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

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Abstract
This paper analyses 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 US model, if it indeed chooses to take the climate change battle to the courts. By synthesising existing US 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 the 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.

This paper identifies and examines several realistic options for Europe's possible espousal of the American climate change litigation model through EU law and national law of individual Member States. 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. Additionally with case studies focusing on France, Germany and the United Kingdom, national law alternatives exist for individual Member States, 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.

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I. Introduction

Debate may still be raging over how serious the effects of climate change may be[1] and over how significant the impact of human activities 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 governments[4] 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 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 secondary importance. The European Union ('EU') and its Member States have extremely limited case law wherein governments act 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 is unlikely to be adopted by the EU 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 assess the possible success rate of different proposed causes of action, its true purpose is to identify and analyse 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 summarise the legal background – including the relevant Supreme Court decisions – that exists in the public nuisance and climate change domains.[5] 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.[6] Part IV sets out and justifies the reasoning behind my assertion that *parens patriae*-like climate change litigation based on an American model may be poised to make an entrance onto the European judicial scene.[7] In Part IV, I also clarify how this paper differentiates between *parens patriae* actions and more purely regulatory remedies.[8] Part V analyses 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).[9] 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.[10] Part VII examines the potential for climate change litigation via various techniques in individual nations – including those from both

1 RS Lindzen, 'The Climate Science Isn't Settled' *Wall Street Journal* (New York, 30 November 2009) <http://online.wsj.com/article/SB10001424052748703939404574567423917025400.html> accessed 20 January 2013 (arguing that 'confident predictions of catastrophe are unwarranted'); E Beament, 'Brown warns of climate change catastrophe' *The Independent (UK)* (London, 19 October 2009) <http://www.independent.co.uk/environment/climate-change/brown-warns-of-climate-change-catastrophe-1805398.html> accessed 20 January 2013 (reporting that then-Prime Minister Gordon Brown warned of "catastrophe' for the planet if action to take climate change is not agreed' upon during UN talks).

2 Intergovernmental Panel on Climate Change (IPCC) Working Group I, *Climate Change 2007: The Physical Science Basis* (Cambridge University Press 2007) §9.2, 702 (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'); N Scafetta, 'Climate Change and Its Causes: A Discussion About Some Key Issues' (18 March 2010) Science & Public Policy Institute 1, 4–6 <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 eg R Ingham, 'Climate change: Dogs of law are off the leash' (*Yahoo! News*, 23 January 2011) <http://news.yahoo.com/s/afp/20110123/lf_afp/climatewarminglaw> accessed 28 January 2011 (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 Part II.C.

5 See Part II (nn 14–68 and accompanying text).

6 See Part III (nn 85–94 and accompanying text).

7 See Parts IV.A–C (nn 95–121 and accompanying text).

8 See Part IV.D (nn 122–126 and accompanying text).

9 See Part V (nn 127–161 and accompanying text).

10 See Part VI (nn 162–186 and accompanying text).

the common law and civil law traditions – and presents case studies for France,[11] Germany[12] and the United Kingdom.[13]

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.[14] Public nuisance cases in the environmental field trace their roots 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 US Supreme Court and the Broadly Defined Parens Patriae *Doctrine*[15]

Parens patriae[16] standing has been defined broadly by the US Supreme Court[17] 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.[18] 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.[19] 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.[20] These quasi-sovereign interests range from citizens' physical and economic health and well-being,[21] to ensuring that the state is not unfairly denied its rightful position within the American federal system,[22] to guarding the state's natural resources, territory and environment.[23]

An important and overlapping justification for applying the expansive definition of *parens patriae* to climate change litigation in the US and EU, is a State's interest in securing for its inhabitants' the rightful benefits which stem from the State's participation in a federal-type political structure.[24] 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.'[25] In both the US and EU, when legislation is passed 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.[26]

To help clarify when a state may seek relief in federal court as *parens patriae*, the Supreme Court suggested comparing situations in the US with those same situations had they occurred in independent countries,[27] indicating that *parens patraie*

11 See Part VII.A (nn 187–206 and accompanying text).

12 See Part VII.B (nn 208–217 and accompanying text).

13 See Part VII.C (nn 218–239 and accompanying text).

14 See text accompanying nn 51–68.

15 Some would disagree: '[C]areful analysis of Supreme Court opinions decided before *Snapp* suggests a narrower interpretation of this form of standing'. DG Gifford, 'Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraints Doctrines' (2010) 62 South Carolina L Rev 201, 245 referencing *Alfred L Snapp & Son Inc v Puerto Rico ex rel Barez* 458 US 592, 601–02 (1982).

16 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* (8th edn 2004) 1144. *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. . . .' ibid. *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 American Electric 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 US 1, 57 (1890).

17 See Gifford (n 15) 245 noting that the Supreme Court's language in *Snapp*, possibly its 'most important *parens patriae* opinion, . . . provides an expansive understanding of *parens patriae* standing'.

18 *Snapp* (n 15) 601–02.

19 ibid 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. ibid 607.

20 ibid 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 US 365 (1923); *Wyoming v Colorado* 259 US 419 (1922); *New York v New Jersey* 256 US 296 (1921); *Kansas v Colorado* 206 US 46 (1907); *Georgia v Tennessee Copper Co* 206 US 230 (1907); *Kansas v Colorado* 185 US 125 (1902); *Missouri v Illinois* 180 US 208 (1901).

21 *Snapp* (n 15) 607.

22 ibid.

23 Gifford (n 15) 245.

24 *Snapp* (n 15) 608.

25 ibid. 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.' ibid.

26 ibid.

27 ibid 603.

actions could be broadly construed in contexts worldwide. In an instance where the 'health and comfort' of a state's residents are threatened, the state may take on the *parens patriae* role of general representative of the public because in the federalist system, individual states have surrendered their powers of diplomacy and war-making – powers which they might have employed on behalf of their citizens had they been completely sovereign nations.[28] When the Union was formed, 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,[29] so *parens patriae* lawsuits in federal court filled the void as a viable alternative.[30] Justice White, writing for the *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.'[31]

B. The Term 'Parens Patriae'

Given this background, this paper will construe *parens patriae* actions 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 Member States (on behalf of their citizens) against other (State or federal[32]) governments/agencies or private defendants, and (2) actions brought by the federal government or EU Commission on behalf of citizens against State governments/agencies or private defendants. 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 relevant and valuable US-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'[33]

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 maintains that 'no other tort is as vaguely defined or poorly understood as public nuisance.'[34] Public nuisance has been used to find tort liability for activities as incredibly dissimilar as releasing untreated sewage,[35] a street gang's behaviour,[36] violation of public morals,[37] and storing coal dust,[38] among others. The Restatement (Second) of Torts imprecisely defines public nuisance as 'an unreasonable interference with a right common to the general public.'[39] 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

28 ibid 604. Although the members of the European Union are obviously not states comprising a single country like 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.

29 ibid 604 quoting *Tennessee Copper Co* (n 20) 237; see also Gifford (n 15) 246-47 (discussing how whether 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).

30 *Georgia v Pennsylvania Railroad Co* 324 US 439, 450, 451–52 (1945) citing *Missouri v Illinois* (n 20) 241; *Tennessee Copper Co* (n 20) 237.

31 *Snapp* (n 15) 607. Importantly, the EU system resembles that of the US 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, 'What is EU law?' (*Europa*, 13 January 2011) <http://ec.europa.eu/eu_law/introduction/treaty_en.htm> accessed 15 January 2011. Somewhat like the US 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], 'General Presentation' (*CVRIA,* 13 January 2011) <http://curia.europa.eu/jcms/jcms/Jo2_6999/> accessed 13 January 2011.

32 'Federal' in the EU context would mean lawsuits against the EU Commission.

33 DG Gifford, 'Public Nuisance as a Mass Products Liability Tort' (2003) 71 University of Cincinnati L Rev 741, 774.

34 ibid.

35 ibid 776 citing *Miotke v City of Spokane* 678 P.2d 803 (Wash 1984).

36 ibid citing *People ex rel Gallo v Acuna* 929 P.2d 596 (Cal 1997).

37 ibid citing, among other cases, *Wagner v Regency Inn Corp* 186 Mich App 158 (1990) (a hotel whose guests generally included prostitutes, drug dealers and thieves).

38 ibid citing *Comet Delta Inc v Pate Stevedore Co* 521 So.2d 857 (Miss 1998).

39 *Restatement (Second) of Torts* (1979) §821B.

> a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[40]

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.[41]

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[42] under which such actions to defend and preserve the environment have been (and will be) pursued.

D. Parens Patriae *in Action: The Environment and Climate Change in American Case Law 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 20th century, the Supreme Court recognised, in two separate cases, suits brought by states as quasi-sovereigns alleging a public nuisance in the environmental context. In *Missouri v Illinois*,[43] the state of Missouri brought suit against the state of Illinois and the Sanitary District of Chicago (in Illinois) for discharging sewage into a canal, which emptied into the Illinois River.[44] This in turn emptied into the Mississippi river sending 'great quantities' of sewage downstream and 'poison[ing] the water of that river, upon which various of [Missouri's] cities, towns, and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing purposes.'[45] 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,[46] it did provide a basis for other, similar suits to follow.[47]

Just over a year later, the Supreme Court decided *Georgia v Tennessee Copper Co*,[48] 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.[49] Significantly, the Court recognised the 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.'[50] 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.[51]

Missouri v Illinois and *Tennessee Copper* set the stage for a spate of climate change lawsuits commencing in 2007 and continuing to this day. In *Massachusetts v Environmental Protection Agency*,[52] one hundred years after its 'parent' lawsuits, the majority reinforced the *parens patriae* right of states to sue as sovereigns on behalf of their citizens, highlighting Justice Holmes's opinion in *Georgia v Tennessee Copper*.[53] Writing for the majority, Justice Stevens analogised that '[j]ust as Georgia's

40 ibid.

41 Gifford (n 33) 774 quoting *Wood v Picillo* 443 A.2d 1247 (RI 1982) (internal quotations omitted).

42 The torts of trespass (See eg *Martin v Reynolds Metals Co* 342 P.2d 790 (Or 1959)) and private nuisance (See eg *Madison v Ducktown Sulphur, Copper & Iron Co* 83 S.W. 658 (Tenn 1904)) have also been applied in the name of environmental protection and defence.

43 200 US 496 (1906).

44 ibid 517.

45 ibid.

46 ibid 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'.

47 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.' ibid 519.

48 *Tennessee Copper Co* (n 20).

49 ibid 236.

50 ibid 237.

51 See ibid 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'.

52 549 US 497 (2007).

53 ibid 518–19 quoting extensively from *Tennessee Copper Co* (n 20).

'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.[54] Concluding that in its *parens patriae* role, Massachusetts met the criteria for standing – injury,[55] causation,[56] and remedy,[57] the Court proceeded to rule that the Clean Air Act authorised the Environmental Protection Agency ('EPA') to regulate tailpipe greenhouse gas emissions from new motor vehicles 'in the event that it forms a "judgment" that such emissions contribute to climate change.'[58] 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*,[59] 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[60] and further ruling that they properly stated a claim under the federal common law of nuisance.[61] 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.[62] The Second Circuit reasoned that because Connecticut met the *Snapp* test[63] for state parties as *parens patriae* as well as the additional requirement imposed by the Second Circuit – that 'individuals [upon whose behalf the State is suing] could not obtain complete relief through a private suit'[64] – they were granted standing.[65] The court found that as a result of the alleged damages caused by global warming, 'these grievances suffice to allege an "unreasonable interference" with "public rights" within the meaning of [Restatement Second] § 821B(2)(a).'[66] The court distilled the public nuisance claim, noting that '[t]he 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'.[67] 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.[68]

Three other significant cases also merit brief mentions as contributors to the US climate change litigation model. First, *California v General Motors Corp*[69] involved a *parens patriae* public nuisance action by the state of California against the automobile industry, claiming damages as a result of global warming partially caused by the automakers' emitting greenhouse gases.[70] The court dismissed the case for lack of subject matter jurisdiction[71] holding that, among other deficiencies, it proposed a non-justiciable political question that demanded a policy determination the court was not permitted to make.[72]

Two years later in *Native Village of Kivalina v Exxon-Mobil,*[73] a non-*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,

54 ibid 519 quoting *Tennessee Copper Co* (n 20) 237.
55 ibid 521.
56 ibid 523.
57 ibid 525.
58 ibid 528.
59 582 F.3d 309 (2nd Cir 2009).
60 ibid 334–36.
61 ibid 352–58.
62 ibid 316.
63 ibid 335–36 quoting *Snapp* (n 15) 603.
64 ibid 336 quoting *People of New York by Abrams v 11 Cornwell Co* 695 F.2d 40 (2nd Cir 1982) vacated, in part, on other grounds in 718 F.2d 22 (2nd Cir 1983) (en banc) (internal quotations omitted).
65 Moreover, the court states that '[s]tanding is "gauged by the specific *common-law*, statutory or constitutional claims that a party presents"' and seeing as 'states have been accorded standing in common law nuisance causes of action when suing as *parens patriae*' for more than a century, the Second Circuit had no reason to deny standing in this case. ibid 339 quoting *Int'l Primate Protection League v Administrators of Tulane Educational Fund* 500 US 72, 77 (1991) (emphasis added by 2nd Cir).
66 ibid 352 citing *In re StarLink Corn Products Liability Litigation* 212 F.Supp.2d 828, 848 (ND Ill 2002) quoting *Restatement (Second) of Torts* (1979) § 821B(2)(a).
67 ibid.
68 ibid 353.
69 2007 WL 2726871 (ND Cal 2007).
70 ibid 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. ibid.
71 ibid.
72 ibid 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').
73 663 F.Supp.2d 863 (ND Cal 2009).

oil and utility companies for their roles in causing global warming.[74] The plaintiff, as a federally-recognised, 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.[75] The federal district court again dismissed for lack of subject matter jurisdiction,[76] and highlighted political question concerns[77] as well as standing issues.[78]

The most recent decision came in May 2010 when the *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 in a court of sixteen.[79] The appealed case involved a group of plaintiff Gulf Coast landowners who alleged that the defendant's energy, fossil fuel and chemical operations emitted greenhouse gases which increased 'global surface air and water temperatures' that contributed to rising ocean levels and 'added to the ferocity of Hurricane Katrina'.[80] 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.[81] In a lengthy opinion, the Fifth Circuit overruled the federal district court, and found that the plaintiffs had standing for all of their claims under Mississippi state law,[82] had standing for their nuisance, trespass and negligence claims under federal law,[83] and that the issue did not present a non-justiciable political question.[84] While not a *parens patriae* example, *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 Patriae*-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 suggested) where are all the *parens patriae* climate change suits that have become rather *en vogue* in the United States?[85] Thus far in the EU and its Member States, *parens patriae* climate change litigation has been extremely limited.

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

74 ibid 868

75 ibid 868–69.

76 ibid 868.

77 ibid 875 citing *Connecticut v American Electric* (n 16) 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.' ibid citing *Connecticut v American Electric* (n 16).

78 ibid 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]'.

79 *Comer v Murphy Oil USA* 607 F.3d 1049, 1053–54 (5th Cir 2010) (rehearing en banc).

80 *Comer v Murphy Oil USA* (2009) 585 F.3d 859 (5th Cir).

81 ibid 860–61.

82 ibid 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.'

83 ibid 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).

84 ibid 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 US 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.' ibid 879 (internal quotations omitted).

85 See eg News and Features: 360 News, 'Are Class Actions Coming to Europe?' (*Lloyd's*, 18 February 2009) <http://www.lloyds.com/News-and-Insight/News-and-Features/360-News/Business-360/Are_class_actions_coming_to_Europe> accessed 14 January 2011. The article notes 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 American Lawyer/Law.com*, 28 February 2006) <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1141047298349> accessed 20 January 2011. The article notes that mass litigation had already been seen in the UK, but that most European countries were 'scrambling to adapt their legal systems to handle' class action-type actions. Admittedly, however, 'significant barriers to class actions remain: In addition to a cultural reliance on governmental, not judicial, regulation, Europe has a range of legal procedures that differ fundamentally from the US model.' ibid. Scholar Edward F Sherman admits that although 'other countries display a growing interest in American class action practice for litigation arising from . . . environmental conditions [among others], they tend to react negatively to the American litigation landscape.' EF Sherman, 'Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions' (2002) 52 DePaul L Rev 401, 401–03, 418–22.

nations, save the United Kingdom.[86] In civil law jurisdictions, judges 'initially look to code provisions to resolve a case', rather than precedent, as in common law countries.[87] 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.'[88] 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.[89]

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 *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,[90] 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.'[91] 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.[92] Thus, in Europe, smaller groups and individuals with fewer resources up-front are less likely to bring claims as they do not have the means to cover the legal fees.

Moreover, the '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.[93] Consequently, far from suits being '(financially) virtually risk free' and very advantageous to plaintiffs, as in the US, 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.[94] Even for a government, the looming possibility of such an expense checks the tendency to bring suit under uncertain or new theories, partially for fear of angering the electorate, whose taxes helped fund such a risky lawsuit.

IV. Why the EU might be Ready for an Influx of *Parens Patriae*-like Climate Change Litigation

Indeed European scepticism of American class action litigation remains strong, it having been labelled as a 'Pandora's box that [other countries] want to avoid opening.'[95] Furthermore, besides the myriad structural obstacles to mass torts litigation and *parens patriae* suits discussed in section III above, the EU also limits group litigation to 'qualified entities'.[96] 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 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)'.[97] 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.'[98] Professor Harald Koch reiterates that culturally-speaking in the EU there is '"no concept of an individual private

86 See JG Apple and RP Deyling, 'A Primer on the Civil-Law System' (*Federal Judicial Center* no date) 36 <http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf> accessed 20 January 2013. The piece notes that '[c]ivil-law countries have comprehensive codes . . . [which] cover an abundance of legal topics, sometimes treating separately private law, criminal law, and commercial law'.

87 ibid 36.

88 ibid 36–37 (emphasis added).

89 FY Chee, 'EU aims to make class action lawsuits easier – draft' (*Reuters*, 1 October 2009) <http://uk.reuters.com/article/idUKTRE59061N20091001> accessed 30 November 2009; K Chellel, 'Brussels flexes its muscles and stalls draft directive on competition law' (*The Lawyer*, 12 October 2009) <http://www.thelawyer.com/brussels-flexes-its-muscles-and-stalls-draft-directive-on-competition-law/1002259.article> accessed 15 November 2009.

90 A few European States allow contingency fees to some degree – Greece, Finland and the UK among them. M Reimann, 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard' (2003) 51 American Journal of Comparative Law 751, 823–25.

91 ibid.

92 ibid.

93 ibid.

94 ibid.

95 Sherman (n 85) 403.

96 ibid.

97 ibid. See also Council Directive (EC) 98/27 [1998] OJ L166/52–53, art 3 providing actual statutory language, under Article 3, for the legislation.

98 Sherman (n 85) 418 quoting Harold Koch, 'Non-Class Group Litigation Under EU and German Law' (2001) 11 Duke Journal of Comparative & International

Attorney General"' because '"in the European tradition…[Europeans] entrust the public interest to public institutions rather than to private law enforcers."'[99] 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 and Statute-based Causes of Action*

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 highly values protecting and preserving the environment and often takes proactive steps to do so before the United States,[100] the EU seems primed for a wave of climate change litigation.

Article 174 of the Treaty on European Union states:

> 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 utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems.[101]

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*.'[102] 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.'[103] 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.[104] Given this language, it is not entirely unreasonable to imagine that it could be stretched to give the EU 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.[105]

B. Allusions to American-modelled, Parens Patriae *Actions in Other Fields of EU Law*

Parens patriae actions have been hinted at in other contexts in the EU and could be translated into the climate change litigation model. In the antitrust instance, the Attorneys General of several US 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.'[106] 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.[107] 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*.'[108]

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'.[109] 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

Law 355, 357-68.

99 ibid.

100 See eg Council Directive (EC) 2003/87 [2003] OJ L 275 (establishing a scheme for greenhouse gas emission trading within the EU; the US has not yet undertaken an emissions trading scheme).

101 Consolidated Version of the Treaty Establishing the European Union [2006] OJ C 321/123.

102 ibid (emphasis added).

103 ibid 124.

104 ibid 124–25.

105 ibid 123.

106 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 (21 April 2006).

107 ibid.

108 ibid.

109 EUROPA Press Release, 'European Union, Antitrust: Commission Prohibits MasterCard's intra-EEA Multilateral Interchange Fees' (19 December 2007) IP/07/1959 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1959> accessed 16 December 2009.

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 EU citizens, as a whole.[110]

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).[111] However, when the Commission attempted to make a passive *parens patriae* enforcement decision to reduce the amount of carbon dioxide Poland was permitted in its National Allocation Plan ('NAP') (because of several violations on Poland's part), it was overruled in a counter suit by Poland.[112] The European Court of Justice ('ECJ') 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.[113] Even so, the ECJ 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'.[114] In doing so, the ECJ preserved a stronger potential *parens patriae* role for the Commission in the effort to control 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.[115]

C. *Non*-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-*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 Labour.[116] 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'.[117] The NGOs requested information under the Environmental Information Act of the Federal Republic of Germany (Umweltinformationsgesetz des Bundes, UIG) from the German government in July 2003 to determine the consequence of projects funded by Hermes which generated greenhouse gas emissions and contributed to global warming.[118] Yet, by August 2003, the German government rejected the request.[119] While the plaintiff NGOs realised the resolution of this lawsuit would not directly impact greenhouse gas emissions, they hoped to emphasise that climate change factors, such as emissions 'are an important factor to be taken into account in the decision-making process'.[120] In ordering 'the government to release information on the climate change impacts of German export credits[,]' the Berlin Administrative Court 'rejected the argument that information on German export credit activities did not constitute "environmental information" within the meaning of the UIG and could not potentially affect elements of the environment, such as climate change.'[121]

110 ibid (emphasis added).

111 See eg Case C-122/05 *Commission v Italy* [2006] '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[l] its obligations under that directive'); Case C-107/05 *Commission 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[l] its obligations under that directive'.

112 Case T-183/07 *Poland v Commission* [2009] paras 9–14.

113 ibid, para 89.

114 ibid.

115 See Part V (Directive 2004/35/EC); Part VI (Directive 2003/87/EC).

116 Bundes fur Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V. v Bundesrepublik Deutschland, vertreten durch Bundesminister fur Wirtschaft und Arbeit, VG [Berlin Administrative Court] 10 A 215.04 (10 January 2006) < http://www.climatelaw.org/cases/case-documents/germany/de-export-jan06.pdf> accessed 20 January 2013, unofficial English translation <http://www.climatelaw.org/cases/case-documents/germany/de-export-jan06-eng.doc> accessed 20 January 2013.

117 Germanwatch & BUND, 'German government sued over climate change' (*germanwatch.org*, 2004) <http://germanwatch.org/rio/herbpe04.pdf>.

118 ibid.

119 ibid.

120 ibid.

121 MB Gerrard and J Chen, 'Database of Non-US Climate Change Litigation' (Case: Bundes fur Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V. v Bundesrepublik Deutschland, vertreten durch Bundesminister fur Wirtschaft und Arbeit, VG [Berlin Administrative Court], 10 A 215.04 (10 January 2006)) (updated 31 December 2012) < http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Resources/Non-US-Climate-Change-Litigation-Chart/Non-U.S.%20litigation%20chart%20%28Dec.%2031%2C%202012%29.pdf> accessed 20 January 2013.

D. *American-style,* Parens Patriae*-like Judicial Solutions are Distinguishable from Other Responses Frequently Utilised in the EU, such as Pure Regulation*

Because the European legal system is almost exclusively code-based and relies heavily on statutes,[122] 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 expansive definitions of *parens patriae* action, particularly the 'passive' *parens patriae* cases described in Part IV.B,[123] and solutions which are more purely regulatory in nature. This paper interprets the difference as the judgment which is sought through litigation – if the governmental plaintiff is seeking damages or injunctive relief involving anything more than the mere enforcement of the regulation at issue, then the action will be considered *parens patriae*.

Precisely because regulations can be easily ignored, bent, ineffectively implemented, complied with only partially, or flouted outright by private parties, Member States, or even EU agencies, it is left to 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[124] or EU directives,[125] the European Commission, EU Member States, or regional/local governments might find it necessary to take *parens patriae* action on behalf of the respective jurisdiction's citizens.[126] These lawsuits 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 roughly interchangeable. Certainly the comparison is satisfactory enough to warrant the claim that the latter may be at least modelled after the former.

V. Statutory-based, *Parens Patriae*-like Climate Change Litigation and 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).[127]

A. *The 'Polluter Pays' Principle*

The Directive begins by echoing the Treaty, stating that 'the prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter pays" principle'.[128] It continues,

> The fundamental principle of this Directive should therefore 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.[129]

In Article 3, the 'polluter pays' principle is applied against damages or imminent threat of damages caused by an expansive list of activities,[130] including air polluting 'installations subject to authorisation in pursuance of Council Directive 84/360/EEC'.[131] Such broad potential liability for polluters whose activities have either caused damage or merely presented an

122 See text accompanying nn 87–88.

123 See text accompanying nn 111-115.

124 Regulations are in essence positive law set out by the European Union. EUR-Lex, 'Process and players: §1.3.2: Regulation' (*EUROPA,* 27 March 2009) <http://eur-lex.europa.eu/en/droit_communautaire/droit_communautaire.htm#1.3.2> accessed 14 January 2011.

125 A Directive basically charges each Member State with implementing a national law that meets certain central EU standards, so as to 'align national legislation.' EUR-Lex, 'Process and players: §1.3.3: Directive' *(EUROPA*, 27 March 2009) <http://eur-lex.europa.eu/en/droit_communautaire/droit_communautaire.htm#1.3.3> accessed 14 January 2011.

126 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-modelled system, or guarding the State's natural resources, territory, and environment. See text accompanying nn 21-23.

127 Council Directive (EC) 2004/35 [2004] OJ L143.

128 ibid 56.

129 ibid.

130 ibid art 3, 60.

imminent threat of such damage provides the perfect opportunity for an almost limitless number of *parens patriae* suits by Member States against polluters on the grounds of an imminent threat of damages resulting from climate change.

The Directive makes it plain that action taken to prevent and remedy environmental damage could be achieved through *parens patriae* action[132] – 'public authorities should ensure the proper implementation and enforcement of the scheme provided for by this Directive.'[133] The Directive recognises that because 'environmental protection is...a diffuse interest... individuals will not always act or will not be in a position to act' and thereby delegates this task to governments and NGOs.[134] Article 11(1) bestows upon Member States the *parens patriae* responsibility and authority to act upon the Directive, stating that 'Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.'[135] Article 12 more explicitly shows how *parens patriae* action may be 'requested' by 'natural or legal persons', including non-governmental organisations.[136] If a person or organisation is 'affected or likely to be affected by environmental damage', they may submit proof 'relating to instances of environmental damage or an imminent threat of such damage and . . . request the competent authority to take action under this Directive.'[137] 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' must, at a minimum, have their request for action considered by the competent authority.[138]

B. Possibilities for Preventative and Remedial Action to Enable Plaintiffs to Bring Suit

Significantly, the Directive allows for possible *parens patriae* suits for both 'preventative action' (under Article 5) and 'remedial action' (under Article 6) – creating a wide range of causes of action for plaintiffs against polluters contributing to climate change. Member States could sue companies and each other *pre-emptively*, claiming that although 'damage has not yet occurred...there is an imminent threat[139] of such damage occurring' as a result of the polluter's contributions to global climate change.[140] 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, a significant burden, as the most serious effects of climate change allegedly have yet to occur.[141] Under Article 5, the competent authority from a Member State is empowered to 'require the operator to provide information on any imminent threat of environmental damage', 'require the operator to take the necessary preventive measures', 'give instructions to the operator to be followed on the necessary preventive measures to be taken', or 'itself take the necessary preventive measures.'[142] Under this theory, for example, the Netherlands, with approximately half its territory below sea level,[143] could sue major European greenhouse gas emitters to compel them to substantially reduce their pollution levels in order to prevent the imminent threat of rising sea levels and flooding.[144] Actual damage would not need to be proven.

Under Article 6 Remedial Action, Member States could sue for remedies to climate change damages that have already occurred, forcing the polluter to take 'all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or other damage factors in order to limit or prevent further environmental damage and adverse effects on human health'.[145] 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

131 ibid annex III, para 9, 71; see also Council Directive (EEC) 84/360 [1984] OJ L188/20–25 listing in Annex I the categories of plants implicated by the directive and in Annex II listing the most important polluting substances.

132 *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.

133 Council Directive (EC) 2004/35 [2004] OJ L143/57.

134 ibid 58.

135 ibid 63.

136 ibid.

137 ibid.

138 ibid 63, art 12.

139 See ibid 60, art 2 (defining 'imminent threat of damage' as 'a sufficient likelihood that environmental damage will occur in the near future').

140 ibid 61, art 5.

141 See Intergovernmental Panel on Climate Change (IPCC) Working Group II, *Climate Change 2007: Impacts, Adaption and Vulnerability* (Cambridge University Press 2007) 543–44 describing some of the various future negative consequences of climate change.

142 Council Directive (EC) 2004/35 [2004] OJ L143/61, art 5.

143 C Woodard, 'Netherlands Battens Its Ramparts Against Warming Climate' *Christian Science Monitor* (Boston, 4 September 2001) <http://news.nationalgeographic.com/news/2001/08/0829_wiredutch.html> accessed 20 January 2013.

144 See IPCC Working Group II (n 141) 563 noting that one of the projected consequences of climate change is a rising sea level off the coast of Western Europe.

145 Council Directive (EC) 2004/35 [2004] OJ L143/61, art 6.

hotter, drier summers [and] increased risk to crops from hail' resulting in decreased yields.[146]

C. *Diffuse Injuries Associated with Climate Change and Working Cooperatively in 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).'[147] Although neither 'fault [nor] negligence [nor] intent on the part of the operators need be established',[148] the Directive cautions that for environmental damage to be effectively remedied by liability mechanisms, there also needs to be 'one or more identifiable polluters' and 'concrete and quantifiable' damage.[149] The ECJ 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'.[150] 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* or failure to act of certain individual actors.'[151] This seems targeted at excluding climate change from the list of actionable harms as, by its nature, climate change generates precisely these 'widespread, diffuse' damages to which the entire world contributes by emitting greenhouse gases.[152]

The Directive does admit that 'environmental protection is...a diffuse interest'[153] and encourages cooperation between Member States '[w]here environmental damage affects or is likely to affect several Member States' to ensure that corrective measures are taken to address environmental damage.[154] Advocate General Kokott explained that because liability can be so difficult to determine in environmental damage cases, the Member States 'enjoy a broad margin of discretion' to 'extend[ ] liability to other polluters' besides the 'responsible operator.'[155] The same is true, she opined, with regard to financial damages: because it is frequently difficult to precisely allocate 'causal contribution of individuals to specific environmental damage... Member States could impose the costs jointly on the polluters who could be identified', rather than absolving them of their responsibility inconsistently with the 'polluter pays' principle.[156] 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, Article 9 of the Directive allows national law 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.[157] 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).

146 See IPCC Working Group II (n 141) 563 noting observed effects of climate change upon agriculture in Europe.

147 Council Directive (EC) 2004/35 [2004] OJ L143/57.

148 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 & Others* [2010]. See also Joined Cases C-378/08, 379/08, 380/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economic & Others* [2010] 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'.

149 Council Directive (EC) 2004/35 [2004] OJ L143/57.

150 *Buzzi Unicem SpA & Others* (n 148); see also *Raffinerie Mediterranee (ERG) SpA* (n 148) 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'.

151 Council Directive (EC) 2004/35 [2004] OJ L143/57.

152 See World Bank, *World Development Report 2010: Development and Climate Change* (World Bank Publications 2010) 53 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 IPCC Working Group II (n 141) 83 noting some of the many effects of climate change, from decline in sea ice to shifts in plant and animal habit ranges to damages due to increased droughts and floods.

153 Council Directive (EC) 2004/35 [2004] OJ L143/57.

154 Council Directive (EC) 2004/35 [2004] OJ L143/64, art 15.

155 Joined Cases C-378/08, 379/08, 380/08, Opinion of Advocate General Kokott, *Raffinerie Mediterranee SpA (ERG), Polimeri Europa SpA, Syndial SpA v Ministero dello Sviluppo Economico and Others* [2009] 106.

156 ibid 109.

157 Council Directive (EC) 2004/35 [2004] OJ L143/63, art 9.

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),[158] and/or the EU as a whole (because winning the battle against climate change 'cannot be sufficiently achieved by the Member States acting individually'[159]; it demands across-the-board, coordinated action by centralised EU authority).[160] 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 and passenger and 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 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.[161]

VI. Statute-based, *Parens Patriae*-like Climate Change Litigation pursuant to EU Directive 2003/87/EC

An alternative EU law cause of action for combating the deleterious effects of climate change (although it is less valuable[162]) 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.'[163] It was developed after the Sixth Community Environment Action Programme identified climate change as a priority issue to be resolved and required that a 'Community-wide emissions trading scheme' be established by 2005.[164] The Council saw Directive 2003/87/EC as a means of helping the EU and its Member States to achieve compliance with the Kyoto Protocol,[165] approved by Council Decision 2002/358/EC in April 2002.[166]

A. Requirements and Obligations for Member States, as well as EU Bodies, under Directive 2003/87/EC

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.[167] 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.'[168] 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.[169]

158 Council Directive (EC) 2004/35 [2004] OJ L143/64, art 15.

159 Council Directive (EC) 2003/87 [2003] OJ L275/34, art 1 (emphasis added). See also Consolidated Version of the Treaty on European Union [2006] OJ C321/46. 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.'

160 Standing to sue could be established via the Treaty on European Union. See Consolidated Version of the Treaty on European Union [2006] OJ C321/124. The Treaty notes that the Council, after consulting the Economic and Social Committee and the Committee of the Regions, decides 'what action is to be taken by the Community in order to achieve the objectives referred to in Article 174').

161 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 E Hondius, 'A Dutch DES Case: Pharmaceutical Producers Jointly and Severally Liable' (1994) Consumer Law Journal (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."').

162 As explained in this section below, Council Directive 2003/87/EC does not readily provide a means for attacking private party contributors to climate change as Directive 2004/35/EC does. Rather, it restricts potential defendants to public entities such as the EU or its agencies and Member States.

163 Council Directive (EC) 2003/87 [2003] OJ L275/34, art 1.

164 ibid 32.

165 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.' ibid.

166 ibid.

167 ibid 33.

168 ibid 37, art 16.

169 ibid. See also ibid. (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 patraie* 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 n 181 and accompanying text.

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.'[170] The Directive further indicates that '[t]he Commission should, *in particular*, consider policies and measures at Community level in order that the transport sector makes a substantial contribution to the Community and its Member States' achieving their climate change goals.[171] 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.[172]

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.[173]

B. EU Courts' Interpretations of the EU Commission's Power pursuant to EU Directive 2003/87/EC

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.[174] The court further held that 'in carrying out that review [the Commission] has a discretion in so far as the review entails complex economic and ecological assessments carried out in the light of the general objective of reducing greenhouse gas emissions by means of a cost-effective and economically efficient allowance trading scheme'.[175] 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.[176]

On the other hand, in *Estonia v Commission* and *Poland v Commission*, the ECJ 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.[177] In other words, the Commission exceeded its power '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]'.[178]

C. Member States. as well as the EU and its Agencies, as Viable Public Defendants under Directive 2003/87/EC

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

170 Council Directive (EC) 2003/87 [2003] OJ L275/34.

171 ibid 34, para 25 (emphasis added).

172 ibid 34, para 30 (emphasis added). See also Consolidated Version of the Treaty on European Union [2006] OJ C321/46. 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.'

173 Council Directive (EC) 2003/87 [2003] OJ L275/36, art 9.

174 Case T-374/04 *Germany v Commission* [2007] para 80.

175 ibid.

176 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.

177 M Jaeger, *Annual Report 2009: Proceedings of the General Court in 2009* (2009) 133–34 discussing Case T-263/07 *Estonia v Commission* [2009]; Case T-183/07 *Poland v Commission* [2009].

178 ibid.

Council and Parliament),[179] 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 2004/35/EC,[180] 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.

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.[181] Suppose for example, the German automobile manufacturing industry is generating significant levels of greenhouse gas emissions. The German government penalises 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 injuries[182] caused by climate change, demanding that Germany strengthen its penalties against polluters[183] 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 rules are implemented', as required by the Directive, thereby causing pollution contributing to climate change.[184]

Member States might also sue the EU or one of its agents, in situations somewhat analogous to a *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.'[185] In particular, Member States might argue that the EU was liable for major contributions to climate change because the Directive *specifically* implicates the Commission in controlling emissions from the transport sector across the entire Community.[186] 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 met that standard.

VII. Three Case Studies: How National Law could be applied as a Basis for *Parens Patriae*-like Climate Change Litigation in Europe

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

179 See text accompanying nn170–173.

180 See Part V.

181 Council Directive (EC) 2003/87 [2003] OJ L275/37, art 16. 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 patraie* 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 also note 131 and accompanying text.

182 See eg ICPP Working Group II (n 141) 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.' ibid. (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.' ibid 556 (internal quotations omitted).

183 So as to make them reasonably 'effective' and 'dissuasive.' Council Directive (EC) 2003/87 [2003] OJ L275/37, art 16.

184 Council Directive (EC) 2003/87 [2003] OJ L275/37, art 16.

185 ibid 34, para 25.

186 ibid.

A. *France*

I. Environmental Interests: A Highly Respected Position in French Law

The French Environmental Code begins by highlighting the importance of protecting and preserving the environment as it is 'part of the common heritage of the nation' and of 'general interest' to the country.[187] 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'.[188] 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'.[189] These provisions set out several basic, but probably overly general, causes of action for future climate change plaintiffs.[190]

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

> exercise the rights recognised as those of the civil party as regards the acts which directly or indirectly damage the interests that they have the role of defending and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soils, sites and landscapes, and to town planning, or to those whose purpose is the control of pollution and nuisances, and of the enactments for their application.[191]

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.'[192] 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.[193] 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 organisation to so act.[194]

II. The French Environmental Code Provisions: 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,

187 Law No 2002-276 of 17 February 2002, Article L110-1 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (28 February 2002) p 1/201.

188 ibid. 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.' ibid.

189 Law No Article 410-1 (Book IV, Title I) Code Pénal (English Translation, updated 25 March 2002) <http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm>.

190 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.

191 Law No 2005-157 of 23 February 2005, Article L132-1 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (24 February 2005) p 13/201.

192 ibid.

193 ibid Article L142-1–L142-3, p 14/201.

194 ibid Article L142-3, p 14/201.

'preventing, monitoring, reducing or removing atmospheric pollution, preserving air quality' and 'conserving energy'.[195] In France, '[t]he State ensures, with the help of local authorities...the monitoring of air quality and its effects on health and the environment.'[196] 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.[197] 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.[198] 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.[199]

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'Etat[200] in charge of drafting a decree with the aim of limiting environmentally harmful pollutant substances and their sources.[201] Accordingly, the Conseil d'Etat's decree determines everything from '[t]echnical specifications and performance standards applicable to the manufacture, sale, storage, use, maintenance and destruction of movable goods' (except for certain vehicles) to '[t]echnical specifications applicable to the construction, use, maintenance and demolition of real-estate'.[202] The law must also lay out how business, industry and private citizen compliance with will be assessed and verified.[203]

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 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.[204] 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,[205] the regional government of Provence-Alpes-Côte d'Azur might file suit against the Conseil d'Etat, à la *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

195 Law No Article L220-1 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (updated 10 April 2006) p 49/201.

196 Law No 2001-398 of 9 May 2001, Article L221-1 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (10 May 2001) p 49/201.

197 Law No 2002-92 of 22 January 2002, Article L222-1 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (23 January 2002) p 50/201.

198 ibid.

199 See Law No 2002-92 of 22 January 2002, Article L222-1–L222-2 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (23 January 2002) p 50–51/201 noting that State departments, environmental/health/technology département commissions, other approved organisations, and the general public are all 'associated' with the preparation of the regional air quality plan or invited to participate in its preparation.

200 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: Home' *(Conseil d'Etat Official Website)* <http://www.conseil-etat.fr/cde/en/> accessed 18 January 2011.

201 Law No 2005-781 of 13 July 2005, Article L224-1 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (14 July 2005) p 52/201.

202 ibid.

203 ibid.

204 ibid.

205 See 'Provence-Alpes-Côte 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*, 19 January 2011) <http://www.regionpaca.fr/notre-region/tourisme/bienvenue-chez-vous-2010.html> accessed 19 January 2011 (noting that 'Avec près de 35 millions de touristes chaque année... Provence-Alpes-Côte 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 (ie 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-Côte 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*, 19 January 2011) <http://www.regionpaca.fr/notre-region/tourisme/tourisme-lenvironnement-au-coeur.html> accessed 19 January 2011.

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.[206]

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.

I. The Environmental Liability Act: 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,[207] the facility operator 'shall be liable to the injured person for the damage caused'.[208] Section 3 of the ELA defines environmental impact damage very broadly as that which arises 'if the damage is caused by materials, vibrations, noises, pressure, rays, gasses, steam, heat, or other phenomena that have been dispersed in soil, air, or water.'[209]

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.[210] Under §7, there can be no presumption of causation where multiple facilities are inherently suited to and fully capable of producing the damage.[211] 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.[212]

II. The German Federal Emission Control Act: 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

206 See Law No Article L224-5 – French Environmental Code (English translation) Journal Officiel de la République Française [JO] [Official Gazette of France] (updated 10 April 2006) p 53/201. Article L224-5 inserts Articles L311-1 and L318-1 through L318-3 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 L220-2 of the Code de l'environnement on air and the rational use of energy as well as other nuisances likely to compromise public health.' ibid.

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

208 Bürgerliches Gesetzbuch [BGB] [Civil Code] [Environmental Liability Act] version 10 December 1990, Bundesgesetzblatt (Federal Law Gazette) [BGBl] I 2634 as amended, art 1, §1 (tr The Cologne Re) <http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1396> accessed 20 January 2013.

209 ibid §3.

210 See Gifford (n 2) 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.' ibid. 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 centred on climate change and the impact on standing in climate change litigation in the US, see Gifford (n 2) Part VI.A.2.

211 German Environmental Liability Act (n 208) art 1, §§ 6–7.

212 ibid § 11. See also Bürgerliches Gesetzbuch [BGB] [Civil Code] version 2 January 2002, Bundesgesetzblatt (Federal Law Gazette) [BGBl] I 42, 2909, §254 (30 January 2011) (tr Langenscheidt Translation Service) <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html> accessed 20 January 2013. Section 254 defines contributory negligence as follows: 'Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.'

implemented.[213] A clean air plan may be instituted in the precautionary sense as well, to thwart potentially detrimental environmental consequences in advance.[214] 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.[215]

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 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.[216] 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.[217]

C. The UK as a Halfway Point between the US and EU: Common Law Actions that could Function like US Actions

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 model, it only makes sense that today – some 400 odd years later – the UK would be the EU Member State most likely to adopt the American model of climate change litigation.

The reasons are obvious enough. Apart from the structural differences highlighted in Part III above,[218] the English 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, English lawyers could conceivably do exactly the same by mirroring the legal techniques used by their American counterparts. While there have not been any outright climate change suits reflecting the American model as of yet, several recent environmental nuisance cases could supply a jumping-off point for an intrepid, enterprising British law firm.

For example, *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.[219] 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.[220] The plaintiff sued Barratt (the developer) for negligence as filling in the drainage culvert directly caused the flooding.[221] More importantly, plaintiff Lambert also brought

213 Bundes-Immisionsschutzgesetz [BImSchG] [Federal Immission [sic] Control Act] – Excerpts 14 May 1990 Bundesgesetzblatt (Federal Law Gazette) [BGBl] I 880, §5, art 47 (9 November 2010) (tr Inter Nationes) <http://www.iuscomp.org/gla/statutes/BImSchG.htm#44> accessed 20 January 2012.

214 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. ibid.

215 ibid.

216 ibid.

217 ibid.

218 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.

219 *Lambert & ORS v Barratt Homes Ltd (Manchestor Division) & Anor* [2009] EWHC 744 (QB), [2009] Env LR D14. Barratt had purchase a parcel of land from Rochdale to construct a residential development, but Rochdale retained other parcels in the area.

220 ibid.

221 ibid. The lower court found Barratt liable for flooding damages; Barratt did not appeal the judgment. ibid.

action against the local Borough of Rochdale for 'breach of a measured duty to take reasonable steps to abate the nuisance'[222] because the Borough of Rochdale knew that water originating from the higher-elevation land it still owned was flowing naturally through the Barratt Homes development and overflowing into the plaintiff's property.[223] Although the appeals court was sceptical of such a claim against Rochdale, it did not dismiss the case[224] 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.[225]

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 neutralise 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.[226] Applied to the flooding case *sub judice*, the court ruled that the Borough of 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'.[227]

Besides the fact that this case 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 *parens patriae* suit against a particularly emissions-heavy industrial or commercial sector of the economy, looking to *Connecticut v American Electric Power Co*,[228] *California v General Motors*[229] or *Native Village of Kivalina v Exxon-Mobil Corp*[230] as models. The plaintiff government could seek monetary damages or an injunction, alleging that, much like the 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 the Borough of Rochdale's land.[231] 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'.[232] 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'[233] by cutting their environment-fouling emissions or paying an amount in damages proportional to the defendant's contribution.[234]

222 ibid.

223 ibid. The court summarised 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.'

224 ibid.

225 ibid citing *Goldman v Hargrave* [1967] 1 AC 645 (appeal taken from High Court of Australia) (PC).

226 ibid citing *Holbeck Hall Hotel v Scarborough Borough Council* [2000] QB 836 (Court of Appeal); *Caparo Industries v Dickman* [1990] 2 AC 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.' ibid (citing *Leaky v Nat'l Trust* [1980] 1 QB 485).

227 ibid.

228 See text accompanying nn 59–68.

229 See text accompanying nn 69–72.

230 See text accompanying nn 73–78.

231 See text accompanying nn 222–223 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.

232 *Lambert* (n 219) citing *Goldman v Hargrave* [1967] 1 AC 645 (appeal taken from High Court of Australia) (PC).

233 ibid.

234 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.

Another option would be for a more local level of government[235] 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 measured duty of care to the citizenry[236] to assist in minimising the public nuisance that is climate change.[237] 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',[238] and perhaps an even greater obligation to make reasonable mitigation efforts because the issue in question – environmental protection – is under direct Defra supervision.[239]

VIII. Conclusion

American environmental tort law developed largely from a public nuisance,[240] *parens patriae*[241] 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.[242] Several recent decisions have started to bring 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.[243] 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 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 as the wild, American world of mass torts law.[244] 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.[245] Not only could *parens patriae* actions in Europe be undertaken via statutory means,[246] but American-style *parens patriae* lawsuits have already been encouraged in other fields of law,[247] including antitrust, and German environmental NGOs filed non-*parens patriae* climate change lawsuits as far back as 2004.[248]
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[249] offers perhaps the best *parens patraie*-type statutory cause of action with its emphasis on the 'polluter pays' principle[250] and dual options for preventative and remedial action against polluters.[251] 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.[252] 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

235 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* (2003) 17. 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. ibid. 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.

236 Attorneys might assert that all UK citizens could be considered 'neighbours' of a national government agency (ie Defra) to whom Defra has a duty to reduce, abate, or at the very least participate in the resolution of hazards and nuisances. See nn 225–226 and accompanying text.

237 A case of this sort would mirror *Massachusetts v EPA*. See text accompanying nn 52–58.

238 *Lambert* (n 219).

239 'About Defra' *(Department for Environment, Food and Rural Affairs,* 31 May 2012) <http://ww2.defra.gov.uk/corporate/> accessed 20 January 2013. Defra's ultimate measured duty liability would likely be based upon a full analysis using the factors discussed in the text accompanying n 226.

240 See Part II.B.

241 See Part II.A.

242 See Part II.

243 See Part II.C.

244 See Part III.

245 See Part IV.

246 See Part IV.A.

247 See Part IV.B.

248 See Part IV.C.

249 See Part V.

250 See Part V.A.

251 See Part V.B.

252 See Part V.C.

beyond mere enforcement for the injury caused.[253]

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.[254] 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.[255] Intrepid German attorneys may look to the Environmental Liability Act[256] or the German Federal Emission Control Act[257] 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.[258]

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 US 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. ■

253 See Part VI.
254 See Part VII.
255 See Part VII.A.
256 See Part VII.B.1.
257 See Part VII.B.2.
258 See Part VII.C.