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THE TORTUOUS ROAD TO LIABILITY:
A CRITICAL SURVEY ON CLIMATE CHANGE LITIGATION IN EUROPE AND NORTH AMERICA

by Luciano Butti*

INTRODUCTION

Climate change is increasingly coming to the fore of public debate. Since the adoption of the Kyoto Protocol on December 10, 19971 and its entry into force on February 16, 2005,2 the international community has drawn increasing attention to the topic of carbon dioxide ("CO₂") emissions. The most recent international meetings and political trends, such as the Copenhagen Climate Conference of 20093 and the latest steps taken by the U.S. administration4 have resulted in perplexity and criticism from many international commentators. Critics have argued that “the Copenhagen Accord left most substantive disagreements unresolved.”5 However, these recent developments have paved the way for a more informed debate on global warming and environmental issues in general.6

The development of high-profile domestic and global discussion has also impacted the legal realm.7 In recent years, particularly since 2006,8 climate change lawsuits have increased in quantity and sophistication, presenting one of the newest challenges within the public law arena. The increased sophistication of climate change lawsuits is a result of individuals who recognize that climate regulation is an issue for both governments and citizens to pursue. This mounting public awareness is evident in U.S. climate change lawsuits. The vast majority of U.S. climate change-related claims are based on individual or communal actions meant to influence industrial and environmental policies by promoting regulation and impact assessment. The U.S. focus on “regulatory claims,” rather than on tort law claims, is mainly due to the difficulties individual applicants face in showing "locus standi," in demonstrating direct liability of the entity sued, and in finding a feasible pathway for redressability. On the other hand, European climate change litigation has blossomed out of private and governmental market-induced interests, as they have been brought primarily with respect to "carbon market" issues. Such a tendency has clearly been highlighted by European Union Courts’ case law concerning the European Union Emissions Trading System (“EU ETS”) Directive.

An additional method of linking climate change to legal claims is the presentation of individual actions for damages directly associated with global warming-related human rights violations. Although important, such an approach to climate change litigation is still far from being widely accepted by courts. The decisions of the European Court of Human Rights (“ECtHR”) and the Inter-American Commission on Human Rights (“IACHR”) are not encouraging for the prospects of the viability of human rights claims within the climate change context. Therefore, it may be a long time before climate change litigation becomes commonplace among individual rights claims.

This article provides an overview of the evolution of climate change related litigation, highlighting the differences and similarities between the U.S. and the European context. Additionally, the article analyzes the future perspective of such claims and concludes with a discussion concerning the possibility of linking climate change to human rights.

CLIMATE CHANGE LITIGATION:
THE UNITED STATES SCENARIO

Recent U.S. case law involving climate change demonstrates that most successful claims concern existing regulations. This is due to the specific aims that applicants pursue, using “existing law—primarily environmental law—to force or block regulatory behavior” in response to policy failures.10 Thus what climate change litigation has so far achieved is to effectively function as a “gap-filling role” as defined by Professor Hari Osofsky.11

The results of a recent study relating to climate change cases filed through the end of 2009 highlights that the courts play a pivotal role in governance, especially with respect to partially unregulated areas such as those of environmental law, regulation, and responsibility.12 The same survey depicts a situation where almost 40.5% of legal actions related to climate change are brought to achieve “substantive mitigation regulation.”13 Therefore, most controversies are based on the willingness of public bodies, states, companies, or non-governmental organizations (“NGOs”) to urge for public intervention, focusing on the necessity of the limitations of the promulgation of statutes and policies establishing more stringent limits on emissions. The 2006 U.S. Supreme Court case of Massachusetts v. EPA14 is probably the most distinguished example of a regulatory claim

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in the context of climate change. Twelve states, three cities, a U.S. territory, and several NGOs claimed that the Environmental Protection Agency’s (“EPA”) denial of a petition to address CO₂ emissions was an arbitrary exercise of the EPA’s mandatory function. Many petitions of the same nature have been filed by public and private actors in state and federal U.S. courts to promote enhanced regulation of carbon dioxide emissions and to force public authorities to take positive action in limiting CO₂ pollution. Such pressures by both public and private actors ultimately resulted in urging public authorities to reform the existing regulatory framework, which happened mainly through the modification of existing laws. Examples of these modifications may be found in some of the major environmental related acts such as the Clean Air Act of 2000 (“CAA”) or the National Environmental Policy Act of 1969 (“NEPA”). The aforementioned statistics uncontrovertibly demonstrate that in most circumstances “climate change litigation . . . represents an effort to fill perceived regulatory gaps.”

A second trend playing a dominant part in U.S. climate change litigation is what Professors David Markell and J.B. Ruhl have defined as “Procedural Monitoring, Impact Assessment, and Information Reporting.” Claims that fall within this category are similar in scope to those of the “regulatory claims model” outlined above, as they seek to impose on public or private entities new or more stringent obligations in monitoring, assessing, or disclosing the environmental impact of activities that such entities perform. An example of this type of claim is the complaint for declaratory and injunctive relief that Greenpeace, Friends of Earth, and four U.S. cities filed against a private investment corporation and a bank for the failure to produce an environmental impact assessment when developing heavily polluting overseas projects. Some fifty-five petitions of this kind have been filed in U.S. courts with the same monitoring and assessment purpose, representing the majority of the U.S. climate change related claims.

Thirdly, tort claims, mostly public nuisance and negligence, have also been brought in U.S. litigation. However, case law concerning the violation of individual rights and liabilities represents only a small minority of the legal arguments brought before U.S. judges when compared to the amount of cases aimed at pushing authorities toward a more efficient, large-scale regulation of CO₂ emissions. Although tort law as a basis for climate change challenges has advanced from a situation in which “such cases were . . . derided as frivolous long shots that would be shot down quickly” to one in which more reliance is placed in claims of individual harms from CO₂ emitters, such claims have yet to result in fully successful outcomes.

The difficulties complainants encounter are numerous when seeking redress of environmental wrongs linked with carbon emissions through tort actions. The primary hurdle for applicants is demonstrating substantial interest for standing. The “classic” U.S. theory of environmental locus standi does not fit the peculiar requirements of climate change. Climate change usually does not entail the existence of a specific natural feature (e.g. a river or a forest) which human behavior is about to despoil or endanger. On the contrary, climate change stems from a multiplicity of sources and affects different aspects of the environment including: arctic melting, rising sea-levels, and disappearing endangered species due to changed weather conditions; these are merely examples of the numerous, yet unpredictable, consequences of greenhouse gas emissions in the atmosphere.

Since it is difficult to identify the specific harms that may affect the environment and the specific species that are at risk of being endangered, it is that much more difficult for a judicial panel to grant standing to the plaintiffs.

The most difficult standing-related hardship that applicants must face when filing emissions-related court claims is proving an emitter’s direct responsibility. It is often argued that there are not a definitive number of entities liable for climate change, or that, on the contrary, this number is too great. Scholars have tried to overcome such hurdles by applying innovative theories on climate change liability, some of which aim to establish a link between local causation and local consequences. These doctrines may prove successful in those cases where the damages at stake are clearly identifiable (and, therefore, the obstacle of locus standi has already been surmounted) and where such damages occur in areas where major emitters directly operate. Also, the application of the environmentally based precautionary principle to tort litigation may provide a clearer basis for allocating liability, thereby providing a reverse burden of proof under which “economic actors are liable unless they can prove that their activities are environmentally harmless.” Such a principle though, despite having been frequently recognized as a “general principle of international law,” has not yet been accepted by U.S. courts, so that future applications within the United States still appear highly improbable.

However, even if these doctrines may sometimes prove successful, applicants may not always find the road to redress clear of impediments since “there is at present no international liability framework directly applicable to climate change-related damage.” This is demonstrated, for instance, by the unfortunate outcome of Connecticut v. American Electric Power Company, in which plaintiffs unsuccessfully alleged infringement by six U.S. power companies (alleged to be major polluters with respect to carbon dioxide emissions) of federal and state public nuisance law. Although the decision was reversed by the U.S. Court of Appeals for the Second Circuit, the District Court decision represents a valuable example of an approach that is still frequently adopted by U.S. courts. Even if it were proven beyond a reasonable doubt that climate change-related damages had actually occurred, it would nonetheless be difficult to identify the entity liable for damages.

Finally, there is one other barrier to justiciability which may be the most difficult to overcome. The “political question doctrine” permits judges to defer climate change questions for political consideration reason. The doctrine highlights the fact that climate change concerns are more appropriate for the legislative branch of the government than for the judiciary. The original District Court’s decision in Connecticut v. American Electric Power Co. aligned with this doctrine, which is now at the center of the American debate.
Nevertheless, tort claims have attracted a lot of attention from the public. Many “liability” actions result in widespread discussion. Some of the most renowned examples include the Inuit Circumpolar Conference Petition, which will be further examined below, or the Hurricane Katrina case, in which victims of the Katrina hurricane sought compensation from CO2 emitters for loss of private property and use of public property.

In light of the above, it can be concluded that the U.S. approach to climate change litigation has been primarily based on regulatory claims. Although it is debatable whether the CAA is the most suitable instrument for addressing such problems, it is nonetheless clear that judicial rulings cannot substitute for robust and stringent policies on global warming and carbon emissions, and that the “abdication of congressional responsibility” feared by some commentators should be avoided. Despite the fact that many, even within Congress, applauded the initiatives undertaken by the Supreme Court, viewing them as ways to enact CO2 controls without directly taking responsibility for them, it has been noted that such ceding of legislative power to non elected litigators and judges may ultimately endanger the principle of representative democracy.

**Climate Change Litigation: The European Scenario**

European climate change litigation has differed from that of the U.S. mainly because of the diverse and less homogeneous framework that characterizes Europe. Each European state tends to tackle domestic issues, including those related to the environment, with a unique and cultural-specific approach, not only from a legal perspective, but also from political and cultural points of view.

To identify a common European trend, it is necessary to reference the supranational political framework provided by the European Union (“EU”) institutions, which have been far-sighted in enacting a thorough regulation of greenhouse gas emissions. When analyzing EU climate change policies, recall that the EU, which was born out of the ashes of a purely economic entity, is facing a difficult process of integrating political, military, financial, and cultural aspects. This process is ongoing, with many purported goals still unachieved, and the road to further unification seems at present tortuous and uncertain. Although important steps have been taken to allow individuals to use the European Union Foundation Treaties, which include the defense of individual subjective rights, when European Union litigation is involved (the Luxembourg-based Court of First Instance and European Court of Justice) the concerns of applicants and defendants are arguably of a purely economic nature.

Directive 2003/87/EC established a greenhouse gas emission allowance trading system within the Community, commonly known as the Emissions Trading Scheme (“ETS”), which fixes a number of allowances for the quantity of CO2 that can be emitted by a single Member state over a particular period; the level of emissions in such period shall then “be equal to the established cap.” Under the ETS, Member states may buy and sell allowances, thereby creating a supply and demand model that forms a basis for the European carbon market.

As a result, carbon market litigation has ensued, resulting in a considerable number of proceedings before the Luxembourg Courts, which have been conceptually divided into the following three categories: challenges to the validity of the Directive, infringement proceedings, and challenges to decisions of the European Commission on the National Allocation Plans designed by Member states for re-allocating the allowances to national installations. The case of *Abraham and Others* slightly detaches itself from this categorization since the applicants asked the European Court of Justice (“ECJ”) to interpret the European Environmental Impact Assessment Directive (85/337/EEC) so that restructuring of the Liège-Bierset Airport could be included within the definition of “project” set out in the directive, and the environmental impact assessment could be considered mandatory for the restructuring.

Although many claims have been brought with respect to carbon market issues, regulatory claims are similarly predominant in Europe. Even the abovementioned case of *Abraham and Others*, although directly linked to the impact of potentially polluting works on the well being of a community, was aimed at triggering inclusionary interpretation by the ECJ of a specific regulation. Evidently, little room is left for individual applications aimed at recovering damages suffered as a result of global warming and, therefore, linked to CO2 emissions. Currently “EU ETS litigation is not concerned with the impacts of climate change . . . but rather the finessing of a new market mechanism from the perspective of key market actors within the established confines of EU law.”

The implications of this mainly regulatory approach to climate change litigation are even worse for Europe than they are for the U.S. Although the U.S. carbon emissions framework is in dire need of further regulation, and though litigation may not be a completely adequate substitute for legislative control, the benefits of litigation far outweigh the drawbacks of total inaction. In Europe, where the ETS is the core of the carbon emission regulatory framework, climate change related claims are primarily concerned only with the applications of such a scheme. The influence of the resulting jurisprudence thus ends up being considerably more limited, and the possibilities of evolution more scant.

In addition, other criticisms may arise. Firstly, as has already been mentioned, regulation is not considered by some as an appropriate task for judges. Even though such an assertion is debatable, it will always be difficult for counter-arguments to prevail, even from a theoretical standpoint. It may be argued, for instance, that the strict “separation of tasks” theory, which some British judges are already accustomed to, is often supported by governments, entities, and courts for nothing but specious reasons. Such arguments, though, appear particularly difficult to prove, and the “spatial separation of competence theory” remains difficult to rebut.

Secondly, once a regulatory mechanism has been successfully implemented, it may not suffice on its own to reduce the effects that greenhouse gases have on the environment. As Philippe Cullet argues, “[I]t cannot be expected that the Climate
Change Convention, the Kyoto Protocol, or any other protocol . . . would be sufficient to effectively mitigate global warming so as to avert the need for adaptation . . . .”75 In other words, the EU ETS Directive, as well as the other international instruments mentioned by Cullet, should be supported by a more complete framework of policies (for instance, liability schemes applicable at the international level), in order to be more effective at preventing—or at least in limiting—climate change.

Thirdly, a lack of political willingness to attain a stricter liability regime for ecological damages exists. The European Environmental Liability Directive, which entered into force in 200976 with the purpose of harmonizing the concept of pollution and the reinstatement of regimes throughout the region, has been until now heavily criticized for not having provided Europe with the expected uniformity with regard to liability for ecological damages.77 Similarly, the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,78 which established tougher rules for liability for environmental damages,79 has not yet been ratified or entered into force.80

The above analysis clearly does not favor a bright future for a comprehensive civil liability regime for damages stemming from carbon dioxide emissions.81 The outcomes of the efforts made by applicants in the human rights law arena are not any more encouraging.

**LINKING CLIMATE CHANGE TO HUMAN RIGHTS**

Recent attempts to link climate change claims to human rights principles have not achieved any revolutionary outcomes. While several human rights-based petitions alleging climate change damages have been filed in international or regional tribunals, none of them has yet come to a completely favorable conclusion for the applicants.

The Inuit petition filed at the IACHR,82 by far the most famous case in which a human rights-focused body addressed climate change, featured applicants seeking “relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States.”83 The action was brought against the U.S. for being the largest emitter of greenhouse gases and because, according to the applicants, it continually refused to undertake serious efforts to reduce emissions.84 The IACHR rejected the petition, holding that the information provided by the claimants did not enable the Commission to determine whether the alleged facts entailed a violation of the rights protected by the American Declaration of the Rights and Duties of Man.85 Even though a subsequent hearing could be held by the IACHR focusing on “the right to use and enjoy property; the right of peoples to enjoy the benefits of culture; and the rights to life, physical integrity, and security,”86 no further action has been taken.87

The Inuit petition outcome may sound surprising, especially in light of the fact that the IACHR had previously upheld indigenous people’s claims related to violations of rights analogous to those mentioned in the petition.88 However, the Inuit petition distinguishes itself from other indigenous communities’ legal actions because of its peculiar liability-related aspects. It is difficult to establish direct links of causation between emitters, no matter how big they are, and damages when climate change is involved. In addition, it can be argued that a decision holding the United States responsible for arctic melting and other damages related to CO\textsubscript{2} emissions would have ended up being too big of a step, providing legal basis for claimants all around the world to sue Western industrialized countries for sea-level rise, hurricanes, flooding, and other effects of climate change. It is undisputable that politically revolutionary decisions have to be balanced with political counter-interests that cannot be set aside: therefore, justices and commissioners tend to be cautious before allowing potentially destabilizing claims to succeed.

In Europe, claimants have not been any more successful. The ECtHR, based in Strasbourg and acting within the framework of the 1951 European Convention of Human Rights (“ECHR”),89 is renowned for being the most important tribunal for assessing human rights claims in Europe and one of the most efficient civil rights monitoring bodies in the world.90 However, the area pertaining to environmental damages is a partially neglected area in the ECtHR’s case law: successful claims in connection with the environment have so far been grounded mostly on Article 8 of the ECHR on protection of private and family life, broadly interpreted so as to include interferences with individuals’ well-being caused by public nuisance and environmental damage.91 In the context of violation of property rights,92 the Court has also recognized that “the environment is a value in itself in which both society and the public authorities take keen interest.”93 Although the ECtHR has recently begun to consider the precautionary principle, while assessing claims on unlawful interference on the applicant’s right to a healthy life,94 there are several obstacles that impede climate change-related claims from being justiciable within the ECHR framework.

First, for a claim to succeed, applicants must demonstrate a concrete interference of their rights beyond all doubt.95 Given that the Convention does not provide for an express right to a safe and healthy environment, whether the latter is included within the scope of Article 8 (the right to private and family life) or Article 1, Protocol 1 (the right to peaceful enjoyment of possession) of the ECHR, is a matter of interpretation. In light of the abovementioned case law, this hurdle may not seem insurmountable. However, climate change claims are different from the classic “environmental claims” brought before the ECtHR because in the former no explicit link between emissions and damages can be easily demonstrated.96

Second, in the unlikely case of an incontrovertible causal relationship between greenhouse gases and local damages in Europe, the “margin of appreciation” doctrine could serve as a convenient tool for the ECtHR judges to defer the matter to the national regulatory level.97 In short, once a private or public entity has satisfactorily demonstrated that domestic law on greenhouse gas emissions has not been infringed upon, the Court could decide to leave this sensitive area of judgment to the discretion of national Member states’ authorities (legislators and judges), thereby abiding by the Court’s subsidiary role.98
It has been recently argued that the ECtHR should address climate change within the scope of the right to property, namely that of protecting private low-carbon investors against risks of excessive state interference through regulatory changes and the imposition of heavy financial burdens. This innovative and practical approach is proof that there are strong countervailing interests (namely, those of investors and corporations) that should be balanced with the perceived need of establishing the civil liability of corporations and emitters. These countervailing interests are worth considering if their aim is “stimulating the flow of private capital in the implementation of low-carbon investments.”

In other fora, more attention has been drawn to the human rights implications of climate change. For example, in Gbemre v. Shell, the Federal High Court of Nigeria held that gas flaring, an unconstitutional practice in breach of the fundamental human right to health, also contributes to adverse climate change as it emits carbon dioxide. The case is particularly important because it is “one of the first where a national court held that climate change, like other environmental issues, may implicate human rights.” However, the Nigerian judges’ conclusions on climate change are not final and do not address global warming directly since gas flaring was the real underlying issue in the case.

In light of the above, it is clear that counter-interests have thus far prevailed over the commitment of states to take a strong standpoint against violations of fundamental human rights caused by human-induced global warming. Arguments against linkages between climate change and human rights law have been brought on several grounds, including the idea that international human rights actors and tribunals should prioritize other emergencies (which are also depicted as easier to cope with in legal terms) and concerns relating to the current trend of excessive anthropocentricity under which climate change is currently being approached. The most convincing explanation of the scant success obtained by climate change petitions in human rights fora seems to be, however, the one which links together hypothetical favorable judgments and their potential consequences, and which takes into account the countervailing economic interests of major public and private emitters. The unwillingness of domestic tribunals throughout the world to acknowledge the existence of “environmental refugees” (who often flee from their countries because of the consequences of climate change) and to grant to such migrants the state-onerous refugee status is clearly another side of the same story. In this sense, the obstacles that prevent human rights tribunals from intervening directly in the climate change issue are similar to those that actors seeking redress in domestic tort actions have found.

### Conclusion: Bleak Prospects for Civil Liability?

Notwithstanding the recent developments of the environmental liability doctrine, which seems to be undergoing a process of strong “internationalization,” it can be concluded that the road to clear and convincing guidelines for establishing liability in cases of climate change-originated damages still appears to be long and tortuous. Even those authors who have tried to provide climate change litigation advocates with a “more realistic understanding of the scientific reality of causation” that “will suitably address climate change” have had to deal with the fact that the proposed solution of making recourse to “probabilistic causation” still leaves several problems unsolved.

Moreover, all the proposed “technical” solutions for establishing airtight causational links tend to overlook the political and institutional problems underlying the task that courts should perform in relation to climate change. As it has been argued in this article, there is a lack of commitment by governments, judges, and other public and private multinational actors to allow the courts to take over the role, which many see as best left to domestic and international regulators. Should a court provide leeway for claimants to obtain redress for damages not strictly linked to local infringements, more petitions would proliferate and the consequences on the international equilibrium would be immense.

The scenarios discussed may be satisfying to those who are “skeptical that tort litigation will be an effective way to combat climate change.” However, from a different standpoint, this “skeptical” approach appears to be misplaced as it tends to confuse the regulatory function with that of assessing damages. While on the one hand it is difficult to rebut the critiques that regulation should be left to the government, on the other hand one could object that the “skeptical” approach would sound more reasonable if applied to regulatory claims, which have proved to be the most successful up to now. On the contrary, establishing standing, liability, and redressability is an appropriate task for the judiciary to carry out.

Civil liability is still far from taking root in the climate change litigation context for different reasons. They are grounded on the far-sightedness that judicial panels have so far demonstrated in dealing with this area of litigation. Judges are often conscious of the vast, wide-ranging consequences (involving, inter alia, economic, energetic, developmental, and migratory issues) that holding an American or European actor responsible for damages occurring thousands of miles away would entail in legal terms. Consequently, before innovative liability principles are established, decision-makers, such as national legislators, must ask if the climate change litigation floodgates are ready to be opened.

### Endnotes: The Tortuous Road to Liability

2. Id.

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Endnotes: The Tortuous Road to Liability continued on page 82

resource/docs/2009/cop15/eng/11a01.pdf.
The Endnotes: The Tortuous Road to Liability continued from page 36


7 Id. at 24 (“No collective challenge facing humanity has ever before attracted such attention, participation and political capital . . .”). See also Robert H. Cutting & Lawrence B. Cahoon, The “Gift” that Keeps on Giving: Climate Change Meets the Common Law, 10 Vt. J. Envt’l. L. 109, 111 (2008) (“Global warming issues have captured an Oscar, the Nobel Prize, and the attention of mainstream media and main street America.”).


9 Richard Ingham, Climate Change: Dogs of Law Are Off the Leash, Agence France-Presse (Jan. 22, 2011), http://www.google.com/hostednews/afp/article/AlEqM5jLQy3ee-D7N4ZQz5yDjVLA8ChElhQ.

10 Hari M. Osofsky, The Continuing Importance of Climate Change Litigation, 1 Climate L. 1878, 1886 (2010).

199 Id. at 399.

200 See id. at 401 (elaborating on why the “evapotranspiration (and thus for water storage) is considerably increased . . .: (1) less atmospheric moisture (drier air) increases the water vapour pressure deficit; (2) higher air temperatures (warmer air) further enhances the dryness of the air and the water vapour pressure deficit; and (3) longer dry periods will require more storage of plant available water in the soil.”).

201 Id.

202 COP/MOP-1 Report-Part Two, supra note 51, at Decision 16/CMP.1 Annex Definitions A(1)(a).

203 Kleidon, supra note 194, at 400.

204 Coe et al., supra note 16, at 1.

205 Id.

206 Kleidon, supra note 194, at 399.

207 See generally COP/MOP-1 Report-Part Two, supra note 51, at Decision 16/CMP.1 Annex Definitions A(1)(a).

208 Kleidon, supra note 194, at 404.

209 Lindsey, supra note 16.

210 Id.

211 Id.


213 Pimentel et al., supra note 169, at 421.

214 Id.

215 Id.

216 Id. at 416.

217 Stickler et al., supra note 161, at 2806.

218 Id.

219 Id.

220 Id.


222 Stickler et al., supra note 161, at 2806.

223 Id.

224 Id.

225 COP/MOP-1 Report-Part Two, supra note 51, at Decision 16/CMP.1 Annex Definitions A(1)(a).


227 COP-16 AWG-LCA, supra note 57, at III.C; Good Practice Guidance for Land Use, Land-Use Change and Forestry, supra note 106.

228 van Noordwijk et al., supra note 110, at 2; 2006 IPCC Guidelines for National Greenhouse Gas Inventories, supra note 107, at 1.5.

229 See generally Kyoto Protocol, supra note 45.


233 Kyoto Protocol, supra note 45.


237 COP-9 Decision IX/16, supra note 78, at A(e).


239 Id. ¶ 8(p).

240 UNFCCC, supra note 232, at 1, art. 2.

241 COP-16 AWG-LCA, supra note 57, at Annex 1(e).

242 Id.

243 See U.S. Gov’t. ACCOUNTABILITY OFFICE, supra note 67, at 2-3 (reviewing the issues of additional, measurement, verification, and permanence); RAMSEUR, supra note 67, at 21 (discussing the issue of leakage).

244 RAMSEUR, supra note 67, at 21.

245 van Noordwijk et al., supra note 110, at 2.

246 Pimentel et al., supra note 16, at 1118-19; Coe et al., supra note 16, at 1; Lindsey, supra note 16.

247 Market Failures and Externalities, supra note 13.

248 SMITH, supra note 3, at 70-75.

249 Miller, supra note 9, at 19.

250 van Noordwijk et al., supra note 110, at 2.

251 Wilde, supra note 1.
Substantial Interest” Requirement for Judicial Review of Planning Decisions

tial interest theory in connection with environmental law, see Rónán Kennedy, 
council on human RiGhtS policy

Compensation Fund as an Alternative to Tort Litigation

10-174) with the oral argument scheduled for April 19, 2011.

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ciple in inteRnational law

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33  Philippe Cullet, Sympo-


Rio Declaration on Environment and Development

3-14, 1992

See, e.g.

standing because they had not demonstrated particularized injury).

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, dissenting in part and concurring in part) (opining that petitioners lacked

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bulldozers and where injury is the subject of public outrage”).

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741-52 (1972) (Douglas, J., dis-

See, e.g.

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the nation). Amounts of such actions were filed in the U.S. before 2010, amounting to only six percent

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23  Markell & Ruhl,

20  Osofsky,

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919 (2010).

Id. at 935.

Id.

JOSEPHINE STEINER, LORNA WOODS & CHRISTIAN TWIGG-FLEESNER, E.U. LAW

3 (2006) (illustrating that the EU arose from the European Economic Community, which itself evolved out of the European Coal and Steel Community, established in 1951).


By way of example, art. 6(2) of the Lisbon Treaty (entered into force on December 1, 2009, now Art. 6(2) of the Treaty on European Union), provides: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” When realized, it is expected that this change will bring significant improvement for the European framework of human rights protection.

For the primacy of the economic aspects underlying the European Union framework, see ALEX WARBOSCH-LACK, EUROPEAN UNION: THE BASICS 60 (2004).


Id. at 13, 16, 27.


E.g., Case C-122/05, Comm’n v. Italy, 2006 E.C.R. I-65.


Id.

Id.

Ghaleigh, supra note 58, at 28-29.


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Frank J. Convery, Origins and Development of the EU ETS, 43 ENVIRO. & RESOURCE ECON. 391, 407 (2009) (“[T]he EU is the initiator and the operator of the world’s first and largest international emissions trading scheme.”).
arguments against judge-made regulation are many in legal theory. See, e.g., William Kristol & Jeffrey Bell, Against Judicial Supremacy, WEEKLY STANDARD, Dec. 4, 2000, at 11. See, e.g., the observations of Lord Hoffmann, according to whom some legal decisions (those concerning the allocation of resources, for example) should be deferred by judges to the Government. Secretary of State for the Home Department v. Rehan, [2001] UKHL 47, [62].


See Murray Hunt, Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Defherence,” in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 338 (Nicholas Bamford & Peter Leyland eds., 2003) (providing a critical reference to the so-called “spatial metaphor”).

Culter, supra note 32, at 115 (agreeing with the idea that regulation and allocation of greenhouse gases emissions would not be sufficient to mitigate global warming).

Id.


The Lugano Convention was adopted on June 21, 1993 within the framework of the Council of Europe.

Under Article 2.7(d), the definition of damages for the purposes of the Convention also includes “the costs of preventive measures and any loss or damage caused by preventive measures.”


See Watt-Cloutier, supra note 45. See id. at 1. See id. at 6.


See Kyrtatos v. Greece, 40 Eur. H.R. Rep. 16 (2003) (holding that there had been no violation of article 8 as the applicants had not been directly affected by urban development in the south-eastern part of the island of Tinos, which had changed the area from a wild natural habitat to a tourist attraction).


Id. at 130.


See Aminzadeh, supra note 95, at 238.

See id. at 262-64.

See id.


Id. at 240 (admitting that “defendants may not be selected based on moral culpability or the ease and efficiency with which they can abate their harmful activity”).


See David A. Grossman, Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation, 28 COUN. J. ENVTL. L. 1, 3-5 (2003) (illustrating the appropriateness of pursuing typical tort law goals in the context of climate change litigation).