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Daniel Hare

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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 G. Hare
Third year student, University of Maryland School of Law

Faculty Advisor
Prof. Donald Gifford, University of Maryland School of Law

Abstract: This paper analyzes how American-style climate change litigation might be adopted by the European Union (EU) and projects potential methods by which the EU might employ the U.S. model, if it indeed chooses to take the climate change battle to the courts. By synthesizing existing U.S. case law in the environment and climate change fields, the paper roughly defines the “American model” of climate change litigation as *parens patriae* actions, oftentimes based in the tort of public nuisance, brought by states and other sovereign entities against polluter-defendants. The structural differences between the common law United States and predominantly civil law European Union are substantial and the EU has traditionally been averse to enter too far into the American mass torts arena. Accordingly, Europeans have not yet undertaken these types of lawsuits on their side of the Atlantic.

This paper identifies and examines several realistic options for Europe’s possible espousal of the American climate change litigation model through EU law, national law of individual member states, and treaties. Although the comparison is admittedly imperfect, I conclude that by drawing on the blueprint of its American counterparts, the EU could viably use Directive 2004/35/EC (environmental liability with regard to the prevention and remedying of environmental damage and the “polluter pays” principle) and Directive 2003/87/EC (establishing a scheme for greenhouse gas emission allowance trading) in a *parens patriae*-like manner to hold defendants liable for damages caused by climate change. With case studies focused on France, Germany, and the United Kingdom, national law alternatives exist for individual countries, as well as regional and local governments, to take action on behalf of their citizens for injuries resulting from climate change, just like sovereign bodies in the United States have done. Finally, treaties – such as the Aarhus Convention and Alpine Treaty – offer yet another possible avenue for signatories, in their *parens patriae*-type capacities, to seek justice through the judiciary system for harms inflicted by climate change.
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I. INTRODUCTION

Debate may still be raging over how serious the effects of climate change may be¹ and over how significant the impact of human activities are as a cause of climate change,² but what cannot be debated is the increasing number of climate change disputes becoming enmeshed in the legal system.³ In the United States, climate change litigation has evolved into a somewhat consistent model with state governments⁴ generally bringing suit as parens patriae plaintiffs on the common law ground that polluter-defendants, through their conduct are contributing to the public nuisance that is climate change. In other words, American climate change litigation tends


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, SCIENCE & PUBLIC POLICY INSTITUTE 4–6 (March 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”).

³ See, e.g., Richard Ingham, Climate change: Dogs of law are off the leash, YAHOO! NEWS, Jan. 23, 2011, http://news.yahoo.com/s/afp/20110123/lf_afp/climatewarminglaw (noting that climate change litigation has gone “[f]rom being a marginal and even mocked issue . . . [to a] fast emerging . . . new frontier of law where some believe hundreds of billions of dollars are at stake”).

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 II.C.
to be torts-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, is a predominantly civil law-based system which relies heavily on legal code provisions and considers case law precedent of very secondary importance. The 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 paper proposes that while, for various reasons, the American climate change litigation model will likely not be adopted by the European Union or its Member States in its exact form, it is certainly not implausible 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 that has occurred across the Atlantic, in the United States.

Although the paper will certainly assess or evaluate to some degree the possible success rate of different proposed causes of action, its true purpose is rather to identify and analyze realistic methods to bring climate change lawsuits which might follow down the path that has been blazed by American litigators. In Part II, I discuss the historical foundation of the American climate change litigation model, clarify the how the paper will construe the term parens patriae, and summarize the legal background – including the relevant Supreme Court decisions – that exist in the public nuisance and climate change domains. Part III attempts to resolve the question of why there are essentially no parens patriae-like, torts-based climate change lawsuits as of yet in the EU, examining a number of structural factors and impediments. Part IV sets out and justifies the reasoning behind my belief that parens patriae-like climate change of the American mold may be poised to make an entrance onto the European judicial

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5 See infra Part II (notes 16–70 & accompanying text).
6 See infra Part III (notes 87–96 & accompanying text).
scene. In Part IV, I also clarify how this paper differentiates between *parens patriae* actions and more purely regulatory remedies. Part V 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 VI 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 VII 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 for France, Germany, and the United Kingdom. Finally, Part VIII proposes that treaties could be another viable option for government entities to bring *parens patriae*-type actions in the name of their citizens and explores how the Aarhus Convention and Alpine Convention might be used in this regard.

II. HISTORY OF THE AMERICAN, TORT-BASED, *PARENS PATRIAE* CLIMATE CHANGE LITIGATION MODEL

To determine if American-style climate change litigation could ever take root in Europe, it is first important to define what “American-style climate change litigation” is exactly. Given the current state of the case law in the United States, American climate change action can be roughly outlined as *parens patriae* lawsuits brought mostly by state or local government founded in the tort of public nuisance. Public nuisance cases in the environmental field trace their roots

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7 See infra Parts IV.A–C (notes 97–123 & accompanying text).
8 See infra Part IV.D (notes 124–128 & accompanying text).
9 See infra Part V (notes 129–163 & accompanying text).
10 See infra Part VI (notes 164–188 & accompanying text).
11 See infra Part VII.A (notes 189–208 & accompanying text).
12 See infra Part VII.B (notes 209–218 & accompanying text).
13 See infra Part VII.C (notes 219–240 & accompanying text).
14 See infra Part VIII.A (notes 241–258 & accompanying text).
15 See infra Part VIII.B (notes 259–280 & accompanying text).
16 See text accompanying notes 53–70 infra.
back to the early 20th century and lawsuits between American states. This precedent has helped to shape parens patriae standing in the United States.

A. The U.S. Supreme Court has defined the parens patriae doctrine very broadly.17

Parens patriae standing has been defined very broadly by the Supreme Court as an action where the State is asserting 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.20 If a State is only a nominal party – that is, if it does not have any of its own real interests at stake – parens patriae standing will not be granted.21 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.22 These quasi-sovereign interests range from citizens’ physical and economic health and well-being, to

18 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 law suit 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.’ ” Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 352–58 (2nd Cir. 2009) (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890)).
19 See Gifford, supra note 17 at 65 (noting that the Supreme Court’s language in Snapp, possibly its “most important parens patriae opinion, . . . provides an expansive understanding of parens patriae standing”).
20 Snapp, 458 U.S. at 601–02.
21 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.
22 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 (1921); 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).
23 Snapp, 458 U.S. at 607.
ensuring that the State is not unfairly denied its rightful position within the American federal system,\textsuperscript{24} to guarding the State’s natural resources, territory, and environment.\textsuperscript{25}

An important and overlapping justification for applying the expansive definition of 
\textit{parens patriae} to climate change litigation in the U.S. and European Union, 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.\textsuperscript{26} 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.”\textsuperscript{27} In both the U.S. and EU, when the central government passes a law which 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.\textsuperscript{28}

To help clarify when a State may seek relief in federal court as \textit{parens patriae}, the Supreme Court suggested comparing situations in the United States with those same situations had they occurred in independent countries,\textsuperscript{29} indicating that \textit{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 \textit{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

\textsuperscript{24} Id.
\textsuperscript{25} Gifford, \textit{supra} note 19 at 65–66.
\textsuperscript{26} Snapp, 458 U.S. at 608.
\textsuperscript{27} Id. The Court further elucidated that “a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population.” \textit{Id}.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 603.
of their citizens had they been completely sovereign nations.\textsuperscript{30} Through their 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.\textsuperscript{31} so parens patriae suits in federal court filled the void as a viable alternative.\textsuperscript{32} Justice White, writing for the \textit{Snapp} Court, described how an instructive factor in determining whether a State would have 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{33}

\textbf{B. How this paper will construe the term “parens patriae”}

Given this background, this paper will construe parens patriae actions equally, if not more, broadly to include both straightforward parens patriae, climate change-focused tort cases and instances that admittedly stretch the definition of parens patriae environmental tort suits. Accordingly, this extended interpretation of parens patriae will comprise several parens patriae-like actions – namely, (1) actions brought by American states or EU members (on behalf of their citizens) against other (state or federal\textsuperscript{34}) governments/agencies or private defendants, and (2) actions brought by the federal government or EU Commission on behalf of citizens against state

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 604. Although the members of the European Union are obviously not states comprising a single country as the American states, and as such, have not surrendered as many powers to the central government as the American states, the analogy is clear. Therefore, this same federalism argument can be applied to the EU Member States as well, albeit to a lesser degree.
\item \textit{Id.} at 604 (quoting \textit{Georgia v. Tennessee Copper Co.}, 206 U.S. 230, 237 (1907)). \textit{But see}, Gifford, \textit{supra} note 19 at 67–68 (discussing how whether or not a state has surrendered powers to the federal government is of little relevance when a state brings a parens patriae lawsuit against a private defendant).
\item \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. European Commission: Application of EU law, \textit{What is EU law?}. \textit{EUROPA} Jan. 13, 2011, http://ec.europa.eu/eu_law/introduction/treaty_en.htm. 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, http://curia.europa.eu/jcms/jcms/Jo2_6999/.
\item “Federal” in the EU context would mean lawsuits against the EU Commission.
\end{enumerate}
\end{footnotesize}
governments/agencies or private defendants. Secondly, this paper acknowledges that the concept of *parens patriae* does not make as much sense in a civil law setting as it does in a common law context, but continues nonetheless with what are still very relevant and valuable U.S.-EU climate change litigation comparisons. To be sure, neither the elasticity of this *parens patriae* definition, nor the slight incompatibility between the *parens patriae* theory and civil law in any way detract from the analytical and comparative purposes of the paper.

**C. A brief background on public nuisance –the ambiguous “Ill-Defined Tort”**

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 has maintained that “no other tort is as vaguely defined or poorly understood as public nuisance.”

Public nuisance has been used to find tort liability for activities as incredibly dissimilar as releasing untreated sewage, a street gang, 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 (Second) further explains that factors helping to determine where interference with a public right is unreasonable, thus leading to a public nuisance, include:

(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.

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36 Id.
37 Id. at 776 (citing Miotke v. City of Spokane, 678 P.2d 803 (Wash. 1984)).
38 Id. (citing People *ex rel.* Gallo v. Acuna, 929 P. 2d 596 (Cal. 1997)).
40 Id. (citing Comet Delta, Inc. v. Pate Stevedore Co., 521 So.2d 857 (Miss. 1998)).
41 Restatement (Second) of Torts §821B (1979).
42 Id.
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.\(^{43}\)

In any case, as ambiguous and obscure the definition of the tort of public nuisance may be, there is little doubt that it offers the most appropriate cause of action for climate change litigators. Certainly it is one of the most popular torts\(^ {44}\) under which such actions to defend and preserve the environment have been (and will be) pursued.

D. *Parens patriae* in action: environmental & climate change examples from American case law evolve into a relatively coherent model from 1906–2010

Modern-day *parens patriae* climate change actions developed from public nuisance lawsuits generally brought by state-level government so as to defend their natural environments from undue harm. In the early 20\(^{th}\) century, the Supreme Court recognized, in two separate cases, suits brought by states as quasi-sovereigns alleging a public nuisance in the environmental context. In *Missouri v. Illinois*,\(^ {45}\) the state of Missouri brought suit against the state of Illinois and the sanity district of Chicago for discharging sewage into a canal, which emptied into the Illinois river.\(^ {46}\) This in turn emptied into the Mississippi river sending “great quantities” of sewage downstream and “poison[ing] the water of [the] river, upon which various of [Missouri’s] cities, towns, and inhabitants depended, as to make it unfit for drinking, agricultural,\(^ {47}\)

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\(^{43}\) Gifford, *supra* note 35 at 774 (quoting Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) (internal quotations omitted)).

\(^{44}\) 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.

\(^{45}\) 200 U.S. 496 (1906).

\(^{46}\) *Id*. at 517.
or manufacturing purposes.” While the court ultimately dismissed the action, because it could not be ascertained that the sewage from Chicago was in fact causing the injury to Missouri, it did provide a basis for other, similar suits to follow.

Just over a year later, the Supreme Court decided *Georgia v. Tennessee Copper Co.*, where the state of Georgia sued, as *parens patriae*, 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. Significantly, the Court recognized 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 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* over 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. EPA*, 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. Illinois*.  

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47 Id.  
48 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”).  
49 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.  
50 206 U.S. 230 (1907).  
51 Id. at 236.  
52 Id. at 237.  
53 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”).  
*Tennessee Copper.*\(^{55}\) 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.\(^{56}\) Concluding that in its *parens patriae* role, Massachusetts meets the criteria for standing—
injury,\(^{57}\) causation,\(^{58}\) and remedy,\(^{59}\) the Court proceeded to rule that the Clean Air Act authorized the 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.”\(^{60}\) Although *Massachusetts v. EPA* was neither a public nuisance lawsuit, nor an action against a private defendant, but actually a statute-based suit against a federal agency, the standing analysis remains crucial in permitting states to bring lawsuits as quasi-sovereign *parens patriae*.

Similarly in *Connecticut v. American Electric Power Co.*\(^{61}\) the Second 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\(^{62}\) and that they properly stated a claim under the federal common law of nuisance.\(^{63}\) 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.\(^{64}\) The Second Circuit

\(^{55}\) Id. at 518–19 (quoting extensively from *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)).

\(^{56}\) Id. at 519 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

\(^{57}\) Id. at 521.

\(^{58}\) Id. at 523.

\(^{59}\) Id. at 525.

\(^{60}\) Id. at 528.

\(^{61}\) 582 F.3d 309 (2nd Cir. 2009).

\(^{62}\) Id. at 334–36.

\(^{63}\) Id. at 352–58.

\(^{64}\) Id. at 316.
reasoned that because Connecticut met the Snapp test\textsuperscript{65} for state parties as \textit{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,’ “\textsuperscript{66} – they were granted standing.\textsuperscript{67} 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 \textsection 821B(2)(a)\textsuperscript{68}.” The court distilled the public nuisance claim, noting that the “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.”\textsuperscript{69} 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.\textsuperscript{70}

Three other significant cases also merit brief mentions as contributors to the U.S. climate change litigation model. First, \textit{California v. General Motors Corp.}\textsuperscript{71} involved a \textit{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.\textsuperscript{72} The court dismissed the case for lack of subject matter jurisdiction,\textsuperscript{73} holding that,

\textsuperscript{65} \textit{Id.} at 335–36 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, \textit{ex rel.}, Barez, 458 U.S. 592, 603 (1982)).
\textsuperscript{66} \textit{Id.} at 336 (quoting People of New York by Abrams v. 11 Cornwell Co., 695 F.2d 34, 40 (2nd Circ. 1982), \textit{vacated in part on other grounds}, 718 F.2d 22 (2nd Cir. 1983) (en banc)).
\textsuperscript{67} 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 \textit{parens patriae}” for more than a century, the Second Circuit had no reason to deny standing in this case. \textit{Id.} at 339 (2nd Cir. 2009) (quoting Int’l Primate Prot. League v. Admins. of Tulane Educ. Fund, 500 U.S. 72, 77(1991) (emphasis added by 2nd Cir.)).
\textsuperscript{68} \textit{Id.} at 352–53 (citing \textit{In re} StarLink Corn Prods. Liab. Litig., 212 F.Supp.2d 828, 848 (N.D. Ill. 2002) (quoting Restatement § 821B(2)(a)).
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.} at 353.
\textsuperscript{71} 2007 WL 2726871 (N.D. Cal. 2007).
\textsuperscript{72} \textit{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. \textit{Id.}
among other deficiencies, it proposed a non-justiciable political question that demanded a policy determination the court was not permitted to make.\textsuperscript{74}

Two years later in \textit{Native Village of Kivalina v. Exxon-Mobil},\textsuperscript{75} a non-\textit{parens patriae} example, a federal district court judge dismissed for lack of subject matter jurisdiction a claim brought by an Inupiat Eskimo government against multiple energy, oil, and utility companies for their roles in causing global warming.\textsuperscript{76} 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.\textsuperscript{77} The federal district court again dismissed for lack of subject matter jurisdiction,\textsuperscript{78} and highlighted political question concerns\textsuperscript{79} as well as standing issues.\textsuperscript{80}

The most recent decision came in May 2010 when the \textit{en banc} Fifth Circuit skirted the entire issue and dismissed an appeal because of lack of quorum, after the last-minute recusal of a judge left only eight judges left to decide the case on a court of sixteen.\textsuperscript{81} The appealed case involved a group of plaintiff Gulf Coast landowners who alleged that the defendant 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

\textsuperscript{73}Id.
\textsuperscript{74}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”).
\textsuperscript{75}663 F.Supp.2d 863 (N.D. Cal. 2009).
\textsuperscript{76}Id. at 868.
\textsuperscript{77}Id. 868--69.
\textsuperscript{78}Id. at 868.
\textsuperscript{79}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.’” \textit{Id.} (citing Connecticut v. Am. Elec. Power Co. Inc., 582 F.3d 309 (2d Cir. 2009)).
\textsuperscript{80}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]”).
\textsuperscript{81}Comer v. Murphy Oil USA, 607 F.3d 1049, 1053–54 (5th Cir. 2010) (\textit{rehearing en banc}).
Hurricane Katrina." 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. In an lengthy opinion, the Fifth Circuit overruled the federal district court, and judged that the plaintiffs had standing for all of their claims under Mississippi state law, had standing for their nuisance, trespass, and negligence claims under federal law, and that the issue did not present an unjusticiable political question. While not a parens patriae example like many of its counterparts, Murphy Oil illustrates some of the most recent judicial activity in the American climate change law arena.

III. WHY EUROPE CURRENTLY LACKS TORTS-BASED, PARENS PATRIAEE-LIKE CLIMATE CHANGE LITIGATION

If American-style class action litigation was poised to invade Europe or had done so already by 2009, as some commentators had suggested, where are all the parens patriae climate change suits that have become rather en vogue in the United States? Thus far in the EU and its Member States, parens patriae climate change litigation has been extremely limited.

82 Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009).
83 Id. at 860–61.
84 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.”).
85 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).
86 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 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.” Id. at 879 (internal quotations omitted).
87 See, e.g., News and Features: 360 News, Are Class Actions Coming to Europe?, LLOYD's Feb. 18, 2009, http://www.lloyds.com/News-and-Insight/News-and-Features/360-News/Business-360/Are_class_actions_coming_to_Europe (noting that the managing director of the European Justice Forum, Malcolm Carlisle, says they are already in Europe “under the name of collective actions”) (internal quotations omitted). Even as far back as 2006, commentators were suggesting that class actions were slowly but surely making their way across the Atlantic to Europe. See Heather Smith, Is America Exporting Class Actions to Europe? THE
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 simply not necessary in the vast majority of EU Member States because of the regulation-heavy, civil law traditions of the EU nations, save the United Kingdom. In civil law jurisdictions, judges “initially look to code provisions to resolve a case,” rather than precedent, as in common law countries. 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.” With an extensive *code napoleon* 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 any number of statutory violations from either their own national legal code or European Union law. Accordingly, when an EU Directive, which would have made European class actions easier to pursue, was proposed in October 2009, Commission President Jose Manuel Barroso supposedly withdrew it himself at the last minute due to lack of support from Member States.
Several other smaller, though not insignificant, structural impediments have helped prevent American-style climate change litigation from taking hold in the EU. Though they probably have less of an impact on \textit{parens patriae} suits than suits by NGOs or other private parties (because the government generally has ample resources and can use its own civil servant attorneys), they are nonetheless worth noting. For example, in much of Europe,\textsuperscript{92} unlike the United States, 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.”\textsuperscript{93} Under the contingency fee arrangement in the United States, 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.\textsuperscript{94} Thus, in Europe, smaller groups and individuals with fewer resources up-front who would have to rely on a contingency fee idea to be able to afford legal representation are discouraged from filing suit.

Moreover, “loser pays” rule instituted in much of Europe can have a serious dampening effect on litigation, because it forces plaintiffs to pay not only their own litigation expenses, but also those of their opponent’s lawyer.\textsuperscript{95} 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.\textsuperscript{96} Even for a government, the looming possibility of such an expense checks the tendency to bring suit under uncertain or new theories, for fear of angering the electorate, whose taxes helped fund such a risky lawsuit.

\section*{IV. Why the EU Might Be Ready for an Influx of \textit{parens patriae}-Like Climate Change Litigation Which Resembles the American Model}

\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
Indeed European skepticism of American class action litigation remains strong, it having been labeled 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 discussed in section III *supra*, the EU’s also limits group litigation to “‘qualified entities.’” Yet, despite all 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 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 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. *Parens patriae* climate change suits could apply statute-based causes of action, in accordance with the founding Treaty on European Union**
Indeed, the American model of *parens patriae* climate change litigation could be partially adopted through statute-based suits instead of public nuisance, tort-based actions. As it values protecting and preserving the environment very highly and often takes proactive steps to do so before the United States, 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.*” 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.” 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. Given this language, it is not entirely unreasonable to imagine that it could be stretched to supply the European Union – as an entity – 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.

**B. American-modeled *parens patriae* examples have already been alluded to in other fields of law in Europe**

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104 Id. (emphasis added).
105 Id. at 124.
106 Id. at 124–25.
107 Id. at 123.
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 instance, the Attorneys General of several U.S. states have already encouraged the EU to adopt parens patriae action in this area as America has done, explaining that “Member State parens actions to obtain damages on behalf of their citizens for European Community antitrust violations appears to fit within the European legal framework.”\textsuperscript{108} The letter 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.\textsuperscript{109} The Attorneys General suggested that parens patriae actions could be brought by government authorities in national courts, “with the European Commission participating as amicus curiae.”\textsuperscript{110}

Shortly thereafter, in the antitrust field, the European Commission ruled against MasterCard, deciding that its multilateral interchange fees “violate[d] EC Treaty rules on restrictive business practices . . . .”\textsuperscript{111} Though an inquiry by the European Commission rather than an actual case, it 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 these excess 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.\textsuperscript{112}

\textsuperscript{108} Letter from the Attorneys General of California, Arizona, Connecticut, the District of Columbia, Illinois, Louisiana, Massachusetts, Mississippi, New Mexico, the Northern Mariana Islands, Ohio, Oregon, Rhode Island, Utah, Washington, West Virginia to European Commission, Directorate-General for Competition, Unit A-1: Antitrust Policy (Apr. 21, 2006).
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{112} Id. (emphasis added).
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. For example, on multiple occasions, the Commission has sued to force Member States to abide by EU Directive 2003/87/EC (establishing a scheme for greenhouse gas emission allowance trading).\footnote{See, e.g., Case C-122/05, Comm’n v. Italy, 2006 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[ll] its obligations under that directive”); Case C-107/05, Comm’n v. Finland, 2006 http://europa.eu (declar[ing] that, by failing . . . to adopt the laws regulations and administrative provisions necessary to comply with Directive 2003/87/EEC . . . the Finnish Republic has failed to fulfil[ll] its obligations under that directive”).} 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, or NAP, (because of several violations on Poland’s part), it was overruled in a counter suit by Poland.\footnote{Case T-183/07, Poland v. Comm’n, 2009 http://europa.eu ¶¶ 9–14.} 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 – it was “empowered only to verify the conformity of the measures taken by the Member State with the criteria” laid out in the Directive.\footnote{Id. at ¶ 89.} 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.”\footnote{Id.} In doing so, the court preserved a stronger potential parens patriae role for the Commission in the effort of controlling climate change. As can be seen in the directives, while this ultimate enforcement parens patriae power resides in the Commission, much of the
grassroots *parens patriae* action is likely to be taken by the individual Member States, empowered through EU legislation.\(^{117}\)

**C. Non-\textit{parens patriae} climate change litigation has been undertaken by two environmental NGOs in Germany**

In a rare example of climate change-related litigation that has already taken place in Europe, although non-\textit{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.\(^{118}\) On July 15, 2004 they 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.”\(^{119}\) The NGOs requested information, via the Environmental Information Act of the Federal Republic of Germany (Umweltinformationsgesetz des Bundes, UIG) from the German government in July 2003 to determine projects funded by Hermes which generated greenhouse gas emissions and contributed to global warming.\(^{120}\) Yet, by August 2003, the German government rejected the request.\(^{121}\) 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.”\(^{122}\) 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

\(^{117}\) See infra Part V (Directive 2004/35/EC); Part VI (Directive 2003/87/EC); Part VIII.A (Aarhus Agreement).


\(^{119}\) Briefing/Press Release, Germanwatch & BUND, German government sued over climate change (no date).

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.
did not constitute “environmental information” within the meaning of the UIG, and instead implied that such activities could potentially affect elements climate change.”

D. American-style parens patriae type judicial solutions are distinguishable from other responses frequently utilized in the EU such as pure regulation

Because the European legal system is almost exclusively code-based and relies heavily on statutes, the opportunities for classic torts-based lawsuits are somewhat limited. Other remedies, such as criminal sanctions, and especially regulatory remedies, are possible alternatives. It must be conceded that there can be overlap between a very expansive definition of parens patriae action, particularly the “passive” parens patriae cases described in Part IV.B, and solutions which are more purely regulatory in nature. This paper interprets the difference as the judgment which is sought after 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 will be considered parens patriae.

Precisely because regulations can be quite easily ignored, bent, ineffectively implemented, complied with only partially, or flouted outright by private parties, Member States, or even EU agencies, it is left the European Commission, other Member States, or regional/local governments to insist that the laws are properly enforced. In these cases of non-compliance with EU regulations or EU directives, it follows that the European Commission, EU Member

124 See supra text accompanying notes 89–90
125 See supra text accompanying notes 113–117.
States, or regional/local governments might find it necessary to take *parens patriae* action on behalf of the respective jurisdiction’s citizens.\(^\text{128}\) These suits would take on many of the characteristics of more traditional tort actions – seeking mitigation/damages for the injury caused and/or the injunctive relief comprising full compliance plus additional concessions. This paper will treat the resemblance between classic, American tort-based, *parens patriae* climate change litigation and the previously described examples of potential European *parens patriae*, tort-style litigation as imperfect, but roughly interchangeable. Certainly the comparison is satisfactory enough to warrant the claim that latter may be at least modeled off of the former.

\textbf{V. Statutory-based, *parens patriae*-like climate change litigation could be effectuated pursuant to EU Directive 2004/35/EC}

Possibly the greatest source for future statutorily-based, *parens patriae* climate change litigation in the European Union is under Directive 2004/35/CE (on environmental liability with regard to the prevention and remedying of environmental damage).\(^\text{129}\)

\textbf{A. The “Polluter Pays” principle seeks to place liability on those entities which cause pollution}

The Directive begins by echoing the Treaty, stating that prevention and remedying of environmental damage should be implemented through the furtherance of the ‘polluter pays’ principle.”\(^\text{130}\) Therefore, 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.”\(^\text{131}\)

\(^\text{128}\) 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. \textit{See supra} text accompanying notes 23–25.
\(^\text{130}\) \textit{Id.} at 56.
\(^\text{131}\) \textit{Id.}
In Article 3, the ‘polluter pays’ principle is applied against damages or imminent threat of damages caused by an expansive list of activities,\textsuperscript{132} including air polluting “installations subject to authorisation in pursuance of Council Directive 84/360/EEC.”\textsuperscript{133} 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 \textit{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 \textit{parens patriae} action\textsuperscript{134} – “public authorities should ensure the proper implementation and enforcement of the scheme provided for by this directive.”\textsuperscript{135} 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 NGOs.\textsuperscript{136} Article 11(1) bestows upon Member States the \textit{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.”\textsuperscript{137} Article 12 more explicitly shows how \textit{parens patriae} action may be “requested” by “natural or legal persons [,]” including non-governmental organizations.\textsuperscript{138} If a person or organization is “affected or likely to be affected by environmental damage [,]” they may submit proof “relating to instances of

\textsuperscript{132} Id., art. 3 at 60.
\textsuperscript{133} Id., annex III ¶9 at 71. \textit{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).
\textsuperscript{134} \textit{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.
\textsuperscript{136} Id. at 58.
\textsuperscript{137} Id. at 63.
\textsuperscript{138} Id.
environmental damage or an imminent threat of such damage and . . . request the competent authority to take action under this Directive.”

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 observation must, at a minimum, have their request for action considered by the competent authority.

B. Possibilities for preventative (ex-ante) and remedial (ex-poste) action enable plaintiffs to bring suits more easily and hold those at fault liable

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. This is a key factor which dramatically strengthens the possibility of future litigation under Article 5, because it relieves the plaintiff of having to prove real, presently-existing damages and so many of climate change’s most serious effects have yet to occur. 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

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139 Id.
140 Id., art. 12 at 63.
141 See id., art. 2 at 60 (defining ‘imminent threat of damage’ as “a sufficient likelihood that environmental damage will occur in the near future”).
142 Id., art. 5 at 61.
necessary preventive measures.”  

Under this theory, for example, the Netherlands, with approximately half its territory below sea level, could sue major European greenhouse gas emitters to require them to substantially reduce their pollution levels in order to prevent the imminent threat of rising sea levels and flooding. Actual damage would not need to be proven.

Under Article 6 Remedial Action, Member States could sue for remedies to climate change damages 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 . . . .” Currently for instance, an Article 6 claim could be brought by one of the northern European 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.

C. The requirements to prove causal link can prove challenging when the harm is as diffuse as the injuries associated with climate change, so it may help if countries and EU bodies work cooperatively in their attempts to tackle the issue

To prove polluter liability under the statute 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).” Although neither “fault [nor] negligence [nor] intent on the part of

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146 See Alcamo, Moreno & Nováky, *supra* note 143 at 563 (noting that one of the projected consequences of climate change is a rising sea level off the coast of Western Europe).
148 See Alcamo, Moreno & Nováky, *supra* note 143 at 563 (noting observed effects of climate change upon agriculture in Europe).
the operators need be established,” 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. The European Court of Justice has interpreted a causal link as “plausible evidence capable of justifying [such 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. . . .” As in the United States, 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.” This seems targeted at excluding climate change from the list of actionable harms, by nature, climate change generates precisely these “widespread, diffuse” damages to which the entire world as a whole contributes by emitting greenhouse gases.

150 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 http://europa.eu. See also Joined Cases C-378/08, 379/08, 380/08 Raffinerie Mediterranee (ERG) SpA v. Ministero dello Sviluppo economici & Others, 2010 http://europa.eu ¶70 (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”).


152 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 http://europa.eu. See also Joined Cases C-378/08, 379/08, 380/08 Raffinerie Mediterranee (ERG) SpA v. Ministero dello Sviluppo economici & Others, 2010 http://europa.eu ¶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”).


154 See ROSINA BIERBAUM, MARIANNE FAY, ET AL., THE WORLD BANK, WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE 53 (Bruce Ross-Larson, ed.) (2010) (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:
Still, the Directive admits that “environmental protection[ ] is . . . a[n inherently] diffuse interest”\textsuperscript{155} 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{156} Advocate General Kokott explained that because liability can be so 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{157} The same is true, she opines, 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{158} 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{159} Therefore, one may suspect that the European courts may be more sympathetic to such a claim than their American counterparts.

The ultimate question, then, comes down to one of proof of 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 (3) a causal link between elements (1) and (2).

If so, a flood of *parens patriae* litigation might ensue from both Member States, cooperating 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”), and/or the EU as a whole (because 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). Future *parens patriae* suits might also be brought, on behalf of aggrieved Members States and citizens, against entire sectors of private industry – the aviation industry, automobile manufacturers, marine shipping industry, passenger & freight rail – under Articles 5 and 6, demanding preventative action or remedial action for the impacts of climate change. *Parens patriae* suits against entire polluter industries would most resemble the American *People v. General Motors Corp.* case because both attempt

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161 Council Directive 2003/87, art. 1, 2003 O.J. (L 275) 34 (EC) (emphasis added). *See also* Consolidated Version of the Treaty on European Union, Dec. 29, 2006, 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.”).

162 Standing to sue could be established via the Treaty on European Union. *See* Consolidated Version of the Treaty on European Union, Dec. 29, 2006, 2006 O.J. (C 321) 124 (noting that 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”).
to impose enterprise liability across an entire industry sector – albeit, one through the tort of public nuisance and the other through Directive 2004/35/EC. 163

VI. STATUTORY-BASED, PARENTS PATRIAE-LIKE CLIMATE CHANGE LITIGATION COULD BE EFFECTUATED PURSUANT TO EU DIRECTIVE 2003/87/EC

An alternative, albeit less valuable, 164 EU law cause of action for combating the 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.” 165 It was developed after the Sixth Community Environment Action Programme identified climate change as an priority issue to be resolved and required that a “Community-wide emissions trading scheme” be established by 2005. 166 The Council saw 2003/87/EC as a means of helping the EU and its Member States to achieve compliance with the Kyoto Protocol, 167 approved by Council Decision 2002/358/EC in April 2002. 168

A. Requirements and obligations exist for Member States as well as EU bodies under Directive 2003/87/EC

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163 A full analysis of enterprise liability in this regard is outside the scope of this paper, but in short, the parens patriae 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,” [1994] CONSUM. L.J. (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.’ ”).
164 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 restricting potential defendants to public entities such as the EU or its agencies and Member States.
166 Id. at 32.
167 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.
168 Id.
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.\(^{169}\) 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.”\(^{170}\) 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.\(^{171}\)

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.”\(^{172}\) The Directive further indicates that “[t]he Commission should, in particular, consider policies and measures at Community level in order that the

\(^{169}\) *Id.* at 33.

\(^{170}\) *Id.*, art. 16 at 37.

\(^{171}\) *Id.*. See also *id.* (imposing “excess emissions penalt[ies]” of €100 on operators who exceed their allowances for every ton of carbon dioxide equivalent emitted without an allowance, as well as forcing the operator to “surrender an amount of allowances equal to the excess emissions” during the next year.) Crucially, the general, even vague language from the Directive allows for debate, discussion, and argument regarding the interpretation of its provisions (thus providing opportunities for *parens patriae* lawsuits seeking damages or specific performance), rather than strictly black-and-white enforcement/non-enforcement of the Directive, which implies an entirely regulatory response. *See infra* note 183 & accompanying text.

transport sector makes a substantial contribution to the Community and its Member States.” achieving their climate change goals. 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.

Moreover, under Article 9, the Commission is empowered to disallow a Member State’s national allocation plan, or any part of it, if it is incompatible with the criteria set out by the Directive.

B. European Union courts have given various interpretations of the extent of the EU Commission’s power pursuant to EU Directive 2003/87/EC, which could expand or limit its ability to pursue climate change actions

European Union courts have interpreted the Commission’s power under the Directive 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. 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

173 Id., ¶25 at 34 (emphasis added).
174 Id., ¶30 at 34 (emphasis added). See also Consolidated Version of the Treaty on European Union, Dec. 29, 2006, 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.”).
trading scheme.” 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.

On the other hand, in *Estonia v. Commission* and *Poland v. Commission*, the European Court of Justice limited the authority of the Commission, and therefore its ability to pursue action against Member States. The court ruled that only Member States have the power to draft national allocation plans – the Commission may not substitute their own findings. In other words, the Commission exceeded its power in “by substituting its [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.”

C. Viable public defendants to potential suits under Directive 2003/87/EC include Member States as well as the European Union or its agencies

Seeing as the objectives of the Directive are to use the trading scheme to achieve reductions in greenhouse gas emissions and meet obligations imposed by the Kyoto Protocol (to help combat climate change – deemed a priority by the European Council and Parliament), Member States and the EU itself could use the Directive in multiple ways to litigate against climate change. Instead of bringing suit against private parties as under Directive 2003/87/EC, 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 on behalf of EU citizens against the Member States found in violation of Directive 2003/87/EC.

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177 *Id.*
178 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.
180 *Id.*
181 *See supra* text accompanying notes 172–175.
182 *See supra*, Part V.
First, 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.183 Suppose for example, the German automobile manufacturing industry is generating significant levels of greenhouse gas emissions. The German government penalizes each violator, according to Directive 2003/87/EC Article 16, but only a very minimal amount, clearly having no deterrent effect on the hypothetical polluters. Spain and Italy might bring a parens patriae action on behalf of their citizens, for current and potential injuries184 caused by climate change demanding that Germany strengthen its penalties against polluters185 and meet the obligations imposed on all Member States by the Directive. Likewise, the 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, failing 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


184 See e.g., Alcamo, Moreno & Nováky, supra note 143 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).

rules are implemented[,]” as required by the Directive, thereby causing pollution contributing to climate change.\textsuperscript{186}

Member States might also sue the EU or one of its agents, in situations somewhat analogous to a \textit{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.”\textsuperscript{187} In particular, Member States might argue that the EU was liable for major contributions to climate change because the Directive \textit{specifically} implicates the Commission in controlling emissions from the transport sector across the entire Community.\textsuperscript{188} As a result, Member States might be directly experiencing the negative consequences of climate change. 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.

\section*{VII. Three Case Studies Show How National Law Could Be Applied as a Basis for \textit{Parens Patriae}-Like Climate Change Litigation in Europe}

Apart from European Union law, \textit{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 very closely mirror that which has begun to flourish in the United States.

\subsection*{A. France}

\subsubsection*{1. Environmental interests occupy a very highly respected position in French law}

\begin{footnotesize}
\footnotesize\textsuperscript{187} \textit{Id.}, ¶25 at 34.
\footnotesize\textsuperscript{188} \textit{Id}.
\end{footnotesize}
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.189 The Code then 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.”190 Meanwhile, in defining “fundamental interests of the nation” which cannot be infringed upon, the French Penal Code lists, among other things, “the balance of its natural surroundings and environment.”191 These provisions set out several basic, but probably overly general, causes of action for future climate change plaintiffs.192

The Code clearly establishes the possibility of parens patriae lawsuits in the environmental context through Article L. 132-1, which certainly seems sets 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:

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190 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 projects that have a major impact on the environment or on town and country planning.” Id.
192 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.
“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.”193

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 the reimbursement by the
responsible parties of the expenses incurred by them.”194 Articles 142-1 through 142-3 confer
similar rights upon approved environmental protection associations, allowing them to “institute
proceedings . . . for any grievance relating to” preservation of nature and the environment.195
Moreover, Article 142-3 affirmatively permits such environmental associations to “seek redress
on behalf of” individuals 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.196

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, which consists of “preventing, monitoring, reducing or
removing atmospheric pollution, preserving air quality,” and conserving energy.”197 In France,
the “State ensures, with the help of local authorities . . . the monitoring of air quality and its

194 Id.
197 Law No. Article L220-1 – French Environmental Code (English translation), Journal Officiel de la République
effects on health and the environment.” 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. 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 which do not suitably prevent or reduce atmospheric pollution and fail to mitigate its effects, thus flouting the objectives stated under Article L. 220-1 and resulting in damages to the plaintiff as a result of the corresponding climate change. 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.

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 in charge of 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,

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200 Id.
202 The Conseil d’Etat (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 authority.” It “advises the Government on the preparation of bills, ordinances and certain decrees,” in addition to answering governmental “queries on legal affairs and conduct[ing] studies upon the request of the Government or through its own initiative regarding administrative or public policy issues.” Conseil d’Etat (The Council of State): Home, CONSEIL D’ETAT OFFICIAL WEBSITE, Jan. 19, 2011, http://www.conseil-etat.fr/cde/en/.
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’Etat 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 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’Etat law set a very high ceiling for building and
construction-related pollution and allows for significant deforestation, in an effort to boost
commercial and industrial development across the country. Seeing an imminent threat to its
tourist-drawing (and therefore, economy-propelling) natural sights and attractions, the regional
government of Provence-Alpes-Côte d’Azur might file suit against the Conseil d’Etat, à la

\[204\] Id.
\[205\] Id.
\[206\] Id.
\[207\] See Provence-Alpes-Cô
te d’Azur, notre région: Tourisme: Bienvenue chez vous 2010: Devenez un visiteur
privilégié de notre région!, OFFICIAL WEBSITE OF THE PROVENCE-ALPES-CÔTE D’AZUR REGION, Jan. 19, 2011,
millions de touristes chaque année... Provence-Alpes-Cô
te d’Azur est l’une des premières destinations touristiques
au monde. » [With nearly 35 million tourists each year, Provence-Alpes-Côte d’Azur is one of the top tourist
destinations in the world.]). The site also highlights the importance of the environment to the region, explaining
how Provence-Alpes-Côte d’Azur has the most protected natural spaces (i.e. parks, reserves) out of any region in
France [“Provence-Alpes-Côte d’Azur arrive en tête des régions françaises pour la labellisation de ses espaces
naturels protégés”], and that Provence-Alpes-Côte d’Azur possesses an exceptional natural and cultural heritage
with a richness of flora and fauna [“Il existe en Provence-Alpes-Côte d’Azur un patrimoine naturel et culturel
exceptionnel [et aussi] les richesses de la faune et de la flore . . . ”]. Provence-Alpes-Cô
te d’Azur, notre région:
Tourisme: Bienvenue chez vous 2010: Devenez un visiteur privilégié de notre région!, OFFICIAL WEBSITE OF THE
lenvironnement-au-coeur.html.
Massachusetts v. EPA for failure to draft suitable regulations to preserve and protect the environment. In failing to do so, the Conseil d’Etat, the regional government would argue is contributing to detrimental climate change which is adversely affecting (or will soon affect) the region both environmentally and economically. Such a suit might seek damages and an injunction against the high level of permitted pollution. 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 via Conseil d’Etat decree, similar to Article L. 224-1, except with regard to automotive vehicles, which were excepted under Article L. 224-1.208

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 (ELA) supplies a difficult, but not impossible means of assigning liability to polluters for climate change harms

First, the Environmental Liability Act (ELA) provides for “facility liability for environmental impacts” 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 (the statute defines facilities as permanent structures, machines, or vehicles), the facility operator “shall be liable to the injured person for the damage caused.”209 Section 3 of the ELA defines environmental

208 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.

209 Bürgerliches Gesetzbuch [BGB] [Civil Code] [Environmental Liability Act] Dec. 10, 1990, Bundesgesetzblatt (Federal Law Gazette) [BGBl] I 2634, as amended, art. 1, §1 translated from German by the Institute for
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.”

In theory, the city of Cuxhaven (located on the coast of the North Sea), for instance, might sue major greenhouse gas emitting industries in its parens patriae capacity for contributing to future property damage due to flooding, à la Native Village of Kivalina v. Exxon-Mobil. Unfortunately for Cuxhaven, its hypothetical climate change litigation faces several major obstacles within the ELA itself. First, because climate change, by nature is said to be caused by the aggregate emissions of people worldwide and not that of one particular party, the presumption of causation granted by ELA §6 would be eliminated. Under §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 §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.


210 Id. at §3.

211 See Gifford, supra note 17 at 66–67 (describing jurisdiction of residence an “independent variable 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 her”). Oppositely, in pre-climate change, American public nuisance cases, “the victim’s harm was directly related and causally connected to her identity as a resident of the [jurisdiction] that sought to vindicate her 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 climate change litigation in the U.S., see Gifford, supra note 17 at Part VI.A.2.


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) might offer another avenue for litigating against climate change in Germany, through its Article 47 – Clean Air Plans provision. Article 47 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. A clean air plan may be instituted in the precautionary sense as well, to thwart potentially detrimental environmental consequences in advance. 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,
4. an assessment of any forthcoming changes in emission . . .
5. details on the [emission] levels . . . and
6. the measures envisaged for the reduction and prevention of air pollution.

Given these provisions, creative climate change litigators – more likely NGOs or local-level government authorities in this case, because the German government would not be likely to 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. Article 47(2)(6) requires that all clean air plans contain a

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215 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.
216 Id.
description of the “measures envisaged for the reduction and prevention of air pollution[.]” so if plaintiffs had experienced 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.  Plaintiffs 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 imposes on the worldwide ecosystem, the German government had contributed to climate change, injuring the plaintiffs.  

C. The United Kingdom seems to act as a half-way point between the U.S. and EU, with common law actions that could function almost exactly as they do in America

While American law has been influenced by many sources, its truest ancestor is 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 United States. Because so much of the American legal system descended from the English common law model, it only makes sense that today – some 400 odd years later – the 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 III supra, the United Kingdom’s legal system is quite similar to its American counterpart, and therefore shares not only the common law system rooted in 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 by mirroring the legal techniques used by their American

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217 Id.
218 Id.
219 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.
counterparts. While there have not been any outright climate change suits reflecting the American model as of yet, several recent environmental nuisance cases could supply a jumping-off point for an intrepid, enterprising British law firm.

For example, \textit{Lambert & ORS v. Barratt Homes Limited, 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.\footnote{Lambert & ORS v. Barratt Homes Ltd, Rochdate Metro. Borough Council, (2010) WL 2131697 *1 (High Court of Justice Court of Appeal (Civil Division)) (appeal taken from Q.B. (Manchester Division)). Barratt had purchase a parcel of land from Rochdale to construct a residential development, but Rochdale retained other parcels in the area.} 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.\footnote{Id.} The plaintiff sued Barratt (the developer) for negligence by its filling in the drainage culvert and directly causing the flooding.\footnote{Id. at *1–*2. The lower court found Barrett liable for flooding damages; Barrett did not appeal the judgment. \textit{Id.} at *3.} More importantly, plaintiff Lambert also brought action against the local Borough of Rochdale for “breach of a measured duty to take reasonable steps to abate the nuisance,”\footnote{Id. at *2.} 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.\footnote{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.”} Although the appeals court was skeptical of such a claim against Rochdale, it did not dismiss the case\footnote{Id. at *9.} and engaged in a very relevant discussion of “measured duty of care.”

The High Court of Justice 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.\textsuperscript{226}

In determining the scope of a property owner’s responsibility (or what qualifies as a “reasonable” measure) that must be taken 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 which ultimately occurred was foreseeable, and considerations of justice, fairness, and reasonableness.\textsuperscript{227} Applied to the flooding case \textit{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 their retained land.”\textsuperscript{228}

Besides the fact that this case clearly indicates how accepting UK courts have been of environmental nuisance cases, the more crucial point is that through measured duties of care, even those parties which do not cause a given nuisance can have a duty to, at the very minimum, participate in the resolution. It does not seem an unreasonable jump then, for the government to bring a \textit{parens patriae} suit against a particularly emissions-heavy industrial or commercial sector of the economy, looking to \textit{Connecticut v. American Electric Power Co.},\textsuperscript{229} \textit{California v. General Motors},\textsuperscript{230} or \textit{Native Village of Kivalina v. Exxon-Mobil Corp.}\textsuperscript{231} as models. The plaintiff government could seek monetary damages or an injunction, alleging that, much like the

\begin{itemize}
\item \textit{Id.} at *5 (citing Goldman v. Hargrave (1967) 1 A.C. 645 (appeal taken from High Court of Australia) (P.C.)).
\item \textit{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.” \textit{Id.} at *7 (citing Leaky v. Nat’l Trust (1980) 1 Q.B. 485).
\item \textit{Id.} at *8.
\item See supra text accompanying notes 61–70.
\item See supra text accompanying notes 71–74.
\item See supra text accompanying notes 75–80.
\end{itemize}
Borough of Rochdale, the defendant-polluter owed a measured duty to the country at large, despite the fact that the defendant clearly is not the sole contributor to climate change. The polluter cannot sit idly by, but must play a role in the global effort to slow or halt climate change, especially because a substantial part of the nuisance (emissions which promote climate change) originates on the defendant-polluter’s property, as the water which caused the flooding in *Lambert* originated on Rochdale’s land.\(^{232}\) 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.”\(^{233}\) The plaintiff government might conclude that even if fault can be attributed to companies, institutions, and people worldwide, this does not release the defendant-polluters from their obligation to “cooperate in a solution”\(^{234}\) by cutting their environment-fouling emissions or paying an amount in damages proportional to the defendant’s contribution.\(^{235}\)

Another option would be for a more local level of government\(^{236}\) to take *parens patriae* action against the UK Department for Environment, Food and Rural Affairs (Defra), claiming that though Defra itself had not been a serious contributor to climate change, the agency had a

\(^{232}\) *See supra* text accompanying notes 223–224 (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).


\(^{234}\) *Id.* at *8.

\(^{235}\) 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 paper.

\(^{236}\) 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 rising sea levels and inland flooding, threatening the very beaches, rivers, and natural landscapes that attract so many tourists. *Id.* 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.
measured duty of care to the citizenry to assist in minimizing the public nuisance that is climate change. In failing to regulate effectively 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 direct Defra supervision.

VIII. TREATY-BASED GROUNDS FOR CLIMATE CHANGE SUITS

Treaties provide yet another possible cause of action for climate change plaintiffs as 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 environmental preservation and defense – the Aarhus Convention and the Alpine Treaty. While they are far from surefire, assuredly successful causes of action for attacking climate change contributors, both treaties represent methods which could quickly develop into feasible parens patriae-like and non-parens patriae type suits.

A. The Aarhus Convention’s demands for permitting public participation in environmental decisions and accessible environmental information create potential strategies for climate change suits

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

237 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 226–227 & accompanying text.
238 A case of this sort would mirror Massachusetts v. EPA, see supra text accompanying notes 54–60.
information, public participation in decision-making, and access to justice in environmental matters . . . ″241 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.”242 Specifically, Article 6 discusses “public participation in decisions on specific activities” and obliges each signatory to inform the general public of “the proposed activity[,]”243 “the nature of possible decisions[,]”244 “the public authority responsible for making the decision[,]”245 and “the envisaged procedure[.]”246 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.247 Similarly, Article 6(6) demands that public authorities “give the public concerned” access to “all information relevant to the decision-making[,]” including at least:

“(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.”248

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242 Id. at art. 2(3).
243 Id. at art. 6(2)(a).
244 Id. at art. 6(2)(b).
245 Id. at art. 6(2)(c).
246 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.
247 Id. at art. 6(3).
248 Id. at art. 6(6)(a)–(d).
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.\textsuperscript{249}

Accordingly, plaintiffs could take several potential paths for climate change litigation using Aarhus. NGO plaintiffs or local governments suing as parents patriae could sue national government signatories of the Aarhus Agreement for denying them the opportunity to properly, fully, and meaningfully participate in environmental decision-making under Article 6. Through the government’s failure to inform adequately the plaintiffs about the proposed environmental activity[,]\textsuperscript{250} “the nature of possible decisions[,]\textsuperscript{251} “the public authority responsible for making the decision[,]\textsuperscript{252} or “the envisaged procedure[,]\textsuperscript{253} the plaintiffs could argue that the public did not have the opportunity to examine the proposed action. In turn, because the government continued on against public will, without assessing the public’s reaction or taking their views into account – that the environmental project in question was of grave concern – thereby breaching the Aarhus Agreement,\textsuperscript{254} the government failed to control pollution and, ultimately, contributed to climate change via omission, causing injury to the plaintiffs. Finally, Article 9 would permit the plaintiffs to bring their case before a court of law for official review.\textsuperscript{255}

Pursuant to Article 6(6) of the Convention, a similar parents patriae claim by local government or an NGO against the nation-state signatory, or perhaps even the European

\textsuperscript{249} Id. at art. 9(1).
\textsuperscript{250} Id. at art. 6(2)(a).
\textsuperscript{251} Id. at art. 6(2)(b).
\textsuperscript{252} Id. at art. 6(2)(c).
\textsuperscript{253} Id. at art. 6(2)(d).
\textsuperscript{254} Id. at art. 1.
\textsuperscript{255} Id. at art. 9(1).
Commission, for lack of acceptable access to information “relevant to the decision-making.”\textsuperscript{256} 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{257} 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 Aarhus.\textsuperscript{258} 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 access to information.

\textbf{B. Alpine Convention’s\textsuperscript{259} 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 Alpine Convention, 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 potential treaty-based climate change litigation that could

\textsuperscript{256} \textit{Id.} at art. 6(6).
\textsuperscript{257} \textit{Id.} at art. 6(6)(c).
\textsuperscript{258} \textit{Id.} at art. 6(6)(e).
\textsuperscript{259} 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).
The main objectives of the Alpine Convention are summarized in Article 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.”

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[,]” “conservation of nature and countryside[,]” and “mountain forests” to “transport[,]” “regional planning[,]” and “energy.” As with potential Aarhus-based lawsuits, under the Alpine Convention, the most likely plaintiffs are still NGOs or local and regional-level governments (again, on a parens patriae theory that they, as quasi-sovereigns, and their citizens are suffering injury as sovereigns because of 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.” For potential climate change litigants, this general, sweeping language is probably a blessing, since it does not sets out any hard, specific measures which 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 – whether or not the

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261 Id. at art. 2(1).
262 Id. at art. 2(2)(c).
263 Id. at art. 2(2)(f).
264 Id. at art. 2(2)(h).
265 Id. at art. 2(2)(j).
266 Id. at art. 2(2)(b).
267 Id. at art. 2(2)(k).
268 Id. at art. 2(2)(c).
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.”269 Take the small French alpine town of St.-Etienne-de-Tinée, for example, which relies on snow cover to turn much of its economic engine during the winter ski season.270 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,271 thus 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 contracting parties for failing to take preventative, cooperative,272 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.”273

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 “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

269 Id. at art. 2(2)(c).
270 See Tourisme: Histoire: Saint Etienne de Tinée et ses Hameaux, OFFICIAL SITE OF SAINT ETIENNE DE TINEE, Nov. 10, 2010 http://www.sainttiennedetinee.fr/index.php?id=8548 (explaining how the development of winter mountain sports, particularly skiing, helped the town take off economically and socially) (“Aussi, le développement des sports de montagne, le ski en particulier . . . ont enfon [sic] donné à la Commune un essor économique et social si longtemps attendu.’’).
271 Alcamo, Moreno & Novák, supra note 143 at 546.
273 Id. at art. 2(2)(c).
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 – they would have to prove that the nation-signatories did not even “undertake to pursue measures” to help preserve indigenous species – in other words, that the parties to the treaty did not even consider such protective actions – quite a heavy burden to prove indeed.

Likewise Article 3 of the Transport Protocol (Sustainable transport and mobility), which only obligates the “Contracting Parties [to] undertake to contain, by means of a concerted transport and environmental policy, the negative effects and risks due to transportation . . . .” faces the same problem, even though it directly implicates emissions in particular. Proving that the parties to the treaty at least “undert[ook] to contain . . . the negative [environmental] effects and risks due to transportation” will not be difficult, as they can in fact point to participation in the Alpine Convention as evidence. 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. By granting local and regional

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275 Id.
277 See id. at 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”).
278 Id. at art. 3(1).
279 See Protocol on Conservation of Nature and the Countryside, art. 5, Dec. 20, 1994, http://www.alpconv.org (English translation provided by Permanent Secretariat of the Alpine Convention) (“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
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.280

IX. Conclusion

American environmental tort law developed largely from a public nuisance,281 parens patriae282 foundation with its roots going back to early twentieth century Supreme Court cases frequently brought by one state against another for an environmental nuisance, like pollution.283 Several recent decisions have started to coalesce climate change actions into a fairly standard model and, while overall such cases have been met with mixed success, some are currently working their way up to the Supreme Court for review.284 But the question remains: Will the flourishing of climate change lawsuits in the United States mean that the European Union 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 “law” response – it depends. There are a number of factors which weigh against Europe importing the American climate change litigation model, including significant structural obstacles and more general cultural disdain toward what is seen

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281 See supra Part II.B.  
282 See supra Part II.A.  
283 See supra Part II.  
284 See supra Part II.C.
as the wild, American world of mass torts law. \(^{285}\) 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 types. \(^{286}\) Not only could *parens patriae* actions in Europe be undertaken via statutory means, \(^{287}\) but American-style *parens patriae* lawsuits have already been encouraged in other fields of law, \(^{288}\) including antitrust, and German environmental NGOs filed non-*parens patriae* climate change lawsuits as far back as 2004. \(^{289}\)

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, seeking either an injunction, monetary damages, or both. EU Directive 2004/35/EC \(^{290}\) offers perhaps the best *parens patriae*-type statutory cause of action with its emphasis on the “polluter pays” principle \(^{291}\) and dual options for preventative and remedial action against polluters. \(^{292}\) 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. \(^{293}\) 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. \(^{294}\)

\(^{285}\) See supra Part III.

\(^{286}\) See supra Part IV.

\(^{287}\) See supra Part IV.A.

\(^{288}\) See supra Part IV.B.

\(^{289}\) See supra Part IV.C.

\(^{290}\) See supra Part V.

\(^{291}\) See supra Part V.A.

\(^{292}\) See supra Part V.B.

\(^{293}\) See supra Part V.C.

\(^{294}\) See supra Part VI.
National law is another method for imitating American-style climate change litigation, whereby either national, regional, or local level government files an action on behalf of its citizens against a public or private contributor to climate change.295 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.296 Intrepid German attorneys may look to the Environmental Liability Act297 or the German Federal Emission Control Act298 as possible causes of action against polluters or failing government regulators. If the American model indeed spreads, the United Kingdom, with the common law heritage it shares with the United States 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.299

Finally, European nations might employ environmental protection treaties like the Aarhus Agreement300 and the Alpine Convention301 to sue fellow signatories who breach their obligations. While the Aarhus Agreement focuses more on informing the public and ensuring public participation in environmental decision-making302 and the Alpine Convention devises policies for preserving and protecting the natural state of the Alps,303 each offers several distinct possibilities, influenced by the American litigation blueprint, for dealing with climate change through the court system.

At this point, it is far from clear whether the American climate change litigation model, which tends toward public nuisance, 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 feasible potential future causes of action, it seems equally likely, if not more so, that EU governmental plaintiffs might choose to attempt claims. To be sure, ideas and tactics that may currently seem a bit far-fetched, difficult to prove, or overly attenuated, may prove to be 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). What this paper has presented is a preliminary investigation into the United States’ brand of climate change litigation and whether it might be successfully exported across the Atlantic Ocean to Europe to be implemented in European courts. As with so much in law, how the real story unfolds will depends on myriad factors, and the legal community will have to wait and see how this burgeoning, but unpredictable field of law plays out worldwide.