)).
67 Id. at 336 (quoting People of New York by Abrams v. 11 Cornwell Co., 695 F.2d 34, 40 (2d Cir. 1982), vacated in part on other grounds, 718 F.2d 22 (2d Cir. 1983) (en banc)).
68 Moreover, the court states that “[s]tanding is ‘gauged by the specific common-law, statutory or constitutional claims that a party presents,’” and seeing as “states have been accorded standing in common law nuisance causes of action when suing as *parens patriae* for more than a century, the Second Circuit had no reason to deny standing in this case. 582 F.3d at 339 (quoting Int’l Primate Prot. League v. Admins. of Tulane Educ. Fund, 500 U.S. 72, 77(1991)) (emphasis in original).
70 Id.
71 Id. at 353.
73 Id. at 2539.
Three other significant cases also merit brief mentions as contributors to the U.S. climate change litigation model. *California v. General Motors Corp.* involved a *parens patriae* public nuisance action by the state of California against the automobile industry, claiming damages as a result of global warming partially caused by the automakers’ emitting greenhouse gases. The court dismissed the case for lack of subject matter jurisdiction, holding that, among other deficiencies, it proposed a non-justiciable political question that demanded a policy determination the court was not in a position to make.

Two years later in *Native Village of Kivalina v. Exxon-Mobil Corp.*, a federal district court judge dismissed a claim brought by an Inupiat Eskimo government against multiple energy, oil, and utility companies for their roles in causing global warming due to lack of subject matter jurisdiction. The plaintiff, as a federally-recognized, self-governing Tribe, brought a suit for federal public nuisance on behalf of the 400 residents of its village, arguing that global warming, partially caused by the defendants, was destroying the sea ice that protects the village from surging coastal waves and would soon force the village to relocate. The federal district court, like in the *California v. General Motors Corp.* case, dismissed for lack of subject matter jurisdiction, and highlighted political question concerns as well as standing issues.

The most recent decision contributing to the U.S. climate change litigation model came in May 2010 when the *en banc* Fifth Circuit skirted the entire climate change issue and dismissed an appeal because of lack of quorum, after the last-minute recusal of a judge left only eight

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74 2007 WL 2726871 (N.D. Cal. 2007).
75 Id. at *1. Specifically, damages to California included increased melting of the Sierra Nevada mountain range snowpack, which comprises about thirty-five percent of the state’s water, increasing sea levels resulting in coastline erosion, and increased frequency and duration of extreme weather events and wildfires. Id.
76 Id.
77 Id. at *6-*13 (reasoning that “resolution of plaintiff’s federal common law nuisance claim would require this court to make an initial policy decision . . . of a kind clearly for nonjudicial discretion”).
78 663 F.Supp.2d 863 (N.D. Cal. 2009) aff’d 696 F.3d 849 (9th Cir. 2012).
79 Id. at 868.
80 Id. at 868–69.
81 Id. at 868.
82 Id. at 875 (citing Connecticut v. Am. Elec. Power Co. Inc., 582 F.3d 309 (2d Cir. 2009)) (maintaining that this case is not one of the “novel” global warming or climate change cases where “[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs’ claims”). The court held that the court was not competent enough to tackle such issues through “‘principled adjudication.’” Id. (citing Connecticut v. Am. Elec. Power Co. Inc., 582 F.3d 309 (2d Cir. 2009)).
83 Id. at 881 (noting that “there are, in fact, a multitude of ‘alternative culprit[s]’ allegedly responsible for the various chain of events allegedly leading to the erosion of Kivalina [village]”).
judges to decide the case on a court of sixteen.\textsuperscript{84} The appealed case involved a group of Gulf Coast landowner plaintiffs who alleged that the defendant’s energy, fossil fuel, and chemical operations emitted greenhouse gases which increased “global surface air and water temperatures,” that contributed to rising ocean levels and “added to the ferocity of Hurricane Katrina.”\textsuperscript{85} The plaintiffs contended that, together, these effects ruined the class members’ private property and destroyed the usefulness of the surrounding public property, and therefore the plaintiffs brought their suit for public and private nuisance, among other claims.\textsuperscript{86} In a lengthy opinion before the \textit{en banc} dismissal for lack of quorum, the Fifth Circuit had initially overruled the federal district court, and held that the plaintiffs had standing for all of their claims under Mississippi state law,\textsuperscript{87} as well as standing for their nuisance, trespass, and negligence claims under federal law,\textsuperscript{88} and that the issue did not present a non-justiciable political question.\textsuperscript{89} While this case was not a \textit{parens patriae} example like many of its counterparts, \textit{Murphy Oil} illustrates some of the most recent judicial activity in the American climate change law arena.

\section*{II. The EU Lacks a Tort-Based, \textit{Parens Patriae} Climate Change Litigation Model}

Thus far in the EU, \textit{parens patriae} climate change litigation has been extremely limited. If American-style class action litigation was poised to invade Europe, or had already done so by 2009 as some commentators suggested, then where are all the \textit{parens patriae} climate change suits that have become rather \textit{en vogue} in the U.S.?\textsuperscript{90}

\textsuperscript{84} Comer v. Murphy Oil USA, 607 F.3d 1049, 1053–54 (5th Cir. 2010) (en banc).
\textsuperscript{85} Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009).
\textsuperscript{86} \textit{Id}. at 860–61.
\textsuperscript{87} \textit{Id}. at 862 (“The plaintiffs clearly allege that their interests in their lands and property have been damaged by the adverse effects of defendants’ greenhouse gas emissions. Accordingly, they have standing to assert all of their claims under Mississippi law.”).
\textsuperscript{88} \textit{Id}. at 867 (“Similarly, the plaintiffs allege that defendants’ emissions constituted a public nuisance because they unreasonably interfered with a common right of the general public by causing the loss of use and enjoyment of public property through erosion of beaches, rising sea levels, saltwater intrusion, habitat destruction, and storm damage . . . . Because the injury can be traced to the defendants’ contributions, the plaintiffs’ first set of claims satisfies the traceability requirement and the [federal] standing inquiry.”) (internal quotations omitted).
\textsuperscript{89} \textit{Id}. at 875. (“Because the defendants have failed to articulate how any material issue is exclusively committed by the Constitution or federal laws to the federal political branches, the application of the [political question test] formulations [from \textit{Baker v. Carr}, 369 U.S. 186 (1962)] is not necessary or properly useful in this case.”). The Fifth Circuit later more explicitly concluded that “defendants have failed to show how any of the issues inherent in the plaintiffs’ nuisance, trespass, and negligence claims have been committed by the Constitution or federal laws wholly and indivisibly to a federal political branch.” \textit{Id}. at 879 (internal quotations omitted).
The simple answer is that such climate change lawsuits are not coming to continental Europe—at least not in the *parens patriae*, public nuisance form. One of the main reasons for this seems to be that tort-based, *parens patriae* lawsuits are not a necessary avenue for the vast majority of EU Member States because of the regulation-heavy, civil law traditions of the EU nations, save the United Kingdom.\(^9\) In civil law jurisdictions, judges “initially look to code provisions to resolve a case,” rather than precedent, as in common law countries.\(^9\) Under civil law, then, courts reason deductively “proceeding from stated general principles or rules of law contained in the legal codes to a specific solution.”\(^9\) With an extensive Napoleonic code codifying environmental rules and regulations, there is no need to follow an American-style tort-based cause of action for climate change litigation; instead countries may simply pursue *parens patriae* claims based on statutory violations from their own national legal code or EU law. Accordingly, when an EU Directive was proposed in October 2009 to make it easier to pursue class actions in Europe, Commission President José Manuel Barroso supposedly withdrew it himself at the last minute due to lack of support from Member States.\(^9\)

Several other smaller, though not insignificant, structural impediments have helped prevent American-style climate change litigation from taking hold in the EU. Though these impediments probably have less of an impact on *parens patriae* suits than suits by NGOs or other private parties (because the government frequently

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\(^9\) Id. at 36–37.

has more ample resources and can use its own civil servant attorneys), they are nonetheless worth noting. For example, in much of Europe, unlike the U.S., contingency fees are forbidden, meaning that the client “bears the risk of having to pay at least his own lawyer in full even if the litigation avails him nothing.” Under the contingency fee arrangement in the U.S., the lawyer bears the risk of paying for costs so that potential clients will pay the lawyer out of the client’s judgment or settlement. Thus, in Europe, smaller groups and individuals with fewer up-front resources who would have to rely on a contingency fee idea to be able to afford legal representation are discouraged from filing suit.

Moreover, the ‘loser pays’ rule instituted in much of Europe can have a serious dampening effect on litigation. This rule forces plaintiffs to pay not only their own litigation expenses, but also their opponent’s expenses. Consequently, far from suits being “(financially) virtually risk free” and very advantageous to plaintiffs, as in the U.S., potential European plaintiffs must consider paying both parties expenses in the event they lose—a risk that surely causes parties to “think twice” before bringing a suit. Even for a government, the looming possibility of such an expense dampens the incentive to bring suit under uncertain or new theories, for fear of angering the electorate, whose taxes helped fund such a risky lawsuit.

### III. The EU Might be Ready for an American-style, *Parens Patriae* Litigation Model

Europeans are generally skeptical of American class action litigation, with some labeling it as a “Pandora’s box that [Europeans] want to avoid opening.” Furthermore, besides the myriad structural obstacles to mass torts litigation and *parens patriae* suits, as previously discussed in Part II *supra*, the EU’s law also limits group litigation to “qualified entities.” Yet, despite this, the EU, European national governments, individual countries’ regional and local governments, and some governmental agencies are still fairly well-placed to bring American-style, *parens patriae*-like litigation, in the name of the general

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96 Id.
97 Id. at 822.
98 Id.
99 Id. at 824–25.
101 Id.
populace, against parties contributing to climate change.

EU Directive 98/27 specifically stipulates that among the “qualified entities” entitled to bring group litigation are “independent public bodies (such as administrative agencies)” or “organizations (such as consumer associations).” Specifically, these parties are permitted to handle “group litigation’ on behalf of a specifically defined group of people adversely affected by a defendant’s conduct.” Professor Harald Koch of Rostock University’s Law Faculty in Germany reiterates that, culturally-speaking, in the EU there is “no concept of an individual private Attorney General [because] . . . in the European tradition . . . [Europeans] entrust the public interest to public institutions rather than to private law enforcers.” This further indicates that if American-style tort litigation is to take hold in Europe, it could very well be through some sort of parens patriae action.

A. Applying the American-style, Parens Patriae Model to Climate Change Suits Under the Treaty on European Union

Indeed, the EU could partially adopt the American model of parens patriae climate change litigation through statute-based suits instead of public nuisance, tort-based actions. As the EU values protecting and preserving the environment very highly and often takes proactive steps to do so before the U.S., the EU seems primed for a wave of climate change litigation. In fact, Article 174 of the Treaty on European Union states that:

Community policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems.

The treaty further stresses that “Community policy on the environment shall aim at a high level of protection . . . [and] shall be based on the precautionary principle . . . on principles that preventative action should
be taken . . . and that the polluter should pay.”107 The treaty also states that it shall be the Council, after consulting the Economic and Social Committee and the Committee of the Regions, that decides “what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.”108 Such broad authority supplied by the EU’s founding treaty appears to grant the Council the ability to undertake any variety of actions, as long as they are in pursuance of the objectives listed in Article 174.109 Given this language, it is imaginable that it could be stretched to supply the EU—as an entity—with the authority to sue Member States, or possibly even private companies on a parens patriae basis to “deal with . . . [a] worldwide environmental problem” like climate change.110

B. Moving Towards the American-style, Parens Patriae Litigation Model in Other Contexts

Parens patriae actions have been hinted at in other contexts in the EU, and could be translated onto the climate change litigation model. In the antitrust area, the Attorneys General of several U.S. states have encouraged the EU to adopt parens patriae action, as the U.S. has done,111 explaining that “Member State parens patriae actions to obtain damages on behalf of their citizens for European Community antitrust violations appears to fit within the European legal framework.”112 In a letter to the European Commission’s Directorate-General for Competition, the Attorneys General observed that “public prosecutors can [already] bring actions for damages on behalf of consumers . . . in, at least, France, Poland, Lithuania, and Denmark,” while the Czech Republic and Slovakia allow for similar actions under EU law.113 The Attorneys General suggested that government authorities could bring parens patriae actions in national courts, “with the European Commission participating as amicus curiae.”114

Shortly after the American Attorneys General sent the letter, the European Commission ruled against MasterCard in an antitrust inquiry,
deciding that its multilateral interchange fees “violate[d] EC Treaty rules on restrictive business practices . . . .”115 Though an inquiry by the European Commission rather than an actual case, the MasterCard antitrust ruling nevertheless took on many of the characteristics of a parens patriae action. The Commission made the decision, essentially reasoning that it needed to defend consumers against the excessive fees, stating that “the Commission will accept these fees only where they are clearly fostering innovation to the benefit of all users,” taking action on behalf of all EU citizens, as a whole.116

In the environmental context, the Commission has thus far acted in a more regulatory role—at best bordering on “passive” parens patriae—enforcing compliance with EU environmental directives, but not yet taking tangible, affirmative steps to pursue litigation on climate change in the same manner as in the U.S. For example, on multiple occasions, the Commission has sued to force Member States to abide by EU Directive 2003/87/EC, which establishes a scheme for greenhouse gas emissions allowance trading.117 However, when the Commission attempted to make a passive parens patriae enforcement decision to reduce the amount of carbon dioxide Poland was permitted in its national allocation plan (NAP), it was overruled in a counter suit by Poland.118 The European Court of Justice interpreted the Commission’s power “to review and reject NAPs” as “severely limited” from Article 9(3) of the 2003/87/EC Directive.119 Under the Directive, the Court reasoned that the Commission was “empowered only to verify the conformity of the measures taken by the Member State with the criteria” laid out in the Directive.120 Even so, the Court still gave the Commission discretion to act more aggressively when a NAP review “involves complex economic or ecological assessments having regard to the general objective to reduce greenhouse gas emissions.”121 In doing so, the Court preserved a stronger potential parens patriae role

116 Id. (emphasis added).
117 See, e.g., Case C-122/05, Comm’n v. Italy, 2006, available at http://europa.eu (“declar[ing] that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with Directive 2003/87/EC . . . the Italian Republic has failed to fulfil[] its obligations under that directive); Case C-107/05, Comm’n v. Finland, 2006, available at http://europa.eu (“declar[ing] that, by failing . . . to adopt the laws regulations and administrative provisions necessary to comply with Directive 2003/87/EC . . . the Finnish Republic has failed to fulfil[] its obligations under that directive”).
119 Id. at ¶ 89.
120 Id.
121 Id.
for the Commission in its effort to control climate change. As evidenced in the directives, while the ultimate enforcement
*parens patriae* power resides in the Commission, the individual Member States, empowered by EU legislation, are likely going to be the parties that have to take much of the grassroots *parens patriae* action.\(^\text{122}\)

### C. NGOs in Germany Have Advanced Non-*Parens Patriae* Climate Change Litigation

In a rare example of climate change-related litigation that has already taken place in Europe, although non-*parens patriae*, a pair of German environmental NGOs—Germanwatch and BUND (the German section of Friends of the Earth) sued the German Ministry of Economics and Labor.\(^\text{123}\) On July 15, 2004, the NGOs brought an action to “force [the German government] to disclose the contribution to climate change made by projects supported by the German export credit agency Euler Hermes AG.”\(^\text{124}\) They requested information, by way of the Environmental Information Act of the Federal Republic of Germany (Umweltinformationsgesetz des Bundes, UIG) from the German government in July 2003 to determine if projects funded by Hermes, which generated greenhouse gas emissions, contributed to global warming.\(^\text{125}\) A mere month later, the German government rejected the request.\(^\text{126}\) While the plaintiff NGOs realized the resolution of this lawsuit would not directly impact greenhouse gas emissions, they hoped to emphasize that climate change factors, such as emissions, “are an important factor to be taken into account in the decision-making process . . . concerning the granting of export guarantees[.].”\(^\text{127}\)

In ordering “the government to release information on the climate change impacts of German export credits[,]” the Berlin Administrative Court “rejected the argument that information on German export credit activities did not constitute ‘environmental information’ within the meaning of the UIG, and instead implied that such activities could potentially affect elements [of] climate change.”\(^\text{128}\)

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\(^\text{122}\) See infra Part IV (Directive 2004/35/EC); Part V (Directive 2003/87/EC); Part VII.A (Aarhus Convention).


\(^\text{124}\) Briefing/Press Release, Germanwatch & BUND, German government sued over climate change (no date), available at http://germanwatch.org/rio/herbpe04.pdf.

\(^\text{125}\) Id.

\(^\text{126}\) Id.

\(^\text{127}\) Id.

\(^\text{128}\) Michael B. Gerrard & Jerry Chen, Columbia Law School Center for Climate Change Law, Database of Non-U.S. Climate Change Litigation, (Case: Bundes fur Umwelt und Naturschutz
D. Distinguishing the American Model, Based in Judicial Enforcement, from Purely Regulatory Techniques

Because the European legal system is almost exclusively code-based and relies heavily on statutes, the opportunities for classic tort-based lawsuits are somewhat limited, but other remedies, such as criminal sanctions, and especially regulatory remedies, are possible alternatives. There can be overlap between a very expansive definition of parens patriae action, particularly the “passive” parens patriae cases described in Part III.B supra, and solutions which are more purely regulatory in nature. The difference is the judgment which is sought through litigation. If the governmental plaintiff is seeking damages or injunctive relief involving anything more than the mere enforcement of the regulation at issue, then the action is akin to parens patriae.

Precisely because regulations can be quite easily ignored, bent, ineffectively implemented, complied with only partially, or flouted outright, Member States, EU agencies, the European Commission, and regional/local governments must insist that the laws are properly enforced. In the cases of non-compliance with EU regulations or EU directives, it follows that the European Commission, EU Member States, or regional/local governments might find it necessary to take parens patriae action. These suits would take on many of the characteristics of more traditional tort actions by seeking mitigation/damages for the injury caused and/or the injunctive relief comprising full compliance plus additional concessions. The resemblance between American-style, tort-based, parens patriae climate change litigation and the previously described examples of potential European parens patriae, tort-style litigation is imperfect, but roughly interchangeable. Certainly the comparison is satisfactory enough to warrant the claim that the


129 See supra text accompanying notes 92–93.

130 See supra text accompanying notes 117–22.


133 As with American parens patriae lawsuits, the EU Commission or a Member State might take such action if non-compliance with the directive or regulation implicated a quasi-sovereign interest such as guaranteeing citizens’ physical and economic health and well-being, ensuring that the State is not unfairly denied its rightful position within the EU’s federalism-modeled system, or guarding the State’s natural resources, territory, and environment. See supra text accompanying notes 24–26.
latter may be at least modeled off of the former.

### IV. Using EU Directive 2004/35/EC to Adopt an American-style, Parens Patriae Model

Possibly the greatest source for future statutorily-based, parens patriae climate change litigation in the EU is under Directive 2004/35/CE, which describes environmental liability with regard to the prevention and remedying of environmental damage.\(^{134}\) Two key aspects of the Directive make it likely the most viable springboard for parens patriae-like climate change lawsuits across the EU. First, the ‘Polluter Pays’ principle plays a critical role by setting the precedent that those parties who are responsible for pollution should bear the cost burden of clean-up and restoration/remediation. Second, two separate articles within Directive 2004/35/CE allow for countervailing action to prevent imminent threats of climate change damage as well as to treat pre-existing or current conditions. Significantly however, because many of the alleged effects of climate change are diffuse and cross national borders, a causal link is frequently difficult to prove. Member States and the EU will need to work cooperatively to confront the issue successfully.

#### A. The “Polluter Pays” Principle

The EU Directive begins by echoing the Treaty on European Union, stating “prevention and remedying of environmental damage should be implemented through the furtherance of the ‘polluter pays’ principle.”\(^{135}\) It continues,

> The fundamental principle of this Directive should . . . be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.\(^{136}\)

In Article 3, the ‘polluter pays’ principle is applied against damages or imminent threat of damages caused by an expansive list of activities,\(^{137}\) including air polluting “installations subject to authorisation in

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\(^{135}\) Id. at 56.

\(^{136}\) Id.

\(^{137}\) Id. art. 3 at 60.
pursuance of Council Directive 84/360/EEC.” 138 Such broad potential liability for polluters whose activities have either caused damage or merely presented an imminent threat of such damage provides the perfect opportunity for an almost limitless number of parens patriae suits by Member States against polluters on the grounds of an imminent threat of damages resulting from climate change.

The Directive makes it plain that action taken to prevent and remedy environmental damage could be achieved through parens patriae action139—“public authorities should ensure the proper implementation and enforcement of the scheme provided for by this Directive.” 140 The Directive recognizes that because “environmental protection is . . . a diffuse interest [and can result in widely distributed damages, as with climate change] . . . individuals will not always act or will not be in a position to act,” thereby delegating this task to governments and potentially even NGOs.141 Article 11(1) bestows upon Member States the parens patriae responsibility and authority to act upon the Directive, stating that “Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.”142 Article 12 more explicitly explains how parens patriae action may be “requested” by “natural or legal persons[,]” including non-governmental organizations.143 If a person or organization is “affected or likely to be affected by environmental damage[,]” they may submit proof “relating to instances of environmental damage or an imminent threat of such damage and . . . request the competent authority to take action under this Directive.”144 Theoretically then, any citizen, group of citizens, or environmental advocacy group who can produce “observations” of actual or imminent damage due to climate change and “relevant information and data supporting” said observations must, at a minimum, have their request for action considered by the competent authority.145

138 Id., annex III ¶ 9 at 71; see also Council Directive 84/360, 1984 O.J. (L 188) 20–25 (EEC) (listing in Annex I the categories of plants implicated by the directive and in Annex II listing the most important polluting substances).
139 Parens patriae action would be one of the possible options, though certainly not the only one. Criminal sanctions and purely regulatory solutions are other alternatives, but beyond the scope of this paper.
141 Id. at 58.
142 Id. at 63.
143 Id.
144 Id.
B. Plaintiff-Friendly Preventative (Ex-ANTE) and Remedial (Ex-POST) Actions

Significantly, the Directive allows for possible parens patriae suits for both “preventative action” (under Article 5) and “remedial action” (under Article 6)—creating a very wide range of causes of action for plaintiffs against polluters contributing to climate change. Member States could sue companies and each other preemptively, claiming that although “damage has not yet occurred . . . there is an imminent threat of such damage occurring” as a result of the polluter’s contributions to global climate change.146 This key factor dramatically strengthens the possibility of future litigation under Article 5 because it relieves the plaintiff of having to prove actual, presently-existing damages, which is particularly important when one considers that many of climate change’s most serious alleged effects have yet to occur and are difficult to quantify.147 Under Article 5, the competent authority from a Member State is empowered to “require the operator to provide information on any imminent threat of environmental damage[,]” “require the operator to take the necessary preventive measures[,]” “give instructions to the operator to be followed on the necessary preventive measures to be taken[,]” or “itself take the necessary preventive measures.”148 Under this theory, for example, the Netherlands, with approximately half its territory below sea level,149 could sue major European greenhouse gas emission sources to require them to substantially reduce their pollution levels in order to prevent the imminent threat of rising sea levels and flooding.150 Actual damage would not need to be proven.

Under Article 6, Remedial Action, Member States could sue for remedies to climate change damages that have already occurred, forcing the polluter to take “all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or other damage factors in order to limit or prevent further environmental damage and adverse effects on human health . . . .”151 For instance, an Article 6 claim could be brought by one of the northern European

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146 Id. art. 5 at 61. Imminent threat is defined as “a sufficient likelihood that environmental damage will occur in the near future.” Id. at 60.
147 See Joseph Alcamo, Jose M. Moreno, & Bela Nováky, Intergovernmental Panel on Climate Change, Climate Change 2007: Impacts, Adaption and Vulnerability 543–44 (Parry, Canziani, Palutikof, van der Linden, and Hanson, eds., 2007) (describing some of the various future negative consequences of climate change).
150 See Alcamo, Moreno & Nováky, supra note 147 at 563 (noting that one of the projected consequences of climate change is a rising sea level off the coast of Western Europe).
nations on behalf of its farmers against large producers of greenhouse gas pollutants because of “increased crop stress during hotter, drier summers [and] increased risk to crops from hail” resulting in decreased yields.152

C. EU AND MEMBER STATE COOPERATION IS CRUCIAL TO PROVING CAUSATION

To prove polluter liability under the Directive for damage resulting from climate change or any qualifying type of pollution, “a causal link should be established between the damage and the identified polluter(s).”153 Although neither “fault [nor] negligence [nor] intent on the part of the operators need be established,”154 the Directive cautions that for environmental damage to be effectively remedied by liability mechanisms, “there [also] need[s] to be one or more identifiable polluters” and “concrete and quantifiable” damage.155 The European Court of Justice has interpreted a causal link as “plausible evidence capable of justifying [a connection between the polluter and the damages], such as the fact that the operator’s installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator . . . .”156 As in the U.S., plaintiffs may face their greatest hurdle at this stage.

In language that reflects many of the American court decisions, the Directive warns that “[l]iability is . . . not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts of failure to act of certain individual actors.”157 This seems targeted at

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152 See Alcamo, Moreno & Nováky, supra note 147 at 563 (noting observed effects of climate change upon agriculture in Europe).
154 Joined Cases C-478/08 & C-479/08, Order of the Court (Eighth Chamber) of 9 March 2010 (references for a preliminary ruling from the Tribunale Amministrativo Regionale della Sicilia, Italy) – Buzzi Unicem SpA and Others, 2010, available at http://europa.eu. See also Joined Cases C-378/08, 379/08, 380/08 Raffinerie Mediterranee (ERG) SpA v. Ministero dello Sviluppo economic & Others, 2010, ¶ 70, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0378:EN:HTML (confirming that “the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage”).
156 Joined Cases C-478/08 & C-479/08, Order of the Court (Eighth Chamber) of 9 March 2010 (references for a preliminary ruling from the Tribunale Amministrativo Regionale della Sicilia, Italy) – Buzzi Unicem SpA and Others, 2010, available at http://europa.eu. See also Raffinerie Mediterranee at ¶70 (confirming that “in order for such a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator’s installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities”).
excluding climate change from the list of actionable harms which, by nature, generates precisely these “widespread, diffuse” damages to which the entire world as a whole contributes by emitting greenhouse gases.\textsuperscript{158} Still, the Directive admits that “environmental protection[ ] is . . . [an inherently] diffuse interest”\textsuperscript{159} and encourages “[c]ooperation between Member States . . . [w]here environmental damage affects or is likely to affect several Member States” to make certain that “corrective measures are taken to address environmental damage.”\textsuperscript{160} Advocate General Kokott explained that because liability is often difficult to determine in environmental damage cases, the Member States and Community “enjoy a broad margin of discretion” to “extend[] liability to other polluters besides the “responsible operator.”\textsuperscript{161} The same is true, she opined, with regard to financial damages: because it is frequently difficult to precisely allocate “causal contribution of individuals to specific environmental damage . . . Member States could impose the costs jointly on the polluters who could be identified[,]” rather than absolving them of their responsibility inconsistently with the ‘polluter pays’ principle.\textsuperscript{162} This indicates that the EU Parliament and EU Commission, in drafting the legislation, may indeed have been prepared to include a widespread environmental harm like climate change as an actionable harm, but simply wanted to discourage frivolous or insufficiently grounded lawsuits through the previous precautionary language.

Additionally, via Article 9, the Directive allows national law concerning cost allocation to control “cost allocation in cases of multiple party causation[,]” indicating that the drafters considered environmental issues with more than one source of damage, such as climate change, as ones that could be pursued under this Directive.\textsuperscript{163} Therefore, one may suspect the European courts to be more sympathetic

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{158} See \textit{The World Bank, World Development Report 2010: Development and Climate Change} 53 (Bruce Ross-Larson, ed., 2010) available at \url{http://web.worldbank.org/WEBSITE/EXTERNAL/EXTDEC/EXTERESSEARCH/EXTWDRS/0,,contentMDK:23079906~pagePK:478093~piPK:477627~theSitePK:477624,00.html} (noting that “because the causes of climate change are diffuse, the direct link between the emissions of a country and the impact suffered in another are difficult to establish in a litigation context”); see also, Cynthia Rosenzweig, Gino Casassa, David J. Karoly, Anton Imeson, Chunzhen Liu, Annette. Menzel, Samuel Rawlins, Terry L. Root, Bernard Seguin, Piotr Tryjanowski, Intergovernmental Panel on Climate Change, Climate Change 2007: Working Group II: Impacts, Adaption and Vulnerability 83 (Parry, Canziani, Palutikof, van der Linden, and Hanson, eds., 2007) (noting some of the many effects of climate change, from decline in sea ice to shifts in plant and animal habit ranges to damages due to increased droughts and floods).
\item \textsuperscript{159} Council Directive 2004/35 O.J. (L 143) 57 (EC).
\item \textsuperscript{160} Id. art. 15 at 64.
\item \textsuperscript{161} \textit{Raffinerie Mediterranee} at ¶ 106 (opinion of Advocate General Kokott).
\item \textsuperscript{162} Id. at ¶ 109.
\end{itemize}
\end{footnotesize}
to such claims than their American counterparts. The ultimate question, then, comes down to one of proof of a causal link, as in the American tort context—whether or not the plaintiff can affirmatively establish: (1) at least one identifiable polluter, (2) concrete and quantifiable damage (or imminent threat in the preventive context), and most critically, (3) a causal link between elements (1) and (2).

If plaintiffs are able to prove a causal link between a polluter and damages caused by climate change, a flood of parenthood litigation might ensue from individual Member States, cooperating Member States, and/or the EU as a whole. Future parenthood suits might also be brought, on behalf of aggrieved Members States and citizens, against entire sectors of private industry—for example the aviation industry, automobile manufacturers, the marine shipping industry, or passenger and freight rail operators—under Articles 5 and 6, and demand preventative action or remedial action for the impacts of climate change. European parenthood suits against entire polluter industries would most resemble the California v. General Motors Corp. case from the U.S. because they could attempt to impose enterprise liability across an entire industry sector—albeit through Directive 2004/35/EC rather than the tort of public nuisance.

164 Id. art. 15 at 64 (“[w]here environmental damage affects or is likely to affect several Member States” to make certain that “corrective measures are taken to address environmental damage”).
165 Council Directive 2003/87, art. 1, 2003 O.J. (L 275) 32, 34 (EC) (noting that winning the battle against climate change “cannot be sufficiently achieved by the Member States acting individually,” and demands across-the-board, coordinated action by centralized EU authority”). See also Consolidated Version of the Treaty on European Union, 2006 O.J. (C 321) 46 (Article 5 states “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”). Standing to sue could be established via the Treaty on European Union. See Consolidated Version of the Treaty on European Union, 2006 O.J. (C 321) 124 (noting that the Council, after consulting the Economic and Social Committee and the Committee of the Regions, decides “what action is to be taken by the Community in order to achieve the objectives referred to in Article 174”).
166 2007 WL 2726871 (N.D. Cal. 2007).
167 A full analysis of enterprise liability in this regard is outside the scope of this article, but in short, the parenthood plaintiffs would be attempting to hold entire sectors of private industry jointly and severally liable for imminent injury or physical, tangible damages suffered by all EU citizens. While there is scant history of market share liability being imposed in Europe, it is not entirely unprecedented. See Ewoud Hondius, A Dutch DES Case: Pharmaceutical Producers Jointly and Severally Liable, 23 EUR. REV. PRIVATE L. 409 (1994) (discussing Dutch case where in 1986 the Hoge Raad held that “it must be assumed . . . that [each of] the companies which marketed DES in the relevant period are each liable therefore on account of fault on their part, that the entire damage of each injured party may have resulted from each of these ‘events’—the marketing—and that at any rate the damage was the result of one of these ‘events’”).
V. USING EU DIRECTIVE 2003/87/EC TO ADOPT AN AMERICAN-STYLE, PARENS PATRIAE MODEL

An alternative, though likely less valuable,\(^{168}\) EU law cause of action for combating deleterious effects of climate change is anchored in Directive 2003/87/EC. Directive 2003/87/EC “establishes a scheme for greenhouse gas emission allowance trading within the Community . . . in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.”\(^{169}\) It was developed after the Sixth Community Environment Action Programme identified climate change as a priority issue to be resolved and required that a “Community-wide emissions trading scheme” be established by 2005.\(^{170}\) The Council saw 2003/87/EC as a means of helping the EU and its Member States achieve compliance with the Kyoto Protocol,\(^{171}\) approved by Council Decision 2002/358/EC in April, 2002.\(^{172}\)

A. REQUIREMENTS AND OBLIGATIONS FOR MEMBER STATES AND EU BODIES

Article 18 of Directive 2003/87/EC requires the Members States to ensure that operators of certain pollution-causing activities possess a permit to discharge emissions before doing so, and charges the national governments with monitoring and reporting on said operators’ greenhouse gas emission levels.\(^{173}\) The potential for parens patriae litigation becomes more apparent in the event of non-compliance by the pollution-causing operators, as the Directive also instructs that “Member States shall lay down the rules on penalties applicable [upon] infringement [of the Directive] . . . and shall take all measures necessary to ensure that such rules are implemented.”\(^{174}\) It is incumbent upon the Member States to guarantee that such “penalties provided for [are] effective, proportionate and dissuasive” so as to punish operators who do in fact over-pollute beyond their allowance and to deter others from doing so.\(^{175}\)

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\(^{168}\) As will be explained in this section infra, Directive 2003/87/EC does not readily provide a means for attacking private party contributors to climate change as Directive 2004/35/EC does, rather, it restricts potential defendants to public entities such as the EU or its agencies and Member States.


\(^{170}\) Id. at 32.

\(^{171}\) The Kyoto Protocol to the United Nations Framework Convention on Climate Change committed the European Community and Member States “to reducing their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8% compared to 1990 levels in the period 2008 to 2012.” Id.

\(^{172}\) Id.

\(^{173}\) Id. at art. 33.

\(^{174}\) Id. at art. 16 at 37.

Although it entrusts much of the implementation and enforcement of the Directive to the Member States, the European Parliament and EU Council grant some parens patriae-type responsibilities to the EU Commission itself, upon which it could theoretically act—in the name of EU citizens as a whole—to compel compliance. The Directive accomplishes this in very general language: “Policies and measures should be implemented at Member State and Community level across all sectors of the European Union economy . . . in order to generate substantial emissions reductions.”\textsuperscript{176} The Directive further indicates that “[t]he Commission should, \textit{in particular}, consider policies and measures at Community level in order that the transport sector makes a substantial contribution to the Community and its Member States” in achieving their climate change goals.\textsuperscript{177} The Directive purposefully notes that:

Since the objective of the proposed action, the establishment of a Community scheme, cannot be sufficiently achieved by the Member States acting individually, and can therefore by reason of the scale and effects of the proposed action be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty.\textsuperscript{178}

Moreover, under Article 9, the Commission is empowered to disallow a Member State’s NAP, or any part of it, if it is incompatible with the criteria set out by the Directive.\textsuperscript{179} In short, under Directive 2003/87/EC, the EU Commission’s reactions and responses to Member State non-compliance offer the broadest avenues for parens patriae-like climate change litigation, though perhaps more reflective of the passive parens


\textsuperscript{177} Id. at ¶ 25 at 34 (emphasis added).

\textsuperscript{178} Id. at ¶ 30 at 34 (emphasis added). See also Consolidated Version of the Treaty on European Union, 2006 O.J. (C 321) 46 (Article 5 states “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”).

*patriae* discussed *supra*,\(^{180}\) than the aggressive, American-style *parens patriae* exhibited in some U.S. tort lawsuits.

**B. Extent of the EU Commission’s Power Pursuant to EU Directive 2003/87/EC**

EU courts\(^{181}\) have interpreted the Commission’s power under Directive 2003/87/EC both expansively and narrowly, setting the stage for some confusion. For example, the European Court of First Instance, in *Federal Republic of Germany v. Commission of the European Communities*, reconfirmed the Commission’s power, ruling that under Article 9(3), “while the Member States have a degree of freedom of action when transposing the directive[,] . . . the Commission is empowered to verify whether the measures adopted by Member States are consistent with the criteria set out in” the legislation.\(^{182}\) The court further held that “in carrying out that review[, the Commission] has a discretion in so far as the review entails complex economic and ecological assessments carried out in the light of the general objective of reducing greenhouse gas emissions by means of a cost-effective and economically efficient allowance trading scheme.”\(^{183}\) Such a holding opens up the Commission’s ability to bring suit against non-compliant Member States in the name of all EU citizens under a wider range of circumstances, though admittedly, it appears that no actions of this sort have yet been brought.\(^{184}\)

On the other hand, in *Estonia v. Commission* and *Poland v. Commission*, the Court of Justice limited the authority of the Commission, and therefore its ability to pursue action against Member States. In those cases, the Court ruled that only Member States have the power to draft NAPs—the Commission may not substitute their own findings.\(^{185}\) In other words, the Commission exceeded its power “by substituting its

\(^{180}\) See *supra* notes 117–22 & accompanying text.

\(^{181}\) Roughly outlined, the Court of First Instance, or General Court, as it is known today, is a lower court with broad jurisdictional grounds to hear many cases. The highest EU court is the Court of Justice, which has more a specialized jurisdiction that includes, among other things, appeals from the General Court. See CVRIA: Court of Justice: Presentation, Court of Justice of the European Union Official Website, Feb. 9, 2013, http://curia.europa.eu/jcms/jcms/jo2_7024/ (describing the Court of Justice); CVRIA: General Court: Presentation, Court of Justice of the European Union Official Website, Feb. 9, 2013, http://curia.europa.eu/jcms/jcms/jo2_7033/ (describing the General Court).


\(^{183}\) Id.

\(^{184}\) An action of this sort could seek damages that resulted from the non-compliance as well as the more traditional regulatory resolution that the state strictly comply with the EU Directive.

[own] method of analysis for that used by the Member States concerned, instead of merely checking that their NAPs were compatible with the criteria laid down by Directive 2003/87/EC.186 A delicate balancing game appears to be the order of the day for the EU Commission when it comes to exercising its authority under Directive 2003/87/EC. While the Commission cannot usurp the power of the Member States and replace a Member State’s reasonable NAP calculation with its own, the Commission can scrutinize a Member State’s NAP to ensure that the Member State has properly implemented its NAP, pursuant to the Directive, so as to guarantee a baseline level of success in reducing greenhouse gas emissions.

C. MEMBER STATES AND OTHER EU BODIES AS DEFENDANTS UNDER DIRECTIVE 2003/87/EC

Through its implementation of a greenhouse gas emissions trading scheme, Directive 2003/87/EC is pursuing two objectives—first, to achieve reductions in greenhouse gas emissions and, second, to meet obligations imposed by the Kyoto Protocol. On a grander scale, by pursuing these twin goals, the EU seeks to combat climate change as a whole, which both the European Council and Parliament have deemed a priority.187 As such, Directive 2003/87/EC offers Member States and the EU itself a variety of routes for litigating against climate change. Instead of bringing suit against private parties as under Directive 2004/35/EC,188 possible strategies here would include parens patriae suits by Member States against each other or against the EU Commission, as well as parens patriae actions by the EU Commission against the Member States found in violation of Directive 2003/87/EC.

A Member State versus Member State climate change lawsuit might be brought under Article 16. Since Member States set the penalties to ensure that the Directive’s “rules are implemented[,]” one EU nation might file a parens patriae suit against another alleging that the penalties are not “effective . . . and dissuasive” enough to prevent or decrease pollution, thereby contributing to climate change, which is damaging the plaintiff country and its citizens.189 Suppose, for example, the German automobile manufacturing industry is generating significant

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186 Id.
187 See supra text accompanying notes 176–79.
188 See supra Part IV.
levels of greenhouse gas emissions. The German government penalizes each violator, according to Directive 2003/87/EC Article 16, but only at a very minimal level, one that clearly has little deterrent effect on the hypothetical polluters. Spain and Italy might bring a parens patriae action on behalf of their citizens, for current and potential injuries caused by climate change, demanding that Germany strengthen its penalties against polluters and meet the obligations imposed on all Member States by the Directive. Likewise, the European Commission could bring a very similar parens patriae suit, in the name of all EU citizens, against non-compliant Member States for an unacceptably low level of penalties for polluter-operators, which fail to effectively prevent and deter climate change-causing pollution. Either Member States or the Commission could also assert that the defendant-country had not properly “take[n] all measures necessary to ensure that such rules are implemented[,]” as required by the Directive, thereby causing pollution contributing to climate change.

Member States might also sue the EU or one of its agents, in situations somewhat analogous to the Massachusetts v. EPA claim, alleging that the EU did not implement effective enough “[p]olicies and measures . . . [at the] Community level across all sectors of the European Union economy . . . in order to generate substantial emissions reductions.” In particular, Member States might argue that the EU was liable for major contributions to climate change because the Directive specifically implicates the Commission in controlling emissions from the transport sector across the entire Community. As a result of the Commission’s inadequate control over transport sector emissions, individual Member States might directly experience the negative consequences of climate change, thereby offering grounds for such an action. Success of such suits would largely revolve—as many cases do—around the judge’s interpretation of a term (here, “substantial”) and the parties’ evidence that the action either was or was not substantial.

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190 See, e.g., Alcamo, Moreno & Nováky, supra note 147 at 555 (noting possible damage to agricultural and energy as a result of climate change). For instance, “in southern Europe, general decreases in yield (e.g., legumes -30 to + 5%; sunflower -12 to +3% and tuber crops -14 to +7% by 2050) . . . are expected for spring sown crops.” Id. (internal quotations omitted). An increased temperature is also expected to increase demand for energy, particularly the demand for cooling during the summer “with increases of up to 50% in Italy and Spain by the 2080s.” Id. at 556 (internal quotations omitted).


195 Id.
VI. Applying National Law to Adopt an American-style, Parens Patriae Model in EU Member States: Three Case Studies

Apart from EU law, parens patriae lawsuits, as well as actions by NGOs, may have a future under national law, as illustrated by two case studies: France and Germany. As civil law nations with extensive and detailed Napoleonic code provisions, climate change litigation in both France and Germany will likely be founded upon statutory violations, of which there are myriad possibilities. On the other hand, litigation in the common law United Kingdom could closely mirror that which has begun to flourish in the U.S.

A. France

1. Environmental Interests Occupy a Very Highly Respected Position in French Law

The French Environmental Code begins by highlighting the importance of protecting and preserving the environment as it is “part of the common heritage of the nation” and of “general interest” to the country.\(^{196}\) The Code identifies four fundamental principles behind it, including the “precautionary principle,” “the principle of preventative and corrective action,” “the polluter pays principle,” and “principle of [public] participation.”\(^{197}\) Meanwhile, in defining the “fundamental interests of the nation” that cannot be infringed upon, the French Penal


\(^{197}\) Id. In its entirety, Article L110-1 says:

I. - Natural areas, resources and habitats, sites and landscapes, air quality, animal and plant species, and the biological diversity and balance to which they contribute are part of the common heritage of the nation. II. - Their protection, enhancement, restoration, rehabilitation and management are of general interest and contribute to the objective of sustainable development which aims to satisfy the development needs and protect the health of current generations without compromising the ability of future generations to meet their own needs. They draw their inspiration, within the framework of the laws that define their scope, from the following principles: 1 The precautionary principle, according to which the absence of certainty, based on current scientific and technical knowledge, must not delay the adoption of effective and proportionate measures aiming to prevent a risk of serious and irreversible damage to the environment at an economically acceptable cost; 2 The principle of preventive and corrective action, as a priority at source, of damage to the environment, using the best techniques available at an economically acceptable cost; 3 The polluter pays principle, according to which the costs arising from measures to prevent, reduce or combat pollution must be borne by the polluter; 4 The principle of participation, according to which everybody has access to information relating to the environment, including information relating to hazardous substances and activities, and whereby the public is involved in the process regarding the development of...
Code lists, among other things, “the balance of its natural surroundings and environment.” These provisions set out several basic, but overly general, causes of action for future climate change plaintiffs.

The Code clearly establishes the possibility of *parens patriae* lawsuits in the environmental context through Article L. 132-1, which certainly seems to set the stage for statutory based climate change litigation under French law. A veritable slew of government environmental agencies are granted the right under the Article to:

> exercise the rights recognised as those of the civil party as regards the acts which directly or indirectly damage the interests that they have the role of defending and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soils, sites and landscapes, and to town planning, or to those whose purpose is the control of pollution and nuisances, and of the enactments for their application.

To further encourage *parens patriae* actions based on violations of environmental statutes, Article L. 132-1 provides that “those legal entities under public law [the agencies of the State] which have taken part materially or financially, have a right to reimbursement by the responsible parties of the expenses incurred by them.” Articles 142-1 through 142-3 confer similar rights upon approved environmental protection associations, allowing them to “institute proceedings . . . for any grievance relating to” the preservation of nature and the environment. Moreover, Article 142-3 affirmatively permits such environmental associations to “seek redress on behalf of” individuals projects that have a major impact on the environment or on town and country planning.

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199 While it is perhaps not out of the question for the State to sue a polluter on the grounds that climate change (partially caused by the defendant-polluter) is destroying “part of the common heritage of the nation” in violation of Article L110-2, it does seem rather untenable. See Law No. 2002-276 of Feb. 27, 2002, Article L110-2 – French Environmental Code (English translation), Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 28, 2002, p. 1/201.


201 Id.

202 Id. at 14/201.
when “several identified persons have suffered individual damages caused by the act of a single person and with a common origin” if at least two of the people concerned appoint the organization to so act.\textsuperscript{203}

2. The French Environmental Code Provisions Can Be Construed to Support Possible Causes of Action Against Polluters or Ineffectively Regulating Government Bodies

Title II of the French Environmental Code covers “[a]ir and the atmosphere” and begins by stating the ultimate objective of “preventing, monitoring, reducing or removing atmospheric pollution, preserving air quality,,” and conserving energy.”\textsuperscript{204} In France, the “State ensures, with the help of local authorities . . . the monitoring of air quality and its effects on health and the environment.”\textsuperscript{205} Therefore, the Conseil Régional’s president prepares guidelines for air quality objectives and sets out techniques for pollution prevention and mitigation in that particular region.\textsuperscript{206} Under Article L. 221-1, any number of plaintiffs—including local, regional, or national government, as well as environmental NGOs—could sue the Conseil Régional alleging ineffectual or overly weak guidelines that do not suitably prevent or reduce atmospheric pollution and fail to mitigate its effects. These ineffectual guidelines would thus flout the objectives stated under Article L. 220-1 and could trigger damages to the plaintiff as a result of the corresponding climate change.\textsuperscript{207} However, given that so many parties are invited to take part in the preparation of these regional air quality plans and voice their concerns beforehand, national courts might be prone to dismiss such ex-post litigation.\textsuperscript{208}

Article L. 224-1 of the Environmental Code presents another possible avenue for climate change litigation under French national law. The statutory language places the Conseil d’État\textsuperscript{209} in charge of

\textsuperscript{203}Id.
\textsuperscript{207}Id.
\textsuperscript{208}See id. at p. 50–51/201 (noting that State departments, environmental/health/technology département commissions, other approved organizations, and the general public are all “associated” with the preparation of the regional air quality plan or invited to participate in its preparation).
\textsuperscript{209}The Conseil d’État (literally, “Council of State”) is the highest administrative jurisdiction in France, and “the final arbiter of cases relating to executive power, local authorities, independent public authorities, public administration agencies or any other agency invested with public
drafting a decree with the aim of limiting environmentally harmful pollutant substances and their sources. Accordingly, the Conseil d’État’s decree determines everything from “[t]echnical specifications and performance standards applicable to the manufacture, sale, storage, use, maintenance and destruction of movable goods,” except for certain vehicles, to “[t]echnical specifications applicable to the construction, use, maintenance and demolition of real-estate.” The law must also lay out how business, industry, and private citizen compliance will be assessed and verified.

This subjective language potentially exposes the Conseil d’État to litigation—both parens patriae actions by local or regional governments and litigation by NGOs where the plaintiffs are suffering climate change-caused harms (or serious injury is imminent) due to inadequately lenient Conseil d’Etat decrees. Plaintiffs might argue that the “technical specifications and performance standards” regulating moveable goods are not “limiting the sources of pollutant substances which are harmful to the environment,” but are in fact allowing the private manufacturers to emit greenhouse gases in excess, thus leading to climate change damages.

Suppose, for example, that the Conseil d’État law set a very high ceiling for building and construction-related pollution and allowed for significant deforestation in an effort to boost commercial and industrial development across the country. Seeing an imminent threat to its tourist-drawing and economy-propelling natural sights and attractions, the regional government of Provence-Alpes-Côte d’Azur might file suit against the Conseil d’État, à la Massachusetts v. EPA,
for failure to draft suitable regulations to preserve and protect the environment. The regional government would argue that the Conseil d’État’s failure to do so was contributing to detrimental climate change, thereby adversely affecting (or imminently affecting) the region both environmentally and economically. Such a suit might seek damages and an injunction against the high level of sanctioned pollution in the building and construction field. In the same vein, litigation could be brought on a parens patriae basis pursuant to Article L. 224-5 of the French Environmental Code, which sets out regulations through Conseil d’État decree, similar to Article L. 224-1, except with regard to automotive vehicles, which were exempted under Article L. 224-1.215

**B. Germany**

German law offers two specific examples of regulations pursuant to which parens patriae-type climate change litigation could develop—the Environmental Liability Act and the German Federal Emission Control Act.

1. **The Environmental Liability Act Supplies a Difficult, But Not Impossible Means of Assigning Liability to Polluters for Climate Change Harms**

   The Environmental Liability Act (ELA) provides for “facility liability for environmental impacts.”216 So, if an individual is injured in body or health or her “property is damaged, due to an environmental impact that issues” from certain facilities,217 the facility operator “shall be liable to the injured person for the damage caused.”218 Section 3 of the ELA defines environmental impact damage very broadly as that which arises “if the damage is caused by materials, vibrations, noises, pressure, rays, gasses, steam, heat, or other phenomena that have been dispersed in soil, air, or water.”219

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215 See Law No. Article L224-5 – French Environmental Code (English translation), Journal Officiel de la République Française [J.O.] [Official Gazette of France], updated Apr. 10, 2006, p. 53/201. Article L. 224-5 inserts Articles L. 311-1 and L. 318-1 through L. 318-3 of the Highway Code into the Environmental Code, and reads “Vehicles must be built, sold, operated, used, maintained and, where appropriate, repaired in such a way as to minimise the consumption of energy, the creation of non-recyclable waste, emissions of pollutant substances, in particular of carbon monoxide, referred to in Article L. 220-2 of the Code de l’environnement on air and the rational use of energy as well as other nuisances likely to compromise public health.” Id.


217 The statute defines facilities as permanent structures, machines, or vehicles. Id.

218 Id.

219 Id. at § 3.
For instance, the city of Cuxhaven (located on the coast of the North Sea) might sue major greenhouse gas emitting industries in its parens patriae capacity for contributing to future property damage due to flooding, like in *Native Village of Kivalina v. Exxon-Mobil*. Un fortunately for Cuxhaven, its hypothetical climate change litigation faces several major obstacles within the ELA itself. First, because climate change is, by nature, purportedly caused by the aggregate emissions of people worldwide and not those of one particular party, the presumption of causation granted by ELA § 6 would be eliminated. Under ELA § 7, there can be no presumption of causation where multiple facilities are inherently suited to and fully capable of producing the damage. Second, the defendant-polluter can always claim contributory negligence under ELA § 11, reasoning that if the city of Cuxhaven contributed in any way to climate change, which is virtually assured, recovery will be reduced or eliminated.

2. The German Federal Emission Control Act Offers Local Level Government a Tactic for Forcing the National Government’s Regulatory Hand and Demanding Compensation for Harms

The German Federal Emission Control Act (Bundes-Immisionsschutzgesetz, BImSchG) (GF ECA) might offer another avenue for litigating against climate change in Germany, through its

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220 663 F.Supp.2d 863 (N.D. Cal. 2009) aff’d 696 F.3d 849 (9th Cir. 2012).

221 *See Climate Change and the Public Law Model of Torts: Reinigorating Judicial Restraints Doctrines, supra* note 18 at 246 (describing jurisdiction of residence an “independent variables in climate change parens patriae actions[,]” because “[g]lobal climate change is a worldwide problem, and an individual’s residence in [a certain jurisdiction] neither increases nor decreases the threat of global climate change to that person”). Oppositely, in pre-climate change American public nuisance cases, “the victim’s harms were directly related and causally connected to their identity as a resident of the [jurisdiction] that sought to vindicate their interests through parens patriae litigation.” *Id.*

For a more thorough discussion regarding how public nuisance, parens patriae cases involving climate change are distinguishable from prior public nuisance, parens patriae environmental cases not exclusively centered on climate change, and the impact on standing in U.S. climate change litigation, see generally *Climate Change and the Public Law Model of Torts: Reinigorating Judicial Restraints Doctrines, supra* note 18.


223 *Id.* at § 11. *See also*, *Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt (Federal Law Gazette) [BGB] I 42, 2909, § 254, Jan. 30, 2011, http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html, translated from German by the Langenscheidt Translation Service (explaining contributory negligence as follows: “Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.”).
Article 47—Clean Air Plans provision. Article 47 of the GFECA explains that after conducting an evaluation concerning the “type and extent of specific air pollution,” if the emissions have exceeded acceptable levels as determined by the law(s) implemented pursuant to this Act, a clean air rehabilitation plan must be drawn up and implemented.\(^{224}\) A clean air plan may be instituted in the precautionary sense as well, to thwart potentially detrimental environmental consequences in advance.\(^{225}\) A clean air plan must contain:

1. A representation of emissions . . . established for all or specific air pollutants,
2. Information about the impacts recorded for assets worthy of protection [an evaluation of pollution’s effects on the natural environment],
3. Any findings obtained as to the causes and effects of such air pollution,
5. Details on the [emission] levels . . . and
6. The measures envisaged for the reduction and prevention of air pollution.\(^{226}\)

Given these provisions, creative climate change litigators—more likely NGOs or local-level government authorities in this case, because the German government would not likely sue itself—could bring action under the theory that the competent authorities charged with creating a clean air plan had not drawn up a sufficiently strict proposal to control and prevent pollution, and in turn, help mitigate climate change. GFCEA article 47(2)(6) requires that all clean air plans contain a description of the “measures envisaged for the reduction and prevention of air pollution[,]” so if plaintiffs had suffered climate change damages or had evidence suggesting that impending damages could be lessened or avoided through more rigorous regulation of a clean air plan, a suit might take shape.\(^{227}\) Plaintiffs, in turn, would contend that by allowing an unreasonably excessive level of emissions/pollutants and failing to design a suitable plan to counter the deleterious effects air pollution


\(^{225}\) Preemptive actions may be commenced “as soon as the air pollutants manifested or anticipated go beyond the characteristic [emission] levels laid down in any legal provisions” or regulations issued under the German Federal Emission Control Act or any pertinent EU law. Id. at art. 47.

\(^{226}\) Id.

\(^{227}\) Id.
imposes on the worldwide ecosystem, the German government had contributed to climate change, thus injuring the plaintiffs.\textsuperscript{226}

\textbf{C. The United Kingdom}

While American law has been influenced by many sources, it largely stems from the English common law system, which accompanied the English colonists on their voyage from Europe and, in large part, installed itself as the legal system of the fledgling U.S. Because so much of the American legal system descended from the English common law model, it only makes sense that almost 400 years later, the United Kingdom (UK) would be the most compatible destination for an EU Member State to adopt the American model of climate change litigation.

The reasons are obvious enough. Apart from the structural differences highlighted in Part II \textit{supra},\textsuperscript{229} the UK’s legal system is quite similar to its American counterpart, and therefore shares not only the common law system rooted in \textit{stare decisis} but the same causes of action as well. This means that, just as American litigators have turned to public nuisance as their tort of choice for combating climate change via the judicial system, British attorneys could conceivably do exactly the same thing by mirroring the legal techniques used by their American counterparts. While there have not been any outright climate change suits reflecting the American model as of yet, several recent environmental nuisance cases could serve as a jumping-off point for an intrepid, enterprising British law firm.

For example, \textit{Lambert & ORS v. Barratt Homes Limited}, \textit{Rochdale Metropolitan Borough Council} was a June 2010 case involving the flooding of plaintiff’s property after construction of a residential housing development on property abutting the plaintiff’s land.\textsuperscript{230} Sometime during the process of building, the developer, Barratt, negligently filled in an existing drainage ditch, which caused damaging floods to the plaintiff’s property whenever it rained.\textsuperscript{231} Plaintiff Lambert sued Barratt for negligence due to Barratt’s filling in the drainage culvert and directly causing the flooding.\textsuperscript{232} More importantly, Lambert also brought action

\begin{footnotesize}
\begin{enumerate}
\item[226] Id. at art. 44, 47.
\item[229] These differences are admittedly not insignificant impediments, and clearly do act as a discouraging mechanism, making it riskier for the plaintiff to file an action in tort.
\item[230] Lambert & ORS v. Barratt Homes Ltd, Rochdale Metro. Borough Council, WL 2131697 *1 (High Court of Justice Court of Appeal, Civil Division 2010) (appeal taken from Q.B. (Manchester Division)). Barratt had purchased a parcel of land from Rochdale to construct a residential development, but Rochdale retained other parcels in the area. \textit{Id.}
\item[231] \textit{Id.}
\item[232] \textit{Id.} at *1–*2. The lower court found Barrett liable for flooding damages; Barrett did not appeal the judgment. \textit{Id.} at *3.
\end{enumerate}
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against the local Borough of Rochdale for “breach of a measured duty to take reasonable steps to abate the nuisance,” because Rochdale knew that water originating from the higher-elevation land it still owned was flowing naturally through the Barratt Homes development, and then overflowing onto the plaintiff’s property. Although the appeals court was skeptical of such a claim against Rochdale, it did not dismiss the case and engaged in a very relevant discussion of the so-called measured duty of care.

The Court of Appeal traced the heritage of “measured duty of care” back to an opinion of the Privy Council. It held that one who occupies land has a:

> general duty of care in relation to hazards, whether natural or man-made, occurring on his land to remove or reduce such hazards to his neighbour. The existence of the duty is based on the knowledge of the hazard, the ability to foresee the consequences of not checking or removing it and the ability to abate it by taking reasonable measures.

In determining the scope of a property owner’s responsibility (or what qualifies as a “reasonable” measure) to abate a nuisance, a number of factors are weighed. It is a subjective standard, assessing the expenditure required to effectively neutralize the nuisance, the ease or difficulty of abating the nuisance, the extent to which the damage that ultimately occurred was foreseeable, as well as policy considerations of justice, fairness, and reasonableness. In applying these factors to the flooding case sub judice, the court ruled that Rochdale, despite not being at fault, at the very least had a duty to “cooperate in a solution which involved the construction of suitable drainage and a catch pit on

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233 Id. at *2.  
234 Id. at *1–*2. The court summarized the case against the Borough as follows: Lambert argues that the Borough “came under a measured duty of care to take reasonable and appropriate steps to prevent water originating on the retained undeveloped land from accumulating in the blocked culvert and then spilling out onto the claimants’ properties in a manner and to an extent that it would not have done if the culvert had not been blocked.”  
236 Id. at *5.  
237 Id. at *5 (citing Goldman v. Hargrave (1967) 1 A.C. 645 (appeal taken from High Court of Australia) (P.C.)).  
238 Id. (citing Holbeck Hall Hotel v. Scarborough Borough Council (2000) Q.B. 836 (Court of Appeal); Caparo Industries v. Dickman (1990) 2 A.C. 605). In the case of an extensive, complicated, and costly abatement action, the court notes Lord Justice Megaw’s contention that a “landowner [may] have discharged his duty by saying to his neighbours, who also know of the risk and who have asked [the landowner] to do something about it, “You have my permission to come on to my land and to do agreed works at your expense”; or, it may be [remedied], “on the basis of a fair sharing of expense.” Id. at *7 (citing Leaky v. Nat’l Trust (1980) 1 Q.B. 485).
Besides illustrating UK courts’ acceptance of environmental nuisance cases, this case also shows that through measured duties of care, even those parties that do not cause a given nuisance can have a duty to, at the very least, participate in the resolution. Accordingly, in looking to Connecticut v. American Electric Power Co., California v. General Motors, or Native Village of Kivalina v. Exxon-Mobil Corp. as models, it does not seem an unreasonable jump for the UK government to bring a parens patriae suit against a particularly emissions-heavy industrial or commercial sector of the economy. The plaintiff government could seek monetary damages or an injunction, alleging that, much like the Borough of Rochdale, a defendant-polluter owed a measured duty of care to the country at large, despite the fact that the defendant is clearly not the sole contributor to climate change. Instead of sitting idly by, the polluter must play a role in the global effort to slow or halt climate change, especially because a substantial part of the nuisance (here, emissions contributing to climate change) originated on the defendant-polluter’s property, much like the water that caused the flooding in Lambert originated on Rochdale’s land. As the Privy Council reasoned, property owners owe a “general duty of care . . . to remove or reduce” hazards that occur on their property, “whether natural or man-made.” The plaintiff government might conclude that even if fault can also be attributed to companies, institutions, and people worldwide, this would not release the defendant-polluters from their obligation to “cooperate in a solution” by cutting their environment-fouling emissions or paying an amount in damages proportional to the defendant’s contribution.

Another option would be for a more local level of government to

239 Id. at *8.
240 See supra text accompanying notes 62–73.
241 See supra text accompanying notes 74–77.
242 See supra text accompanying notes 78–83.
243 See supra text accompanying notes 233–34 (describing the facts of the Lambert case and how water from the Borough of Rochdale’s higher elevation land flowed naturally down to the plaintiff’s property, flooding it).
244 Lambert, WL 2131697 at *5 (citing Goldman v. Hargrave (1967) 1 A.C. 645 (appeal taken from High Court of Australia) (P.C.)).
245 Id. at *8.
246 Determining appropriate, proportional, and fair judgments in climate change cases, whether injunctions or monetary damages, is a highly complicated and contentious, but crucially important issue, though beyond the scope of this article.
247 Take the South West region of England, for example, where, in 2000, the tourist industry supported 225,000 jobs in 11,000 businesses, welcoming over 21 million tourists who spent £3.5 billion. South West Region Climate Change Impacts Scoping Study, Warming to the Idea: Meeting the Challenge of Climate Change in the South West 17 (2003). Increased temperatures due to climate change could extend the tourist season, but wreak havoc on coastlines due to
take *parens patriae* action against the UK Department for Environment, Food and Rural Affairs (Defra), claiming that although Defra itself had not been a serious contributor to climate change, the agency had a measured duty of care to the citizenry to assist in minimizing the public nuisance that is climate change. In failing to effectively regulate emitters of pollutants that trigger climate change, a problem of which it was aware and had knowledge, Defra would be breaching the measured duty it owed to UK citizens. Much like the Borough of Rochdale, Defra, while not the party at fault, would have a minimum duty to “cooperate in a solution,” and perhaps an even greater obligation to make reasonable mitigation efforts because the issue in question—environmental protection—is under Defra’s direct supervision.

**VII. Treaty-Based Grounds for Climate Change Suits**

Treaties provide another possible cause of action for climate change plaintiffs because they serve as binding contracts for the nations which agree to ratify them. Numerous treaties exist which implicate climate change in some fashion, but this section will concentrate on two of the main European treaties focusing on environmental preservation and defense—the Aarhus Convention and the Alpine Convention. While they are far from assuredly successful sources for causes of action for attacking climate change, both treaties represent methods which could quickly develop into feasible *parens patriae*-like and non-*parens* rising sea levels and inland flooding, threatening the very beaches, rivers, and natural landscapes that attract so many tourists. In anticipation of this, the cities of South West England—Bristol, Plymouth, Swindon, Gloucester, Exeter, and Poole, among others—might band together in a mass torts class action against Defra to force the agency to take more serious steps in the fight against climate change.

Attorneys might assert that all UK citizens could be considered “neighbors” of a national government agency (i.e. Defra) to whom Defra has a duty to reduce, abate, or at the very least participate in the resolution of hazards and nuisances. See supra notes 237–38 & accompanying text.

A case of this sort would mirror *Massachusetts v. EPA*, see supra text accompanying notes 55–61.

Treaties do not afford plaintiffs with surefire causes of action for several reasons, some of which will be examined in this section. Without going into too much detail, there are several major reasons for this. Treaty language is frequently drafted in terms that are more like aspirational (and sometimes overly general and vague) objectives, instead of compulsory, concrete requirements. See, e.g., note 254 infra & accompanying text. Sometimes, treaties possess only weak enforcement mechanisms, or lack them completely. As such, and given international law’s often-tenuous position, treaty signatories may be able to openly defy their treaty obligations or withdraw from treaties entirely, with few or no consequences. The debate over whether treaties and international law are truly binding and effective ‘hard law’ tools, or merely looser ‘soft law’ guidelines, however, reaches beyond the scope of this article.
patriae-type suits.

A. THE AARHUS CONVENTION

The Aarhus Convention’s requirements in the way of permitting public participation in environmental decisions and supplying accessible environmental information create multiple potential strategies for climate change lawsuits. Signed by the European Commission, as well as every member of the EU except Slovakia, the Aarhus Convention’s objective is to allow every person to live in an environment “adequate to his or her health and well-being,” and “guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.”253 As such, each party agrees to “endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.”254 Specifically, Article 6 discusses “public participation in decisions on specific activities” and obliges each signatory to inform the general public of “the proposed activity[,]”255 “the nature of possible decisions[,]”256 “the public authority responsible for making the decision[,]”257 and “the envisaged procedure[.]”258 The convention includes provisions to allow ample time for the public to be informed and prepare a response to participate effectively in the environmental decision-making, if they so desire.259 Similarly, Article 6(6) demands that public authorities “give the public concerned” access to “all information relevant to the decision-making[,]” including at least:

253 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1 (June 25, 1998) 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]. The agreement is known as the “Aarhus Convention” because it was signed in Aarhus, Denmark.
254 Aarhus Convention art. 2(3), June 25, 1998, 2161 U.N.T.S. 447. Importantly, the language ‘endeavor’ is aspirational (e.g., each party endeavors to) rather than obligatory (e.g., each party shall).
255 Id. at art. 6(2)(a).
256 Id. at art. 6(2)(b).
257 Id. at art. 6(2)(c).
258 Id. at art. 6(2)(d). Also included in this section is the disclosure as much information as possible concerning: (i) The commencement of the procedure; (ii) The opportunities for the public to participate; (iii) The time and venue of any envisaged public hearing; (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public; (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and (vi) An indication of what environmental information relevant to the proposed activity is available; and (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.” Id.
(a) a description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions; (b) A description of the significant effects of the proposed activity on the environment; (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions; (d) A non-technical summary of the above; (e) An outline of the main alternatives studied by the applicant.260

Finally, Article 9 calls for all signatories to offer “a review procedure before a court of law or another independent and impartial body established by law” for “any person who considers that his or her request for information . . . has been ignored, wrongfully refused, . . . inadequately answered, or otherwise not dealt with in accordance with the provisions” of the Convention.261

Accordingly, under the Aarhus Convention, plaintiffs could take several potential paths for climate change litigation. NGO plaintiffs or local governments suing as parens patriae could sue national government signatories of the Aarhus Convention for denying them the opportunity to properly, fully, and meaningfully participate in environmental decision-making under Article 6. Through the government’s failure to adequately inform the plaintiffs about the proposed environmental activity,262 “the nature of possible decisions[,]”263 “the public authority responsible for making the decision[,]”264 or “the envisaged procedure[,]”265 the plaintiffs could argue that the public did not have the opportunity to examine or protest the proposed action. In turn, because the government continued on against public will without assessing the public’s reaction or taking the public’s views into account—suppose, for example, that overwhelming public opinion found the environmental project in question to be of grave concern—the government would thereby be breaching the Aarhus Convention.266 The plaintiff might then build its climate change lawsuit from there, alleging that by the government failing to properly disseminate crucial information and refusing to weigh public concerns, the government flouted its treaty obligations, thus causing injury to the plaintiffs. Finally, Article 9 would permit the plaintiffs to bring their case before a

260 Id. at art. 6(6)(a)–(d).
261 Id. at art. 9(1).
262 Id. at art. 6(2)(a).
263 Id. at art. 6(2)(b).
264 Id. at art. 6(2)(c).
266 Id. at art. 1.
court of law for official review, delaying or perhaps even permanently halting a government decision and/or an ensuing project.\textsuperscript{267}

Pursuant to Article 6(6) of the Convention, a similar \textit{parens patriae} claim might be brought by a local government or an NGO against a nation-state signatory, or perhaps even the European Commission, for lack of acceptable access to information “relevant to the decision-making” procedure.\textsuperscript{268} For an action alleging injuries due to climate change, plaintiffs would likely find it easiest to focus on subsection (c) because plaintiffs could concentrate on proving that the “description of the measures envisaged to prevent and/or reduce the effects, including emissions” did not provide complete and accurate explanation of what measures might be implemented to achieve this, in violation of Aarhus.\textsuperscript{269} Concerning subsection (e), the most practical assertion would seem to be that the defendant did not perform a good-faith study to determine the possible alternatives, thereby failing to meet the requirement of granting the general public full access to all relevant information agreed to in the Aarhus Convention.\textsuperscript{270} By flouting these provisions of Aarhus, the defendant governments would be refusing to supply thorough and truthful information to the general public about its plans, and consequently contributing to climate change more than they may have had the public had comprehensive (and obligatory) access to information.

\section*{B. The Alpine Convention}

The Alpine Convention,\textsuperscript{271} an agreement to preserve and protect the Alps, entered into by Germany, France, Slovenia, Liechtenstein, Austria, Switzerland, and the European Economic Community, is a second example of treaty-based climate change litigation that could sprout up in Europe.\textsuperscript{272} The Alpine Convention’s binding obligations to cooperate so as to protect and preserve the Alps in their natural state raises the possibility for legal actions in cases of non-compliance. The main objectives of the Alpine Convention are summarized in Article

\begin{itemize}
\item \textsuperscript{267} Id. at art. 9(1).
\item \textsuperscript{268} Id. at art. 6(6).
\item \textsuperscript{269} Id. at art. 6(6)(c).
\item \textsuperscript{270} Id. at art. 6(6)(e).
\item \textsuperscript{271} While the contracting parties to the Alpine Convention have drafted a “Declaration on Climate Change,” it is unbinding and merely “invites the Alpine states and the EU to include . . . the following recommendations for action to avoid a further progressive climate change . . . .” It focuses mainly on avoiding climate change and adapting to the effects of climate change. Declaration on Climate Change [Ministerial declaration made by the Alpine Conference], 2, Nov. 2006, http://www.alpconv.org (English translation provided by Permanent Secretariat of the Alpine Convention).
\end{itemize}
2(1), which states:

The Contracting Parties shall pursue a comprehensive policy for the preservation and protection of the Alps by applying the principles of prevention, payment by the polluter (the ‘polluter pays’ principle) and cooperation, after careful consideration of the interests of all the Alpine States, their Alpine regions and the European Economic Community, and through the prudent and sustained use of resources. Transborder cooperation in the Alpine region shall be intensified and extended both in terms of the territory and the number of subjects covered.\footnote{273}

The aims encapsulated in Article 2(1) are fleshed out in more detail in the subsections of Article 2(2), where the signatories agree to “take appropriate measures” in twelve different areas, ranging from “prevention of air pollution[\textit{,}]”\footnote{274}“conservation of nature and countryside[\textit{,}]”\footnote{275} and “mountain forests”\footnote{276} to “transport[\textit{,}]”\footnote{277} “regional planning[\textit{,}]”\footnote{278} and “energy.”\footnote{279} As with potential Aarhus Convention-based lawsuits, under the Alpine Convention the most likely plaintiffs are still NGOs or local and regional-level governments (again, on a \textit{parens patriae} theory that they, as quasi-sovereigns, and their citizens are suffering injury due to climate change).

Article 2(2)(c)’s purpose is to “drastically reduce the emission of pollutants and pollution problems in the Alpine region,” as well as similar harms coming from outside the region, “to a level which is not harmful to man, animals and plants.”\footnote{280} For potential climate change litigants, this general, sweeping language is probably a blessing, since it does not set out any specific, hard and fast measures that have to be met in order to give rise to liability by the signatories. Instead, complaints can be judged on a more subjective, arguable basis. One possible theory is whether the contracting parties have indeed undertaken steps to “drastically reduce emission of pollutants” to the point where they proved “not harmful to man, animals and plants.”\footnote{281} Take the small French alpine town of St.-Etienne-de-Tinée, for example, which

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\begin{itemize}
  \item \footnote{273}{Id. at art. 2(1).}
  \item \footnote{274}{Id. at art. 2(2)(c).}
  \item \footnote{275}{Id. at art. 2(2)(f).}
  \item \footnote{276}{Id. at art. 2(2)(h).}
  \item \footnote{277}{Id. at art. 2(2)(j).}
  \item \footnote{278}{Alpine Convention, art. 2(2)(b), Nov. 7, 1991, http://www.alpconv.org (English translation).}
  \item \footnote{279}{Id. at art. 2(2)(k).}
  \item \footnote{280}{Id. at art. 2(2)(c).}
  \item \footnote{281}{Id. at art. 2(2)(c).}
\end{itemize}
}
relies on snow cover to turn much of its economic engine during the winter ski season. As a result of continually warming temperatures because of global climate change, a “decrease in seasonal snow cover” has been observed at lower elevations in the Alps, thus potentially causing direct economic harm to St.-Etienne-de-Tinée and its citizens. Accordingly, St.-Etienne-de-Tinée might bring a lawsuit against the Alpine Convention’s contracting parties for failing to take preventative, cooperative, meaningful action—whether it be stricter emissions controls or putting more pressure on the international community—to “drastically reduce emission of pollutants . . . to a level which is not harmful to man, animals and plants.”

The Protocol on the Implementation of the Alpine Convention of 1991 Relating to the Conservation of Nature and the Countryside, as well as the Protocol on the Implementation of the 1991 Alpine Convention in the Field of Transport provide potential, albeit less likely, alternative means of taking action to counter climate change in European courts. The Conservation of Nature and the Countryside Protocol’s Article 14 calls for “the Contracting Parties [to] undertake to pursue the measures appropriate for preserving the indigenous animal and plant species with their specific diversity and in sufficient populations, particularly ensuring that they have sufficiently large habitats.” While it is not completely unforeseeable for climate change lawsuits to emerge pursuant to breaches of this article, the burden of proof for plaintiffs here would be very difficult to overcome because they would have to prove that the nation-signatories did not even “undertake to pursue measures” to help preserve indigenous species. In other words, a plaintiff would have to show that the parties to the treaty did not even consider such protective actions. This is quite a high hurdle to clear.

LikewiseArticle 3 of the Transport Protocol (sustainable transport and mobility), which only obligates the “Contracting Parties [to] undertake

283 See Alcamo, Moreno & Nováky, supra note 147 at 546.
285 Id. at art. 2(2)(c).
287 Id.
to contain, by means of a concerted transport and environmental policy, the negative effects and risks due to transportation . . .”288 faces the same problem, even though it directly implicates emissions in particular.289 Proving that the parties to the treaty at least attempted to control the detrimental environmental effects and associated risks generated by transportation will not be difficult, as they can in fact point to participation in the Alpine Convention itself as evidence.290 On top of these heavy burdens of proof, Article 5 of both Protocols makes it even more difficult for regional or local governments to sue parens patriae on Alpine Convention grounds by expressly including them in the proceedings and urging coordination between the various parties.291 By granting local and regional governments a legitimate opportunity to participate in and contribute to the environmental decision-making and plan of action, the Alpine Convention Protocols largely eliminate lawsuits by local and regional governments because these parties cannot complain ex-post when there was “solidarity of responsibility” for these decisions.292

**Conclusion**

American environmental tort law developed largely from a public nuisance,293 parens patriae294 foundation with its roots going back to early twentieth century Supreme Court cases that were frequently brought by one state against another for an environmental nuisance, like

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289 See id. art. 3(1)(a)(bb) (stating the importance of the environment must be taken into account so that “harmful emissions are reduced to a level which is not detrimental to the absorption capacity of the environments concerned”).
290 Id. at art. 3(1).
291 See Protocol on Conservation of Nature and the Countryside, art. 5 (“Each Contracting Party shall define, within its institutional framework, the best level of coordination and cooperation between the institutions and regional and local authorities directly concerned so as to encourage solidarity of responsibility, in particular to exploit and develop potential synergies when applying nature and countryside conservation policies and implementing measures under them. . . . The regional and local authorities directly concerned shall be parties to the various stages of preparing and implementing these policies and measures, within their competence and within the existing institutional framework.”); Transport Protocol, art. 3(1) (“Each Contracting Party shall define, within its institutional framework, the best level of coordination and cooperation between the institutions and regional and local authorities directly concerned so as to encourage solidarity of responsibility, in particular in order to exploit and develop synergies when implementing transport policies and the resulting measures. . . . The regional and local authorities directly concerned shall be parties to the various stages of preparing and implementing these policies and measures within the limits of their competence and within the existing institutional framework.”).
292 See Protocol on Conservation of Nature and the Countryside, art. 5; Transport Protocol, art. 3(1).
293 See supra Part I.C.
294 See supra Part I.A.
pollution. Several recent decisions have started to coalesce climate change actions into a fairly standard model and, while such cases have been met with mixed success, some are currently working their way up to the Supreme Court for review. Nevertheless, the question still remains: Will the flourishing of climate change lawsuits in the U.S. mean that the EU and its Member States will adopt the American technique and pursue similar claims in European courts in the name of environmental protection?

The short answer is the quintessential legal response of ‘it depends.’ There are a number of factors that weigh against Europe importing the American climate change litigation model, including significant structural obstacles and more general cultural disdain toward what is seen as the wild, American world of mass torts law. However, given the European penchant for environmental protection, a number of equally persuasive reasons indicate that the EU might cautiously welcome parens patriae-like climate change actions as well as other theories of climate change litigation. Not only could parens patriae actions in Europe be undertaken via statutory means, but American-style parens patriae lawsuits have already been encouraged in other fields of law, including antitrust, and German environmental NGOs have filed non-parens patriae climate change lawsuits as far back as 2004.

If climate change actions were to develop in the EU, a number of approaches could be taken by both EU authorities and multiple levels of Member State government to pursue them. Such approaches include seeking an injunction, monetary damages, or both. EU Directive 2004/35/EC offers perhaps the best parens patriae-type statutory cause of action with its emphasis on the “polluter pays” principle and dual options for preventative and remedial action against polluters. Admittedly, such suits would have to overcome the difficulty of sufficiently linking the polluters to the resulting harm, the origin of which can be tough to pinpoint when the harm is as diffuse as that of climate change. An alternative would be EU Directive 2003/87/EC,
establishing a greenhouse gas emissions trading scheme, which could allow for various suits for proper enforcement of the limits established by the Directive, where the plaintiff country or the EU as an institution might seek additional damages beyond mere enforcement for the injury caused.306

National law is another method for imitating American-style climate change litigation, whereby national, regional, or local level government files an action on behalf of its citizens against a public or private contributor to climate change.307 In France, French Environmental Code provisions offer a viable means of pursuing a parens patriae lawsuit stemming from climate change for damages or an injunction.308 Intrepid German attorneys may look to the Environmental Liability Act309 or the German Federal Emission Control Act310 as possible causes of action against polluters or failing government regulators. If the American model indeed spreads, the UK, with a common law heritage like the U.S., will most likely be the first European nation to enter into the climate change litigation arena, perhaps using one of its own nuisance cases as a foundation.311

Finally, European nations might employ environmental protection treaties like the Aarhus Convention312 and the Alpine Convention313 to sue fellow signatories who breach their obligations. The Aarhus Convention focuses more on informing the public and ensuring public participation in environmental decision-making314 while, in contrast, the Alpine Convention devises policies for preserving and protecting the natural state of the Alps.315 Nonetheless, each offers several distinct possibilities to act as a foundation for possible litigation, all of which are influenced by the American blueprint for addressing climate change through the court system.

At this point, it is far from clear whether the American climate change litigation model, which tends toward tort-based, parens patriae claims, will in fact make the trans-Atlantic journey and gain a foothold in Europe. There are certainly reasons to believe that neither the EU as a body, nor the EU Member States, will ever embrace American-
style climate change proceedings. Yet, by drawing on the U.S. version of climate change litigation to generate so many potentially feasible future causes of action, it seems equally likely, if not more so, that EU governmental plaintiffs might choose to attempt such actions. To be sure, ideas and tactics that may currently seem a bit far-fetched, difficult to prove, or overly attenuated, may become very solid legal arguments in the future, between advances in science and further investigation into various entities’ states of knowledge (in other words, who knew what when). This article has made a preliminary investigation into the U.S.’s brand of climate change litigation and explored whether it might be successfully exported across the Atlantic Ocean to be implemented in European courts. As with so much in law, how the real story unfolds will depend on myriad factors, and the legal community will have to wait and see how this burgeoning, but unpredictable, field of law plays out worldwide.