Europe and Eurasia
The European Union legal system

14.01 The European Union (‘EU’) is a regional integration organisation consisting at present of twenty-seven European Member States that have transferred part of their sovereignty to the EU. The EU is based on international treaties – the Treaty on European Union (‘TEU’) and the Treaty on the Functioning of the European Union (‘TFEU’) – and its power to act is laid down in the various provisions of these treaties; there is no ‘common law’ applicable to it. In this regard, the EU is similar to a civil law country.

14.02 A number of specific features distinguish the EU from traditional international organisations. First, the TEU and TFEU address not only the relations between the Member States and the EU institutions, but also establish rights and obligations for individuals. Second, though legislative decisions in climate change matters are taken by majority vote in the European Parliament – whose members are directly elected – and the Council, which consists of the governments of the twenty-seven Member States, the adoption of legislation on climate change is only possible on the basis of a proposal by the European Commission. The Commission oversees the application of EU law in the Member States, and has the duty to act in the general interest of the EU rather than in the interest of the individual Member States.

14.03 The Court of Justice of the EU, consisting of a General Court (‘GC’) (formerly the Court of First Instance) and the European Court of Justice (‘ECJ’), has the duty to ensure the correct application of EU law. Its judgments are binding on all public authorities, both at EU and at Member State level. When a question of EU law
becomes relevant in a case before a national court, that court may ask the European Court for an interpretation, and where there is no judicial remedy under national law against a decision of the national court, that court is obliged to make a request to the ECJ for an interpretation of the relevant EU law provision.

14.04 The competence to adopt environmental legislation, including legislation on climate change, is shared between the EU and the Member States. When EU legislation is adopted, Member States are not only obliged to implement it, but they must not adopt provisions or practices that contradict EU provisions, though in the case of legislation based in the environmental provisions of the TFEU they may maintain or introduce more stringent national provisions than those provided by the European rules.

**Constitutional/principal environmental/human rights law**

14.05 The TEU lays down as objectives of the EU, among others, ‘sustainable development’ and ‘a high level of protection and improvement of the quality of the environment’. The TFEU sets out that ‘[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development’. Articles 191–193 TFEU, which specifically address environmental policy, state explicitly that the EU’s environmental policy shall contribute to ‘combating climate change’.

14.06 The EU is not yet a member of the European Convention on Human Rights and Fundamental Freedoms of 1950, but its accession is now required under Article 6(4) TEU, which states that the provisions of the Convention ‘shall constitute general principles of the Union’s law’. In 2000, the EU adopted a separate Charter on Fundamental Rights, which now has the same legal value as the EU Treaties, though in the case of the United Kingdom and Poland, a Protocol to the Lisbon Treaty states that the Charter does not create justiciable rights in those countries except in so far as they have created such rights under national law.

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1 Article 3(3), TEU.  
2 Article 11, TFEU.  
3 Article 191(4), TFEU.  
14.07 There is no comprehensive EU climate change legislation. The EU has signed and ratified the Kyoto Protocol, which imposes a reduction by 2012 of 8 per cent of the EU’s greenhouse gas (‘GHG’) emissions from 1990 levels. At the time, the EU agreed to an internal, legally binding ‘burden-sharing’ system, which provided for differentiated obligations for the – at that time fifteen – Member States. Another binding burden-sharing agreement was decided in 2009 among the now twenty-seven Member States, which aimed at reducing the EU’s GHG emissions by 20 per cent by the year 2020, compared to 2005 levels.

Trading with emission allowances

14.08 The main EU instrument to address the reduction of the emission of GHGs is Directive 2003/87 establishing a scheme for GHG emission allowance trading (the ‘EU ETS’).

Trading with emission allowances

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6 The reduction/increase percentages were fixed as follows: Belgium –7.5%; Denmark –21%; Germany –21%; Ireland +13%; Greece +25%; Spain +15%; France 0%; Italy –6.6%; Luxembourg: –28%; Netherlands: –6%; Austria: –13%; Portugal: +27%; Finland: 0%; Sweden: +4%; United Kingdom –12.5%.


8 The reduction/increase percentages were fixed as follows: Belgium –15%; Bulgaria +20%; Czech Republic +9%; Denmark –20%; Germany –14%; Estonia +11%; Ireland –20%; Greece –4%; Spain –10%; France –14%; Italy –13%; Cyprus –5%; Latvia +17%; Lithuania +15%; Luxembourg –20%; Hungary +10%; Malta +10%; Netherlands –16%; Austria –16%; Poland +1%; Portugal +1%; Romania +19%; Slovenia +4%; Slovakia +13%; Finland –16%; Sweden –17%; United Kingdom –16%.

9 A Directive is a legally binding instrument, addressed to EU Member States. It obliges them as to the result to be achieved, but leaves to the national authorities the choice of form and methods (Article 288 TFEU).

allowances on the market. Installations which participate in the trading system need not respect the requirement of using the best available techniques for limiting their CO₂ emissions. However, Member States may be able to impose national CO₂ performance standards on installations even though they are covered by the emissions trading Directive.¹¹ The distribution of allowances follows national allocation plans that must be established by the Member States and approved by the Commission.

14.09 This Directive has been amended and strengthened several times, most recently to include aviation activities in the EU ETS;¹² and as of 2013, the total number of EU emission trading allowances will be reduced by 1.74 per cent each year.¹³ Furthermore, the percentage of allowances to be auctioned will increase from 2013. Whilst in the energy sector all allocation will be auctioned from 2013, the percentage of allowances to be auctioned will vary from sector to sector.

**Alternative energies**

14.10 Directive 2009/28, which has replaced earlier EU legislation, aims to ensure that, by 2020, at least 20 per cent of total energy consumption in the EU will stem from renewable energy sources.¹⁴ To that end, each Member State is to reach a specific percentage level of energy consumption from renewable

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¹¹ Directive 2010/75/EU of 24 November 2010 on Industrial Emissions repeats the formulation in the Integrated Pollution Prevention and Control (IPPC) Directive that where emissions of greenhouse gases covered by the emissions trading regime are involved, a permit may not include emission limit values for direct emissions of greenhouse gases unless necessary to prevent significant local pollution (Article 9). But Preamble 10 then provides that ‘In accordance with Article 193 of the Treaty on the Functioning of the European Union (TFEU), this Directive does not prevent Member States from maintaining or introducing more stringent protective measures, for example greenhouse gas emission requirements, provided that such measures are compatible with the Treaties and the Commission has been notified.’


sources, with the levels varying according to (i) earlier efforts by the individual Member States, (ii) the possibilities to fulfil the objective, and (iii) considerations of equity.\textsuperscript{15} Furthermore, each Member State is obliged to ensure that, by 2020, 10 per cent of its energy consumption in the transport sector comes from renewable energy sources. A further Directive passed in 2009 addresses the mixing of bio-fuels with petrol and diesel,\textsuperscript{16} and contains detailed sustainability requirements, applicable to both the areas within the EU and third countries, about bio-fuel generation; the Commission must report every two years on whether the relevant third countries are complying with these requirements.

\textit{Other measures}

14.11 The EU has adopted a non-binding target of increasing energy efficiency by 20 per cent by 2020. In order to reach that objective, the European legislators adopted a Directive on the eco-design of energy-using products;\textsuperscript{17} a work programme elaborated under this Directive\textsuperscript{18} provides for the fixing of energy standards for fifty-seven product groups (computers, television sets, light bulbs, refrigerators etc.) to be progressively adopted by way of an accelerated legislative procedure. A further Directive\textsuperscript{19} from 2006 requires the creation and development of national action

\textsuperscript{15} By 2020, the following percentages shall have to be reached: Belgium 13%; Bulgaria 16%; Czech Republic 13%; Denmark 30%; Germany 18%; Estonia 25%; Ireland 16%; Greece 18%; Spain 20%; France 23%; Italy 17%; Cyprus 13%; Latvia 40%; Lithuania 23%; Luxembourg 11%; Hungary 13%; Malta 10%; Netherlands 14%; Austria 34%; Poland 15%; Portugal 31%; Romania 24%; Slovenia 25%; Slovakia 14%; Finland 38%; Sweden 49%; United Kingdom 15%.


plans on energy efficiency and fixes a non-binding target of a 9 per cent increase in energy efficiency to be reached by 2015.

14.12 A Directive on energy efficiency of buildings was adopted in 2002 and reviewed in 2010, and provides for measures to increase the energy efficiency of not only new buildings and apartments, but also of existing buildings and apartments that undergo major restoration. Such buildings must comply with minimum performance requirements and require an energy performance certificate that must be passed on to any future buyer. The Directive also puts in place a methodology for calculating the energy performance of buildings.

14.13 European rules passed in 2009 concerning passenger cars put into circulation within the EU stipulate that these may not emit more than 130 grams CO₂ per kilometre; there is an intention to further lower this standard by 2020 to 95 grams per kilometre. This obligation is to be phased in between 2012 and 2015. Less stringent limit values have been set for light commercial vehicles, though not for trucks.

14.14 The EU has adopted a considerable number of legally binding measures in the agricultural, energy, transport and industrial sectors to reduce energy consumption, increase energy efficiency, promote the generation and use of energy from renewable sources, and to reduce the emission of GHGs.

14.15 Additional EU provisions that have some relevance for climate change litigation deal with the environmental impact assessment.

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of certain public and private projects, the environmental assessment of plans and programmes, industrial emissions, and with access to information, participation in decision-making and access to justice in environmental matters.

14.16 The environmental liability Directive\textsuperscript{24} is not likely to play a significant role in climate change litigation. Indeed, this Directive only applies to certain activities which are listed in an Annex. Such activities must have damaged natural habitats, fauna or flora species, the water or the soil. However, the Directive only applies to damage ‘caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators’ (Article 4(4)). In practice, such a causal link is almost impossible to establish.

\textit{The EU institutions’ stance on climate change}

14.17 From the very beginning of the discussions for an international agreement on climate change, the EU has favoured efficient and effective measures against climate change. It signed and ratified the UN Convention on Climate Change 1992 and stabilised its CO\textsubscript{2} emissions by 2000 at the level of 1990. At the Kyoto Conference in 1997, the EU favoured the adoption of strict measures to reduce overall GHG emissions by 2012. It signed and ratified the Kyoto Protocol, which provided for a reduction of EU GHG emissions by 8 per cent (compared to 1990 levels). Its measures intended to implement these commitments are described above. The EU committed itself on several occasions to achieving the objective of limiting the global average temperature increase to not more than 2°C above pre-industrial levels, and has always favoured, on an international level, the adoption of more efficient measures to fight climate change.

14.18 At the Copenhagen Conference in 2009, the EU offered to reduce its emissions by 30 per cent (compared to 2005 levels) by the year 2020, provided that similar commitments were made by other developed countries and economically more advanced developing countries; this commitment had already been laid down in

\textsuperscript{24} Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004, L 143, p. 56.
When the negotiations in Copenhagen for an international agreement failed, the EU Member States opposed a unilateral EU commitment to a 30 per cent reduction in emissions, but stuck to the original reduction plan of 20 per cent.

**EU risks from climate change**

14.19 Most of the impacts of climate change risk have repercussions within the EU, as the EU territory covers such a large geographical area. The main consequences include an increased risk of coastal and river floods, droughts, loss of biodiversity, threats to human health, and damage to economic sectors, such as forestry, agriculture and tourism.

14.20 At present, temperatures are forecasted to rise everywhere, with southern Europe having to face tropical temperatures and more frequent heatwaves. Should, however, a change in the ocean currents lead to the disappearance of the Gulf Stream that provides Europe with a warm, mitigated climate, the average temperatures might fall considerably and change the EU’s climate drastically. A rise in sea levels would threaten large coastal areas and create problems for countries such as The Netherlands or coastal zones which lie at present below sea level. Droughts will occur more frequently, and desertification and soil erosion are likely to progress with greater speed than currently. Southern Europe in particular will be confronted with greater water scarcity than at present. Together with more frequent droughts and changing precipitation levels, there will be considerable impact on crops and changes in the biological diversity, while more tropical diseases will spread across Europe.

14.21 The consequences of a changing climate for the EU are difficult to assess because the EU is an affluent region and measures will be undertaken to mitigate the effects of climate change. These include dike construction, irrigation projects, water transfer, changes in production methods in agriculture, different approaches to the construction of buildings, changes in

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25 Decision 406/2009 (see n. 7 above).
energy-saving and energy-efficiency measures, and changes in tax legislation and working methods. The agricultural sector will request more State aid, and other sectors are likely to rely heavily on public financial and/or economic support. It seems clear that the effects of climate change will not favour market freedom, but rather interventionist measures, in Europe.\textsuperscript{27}

\textbf{14.22} Mitigation measures and their impact as well as State intervention are likely to be largely adopted at regional (Member State) level, as the impact of climate change will vary considerably from one Member State to another.

\textit{Existing industries and natural resources}

\textbf{14.23} The EU’s primary energy production relies on various types of sources: nuclear energy (28.4%), coal and lignite (22.0%), natural gas (19.7%), renewable sources (16.3%) and crude oil (13.6%).\textsuperscript{28} The EU depends on imports for 54.8% of its energy. There is no internal EU energy market per se; the use of the different energy sources varies greatly from one Member State to another, as do the tax provisions and public measures to promote renewable energy and increased energy efficiency.

\textbf{14.24} Though EU policy decisions and legislative measures promote renewable energies and greater energy efficiency, Member States frequently take decisions in this area according to their specific national energy situation. At present, about half of the EU Member States turn to nuclear energy, while several Member States strictly object to it – though as a result of the climate change discussions, these positions are changing. Nuclear energy is, in most countries, not a competitive industry, but relies on


direct and indirect State aid to remain viable. Coal remains an important source of energy in several Member States (Poland, Spain, Germany), and is also important for social (employment) reasons, though it is not competitive with imported coal. Current EU policy seeks to phase out State aid for coal by 2018.

(B) Public law litigation

14.25 The EU is an international regional integration organisation with specific characteristics, so most litigation in the area of climate change concerns the relationship of the EU and its Member States. A first series of European court cases addressed the division of power between the EU and Member States in climate change matters. In a second series, the European courts had to intervene to decide on the validity of EU legislative acts or specific decisions on climate change. A third series of court decisions concerned the enforcement of the application of EU climate change law in Member States. Actions brought by private persons against the EU have mainly concerned individual decisions taken by the European Commission.

14.26 Actions for damages will be discussed in (C) Other EU law provisions below, although it is questionable whether actions brought against the EU also form part of public law.

Court decisions on the allocation of powers between the EU and its Member States

14.27 The division of powers between the EU and its Member States and any related disputes concern the EU and its Member States. Due to the nature of such disputes, private individuals are not normally involved in the same. As Member States, meeting in Council, decide – together with the European Parliament – on legislative measures, disputes as to allocation of powers are infrequent. In climate change questions, only one set of acts has, until now, been the subject of litigation.

14.28 In one case, the Commission considered the national allocation plan (‘NAP’) under the emissions allowances Directive, submitted by Poland, to be incompatible with the conditions of Directive 2003/87 and reduced the annual quantity of emission
allowances by around 25 per cent. Poland asked the GC to annul the Commission’s decision.  

14.29 The Court found that the Commission had exceeded its powers by using an assessment method of its own, thereby reaching different results than Poland had done. The Court held that the drawing up of a NAP was a matter which fell within the competence of the Member States and that the Commission only had limited powers to oversee the Member States’ relevant decisions. The Court annulled the Commission’s decision.

14.30 In case T-263/06 involving Estonia, where the Commission again had objected to the NAP for much the same reasons as in the case concerning Poland, the Court came to the same conclusion for similar reasons. The Commission then appealed both cases and these are currently pending. It is likely that other such cases brought by Member States against the Commission will not be decided by the Court before the appeal procedure has ended.

14.31 Member States have also obtained victories against the Commission in two other cases concerning Directive 2003/87, where the respective competences were in question. In case T-178/05, the question was raised whether a Member State, after having submitted its NAP plan to the Commission, was entitled to amend it and increase the overall amount of allocations it distributed. When the United Kingdom (‘UK’) did so, the Commission rejected the amendments as inadmissible. However, the Court held that it followed both from the wording of the Directive and from the general structure and objectives of the system which it established that the Commission could not restrict a Member State’s right to amend its NAP and annulled the Commission’s decision. The Commission later rejected the amendments proposed by the UK for a second time, but for different reasons, and the UK then decided not to challenge the Commission’s decision.

31 See ECJ, case C-504/09, Commission v. Poland; case C-505/09, Commission v. Estonia.
In another case, Germany had submitted to the Commission a NAP which provided for the possibility of some later amendments to take account of economic development in Germany. The Commission rejected the provisions on ex-post adjustments as inadmissible, stating that a NAP could not be subsequently amended. When Germany applied to the GC, the Court proceeded to a literal, historical, contextual and teleological interpretation of the relevant provisions of Directive 2003/87. It came to the conclusion that the Directive did not prohibit Member States from ex-post adjustments. Furthermore, the Court held that the Commission had erroneously considered that the German provisions discriminated in favour of new market entrants, and that the Commission had not sufficiently justified its decision to prohibit certain ex-post adjustments.

**The validity of EU legislation**

Actions on the compatibility of EU climate change legislation with the EU 'constitution' (the EU Treaties), with general principles of EU law or with public international law are mostly brought by companies or private individuals. Member States – as members of the Council – are also co-legislators in climate change matters, but do not appear as applicants to the courts, although they would have standing for actions against an EU legislative act.

The first decision on climate change issues concerned the request for a preliminary ruling that had been referred to the ECJ by an Italian court. In that case, an Italian company claimed damages from a customer who defended himself with the argument that the purchase contract was invalid because it contradicted an EU regulation on the ban of the ozone-depleting substance hydrochlorofluorocarbon (‘HCFC’). The Italian court wanted to know whether the ban of HCFC was in conflict with provisions and principles of EU law, in particular as substances with a higher global-warming potential had not been prohibited.

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14.35 The ECJ examined whether the ban was compatible with the objective to protect the environment, whether it ensured a high level of protection and whether it took into account the available scientific and technical data. It also examined the compatibility of the ban with the provisions on the free circulation of goods and the proportionality principle, with competition law, with State aid provisions and with the requirement of sincere cooperation between the EU and Member States. The Court concluded that the HCFC ban was in full compliance with EU law.

14.36 In climate change matters, a French company brought a case before French courts, contesting the validity of Directive 2003/87 on GHG emission allowance trading. The French court asked the ECJ whether this Directive was valid in light of the principle of equal treatment, in so far as it makes the allowance trading scheme applicable to installations in the steel sector without extending its scope to the aluminium and plastics industries.

14.37 The ECJ held that the chemical sector covered a large number of installations. Its inclusion into the scheme would have made the management of the scheme more difficult and increased the administrative burden. As the EU institutions introduced the scheme by way of a step-by-step approach, applying it in the beginning only to some installations and economic sectors, they were entitled to take the view that the complete exclusion of the chemical sector from the scheme outweighed the advantages of including some larger chemical installations. As regards the non-ferrous metal sector, the Court concluded that the amount of direct emissions from that sector – 16.2 million tonnes of CO₂ in 1990 – was so different from that of the steel sector – with 174.8 million tonnes of CO₂ emissions – that, in view of the step-by-step approach, the EU legislature was entitled to treat the two sectors differently, without having to take into consideration the indirect emissions attributable to the different sectors. The ECJ held that the validity of Directive 2003/87 did not contain a discrimination of the steel sector. The Court explicitly mentioned, though, that the emission allowances trading scheme was a new

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37 Directive 2003/87 (see n. 10 above).
instrument in EU law and that the EU legislature had a considerable degree of discretion, in particular during the initial stages of the use of that instrument, to differentiate between the industrial sectors. These remarks leave it open as to whether the Court might, in a future case, not find an unjustified different treatment of industrial sectors.

14.38 The French company also tried to directly question the validity of Directive 2003/87 before the GC. However, the Court found that the Directive was of a general nature and that the applicant was not individually and directly affected by its adoption, as required by Article 263(4) TFEU. Consequently, it declared the action to be inadmissible.  

14.39 Directive 2003/87, as amended by Directive 2008/101, was also the subject of a preliminary request referred to the ECJ by a British court in a case introduced by the Air Transport Association of America and a number of US airline companies. The British court posed the question as to whether the inclusion of aviation activities within the EU ETS was compatible with customary international law, the Chicago Convention on International Civil Aviation of 1944, the Open Skies Agreement and the Kyoto Protocol. The decision is pending; a judgment is expected by the end of 2011 or in 2012.

The enforcement of EU climate change provisions in the Member States

14.40 Actions in relation to the enforcement of EU climate change provisions in the EU Member States are, in practice, exclusively commenced by the European Commission. It is true that Article 259 TFEU provides that a Member State that considers another Member State to have failed to fulfil an obligation under the Treaties may bring the matter before the ECJ. However, this

41 Directive 2008/101 (see n. 12 above).
42 This probably refers to the Community Air Service Agreement, concluded between the United States and the EU on 2 March 2007. However, this was not specified in the published and publicly available documents.
43 ECJ, case C-366/10, introduced on 22 July 2010.
provision has, until the end of 2010, never been used in the environmental sector; and in other areas of EU policy, its application is extremely rare, as Member States largely prefer to let the Commission take action against a Member State.

14.41 The Commission is entitled to take legal action against a Member State when it considers that the relevant Member State has failed to fulfil an obligation under EU law. It has discretion in this regard that is not controlled by the ECJ. Private individuals may not bring an action against the Commission for failing to act or for damages when the Commission has failed to take any action. In the past, all such actions brought by private persons against the Commission have been unsuccessful. The decision by the ECJ is a declaratory judgment; no sanction is foreseen, except that the Court may, on the Commission’s request, impose a lump sum or penalty payment, when a Directive was not transposed into national law. When a Member State does not comply with a judgment of the Court issued under Article 258 or 259 TFEU, the Commission may, under Article 260 TFEU, bring a second case against that Member State and ask for financial sanctions.

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44 See Court of Justice, case 141/78, France v. United Kingdom, ECR 1979, p. 2923; case C-145/04, Spain v. United Kingdom, judgment of 12 September 2006.

45 See Article 258 TFEU: ‘If the Commission considers that a Member State has failed to fulfil an obligation under the treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.’

46 See Article 260(3) TFEU: ‘When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission …’ This provision has only been in force since 1 December 2009.

47 See Article 260(2) TFEU: ‘If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.’
Until the end of 2010, such sanctions were imposed in four environmental\textsuperscript{48} and in a number of other cases.

14.42 In climate change matters, the Commission brought a court action against Italy and Finland for failure to transpose Directive 2003/87 on the emission allowances trading scheme into their national legal order by the deadline specified in the Directive; for Finland, this action was limited to the province of Aaland. The Court stated in both cases that the Directive had not been transposed in time.\textsuperscript{49} Furthermore, the Court found in two cases\textsuperscript{50} that Luxembourg had not met the transmission deadline for the necessary information on the actual GHG emissions, required under Decision 280/2004.\textsuperscript{51} Luxembourg then had to take the necessary measures to comply with its obligations.

14.43 Overall, it should be noted that the Commission has limited itself until now to taking court action against a Member State when EU legislation had not been transposed into national law or when data had not been transmitted to the Commission. It has not taken action against Member States when the climate change provisions of EU law had been incorrectly applied, for example when GHG emissions had increased in contravention of Decision 2002/358\textsuperscript{52} or Member States had been too generous in allocating ETS allowances.\textsuperscript{53} One can only speculate as to the reasons for

\textsuperscript{48} See Court of Justice, cases C-387/97, Commission v. Greece, ECR 2000, p. I-369 (€20,000 per day); C-278/01, Commission v. Spain, ECR 2003, p. I-14141 (€624,000 every six months); C-304/02, Commission v. France, ECR 2005, p. I-6263 (lump sum of €20 million and €57.6 million every six months); C-121/07, Commission v. France, ECR 2008, p. I-9159 (lump sum of €10 million).

\textsuperscript{49} ECJ, cases C-122/05, Commission v. Italy, judgment of 18 May 2006; C-107/05, Commission v. Finland, judgment of 12 January 2006.

\textsuperscript{50} ECJ, cases C-61/07, Commission v. Luxembourg, judgment of 18 July 2007; C-390/08, Commission v. Luxembourg, judgment of 14 May 2009.


\textsuperscript{52} For example, according to Decision 2002/358 (see n. 5 above) Belgium should have reduced its greenhouse gas emissions until 2012 by 7.5 per cent; until 2005, it had only reduced them by 0.7 per cent. Denmark should reduce greenhouse gas emissions by 21 per cent until 2012; until 2005, it had reduced them by 8.7 per cent. Spain was allowed to increase its emissions by 15 per cent; until 2005, it had increased them by 53.1 per cent. See for details L. Krämer, ‘Klimaschutzrecht in der Europäischen Union’, Revue Suisse du Droit International et Européen, (2010), 311.

\textsuperscript{53} In a letter of 17 March 2004, the Commission had stated that this practice constituted unjustified State aid, since the undertakings could sell the surplus allowances and retain the proceeds of the sale; such an advantage could seriously distort competition. The letter is mentioned in GC, case T-387/04, ENBW Energie Baden-Württemberg v. Commission, Order of 30 April 2007, ECR 2007, p. II-1195, para. 23.
the Commission’s passivity and it is questionable as to whether this passivity is compatible with the Commission’s obligation to ‘ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them’ and to ‘oversee the application of Union law under the control of the Court of Justice of the European Union’.\footnote{Article 17(1), TEU.}

\textit{Action by private persons against individual decisions by the European Commission}

14.44 Private undertakings have tried in a number of cases to challenge the decisions taken under Directive 2003/87\footnote{Directive 2003/87 (see n. 10 above).} by the European Commission concerning the NAPs of Member States and the allocations made to the individual undertakings.

14.45 In case T-489/04,\footnote{GC, case T-489/04, \textit{US Steel Kosice v. Commission}, Order of 1 October 2007.} the GC concluded that the decision as to how many allocation allowances, including allowances to individual undertakings, were to be distributed was taken by the individual Member States and not by the Commission. The Member States only had to respect the overall ceiling fixed by the Commission. Individual undertakings were therefore not directly and individually affected by the Commission’s decision and thus had no standing.

14.46 On appeal from the applicant, the ECJ confirmed these findings.\footnote{ECJ, case C-6/08P, \textit{US Steel Kosice v. Commission}, Order of 19 June 2008.} It held that the Commission’s decision ‘was not such as to directly affect the legal situation of the appellant and was therefore not of direct concern to him’.\footnote{Ibid., n. 68.} Subsequently, all applications by undertakings against the Commission’s decisions regarding NAPs have been considered inadmissible. The reasoning of the GC has varied slightly: either the applicants were considered not to be \textit{individually} concerned,\footnote{GC, cases T-130/06, \textit{Drax Power and others}, Order of 25 June 2007; T-28/07, \textit{Fels-Werke and others v. Commission}, Order of 11 September 2007; T-241/06, \textit{Buzzi Unicem v. Commission}, Order of 27 October 2008.} or they were considered not to be \textit{directly} concerned.\footnote{GC, cases T-13/07, \textit{Cemex UK v. Commission}, Order of 6 November 2007; T-193/07, \textit{Görazde Cement v. Commission}, Order of 23 September 2008; T-195/07, \textit{Lafargue Cement v. Commission}, Order of 23 September 2008; T-196/07, \textit{Dyckerhoff v. Commission}, Order of
14.47 In case T-387/04, the applicant argued that the German NAP contained elements of State aid, as it included an over-allocation of trading allowances to some undertakings. As a competitor of those undertakings, it was individually affected by the Commission’s decision which constituted an authorisation of the NAP and State aid elements; and since the NAP did not give the German authorities any discretion in distributing the allowances otherwise, it was also directly affected by the decision.

14.48 The Court held that the Commission’s decision did not constitute an authorisation of the NAP, but a mere review; the Commission had thus not authorised any eventual State aid contained in the NAP. The annulment of the Commission’s decision on the German NAP would thus not procure any advantage to the applicant and the Court, therefore, declared the application inadmissible.

14.49 In 2010, a Spanish undertaking brought an action against the Commission’s decision to authorise Spain to pay compensation to undertakings in respect of the additional costs borne by those electricity producers who, as a result of public-service obligation, had to ensure that a part of their production used domestic coal. The applicant argued that this decision infringed provisions on the internal market, competition and environmental protection, in that it promoted the operation of installations which increase the level of gas emissions into the atmosphere: this constituted a breach of the prohibition on allocating new free emission allowances. The case is pending.

General assessment of EU public law litigation

14.50 A general look at the public law litigation on climate change issues at EU level reveals that most of the litigation takes place between the EU institutions and the EU Member States. This concerns the


61 GC, case T-387/04 (see n. 53 above).

62 GC, case T-484/10, Gas Natural Fenosa v. Commission.
allocation of power, the validity of EU legislative provisions and the enforcement of EU legislation in the Member States. National courts may, via the preliminary court procedure, provoke a judgment by the ECJ as to the validity of EU legislation. In substance, though, the ECJ is very reserved in this regard and does not easily annul EU (climate change) legislation because it takes the view that the EU legislature benefits from a large amount of discretion as to the provisions which it adopts.

14.51 The European Commission oversees the transposition of EU climate change legislation into the national legal order of the Member States as well as the formal requirements linked to that, such as the drawing up of plans or the transmission of reports or data to the Commission. However, it is reserved to look into the practical application of the provisions within the Member States. For example, larger infrastructure and industrial installation projects must, before they are authorised, be the subject of an environmental impact assessment which also shall examine the direct and indirect effects of the project on the climate. Until now, the Commission has never examined if, and to what extent, national assessments comply with this requirement.

14.52 Practically all activities by the EU institutions belong to the sphere of public law. There is thus no room for private law litigation concerning climate change issues. This also includes action for damages.

14.53 Private persons and undertakings are mostly barred from access to the EU courts by virtue of the provision of Article 263(4) TFEU which gives them standing only when they are directly and individually affected by a legislative act or a specific decision. In practice, they only have the possibility to question the validity of EU climate change legislation by bringing an action to a national court and asking that court to make a reference to the Court of Justice for a preliminary ruling. As almost all specific decisions by the EU Commission are addressed to Member States, judicial

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63 Directive 85/337, OJEU 1985, L 175, p. 40, Article 3: ‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case ... the direct and indirect effects of a project on the following factors: - human beings, fauna and flora, soil, water, air, climate and landscape ...’
action against such a decision is also barred. Actions before the EU courts appear only to be possible where a breach of State aid rules is invoked, as in such cases competition within the EU could be distorted. However, no such case has yet been decided by the EU courts.

14.54 Article 340(2) TFEU addresses the non-contractual liability of the EU, and reads: ‘In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.’ Article 340(3) TFEU extends this obligation to the European Central Bank. The action may be addressed against any action of an institution, including legislative measures. Omissions to act may also be challenged.

14.55 In order to be admissible, an action for compensation of damage must indicate to which unlawful conduct of an EU institution the action relates, why the applicant considers that there is a causal link between the conduct and the damage, and the nature and the extent of that damage. The EU courts have a tendency to be relatively generous with regard to the admissibility of actions under Article 340(2) TFEU.

14.56 By contrast, the requirements for an action to succeed are rather strict. As regards the unlawful conduct of the EU institutions, the rule of law which is breached must intend to confer rights on individuals. Furthermore, the breach of the rule of law must be sufficiently serious. This is the case when the institution in question manifestly and gravely disregarded the limits of its discretion; where only reduced or no discretion is granted, the mere infringement of EU law is sufficient. The system is one of strict liability; therefore, the concept of negligence is not relevant in this context.

64 According to Article 340(1) TFEU, contractual liability of the EU ‘shall be governed by the law applicable to the contract in question’, and shall not be discussed here.

65 See GC, cases T-138/03, Abad Pérez and Others v. Commission, ECR 2006, p. II-4857, para. 44; T-16/04 (see n. 40 above), para. 132.


67 GC, case T-16/04 (see n. 40 above).
14.57 In *Arcelor v. European Parliament and Council*, the GC assessed whether the EU institutions, by adopting Directive 2003/87, committed a sufficiently serious breach of a rule of law by exceeding the limits of the broad discretion which they enjoyed under the present Articles 191 and 192 TFEU. The Court examined successively the applicant’s right of property, the freedom to pursue an economic activity, the principles of proportionality, equal treatment and legal certainty, and the freedom of establishment. It held that the applicant had not proven that any of these legal provisions or principles had been breached. Until the end of 2010, this was the only case concerning non-contractual liability which had been brought in front of an EU court.

(C) Other EU law provisions

14.58 **Human rights.** EU law does not grant an individual right to a clean environment. The Charter on Fundamental Rights only provides that ‘[A] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’ Until now, this provision has not been used in the context of an action on climate change issues before EU courts; it is unclear how the provision will be interpreted by European courts.

14.59 **Constitutional rights.** The TFEU lists, as mentioned above, the fight against climate change as one of the policy objectives of the EU’s environmental policy. Environmental policy objectives were used by the ECJ to underpin interpretations of EU law provisions, but were never used to justify an action without any specific rule of law supporting the action.

14.60 **Supply chain regulation.** Recent EU legislation prohibits the placing on the market of timber harvested in contravention of the applicable legislation in the country of harvest. One of the declared objectives of this Regulation is to reduce illegal logging, which has been declared ‘responsible for about 20% of global CO₂

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emissions'. No cases have yet come in front of the court on such matters.

14.61 **Criminal law.** Under the allocation of competences in the EU, criminal law cases are not brought to EU courts, but rather are exclusively the jurisdiction of national courts.

(D) **Soft law**

14.62 The only instrument of dispute resolution other than the EU courts at EU level is the European Ombudsman. The Ombudsman is empowered to receive complaints from natural or legal EU persons concerning instances of maladministration of the EU institutions or bodies. He examines such complaints, reports on them and gives recommendations or reports on his conclusions. His recommendations are not binding.

14.63 Until now, the Ombudsman has not looked into issues of climate change, though he has dealt with some complaints regarding access to NAPs for GHG emission allowance trading. His influence in dispute settlement is generally rather limited.

(E) **Practicalities**

14.64 The provisions on standing before the EU courts do not differentiate between EU citizens and residents and other residents. However, such a differentiation may follow from specific provisions of EU law. For example, according to Article 15 TFEU, ‘any citizen of the Union and any natural or legal person residing or having its registered office in a Member State’ shall have a right of access to documents of the Union institutions and bodies.

14.65 The judgments of the ECJ and the GC are enforceable by law. Enforcement is governed by the rules of civil procedure in the Member State in the territory of which it is carried out.

14.66 Actions brought before the EU courts do not have suspending effect. However, the courts may order that application of the

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71 Ibid., Recital 3.  
72 See for details Article 228 TFEU.  
73 Articles 280 and 299 TFEU.
contested act be suspended. The courts may also, in cases before them, prescribe any necessary interim measures.\textsuperscript{74}

14.67 The ECJ has categorically denied that the public interest in a particular lawsuit could overcome the requirement laid down in Article 263(4) TFEU, that a person must be directly and individually affected by the contested act. Environmental organisations do not therefore have standing in environmental issues, unless a decision is addressed to them.\textsuperscript{75} The new provision of Article 263(4) TFEU, according to which actions against a regulatory act which does not entail implementing measures only require a direct concern, may lead in future to some softening of the courts’ very restrictive interpretation of Article 263(4).

14.68 A decision as to the cost of the litigation is given in the judgment or order which closes the proceedings. The general rule is that the unsuccessful party shall be ordered to pay the necessary costs if they have been applied for in the successful party’s pleadings.\textsuperscript{76}

14.69 Regulation 1049/2001\textsuperscript{77} is concerned with access to documents held by EU institutions and bodies. Its wording is, like Article 15 TFEU on which it is based, relatively liberal. However, in practice, EU institutions and bodies make large use of the exceptions provided for in that Regulation and are not really committed to principles of an open society and of transparency, though there is a slow evolution for the better. There are no specific provisions on access to information in the course of litigation.

14.70 In environmental matters, the Aarhus Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters applies. It has been ratified by the EU\textsuperscript{78} and is, at least as regards access to information, part of EU law. Its provisions prevail over those of Regulation 1049/2001.\textsuperscript{79} The right of access to information under the

\textsuperscript{74} Articles 278 and 279 TFEU.
\textsuperscript{75} See the landmark decision of the ECJ, case C-321/95P, Greenpeace and Others v. Commission, ECR 1998, p. I-651.
\textsuperscript{76} Rules of procedure of the ECJ, OJ EU 2010, C 177, p. 1, Article 69; Rules of procedure of the GC, OJEU 2010, C 177, p. 37, Article 87.
\textsuperscript{78} Decision 2005/370; see also Regulation 1367/2006, OJEU 2006, L 264, p. 13 which implements the Aarhus Convention.
\textsuperscript{79} See Regulation 1049/2001 (see n. 77 above), Article 2(6).
Constitution is considerably broader and the exceptions to this right are considerably narrower, though neither the EU institutions nor the EU courts are as yet accustomed to applying the Aarhus Convention. However, in a recent important case the ECJ has held that the provisions of the Convention ‘now form an integral part of the legal order of the European Union’, and that in any area covered by EU environmental law, national courts have a duty to interpret its national law and procedural rules as far as possible to be consistent with the access to justice provisions of the Convention. Neither the EU institutions nor the Member States and their Governments enjoy immunity from legal action at EU level. The ECJ has pronounced, as of the end of 2010, more than 600 judgments against Member States in environmental matters. The judgments are accepted and, generally, measures are taken to comply with them.

(F) Conclusion

14.71 The EU succeeded in adopting strong and far-reaching climate change legislation which is binding on all twenty-seven Member States, without a significant amount of court litigation. Its policy commitments, which already take into consideration the time-frame leading up to the year 2050, were reached by consensus and did not really raise objection by public authorities, private operators and public opinion. Climate change policy within the EU is based on the consensus of society; concerns have been voiced that the reduction of GHG emissions and the replacement of fossil fuels by renewable energy is not advancing quickly enough. Litigation is likely to increase when the Commission tries to enforce the legally binding targets of 2020, and when it is likely to become apparent that some EU Member States will not be able to comply with their obligations.

14.72 Litigation initiated at EU level in favour of more drastic adaptation or mitigation measures is unlikely to increase in the future. Indeed, neither the human rights provisions nor the EU rules on environmental policy allow representatives of civil society or environmental or human rights organisations to bring such

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80 Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, 8 March 2011.
actions to the EU courts. In particular, the requirement that an applicant normally must be *directly and individually* concerned by a piece of legislation or a measure is a very strong barrier of access to EU courts. At present, applicants will be asked to apply to the national courts. The national courts will have to decide within the legislative framework set by the EU, without being able to challenge it themselves, as the ECJ alone decides on the validity of EU legislation; and the ECJ will only very exceptionally question the decisions by the EU legislature.

14.73 At present, most of the litigation at EU level will be initiated by private undertakings that want less climate change legislation and less action. In view of the political and societal consensus on the necessity to fight climate change, their chances of significantly influencing this fight via litigation appear to be rather limited.
Germany

HANS-JOACHIM KOCH, MICHAEL LÜHRS AND RODA VERHEYEN

(A) Introduction

15.01 Section A of this chapter provides an overview of the German legal system and facts and figures relevant to climate change. It also gives an overview of German climate change policy and the legal instruments that have been introduced to combat global warming. Given Germany’s membership of the EU, it should be noted that there will inevitably be a certain degree of overlap with the chapters in this volume relating to other EU Member States. The section does not cover German measures to deal with the effects of climate change. Section B focuses on public law, with a particular focus on how to: (i) enforce existing law (including through the adoption of climate-friendly discretionary decisions); (ii) make existing law stricter; and (iii) force the government to legislate. Section C looks at private law in the field of climate change, focusing on tort law and possible causes of action as there is no case law on the subject to date. Section D focuses on information law. Section E provides a brief conclusion.

The German Legal System

15.02 As a member of the EU, Germany must abide by EU law. The country is a federal constitutional democracy and its Constitution or ‘Basic Law’ (Grundgesetz, GG) has played a major role in political and legal developments since its creation after World War II. It contains a set of basic human rights (Articles 1–20 GG). While there is no specific ‘environmental right’, the State has expressed

1 Status as of 10 March 2011. Subsequent changes have not been processed.
an aim to protect the environment in Article 20a GG. The basic rights are well entrenched in the German legal system as a whole, but there is no distinct area that could be termed ‘Human Rights Law’. Rather, every administration, court and legislator is directly bound to give effect to the basic rights. The rights even regulate relationships between private persons or entities to a certain degree.\(^2\)

15.03 Germany has a civil legal system. Strictly speaking, all law derives from the legislators, the parliaments and local decision-making bodies at various levels: federal (Bund), state (Land), regional (Landkreis) and municipal (Gemeinde). In practice, however, the German higher courts’ interpretations of the law serve as an additional authority. The country has a well-established process for scrutinising the actions of its legislators. The Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) makes decisions nullifying or calling for stricter laws relatively frequently.

15.04 German climate policy is derived from federal policy, with specific federal policy plans shaping legislation. This is true despite the fact that the GG confers upon the Federal Government no general legislative power to deal with the environment or climate protection.\(^3\) The German states bear a great degree of responsibility in terms of law enforcement, including for federal law (Article 83 GG). Many states have developed their own climate change strategies, or at least strategies concerning the levels of CO\(_2\) emissions.

15.05 The judicial system is subdivided into two branches that deal with administrative and civil/criminal matters respectively. The first branch consists of administrative courts (Verwaltungsgerichte, VG), which deal with any kind of judicial review of public actions or decisions. There is then generally resort to a

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\(2\) Third-Party Effect (Drittwirkung): BVerfG (Lüth-Decision), 15 January 1958, 1 BvR 400/51.

\(3\) For the federal level to legislate, it must be granted the relevant power in the GG. The respective legislative powers are expressly provided for in the GG in themes: air pollution control, noise abatement, waste management, nature conservation or water supply (see Article 74 (1) Nos. 24, 29, 32 GG). Climate is not explicitly mentioned, but can also fit under the power to enact ‘law relating to economic affairs’ (Article 74 (1) No. 11 GG).
higher administrative court (Oberverwaltungsgerichte, OVG). The federal high administrative court in Leipzig (Bundesverwaltungsgericht, BVerwG) will normally be available in the last instance, to decide issues of law only and not issues of fact. Criminal/civil matters are dealt with by district courts (Amtsgericht, AG), with resort to the higher district courts (Oberlandesgericht, OLG) and, in the last instance, the federal court in Karlsruhe (Bundesgerichtshof, BGH).

15.06 In all branches and instances there is the possibility of resort to the BVerfG to argue non-compliance with basic rights or other rules contained in the GG.

Emission sources and energy mix

15.07 Germany is currently the seventh biggest greenhouse gas ('GHG') emitter worldwide.\(^4\) Overall German emissions in 1990 amounted to 1232 Mio. t CO\(_2\)-e.\(^5\) This figure included industry in the former German Democratic Republic, which collapsed after German reunification in 1990. In 2008, emissions were down to 958 Mio. t CO\(_2\)-e (amounting to a reduction of 22.2%), and in 2009 emission had decreased to 878 Mio. t CO\(_2\)-e (an overall reduction of 28.7%).\(^6\)

15.08 GHG emissions in Germany are primarily caused by energy generation (80.6%), industrial processes (10.9%) and agriculture (6.9%). Industry’s share of final energy consumption is 28%, private households 25.6% and the transport sector 30.3%. In 2007, Germany’s primary energy needs were met by the following sources: petroleum (34%), natural gas (22%), hard coal (14%), lignite (11%), nuclear energy (11%) and renewables (7.2%).\(^7\) By 2010, the share of renewable energy had increased to 10.3%.\(^8\)

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15.09 As well as undertaking major discussions about the future of nuclear power, Germany is experiencing a wave of applications for new coal power plants. In 2008, forty-three new fossil-fired plants (> 20 MW) were either being built or were in the planning/licensing phase. Of these, about twenty-five were large, new coal-fired plants. Some of these plants have now been abandoned. In March 2011, however, a new 2,100 MW coal plant by the river Elbe in Brunsbüttel was granted a licence in accordance with the Federal Emission Control Act (BImSchG).

15.10 Energy resources in Germany are limited to coal, lignite and natural gas; however, large offshore wind parks have been granted support and are currently being developed. NGOs and expert bodies such as the German Advisory Council on the Environment (‘SRU’) contend that German energy demand could be met entirely by renewable sources by the year 2050.

**Climate protection legislation**

15.11 Climate change law in Germany has become a highly elaborate and complex subject. It is mostly derived from regulatory law (Ordnungsrecht), and is set out in terms of distinct ‘do’s and don’ts’. Only industrial emissions are regulated through an economic instrument – the emissions trading scheme. Despite the many statutes and regulations (whether of EU or domestic origin), it has been said that federal legislators are not doing enough to deal with the problems of climate change. Legally, this question must be judged against the overarching goal of protecting the environment stated in Article 20a GG, as well

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10 Landesamt für Landwirtschaft, Umwelt und ländliche Räume Schleswig Holstein, Medien-Information, Landesamt für Landwirtschaft, Umwelt und ländliche Räume erteilt erste Teilgenehmigung für SWS-Kohlekraftwerk in Brunsbüttel, 1 March 2011.

11 See n. 9 above.


13 For an overview, see Verheyen, n. 9 above.
as against the State’s obligation to protect its citizens (mainly based on the right to life and health under Article 2 GG). Article 20a GG aims to protect the natural basis of life. There is no doubt that climate protection, though not specifically referred to, is covered by this provision – a view which has been upheld by the BVerwG.\textsuperscript{14}

15.12 Article 20a GG has been criticised for not conferring explicit law-making duties on the State, and there is now a petition to explicitly include climate protection in the GG.\textsuperscript{15}

Mitigation targets

15.13 Germany has always been a frontrunner in terms of setting climate targets and in contributing to the international negotiations on the subject.\textsuperscript{16} However, there is still a reluctance to adopt legally binding targets such as those in the UK instead of merely sectoral targets. The first political goal set in Germany was to reduce emissions to 25% below 1990 figures by 2005. This was not achieved. Under the agreement between EU States to share the burden of implementing the Kyoto Protocol, Germany has committed to reducing its GHG emissions to 21% below 1990 levels between 2008 and 2012.\textsuperscript{17} Germany is on target to fulfil this commitment. The ‘Meseberg Energy and Climate Programme’ of 2007\textsuperscript{18} sets out how Germany will achieve the 2007 EU targets. This programme still contains the framework for federal climate policy. Overall, Germany has committed to reducing GHG emissions to 40% below 1990 levels by 2020.

\textsuperscript{14} BVerwG, 25 January 2006, 8 C 13/05, BVerwG, 23 November 2005, 8 C 14/04.
\textsuperscript{15} Official website of the German Bundestag, www.bundestag.de (search for ‘Klimaschutz als Staatsaufgabe’ and ‘Petitionsausschuss’ which is the responsible body for petitions from the general public).
There are several sectoral climate targets contained in legal provisions, such as: (i) the aim to increase the share of renewable electricity to 30% by 2020 (§ 1 para. 2 EEG);\(^1\) (ii) the aim to increase the share of renewable energy in heating by 14% by 2020 (§ 1 para. 2 EEWärmeG);\(^2\) and (iii) the aim to increase the percentage share of high-efficiency combined heat and power (‘CHP’) plants in electricity and heat generation from 12% to 25% (§ 1 KWKG).\(^3\) The prevailing view is that these targets are not enforceable in the courts.\(^4\)

**Emission Trading Scheme**

The EU Emissions Trading Scheme (‘ETS’) has been established in Germany through the Federal Greenhouse Gas Emissions Trading Act (‘TEHG’),\(^5\) the Federal Allocation Act (‘ZuG’) 2007,\(^6\) the National Allocation Plan I of 31 March 2004,\(^7\) the ZuG 2012\(^8\) and National Allocation Plan II of 28 August 2006. It covers approximately 1,650 installations in Germany.\(^9\)

The ETS has given rise to many disputes in the courts, with operators challenging allocation decisions made by the German Emissions Trading Authority (‘DEHSt’).\(^10\) Operators have argued that the establishment of the ETS has infringed basic rights such as the right to property (Article 14 GG), the right

\(^4\) Salje, *EEG Kommentar*, 5th edn (2009), § 1, p. 140; Müller, Oschmann and Wustlich, *EEWärmeG Kommentar* (2010), §1, marginal no. 2, 3.
\(^8\) Of 7 August 2007, BGBl I 2007, p. 1788.
to freedom of occupation (Article 12 GG) and the principle of equal treatment (Article 3 GG). The courts have, nonetheless, consistently upheld the ETS.\textsuperscript{30}

Legislation on energy efficiency

15.17 In general there is still great potential for measures that increase energy efficiency, especially since the majority of industrial facilities in Germany (including those for electricity generation) are not covered by any specific energy efficiency requirements at all. While energy efficiency is still required for industrial installations under § 5 para. 1 1st sentence Nr. 4 Federal Emission Control Act (‘BImSchG’), this provision has effectively been suspended for all installations covered under the ETS (§ 5 para. 1 4th sentence, which was introduced in conjunction with the TEHG).\textsuperscript{31}

15.18 Regulatory requirements do play a significant role in increasing energy efficiency in the building sector. An example of this is the Energy Saving Act (‘EnEV’),\textsuperscript{32} which applies to buildings. The KWKG helps to expand heat networks and contains an obligation to connect CHP, to accept and to purchase the electricity and heat produced by these installations (§§ 4–8 KWKG).\textsuperscript{33}

15.19 With regard to motor vehicles, the EU has set binding targets for CO\textsubscript{2} emissions from new vehicles (Regulation 443/2009).\textsuperscript{34} This Regulation has not yet been implemented into German law. In respect of product efficiency requirements, German law

\textsuperscript{30} See BVerwG, 30 June 2005, 7 C 26/04 and BVerfG, 14 May 2007, 1 BvR 2036/05 which did not accept the appeal against the BVerwG decision. For further discussion of the many disputes arising from the implementation of the TEHG, see Frenz, ‘Gleichheitssatz und Wettbewerbsrelevanz bei BVerfG und EuGH – Das Beispiel Emissionshandel’, DVBl 2010, p. 223 with references. See also the DEHST website at www.dehst.de.

\textsuperscript{31} For a critique see SRU, Umweltgutachten (2008), para. 164 ff and Verheyen, n. 9 above.


\textsuperscript{33} See n. 21 above.

essentially follows EU rules. For example, Germany has transposed the EU Eco-design Directive of 2005.\textsuperscript{35}

Legislation on renewable energy

15.20 The EEG is the core instrument supporting renewable energy generation.\textsuperscript{36} At the heart of the EEG are two fundamental obligations placed on electricity grid operators. First, they must give priority to feeding in, transmitting and distributing renewably generated energy (§§ 5 para. 1 and 8 para. 1, first sentence, No. 1 of the EEG 2008); and second, they must pay a guaranteed price designed to promote the use of renewable energy, which is not yet market-ready. The feed-in tariffs are initially paid for by grid system operators and electricity supply companies through an elaborate vertical and horizontal compensation mechanism, although the costs are in the end borne by consumers. This regulatory model has proven extremely effective,\textsuperscript{37} and the ECJ has classified this instrument as compliant with EU law.\textsuperscript{38}

15.21 The Renewable Energy Heat Act contains, inter alia, a statutory obligation to cover a percentage of heat demand from renewable energy sources.\textsuperscript{39}

15.22 A key factor in promoting renewable energy involves encouraging greater use of biofuels and biogas.\textsuperscript{40} However, the general attempt to support biogas has resulted in conflict surrounding the level of land use required.\textsuperscript{41} The biogas installations also


\textsuperscript{37} See the Bundesregierung (German government), 'Konzept zur Förderung, Entwicklung und Markteinführung von geothermischer Stromerzeugung und Wärmenutzung', dated 13 May 2009, BT-Drs. 16/13128.

\textsuperscript{38} ECJ, 13 March 2001 (C 379/98, 2001, I–2099).

\textsuperscript{39} See n. 19 above.


\textsuperscript{41} SRU, \textit{Klimaschutz durch Biomasse} (2007), marginal no. 105 ff, 150.
cause controversy because of the fumes and odours they generate, and in a growing number of cases community groups and environmental organisations have opposed permits for these plants.\textsuperscript{42}

15.23 One of the main political issues in respect of renewable fuels concerns the use of biofuels in cars. The EU has prescribed a 10 per cent share of biofuels in the transport sector (Directive 2009/28/EG, Article 3 para. 4). This requirement has already been implemented in part.\textsuperscript{43}

Planning law

Climate change in impact assessments

15.24 Germany has largely implemented the EU Directives on EIAs and strategic environmental assessments (‘SEAs’)\textsuperscript{44} through the Act on Environmental Impact Assessment (‘UVPG’).\textsuperscript{45} In Germany, an EIA or SEA is a separate procedure which is integrated into the actual licensing or planning procedure (§ 2 para. 1 UVPG). It can only be challenged in the context of an action against the actual licence or plan, and its outcome does not preempt the outcome of the licensing or planning procedure in any way.

15.25 The EIA must look at the environmental impact of a project. As stated in the administrative guidance to the EIA (‘UVPVvW’),\textsuperscript{46} all impacts ‘relevant to the decision’ must be assessed. As the climate is expressly mentioned as factor in § 2 para. 1 Nr. 2 UVPG, there should be no doubt that this includes the global climate.\textsuperscript{47} However, there is to date no court case explicitly concurring with this opinion. In practice, EIAs and SUPs tend to include global climate effects, even though there is no acknowledged


\textsuperscript{44} EIA, Directive 85/337/EEC and its amendments; and SEA, Directive 2001/42/EC.

\textsuperscript{45} Of 24 February 2010, BGBl I 2010, p. 94.

\textsuperscript{46} Of 18 September 1995, GMBl, p. 671.

The problem lies essentially with defining the impacts or effects of a given project on the climate, given that this is a cumulative problem and that impacts on the regional scale are still relatively uncertain.

In urban planning, ‘climate protection requirements’ must be considered at all times (§ 1 para. 5, 2nd sentence of the Federal Building Code (‘BauGB’)). Thus, the municipalities should make a level-specific, municipal contribution to climate change mitigation. This has been expressly recognised in BVerwG judgments. Moreover, specifically designated areas must, under § 9 para. 1 No. 23b BauGB, when constructing buildings, implement ‘certain building measures … to allow the use of renewable energy and particularly solar energy’. Under § 11 para. 1 No. 4 BauGB, municipalities may agree on ‘the use of district networks, combined heat and power plants and solar energy facilities to provide heat, cooling and electricity supplies’.

§ 35 para. 1 BauGB sets out a simplified procedure under which a facility designed to use wind energy, hydropower or biogas may be approved as a development project conducted in the undesigned outlying area. Furthermore, climate protection should be considered in land-use planning at the regional and even state level (§ 2 Nr. 6 Spatial Planning Act, ‘ROG’).

Most of Germany’s climate law is now no longer based on economic instruments. The fundamental instrument aimed at

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48 See on this, in the context of coal-fired power plants, Verheyen, n. 9 above, p. 406 ff.
50 See Koch and Hendler, Baurecht, Raumordnungs- und Landesplanungsrecht, 5th edn (Boorberg, 2009), § 14 marginal no. 39, and Ingold and Schwarz, ‘Städtebau- und Energiefachrecht’, NuR 2010, p. 308.
51 BVerwGE 118, S. 33 (41); 125, S. 68 (73); see also the decision by the Competition Senate at the BGH: BGHZ 151, 274 at 285.
53 See Koch and Hendler, n. 50 above, § 25, marginal no. 79.
54 See BGBI I 2008, p. 2986, 22 December 2008. This provision also calls on states and regions to safeguard natural sinks as well as storage spaces for greenhouse gases.
reducing CO₂ emissions is the eco tax (Eco Tax Act 2000). This brought in taxation on electricity and increased taxation on fossil fuels, while also simultaneously decreasing tax on labour and amending existing legislation such as the Fossil Fuel Tax Act. The eco tax was strongly resisted by industry, which argued that it infringed basic freedoms of the GG as well as the principle of equal treatment (Article 3 GG). However, it was declared fully lawful by the BVerfG.

15.29 As of 1 January 2011, a special aviation tax applies for all flights from Germany. Levies vary depending on the distance covered by the specific flight as well as the number of passengers. This tax has been criticised on the grounds that aviation now also falls within the ETS. It is also still disputed whether the tax itself infringes the GG.

National climate change risks

15.30 Mean air temperature increased in Germany by 0.9°C between 1901 and 2006, while annual rainfall increased by approximately 9 per cent from the beginning of the nineteenth century, and the 1990s were the warmest decade of the twentieth century. In 2008, the Federal Cabinet approved the 'German Strategy for Adaptation to Climate Change'. This Adaptation Strategy predicts a number of possible outcomes resulting from climate change, inter alia: (i) more instances of extreme precipitation leading to flooding; (ii) winter flooding due to a decrease in snowfall and therefore snowpacks as a result of warmer winters; and (iii) frequent low-water phases during dry summer periods, which will affect cooling-water availability and ecological health and increase erosion as well as the risk that pollutants, waste fertilisers and waste pesticides will find their way into ground and surface waters.

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56 BVerfG, 20 April 2004, 1 BvR 905/00.
60 Text partly taken from the Fifth National Communication: see n. 7, p. 183.
15.31 A recent major study on the legal implications of climate change shows that adapting to the impact of climate change will necessitate major alterations in coastal protection law, spatial and other planning law enforcement mechanisms, as well as requiring legal tools to tackle uncertainty.\textsuperscript{61} This is a growing area of law, and one which may provide fertile ground for future lawsuits.

(B) Public law

15.32 This section discusses the ways in which court challenges may improve and strengthen climate protection. While the climate protection instruments referred to above are often challenged by those they target, as seen with the challenges against the allocation of certificates under the emissions trading regime, there is still relatively little case law challenging the legislative or administrative decisions on climate grounds. This is partly due to the standing restrictions that have always governed German administrative law and have been upheld by the judiciary. These restrictions essentially bar all general climate considerations from judicial review, while also generally allowing those to whom climate regulation is addressed (mostly operators and industry) to sue at all instances. As this seems about to change, there is a need to reconsider possible cases for judicial review. In this context, as mentioned above, constitutional law contains the legal basis for using climate protection arguments in administrative courts.

The constitutional context

15.33 Article 20a GG states that, ‘mindful also of its responsibility toward future generations, the State shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order’. As the climate system is undoubtedly a natural resource vital to survival and development, climate protection is covered by this provision,\textsuperscript{62} even though, strictly speaking, protection of the natural systems will not include,

\textsuperscript{61} Cf. Reese, et al., Rechtlicher Handlungsbedarf für die Anpassung an die Folgen des Klimawandels (UBA-Berichte, 2010), with English summary at www.uba.de.

\textsuperscript{62} BVerwG (see n. 14).
for instance, protection of infrastructure threatened by climate change. Furthermore, it is clear from the wording that this ‘aim’ is different from a traditional human rights obligation. As such, it is difficult to assess what climate change mitigation obligations arise directly from the GG. The literature on constitutional law contains a wide range of proposals, including a general prohibition against allowing the environmental situation to worsen and an obligation for energy policy to promote renewable energy before all other energy sources. There is as yet no case law confirming the precise application of Article 20a GG with respect to climate change. Interestingly, however, the BVerfG recently nullified a regulation on cages for laying hens on the basis (inter alia) that this regulation violates Article 20a GG, thus accepting Article 20a GG as a ‘firm’ yardstick against which to measure federal law. Moreover, in the context of the commercial release of genetically modified organisms, the BVerfG emphasised the special duty of care of the legislator in the face of scientific uncertainty.

15.34 In general, Article 20a GG appears to place all State authorities, including the legislature, under an obligation to engage in proactive climate change policy. This must be viewed in close conjunction with the duties of protection derived from the basic human right to life and health (Article 2 GG). The BVerfG has not excluded the possibility that an individual could rely directly on Article 20a – thus indirectly placing Article 20a GG in the vicinity of other human rights covered by the GG. The personal freedoms and guarantees provided in the GG include not only a protection of the rights of individuals against State intervention, but also an obligation on the legislator to protect and promote the holders of basic rights. This is particularly relevant where

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65 BVerfG, 12 October 2010, 2 BvF 1/07.
66 BVerfG, 24 November 2010, 1 BvF 2/05.
67 BVerfG, 10 November 2009, 1 BvR 1178/07, Leitsatz 5b: ‘it can be left open whether …’.
the ‘environment-reliant’ basic legal concepts of life, physical integrity (Article 2 GG) and property (Article 14 GG) are threatened by private users’ environmental impacts. As such, the State also has an objective constitutional responsibility, for example to take action against health-damaging air pollution and noise from industrial facilities and motor vehicles by introducing adequate statutory regulations. This also applies in respect of the wide-ranging threats to people’s health and property which would arise from significant changes in the climate. Examples include the threat of flooding or water scarcity caused by periods of drought.

15.35 Article 1 GG may also in some instances be interpreted as assigning the State a responsibility to protect against risks arising from negative impacts on the environment. Under Article 1 GG, ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’ A State obligation to secure an ‘ecological subsistence level’ may be inferred from these guarantees. If the international community fails to meet the 2°C target, then the scope of the resulting threats will be such that measures to mitigate them could well be necessary to secure the ‘ecological subsistence level’ arising from Article 1 GG in conjunction with Article 2 GG.

15.36 However, the main obstacle faced by a judicial review of a law or a decision taken by an authority arguing that it insufficiently protects the climate (and thus for example the right to life/health) is that the State’s obligation to protect as set out in Article 20a GG and Articles 1 and 2 GG gives the State broad scope in terms of ‘assessing, evaluating and structuring’. Only when the State’s failure to comply breaches the ‘subsistence level’ requirement is it deemed to have breached the constitutional duty to protect. This is the reason why major cases on environmental pollution have been lost in court. An example is long-range air pollution, where forest owners argued that emission standards had to be tightened by the legislator to protect their property (Article 14

another is ground-level ozone, with individuals arguing that the emission control standards enacted by the government violated their right to health (Article 2 GG), and yet another is aviation noise (again Article 2 GG). This, however, is a dynamic concept. If, for example, the concept of emission budgets is elaborated further, it is possible to conceive a case which forces the administration to do more to achieve a certain climate protection aim or target, or to generally argue that (as in the case for waste or agriculture) nothing is being done or (as in the case of transport) far too little is being done. Who could bring such cases, and how they would work is discussed in the next section.

Judicial review law

Overview

Public law is considered to be all law that applies between the State and citizens (private persons or legal entities). Article 19 para. 4 GG guarantees that the judiciary will scrutinise actions by the State with respect to the individual. The main group of cases in climate change law will be those challenging a particular administrative decision (Verwaltungsakt, VA), allowing a particular industrial installation, airport or road to be built. In these cases, the lawsuit would attack that administrative act – an action for annulment (§ 42 para. 1 Administrative Court Procedures Code, ‘VwGO’). If one considers that an administrative decision must be taken, an action for engagement would be eligible, i.e. the authority ordered by the court to take a certain decision (§ 42 para. 2 VwGO). For such an action to be successful, the plaintiff will have to show that the law affords him a specific right to the desired behaviour, for example in protecting his interests in property or health. For the whole system of judicial review it is decisive to determine whether the subject matter is a VA or not.

72 BVerfG, 14 September 1983, 1 BvR 920/83. See also the civil law side of this in BGH, 10 December 1987, Az.: III ZR 220/86.
73 BVerfG, 29 November 1995, 1 BvR 2203/95.
76 The term is defined in § 35 of the Administration Procedural Code, BGBl I 2003, p. 102, dated 23 January 2003.
There are also similar types of suits addressing actions by the public authorities that are not decisions binding certain individuals, but simply constitute activities ‘in reality’.

15.38 However, courts will also – under certain circumstances – scrutinise the lawfulness of statutes or regulations. In particular, state and municipal law can be challenged taking a ‘norm control action’ (§ 47 VwGO). In the climate context this is relevant for land-use plans, for spatial planning acts on state or regional level, but also for all other law enacted by the states as long as the respective state law allows the norm control action.

15.39 Depending on the case, there is also the option of directly challenging federal law before the BVerfG, either by an individual (Article 93 para. 1 Nr. 4a GG) or by a public body such as the federal parliament or parts of it, a government or parliament of a state, etc. Such cases are governed by the procedural code for the BVerfG (BVerfGG), and not the VwGO. Any court can refer a case for a direct opinion to the BVerfG (Article 100 GG) if it sees a conflict with the basic laws of the GG.

15.40 In administrative matters, it will normally be necessary to argue the case with the authority on a higher level before going to court (see §§ 69 ff VwGO), especially if a VA is not granted, or a decision negatively affects the individual. It will be this last decision that is the subject matter of the judicial review.

15.41 Generally speaking, a lawsuit will be successful if (i) it is procedurally eligible – this includes standing of the plaintiff; and (ii) it can be shown that the challenged act or omission by a public body violates material law and (normally; exceptions will be discussed below) the ‘subjective right’ of the plaintiff (§ 113 para. 5 VwGO), including rights granted directly by the GG. This last requirement is of high importance for all judicial reviews taken in the context of climate change. It means that even if on the procedural level standing can be shown, there might still be no review of the substantive law (say, compliance with a target such as in § 1 EEG to achieve 30 per cent renewable energy by the year 2020).

because the failure to achieve this target will not affect the plaintiff’s rights.

15.42 The VwGO (§§ 42, 43) foresees essentially the following possible actions: (i) annulment of a VA; (ii) obligation of a public authority to enact a VA; (iii) obligation to omit a certain type of behaviour; (iv) obligation to undertake a certain type of behaviour; and, in the case of norm control actions, (v) nullify a statute or regulation. Due to the separation of powers, the court can revoke VAs, but not ‘make’ them itself.

Grounds for judicial review (Klagegründe)

15.43 Generally, a judicial review can be based on any of the following grounds: (i) action or decision not in compliance with the applicable legal provision(s); (ii) unlawful exercise of discretion; (iii) procedural errors; or (iv) unconstitutionality of the applicable provision or law.

15.44 Ground (i). Generally, a decision will have to be in accordance with the legal framework and have a firm legal basis. If the rule in question simply stipulates legal criteria for a certain type of decision and does not afford discretion, the case will revolve around the facts and whether these fulfil the legal criteria. The court’s role is straightforward: it can offer its own finding of facts and legal interpretation, and, in particular, give a different interpretation of the specific legal criteria, an example in the context of climate change being in relation to a permit to run a major power station (governed by §§ 5, 6 BImSchG) which does not afford discretion.

15.45 Provisions that afford authorities a margin of appreciation are an exception to this rule. In such cases, due to the complexity and special circumstances of the law in question, an authority will be afforded room to manoeuvre, and the courts will not intervene even if the matter in question is one of interpreting the law and factual circumstances. This heavily criticised concept is now widely applied in nuclear safety law, on genetically modified organisms and in nature conservation, especially species protection law.

78 BVerwG, 19 December 1985, 7 C 65/82.
80 BVerwG, 9 June 2010, 9 A 20/08.
15.46 Ground (ii). If the rule in question affords discretion to the authorities, the case will – in addition to testing whether the purely legal criteria are met – revolve around whether or not discretion was exercised in a lawful way.

15.47 While there are some differences in theory between the types of discretion offered (simple discretion in nature protection law, planning discretion in road building, management discretion in water law), the method of scrutiny applied by the courts is very similar. The task given to the authority is to weigh interests against each other and then come to a ‘justly weighed’ conclusion. The courts will therefore scrutinise whether the authority has (i) actually exercised its discretion; (ii) gathered and assessed all relevant information; (iii) not taken into consideration facts or interests that the applicable law did not intend to be considered; and (iv) not acted outside its discretion. A similar test is applied in cases of planning or management discretion, with the general obligation being to weigh all interests in a ‘just’ manner and to ensure that conflicts arising from the project are solved by the decision itself.

15.48 Ground (iii). As a rule of thumb, non-compliance with the rules of procedure and form will not lead to the annulment of a decision, especially with respect to planning decisions. This is already stated in the Administrative Procedure Act (‘VwVfG’) and specified in many other provisions.

15.49 Ground (iv). At any stage of a court procedure the plaintiff can argue that the applicable provision in law violates one or several of the basic (human) rights or other rules of the Constitution. An example of the former would be a provision in federal law which regulates flight noise but in an insufficient manner and in conflict with Article 2 para. 2 GG (health protection). Another example would be the proposed climate protection law of the

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81 See Kopp and Ramsauer, ‘VwVfG’, Kommentar, § 40, No. 58.
84 § 46 VwVfG: ‘The repeal of an administrative act … may not be claimed only because it was taken in violation of regulations on the procedure, the form or the local jurisdiction, if it is evident that the error has not influenced the decision as such.’
85 See n. 70 above.
state of Nordrhein-Westphalia, which has been criticized for falling outside the state’s jurisdiction.  

Standing

15.50 Standing has traditionally been a major hurdle for all actions relating to the environment. German legal tradition has rejected popular actions and remains focused on protecting the *rights of individuals*, not providing a judicial review of all actions or omissions by public authorities.

15.51 § 42 para. 2 VwGO stipulates that plaintiffs will only have standing if they demonstrate that the act or omission that is challenged in court relates to their ‘subjective rights’. In practice, this means the plaintiff must find a provision in the given law which protects the interests of the plaintiff (*drittschützend*), not just the interests of society as a whole, and make a cursory case that this ‘subjective right’ is violated by the public authority or lawmaker. On the whole, many laws, especially those relating to the protection of nature or containing precautionary measures or policies, will not be deemed to be *drittschützend*, while noise and air pollution provisions will be.

15.52 A notable exception is the norm control action. The plaintiff can challenge the statute or regulation on the basis of all applicable law, regardless of whether this confers any specific rights or interests on the plaintiff. This is one reason why, for example, resistance against coal-fired power plants has focused on challenging the land-use plans enacted by the municipalities.

15.53 It must be reiterated that neither standing nor the scope of judicial scrutiny is an issue for the addressee of a decision, for example the operator of a plant. He can basically argue all substantive law. This situation has led to some provisions in federal and state law introducing a limited type of class action, i.e. limited

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88 There is such a wealth of case law on this issue, that looking at individual rules with respect to whether they are meant to protect the plaintiff (*drittschützend*) or not cannot be covered here. See for a summary Ramsauer, in Koch (ed.), Umweltrecht, 3rd edn (2010), p. 142 ff.
standing provisions for NGOs, the most important one being § 64 Federal Nature Protection Act (‘BNatSchG’), introduced only in 2002. However, standing is limited to major projects such as road construction, landfill sites and specific decisions related to nature protection.

15.54 In transposition of the Aarhus Convention and EU Directive 2003/35, the Federal Environmental Appeals Act (‘UmwRG’) of 2006 now allows suits by environmental NGOs in a broader context, namely for all projects requiring an EIA. However, this option has been restricted to breaches of rules: (i) protecting the environment; and (ii) affording rights to individuals. This limitation, in turn, has been criticised for not being in compliance with the Aarhus Convention of 1998 and EU Directive 2003/35. After decisions by some German courts to the effect that the UmwRG is consistent with EU law, the Münster OVG referred the matter to the ECJ for a preliminary ruling. The ECJ’s ruling is still pending, but some conclusions can be drawn on the basis of the opinion of the Advocate General in Sharpston, with which the ECJ is likely to concur. In essence, the Advocate General argues that the implementation of Directive 2003/35 in German law is insufficient, that NGOs can rely directly on this Directive to seek access to courts and, in this context, are:

permitted to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals.

89 These must be officially registered and show that they have as their main purpose the protection of the environment (§ 3 Federal Environmental Appeals Act of 7 December 2006, BGBl I 2006, p. 2816).
90 Some states still retain their own nature protection acts which contain some additional standing provisions. These cannot be dealt with in detail here.
92 OVG Schleswig, 12 March 2009, 1 KN 12/08, OVG Lüneburg, 7 July 2008, 1 ME 131/08, but see also OVG Lüneburg, 10 March 2010, 12 ME 176/09.
93 OVG Nordrhein-Westfalen, 5 March 2009, order for reference to the ECJ, 8 D 58/08.AK.
94 Case C-115/09, Opinion of 16 December 2010.
95 Ibid., para. 95 (emphasis added).
This would mean that – at least in the context of projects that must undergo an EIA – NGOs would in future be able to argue ‘objective’ law in court, not being restricted to either law that protects only the environment in certain procedures (§ 64 BNatSchG) or provisions that afford – in the German terminology – Drittschutz to individuals.\textsuperscript{96} In terms of climate protection, this could make a decisive difference.

Other procedural aspects of judicial review

In judicial review law, if factual matters are disputed, it is the court’s responsibility to assess the facts and even investigate itself in cases where the plaintiff has not submitted enough evidence (see § 86 para. 1 VwGO). In practice, however, it will be necessary for the plaintiff to argue both facts and law to the most detailed level.

Court costs are normally not excessive in Germany. They are calculated on a fixed legal basis applying the value of the claim in question as set by the court (§ 52 para. 1 of the Court Cost Act (‘GKG’)).\textsuperscript{97} To guide court discretion, a detailed table has been issued by judges,\textsuperscript{98} which is not binding but will almost always be applied. For example, this table stipulates that actions taken by NGOs will normally be fixed at €15,000 – even if this case was taken against a major road-building project of a value of several million Euros. This would then result in a fee of €242, which would – in accordance with the GKG – automatically be multiplied by three for actions commenced in an administrative court (by four for actions commenced in a high court), resulting in moderate court costs of €726 or €968, respectively. In addition, attorney fees would arise. There is no obligation to appear with an attorney in a first instance court. This obligation only arises in the higher courts (see § 67 VwGO). Attorney fees would also depend on the value of the claim. In the example given above, a first instance case would cost around €1,700 plus tax

\textsuperscript{96} Note however that there is some uncertainty in this regard because the Advocate General has not taken a position as to whether this scope of access to court should only apply to EU law or to national rules as well.


\textsuperscript{98} The currently applied version of this is the Streitwertkatalog 2004, available at www.justiz.nrw.de/BS/Hilfen/streitwertkatalog.pdf.
etc. in accordance with the Attorney Fee Act (‘RVG’).

However, given that these fees would not cover real costs, attorneys operate mostly on the basis of fee agreements. As a general rule, the defeated party bears all the costs of the case.

**State aid/competition law**

15.58 Municipalities, which hold major property interests, also have civil law options to enforce climate protection aims. For example, the Börnsen municipality won its case against an oil trading association which had challenged, under competition law, contracts under which property buyers were obliged to use the electricity and heat generated by the municipality’s own CHP plant in housing to be built on the relevant property.

**Other cases**

**OECD complaints**

15.59 The OECD *Guidelines for Multinational Enterprises* (‘the Guidelines’)

contain a set of rules which can be applied to improve climate protection, aimed at multinational enterprises operating in or from adhering countries. These Guidelines are said to be ‘voluntary’ in that they do not constitute public or private international law; however, they are to some extent institutionalised with national contact points (‘NCP’) administering a complaint procedure. The NCPs are to support the implementation of the Guidelines, to inform the public about them and to handle complaints as specified in the ‘Procedural Guidance’ to the Guidelines. NCPs should offer a ‘forum for discussion to resolve conflicts and problems arising from the implementation of the Guidelines’, and anyone claiming an interest can bring a 

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100 BGH, 9 July 2002, KZR 30/00.


102 The German NCP is based at the German Federal Ministry of Economics and Technology.

claim for breaches of the Guidelines. In terms of substantive law, the environment chapter (Chapter V) of the Guidelines contains general as well as quite specific obligations, such as to ‘establish and maintain a system of environmental management’, including the collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of the enterprise’s activity (V.1.a), disclosure of risks arising from its activities (III.1.) and obligations to refrain from deceptive marketing practices (VII.4).

15.60 The first climate-related complaint was launched against Volkswagen in 2007, on a number of substantive points.\(^{104}\) It was turned down by the NCP, on the basis that no violation of the Guidelines had been found. A second climate-related complaint was brought in 2009, against Vattenfall, a Swedish-based energy company.\(^{105}\) This complaint was also turned down. In both cases, the NCP argued that the particular conduct of the company was not forbidden by law, and that climate protection considerations were essentially policy led.

15.61 One major problem with the Guidelines is that there is currently no procedure in place for requesting judicial review of an NCP decision. The NCP argues that there is no entitlement to a complaint procedure, as it is only engaged as a mediator, i.e. that its rejection of a complaint is not a formal administrative decision which can be challenged in court. The counter-argument is that, even if the Guidelines are not binding on companies, States are under an obligation to open up a procedure to interested parties and so to provide a complaint procedure. Under the GG, any activity by a public authority with a bearing on public interests must be challengeable.

**Justification of climate-related protest**

15.62 An issue of growing importance – especially since the *Kingsnorth* ruling (see Chapter 17) – is whether NGO actions such as mounting chimneys or blocking access to plants can

\(^{104}\) See www.germanwatch.org/corp/vw-besch-e.pdf.

\(^{105}\) See www.greenpeace.de/fileadmin/gpd/user_upload/themen/klima/OECD-Beschwerde.pdf.
be legally justified where it is for the public good. This has been argued under § 227 BGB (Emergency Aid) and §§ 228, 904 BGB (State of Necessity) in defence against claims for financial damages in the context of a Greenpeace action against lignite mining. However, the court, while acknowledging that climate change is a major issue, rejected the notion that private action could be warranted to stop lignite mining.

(C) Private law

15.63 In Germany, no direct climate liability claims have yet been made. Commentators from some law firms have expressed views that are very sceptical as to the chances of success of such claims; and debate has now started also as to whether such claims would be covered by standard liability insurance.

15.64 The subject matter of this section is climate liability in the narrow sense. It therefore deals only with statutory claims that allow proceedings to be brought against the direct or indirect originators of climate change. The presentation follows the respective common law torts which do not exist in German law in this form but will help the non-German reader to navigate this area. The tort of ‘negligence’ (see 15.65) is followed by claims arising from ‘private nuisance’ (see 15.88) and ‘strict liability’ (see 15.97). We show that substantial potential lies in cases where the owner of a coastal property claims costs for increasing coastal protection infrastructure from, for example, operators of large coal-fired power plants; similarly, claims for damages after a major storm flood.

106 LG Aachen, 16 March 2006, 1 O 126/05. Upheld by the BGH, 17 December 2007, VI ZR 216/06.A. For an action against nuclear power, see LG Dortmund, 14 October 1997, Ns 70 Js 90/96.


Negligence

15.65 The fundamental rule of the German law of delict – § 823, para. 1 BGB (German Civil Code) – provides a damages claim for loss of, or damage to, a legally protected good (e.g. property) that is attributable to a person who is at least negligent. There is an obvious similarity to the common law concept of ‘negligence’. The differences will become apparent in the discussion of the individual conditions of liability that are discussed below.

Factual causation

15.66 As in common law jurisdictions, German law has a two-fold test for causation. A distinction is made between the question of causal relationship in the logical or scientific sense between the action and the loss (causation) and the further question of whether it is justified to hold the person who has caused the loss responsible (accountability).\(^{110}\) It is recognised that causation in the logical or scientific sense is determined according to the so-called conditio sine qua non formula (the ‘but for test’). According to this test, an event is to be viewed as a cause if, without it, the result, in its specific form, would not occur.\(^{111}\) The act of an offender is therefore still a cause even if it in itself could not result in the damage but only in combination with the actions of another (so-called cumulative causation).\(^{112}\) In spite of this simple and attractive definition, German legal literature considers that questions of causation belong to the biggest problems of environmental liability law.\(^{113}\) The defendants in climate liability trials also see their best chances of defence in this area.\(^{114}\)

Causation by innumerable (ubiquitous) emission sources

15.67 Defendants will like to emphasise the similarity between climate change related damage and the forest damage caused by the

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\(^{111}\) BGH, 4 July 1994, II ZR 126/93, marginal no. 15.

\(^{112}\) BGH, 20 November 2001, VI ZR 77/00, marginal no. 9; Staudinger and Kohler (see n. 110 above), Introduction, marginal no. 172.

\(^{113}\) Staudinger and Kohler (see n. 110 above), Introduction, marginal no. 156, with further references.

\(^{114}\) Chatzinerantzis and Herz (see n. 107 above), 596.
so-called ‘acid rain’ that initiated a broad debate on liability law in Germany in the 1980s. At the time it was accepted that air pollutants with a large-scale effect, particularly the sulphur dioxide and nitrogen oxide emissions from a very large number of larger and smaller sources (power stations, industrial plants, heating and traffic), had damaged a considerable part of the German tree population. The polluters, however, escaped liability because it was impossible to attribute the loss of a particular forest owner to one or more specific polluters.116

But in the case of GHG, unlike the forest damage example, there is no similar causation problem if, as we assume here, it can be shown that the gases are distributed evenly into the atmosphere and therefore that every molecule that is emitted, irrespective of where it actually comes from, contributes at least marginally to the greenhouse effect and thereby to the rise in temperature and its consequences.117

Burden of proof

As a rule, it is the claimant who carries the burden of proof in relation to the cause of the damage. For some groups of cases, however, the law eases the evidential burden, even as far as a reversal of the burden of proof. This is the case when the defendant breaches a protective or safety duty or (this forms a sub-category of such cases) exceeds specified emission limits.118 The causation presumption is explained here as the procedural consequence of a reasoning that lies at the basis of the substantive law. Underpinning a limit or protective duty is always119 the expectation that, in case of breach, there will be a considerable increase in the likelihood of specific damage occurring.120 This expectation is attributed to the effect of a rebuttable presumption for the causation of the types of damage that with increased probability result from the given breach of duty.121

117 Frank (see n. 108), p. 2298. See also Verheyen, Climate Change Damage in International Law (Martinus Nijhoff, 2005), p. 248 ff.
118 BGH, 17 June 1997, VI ZR 372/95, marginal no. 11; BGH, 2 April 2004, V ZR 267/03, marginal no. 37.
119 This interpretation might not be valid for precautionary limits.
120 Staudinger and Kohler (see n. 110 above), Introduction, marginal no. 267.
121 Ibid., marginal. no. 265, with further references.
It seems plausible that this argument applicable to emission limits could be applied to establish a prima facie causal relationship between GHG emissions and the increased global mean temperature due to the anthropogenic greenhouse effect. This link is not only implied by the German legislator, but explicitly recognised in statutes. For example, the legislator assumes that GHGs have a ‘potential to raise the temperature of the atmosphere’ that can be calculated precisely (§ 3 para. 4 TEHG). The ‘aim’ of ‘slowing down the anthropogenic greenhouse effect and contributing towards the reduction of atmospheric GHGs levels’ was set as early as 2007 in the Federal Allocation Act 2007 for Greenhouse Gas Emission Permits (see para. 15.15 above).

**Standard of proof**

§ 286 ZPO (Civil Procedure Act) defines the applicable standard of proof: a disputed fact may only be accepted as proven by the judge when he or she is ‘persuaded’ of the ‘truth’ of the submission. ‘Persuasion’ does not, however, require incontrovertible certainty. It is rather the case that the judge is permitted and indeed must, in the poetic words of the Federal Judges, ‘be satisfied with a degree of certainty that is sufficient to subdue doubt for life’s practical purposes, but without eliminating it completely’. The actual level of probability of causation by the defendant in a particular case must be high enough for no reasonable doubts to remain.

It is not to be expected within the foreseeable future that the courts will follow the view held in legal literature that in order to prove causation it is generally sufficient that the court is persuaded of predominant probability. It could however prove to be helpful that the objective content of the basic rights (see 15.34 above) is to be taken into account in establishing requirements for evidence. It therefore seems perceivable that the courts

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122 Explanatory Statement accompanying the draft of the ZuG 2007, BT-Drs. 15/2966, p. 15.
125 BVerfG, 27 January 1998, 1 BvL 15/87, marginal. no. 37; Prütting, *ibid.*, § 286, marginal no. 129.
would lower the standard of proof in cases where the difficulties in providing evidence are due not to the circumstances of the particular case but to the limits of ‘human knowledge’, especially if otherwise it would not be possible to ensure the effective protection of fundamental rights.

Chances to prove causation

As for the chances to prove causation in court we will have to distinguish between the various stages of the causal chain. The first part of the chain from emissions to the resultant global warming can most likely be evidenced with the research results published in the IPCC Assessment Reports; it is even possible that a court will recognise a causation presumption for this part (see para. 15.70 above). But it will be much more difficult to prove the second link in the causal chain, namely that specific losses are caused by the effects of the global rise in temperature. This is because, as is emphasised often enough by those who are sceptical as regards the establishment of liability, in particular as regards extreme weather events, according to the present state of scientific knowledge it can only be shown that these occur more frequently or severely as a result of climate change; not, however, that climate change related circumstances have had an effect on a specific event. However, cases are conceivable in which this connection could be proven. In particular, sea-level rise, including in its regional dimension, could at least partially be attributable to anthropogenic climate change. Since the risk of storm floods depends on the sea level, GHG emissions would be manifest in every storm flood damage, at least as a contributing factor. Therefore, a claim related to storm-surge events was recently given good prospects of success.

Increase of risk and liability

In spite of those prospects, there remain many case groups in which only an increased risk can be established. This situation raises the question as to whether establishing a cause that is only probable can lead to liability. In Germany, in light of the so-called acid rain cases, there was broad debate on this, particularly in

126 Chatzinerantzis and Herz (see n. 107 above), p. 593.
127 Frank (see n. 108 above), pp. 2296–7.
the 1980s, which focussed on, among other matters, the concept of ‘pollution share liability’ as developed by US law.\textsuperscript{128} Its application to the acid rain cases was considered because it was not possible to show whose sulphur dioxide emissions had resulted in specific damage. This problem does not exist in respect of CO\textsubscript{2} emissions if it is possible to assume that every emission contributes marginally to climate change (see 15.68 above). What is problematic here is much rather the question as to whether climate change has contributed to a particular loss \textit{at all}. These two constellations differ in that in the first case other \textit{anthropogenic} emissions are an obstacle to the proof of causation whereas in the second case it is the conceivable cause of \textit{natural} influences that are.

15.75 In German legal literature advocates of liability on the basis of probability are primarily in favour of the first of the two case groups in which the class of possible perpetrators can be determined and natural influences are excluded as far as possible.\textsuperscript{129} In the second case group, liability is sometimes considered to be desirable \textit{de lege ferenda},\textsuperscript{130} but only very few commentators hold the view that liability is already provided for by the current state of the law, for example by analogous application of §§ 830 para. 1 s. 2, 254 BGB.\textsuperscript{131} The courts have not recognised an increased risk or an ‘endangering impact’ on the environment as material grounds for liability, not even in exceptional cases, but have viewed these circumstances, in a case of the first category, at best as a starting point for a (rebuttable) presumption: this has happened on the basis of a rule that covers impact on waterpaths but not on the air (§ 89 Water Management Act (‘WHG’)).\textsuperscript{132} Affirmation by the German courts of liability on the basis of probability is barely to be reckoned with in the future.

\textsuperscript{128} Staudinger and Kohler (see n. 110 above), Introduction, marginal nos. 165–7 for references.
\textsuperscript{129} \textit{Ibid.}, marginal no. 202 for references.
\textsuperscript{130} K\öndgen, \textit{"{U}berlegungen zur Fortbildung des \textsc{umwelthaftpflichtrechts} (UPR, 1983), pp. 345–56, at p. 347; Reiter, \textit{Entschädigungslösungen für durch Luftverunreinigungen verursachte Distanz- und Summationsschäden} (ESV, 1998), p. 129 ff.}
\textsuperscript{132} BGH, 22 November 1971, III ZR 112/69, marginal no. 27.
Legal causation/accountability

15.76 To be held accountable for a loss, established case law requires: (i) adequate causal connection; and (ii) that the loss (in terms of its type and the way in which it has arisen) is covered by the scope of the liability rule. Adequacy is affirmed if the occurrence of the relevant type of loss, when viewed retrospectively and in objective terms, was not completely improbable, or if its probability was ‘increased by more than only an insignificant amount’. In contrast to common law practice, legal causation does not depend on whether it is reasonable to hold the relevant offender liable. The courts cannot therefore spare the relevant offender on the basis of a ‘sympathetic’ balancing of interests.

15.77 It appears almost impossible that a loss could be considered too improbable and therefore ‘inadequate’, given that all the types of loss for which there is potentially a claim have been the subject of discussions of the characteristic consequences of climate change for years. This is all the more so given that the minimum probability is required in respect of the loss itself, not in respect of the specific, possibly atypical causal chain of events. All loss that arises from damage to property or health comes within the scope of § 823 para. 1 BGB, even if it is brought on by complex atmospheric processes. This is because the protective function of this basic rule of the law of delict is not limited to particular dangers or particular ways in which danger arises.

15.78 Particular conditions for accountability apply in cases of indirect causation in which the loss only arises on subsequent action by a third party. The indirectly responsible party will only be liable if his/her contribution breached a duty to protect the general public (a so-called Verkehrssicherungspflicht or safety duty). The contents of the safety duty depend on the recognised dangers and on the preventative measures that are technically available and economically reasonable for the indirectly responsible party. It is up to the civil courts to rule on the existence of the duty and in doing so they may take public law provisions into consideration.

134 Ibid., marginal no. 27, with references.
135 Palandt and Sprau, Bürgerliches Gesetzbuch, 70th edn (2011), § 823, marginal no. 45.
A safety duty of this type also applies when putting products into circulation. Of particular importance among the indirect initiators of climate change are motor vehicle manufacturers, where emissions are produced only when the motor vehicles are used by the buyer. An option would be to impose a duty of care on manufacturers that would entail taking constructive measures to reduce the CO$_2$ emissions of the vehicles they produce. The fleet target in Regulation (EC) No. 443/2009 (see 15.19 above) comes to mind as a possible standard.

**Illegality/lack of justification**

15.79 If particular behaviour causes damage in an attributable way, its unlawfulness will be ‘indicated’ by the application of § 823 para. 1 BGB. That means that the relevant behaviour is to be viewed as unlawful even in the absence of a finding of a breach of duty unless, exceptionally, grounds for justification arise. Such grounds can arise, in particular, from certain duties to tolerate infringements of one’s rights, because if someone must tolerate an infringement, this can logically be interpreted as an intervention right of the beneficiary; that is, as a justification to intervene. Emissions-related damage must be tolerated where prescribed by the legislature on the basis of the prevailing interest in the activity causing the emissions. The types of emission that come within this bracket include emissions arising from customary use of land or from the operation of a licensed factory.

**Justification by customary land use**

15.80 A landowner need only tolerate damage that is either ‘insignificant’ (§ 906 para. 1 BGB) or, to the extent that it arises from the customary use of another property, cannot be avoided by measures that are reasonable in terms of cost (§ 906 para. 2 1st sentence BGB). If these conditions are satisfied there will be no liability in delict as there will be no illegality. The first justification will never apply to a case that seriously comes into consideration for a liability claim because the significance threshold is generally exceeded in cases of damage to property or to health. The second justification, however, is a serious possibility.

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136 Staudinger and Kohler (see n. 110 above), Introduction, marginal nos. 59–61.
137 BGH, 18 September 1984, VI ZR 223/82 (Kupolofen), marginal no. 18.
§ 906 para. 2 1st sentence BGB must, in the first instance, be considered applicable to GHG emissions if it is to have any exculpatory effect. Applicability in this situation might be challenged by the argument that the provision has been systematically integrated into the law concerning the interests of neighbours contained in the BGB. This is why it is said to be applicable to emissions that have an effect within a limited geographic sphere, i.e. an area with a radius of up to 50 km only.\(^\text{139}\) This would be an argument against the application of § 906 BGB to GHG emissions as these gases only give rise to liability for their adverse effects after they have, in the first instance, had an effect on a worldwide scale, i.e., after they have contributed to the increase of the total global GHG volume. It is not, however, compatible with the objective of this provision to exclude long-range effects from the scope of its application. This is because the legislator wanted, with § 906 BGB, to make a general decision under which circumstances the interests of the landowner in protecting the land take a back seat to the interest of another owner in using it, i.e. the legislator has created a generalised definition of property that is not genuinely of a neighbour-law nature.\(^\text{140}\) This interpretation is also backed by the preparatory documents for the BGB.

As GHG emissions are likely to be considered a customary land use, the exclusion of tortious liability for damages to the land belonging to a claimant still hinges on the fact that the effects were not preventable through economically reasonable measures (which will be discussed below).

**Justification by licences**

15.83 Generally, tortious liability is excluded by a pollution control licence that has been issued to a factory as a result of an administrative procedure that has involved the participation of the public. This is because, according to § 14 sentence 1 BlmSchG, a licence imposes a duty to tolerate the effects of the operation (see 15.79 above). An emission licence issued according to § 4 TEHG (see 15.15 above) that accompanies the pollution control licence

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as a separate legal act, can, by contrast, not have an exculpatory effect because the TEHG does not impose a duty to tolerate.\footnote{Staudinger and Kohler (see n. 110 above), Introduction, marginal no. 54.}

Fault/responsibility

15.84 In contrast to common law, the legal provisions as to liability for negligent and intentional actions are brought together in § 823 BGB. As no relevant legal differences are evident in the case of an intended action, the only issue of interest is the allegation of negligence. Negligence is defined in § 276 para. 2 BGB as the failure to exercise reasonable care. The standard of reasonable care is not to be determined on an individual, but rather on an objective, basis considering which behaviour can be expected of a particular group of people (for example, that of ordinary factory operators). A person has not acted with reasonable care when he/she has not undertaken necessary and reasonable action to avoid a foreseeable danger.

15.85 In terms of foreseeability it must be noted that the BGH has acknowledged that an action is not to be considered negligent if a competent expert has confirmed that no significant risk will arise from it.\footnote{BGH, 8 July 1971, III ZR 67/68, NJW 1971, p. 1881, at p. 1882.} But since the moment that the IPCC Reports documented the scientific consensus that there is a high probability of anthropogenic causation of climate change and of certain types of damages arising from it, the emitters of GHGs should have been unable to refer to ‘experts’ who tell them the contrary. Moreover, licences that have been granted by the authorities would speak against a finding of negligence as long as there are no special circumstances that make a special care reasonable. This view is supported where the permitted action constitutes a threat to the general public,\footnote{Palandt and Sprau (see n. 135 above), § 823, marginal no. 43.} which unquestionably can be said about climate change. But it is not clear how the courts would find if the defendant were able to show that being the only one to perform mitigation measures would put his business at risk for survival.

Reimbursable damages

15.86 According to § 823 para. 1 BGB, only those damages are eligible for compensation that result from the infringement of the...
interests protected by that provision such as life, health and property. Liability for pure economic loss is found under § 823 para. 2 BGB which applies if the defendant has infringed a so-called protective law (Schutzgesetz). A protective law is a general regulation the purpose of which is the protection of individuals and not just the general public. Even certain types of factory licences that impose requirements in favour of a distinguishable group of people are – together with the legal basis for the licence – recognised as a protective law. In spite of this, it is not easy to find a protective law applicable to GHG emitters, as § 5 para. 1 sentence 4 BImSchG does not allow imposition of any emission limits (see 15.17 above).

15.87 At least § 14 sentence 1 BImSchG, which provides a claim to economically justifiable precautionary measures against the consequences of emissions (see 15.94 below), is likely to be considered a protective law because this legal character has been recognised for injunctive relief under § 1004 BGB, which is replaced by § 14 sentence 1 BImSchG, if a pollution control licence has been granted. As long as, for example, an emitter who is required to take precautionary measures against floods of river banks or in coastal areas disregards these measures, he is liable for the loss in value of the land as far as it can be proven that this loss in value is a result of the increased risk of flooding, as well as, as the case may be, for the increase in insurance premiums.

Private nuisance

15.88 German civil law stipulates that anyone can demand that interferences with his/her property be ceased as long as there is no overriding interest in the activity from which the interference originates. But GHG emitters will, as a rule, be able to show an overriding interest (see 15.90 below). In such a case the endangered property owners can rely on a claim for protective measures (instead of one for injunctive relief): these measures can be performed either at the source of the interference, for example by reducing emissions (see 15.91 below), or at the location of the potentially damaging effect, for example by increasing the

144 BGH, 20 November 1992, V ZR 82/91, marginal no. 33.
height of a dyke (see 15.94 below). If protective measures cannot reasonably be expected of the person causing the interference, compensation can be considered for the interference that must be accepted by the affected party (see 15.96 below). The order of available remedies – injunctive relief, protective measures, financial compensation – shows an obvious parallel to ‘private nuisance’ cases in common law jurisdictions.

Claim for termination of greenhouse gas emissions

15.89 According to § 1004 para. 1 BGB, any person can demand the cessation of an activity that creates a concrete danger of an interference with his/her land. For example, a court might have to examine a claim by a coastal landowner who fears her land could be flooded by a storm surge, that a GHG emitter cease its activity. The claimant would have to show that the increase of the risk of flooding caused by the local sea level rise is not only insignificant.

15.90 In practice it will, however, be almost impossible to require a cessation of emission activity. As there is a lot of support for the argument that the emission of GHG is to be considered a customary use of land, an injunction is precluded according to § 906 para. 2 1st sentence BGB if the threatening flood cannot be prevented by economically reasonable measures. Even if the flood could be prevented, in cases where installations have been granted a pollution control licence, an injunction is precluded according to § 14 1st sentence (first half) BImSchG.

Claim for abatement of emissions

15.91 A person who does not have a right to cessation of operations because of a pollution control licence can make a claim for the abatement of emissions under § 14 1st sentence (second half) BImSchG if this is technically possible and economically reasonable to require of the operator. The measure of reasonableness is the financial capability of an average business of that particular type, though the limit of reasonable investment is surpassed if the operator would no longer attain a fair level of income from the operations. How close the operator must come to this limit depends especially on which damages are likely to occur without the sought protective measures.
It is expected that the defendant will object and argue that even very large abatements would not bring appreciable advantages to the claimant and all others affected. According to § 275 para. 2 BGB the stark disproportionality of costs and benefits leads a claim to fail. But abatement measures of a single operator could however miss the point. This becomes apparent when the situation is compared to a claim for cessation of emissions: if a high number of interferers contribute in an insignificant way to an (in totality) significant interference, the affected person can demand cessation of his contribution from each and every interferer without having to sue them in one and the same claim. Consequently, it would be decisive whether the totality of the emission abatement measures that would be considered reasonable to impose on the emitters would lead to an appreciable improvement of the situation for those affected by the emissions.

Nevertheless, it seems that such a claim will not likely be successful. This is because a court would be forced to analyse for every emitter the extent to which abatement measures could be reasonably imposed on him and then to set the total costs of all measures in proportion to the amount of avoided damages for every person affected by climate change. This Herculean task could – at least from a psychological point of view – easily lead a court to decide that such a case is lacking justiciability.

Claim for safety measures
(eespecially against flooding)

Given that, under a claim based on § 14 1st sentence BImSchG, it would always be for the operator to choose the course of action to remedy the risk of damage, it would not be possible to claim a particular protection measure. However, the claimant would be free to name his/her measure of priority, given that issues of technical possibility and economic feasibility could only be judged against a distinctly defined measure. In particular with regard to economic feasibility, measures at the place of the pending damage (passive protection measures) would likely be more successful than a claim for reducing emissions. This can be exemplified with a case of coastal property owners raising a claim for erecting dykes to a level which ensures that the risk of floods will be equal.

Palandt and Bassenge (see n. 138 above), § 906, marginal no. 29.
to that without climate change and the ensuing rise in sea levels (locally).

15.95 The first obvious advantage is that there could be no doubt that the measure would actually remedy the damage/risk of damage, which could be doubted if only a fraction of global emissions is omitted. Secondly, the costs and benefits of such measures could be specified precisely: building costs on the one hand, and on the other the reduced risk of flooding for all goods and valuables that can be found in the threatened coastal area. Thirdly, the economic burden placed on the defendant would be much more adequate than in the case of an action calling for emission reductions. His/her obligation would be limited to a share of the building costs for the dyke, the share being defined by the defendant’s own share of emissions based on global emissions. It seems, after all, plausible to hold a defendant liable only for ‘his share’ of the damaging factor.\(^{146}\) this also being applicable to protection measures. Given that even large power plant operators only contribute a small fraction of global GHG emissions, their share of the building costs would also be small.

**Claim for financial compensation**

15.96 In as far as the affected person is unable to assert a right to protective measures because they are not considered economically reasonable to impose on the emitter, a claim for compensation according to § 906 para. 2 2nd sentence BGB can be considered. This provision affords damages for the special burden a property owner must accept, if he cannot stop the activity affecting him because of the predominant public interest (*Aufopferungsentschädigung*). Given this special situation, full damages will not be awarded, but – as in the case of expropriations for the public interest – only limited compensation.\(^{147}\) In this way, coastal property owners could be compensated for damages due to storm floods that they must otherwise accept. It would only be consistent to award them – even before the damage has occurred – a compensation for the decreased value of the property (due to the increased flood risk).\(^{148}\)

\(^{147}\) *Ibid.*, § 906, marginal no. 27.  
\(^{148}\) Frank (see n. 108 above), p. 2298.
based on an understanding of § 906 para. 2 2nd sentence BGB as including distant or cumulative damages such as those resulting from climate change.

**Strict liability**

15.97 § 1 UmweltHG (Environmental Liability Act) grants a strict liability right to compensation for cases in which – as a consequence of acts affecting the environment – a human being is killed, his/her health is compromised or a thing is damaged. The definition of environmental impact includes the emission of (greenhouse) gases (§ 3 UmweltHG). The right does not require the emission to be illegal, and can thus be used against emitters who have a pollution control licence. Only factory operators who are included on an annex to the law are subject to such strict liability. The list includes all of the largest GHG emitters. The liability is limited to a maximum amount of €170 million (§ 15 UmweltHG) per incident. No liability arises in relation to damages that were caused before 1 January 1991 (§ 23 UmweltHG).

15.98 The application of the UmweltHG could only be problematic on two grounds, which have been raised by scholars:

(i) The legislator did not want to establish liability for such distant and cumulative damage, including for climate-impact damage. A closer look at the preparatory materials for the statute reveals, however, that these types of damages were not to be excluded from liability per se, but only insofar as they cannot be attributed to a particular polluter. In the case of climate damages, polluters (or their share of emissions) can be identified. (ii) It has been argued that the preventive aim of the statute would be undermined if liability would apply to an activity which is not preventable (as a CO₂-free economy is not currently conceivable). This can be countered by the fact that the legislator has prescribed a compensation duty (as in the case of § 906 para. 2 2nd sentence BGB, see 15.96 above) even though the damage could not be prevented with economically reasonable expense. Some argue that

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149 Chatzinerantzis and Herz (see n. 107 above), p. 597 ff.
150 Explanatory statement accompanying the draft of UmweltHG, BT-Drs. 11/7104, pp. 16, 29.
this type of compensatory duty would override the UmweltHG, but the majority view is that both concepts apply in parallel.\textsuperscript{151}

(D) Information law

15.99 Generally, information law is of great importance to climate protection in increasing transparency and knowledge.

\begin{quote}
\textit{Claims for information against public authorities}
\end{quote}

Environmental Information Act

15.100 Germany implemented the EU access to information requirements into national law mainly through its Environmental Information Act (\textit{Umweltinformationsgesetz (‘UIG’)})\textsuperscript{152} and the associated state laws. There have been many cases brought under the UIG involving climate-relevant data and information. The first obviously climate-related case (in 2006) was a claim made by the NGO Germanwatch against the German Export Credit Agency Hermes AG, requesting information about the CO\textsubscript{2} impact of the export credit guarantees granted to German companies for investment abroad.\textsuperscript{153} The defendant, the German Ministry of Economy, was of the opinion that data on CO\textsubscript{2} emissions of installations supported by export credit guarantees were not environmental information and thus not covered by the obligation in § 4 para. 1 UIG to make available information on the environment. This opinion was not shared by the court. Therefore, as part of a settlement, the information was made available in as much as it was available to Hermes AG.

15.101 In the wake of the ETS there is now also a growing body of case law concerning claims made by industry to receive information about allocation permits granted to competitors. This jurisprudence shows that, even in the context of competitors requesting information, the requests must normally – with only few

\begin{itemize}
\item \textsuperscript{151} Kohler, ‘Duldungspflichtabhängige Aufopferungshaftung als Grenze der Umweltgefährdungshaftung’, NuR 2011, p 7.
\item \textsuperscript{152} Of 22 December 2004, BGBl I 2004, p. 3704.
\end{itemize}
exceptions – be granted. In one case decided on appeal by the BVerwG the court ruled that the term ‘emissions’ as part of the definition of ‘environmental information’ also encompasses information about the actual allocation volume.\textsuperscript{154}

**Consumer information**

15.102 There have been a number of cases based on obligations stemming from EU Directive 1999/94/EG relating to the availability of consumer information on fuel economy and \( \text{CO}_2 \) emissions in respect of the marketing of new passenger cars\textsuperscript{155} and the corresponding German Regulation (PKW-EnKV) in conjunction with the general prohibition against misleading advertising (§§ 3, 4 UWG).\textsuperscript{156} Directive 1999/94 contains specific requirements for display and advertising of \( \text{CO}_2 \) emissions from cars. As the wealth of cases shows, these are not always complied with. A concerted action led by the NGO Deutsche Umwelthilfe, acting as a consumer organisation with standing in accordance with EU and German law, has shown most major car producers to be non-compliant.\textsuperscript{157}

15.103 There have also been cases barring companies from using climate-related arguments to boost the popularity of their products. For example, the LG Berlin granted injunctive relief on the basis of §§ 3, 6 para. 2 Nr. 4, 8, 12 UWG to a major producer of wind power stations who challenged an advertisement campaign by an institute for nuclear power (Deutsches Atomforum e.V.).\textsuperscript{158} The institute had displayed windmills next to nuclear power stations with the slogan ‘\textit{Klimaschützer unter sich}’ (literally: ‘Climate Protectors amongst themselves’) in posters and ads. This was deemed to be comparative advertising by way of

\textsuperscript{154} BVerwG, 24 November 2009, 7 C 2/09. See also OVG Berlin-Brandenburg, 8 May 2008, 12 B 24.07.

\textsuperscript{155} Amended by Directive 2003/73/EC, OJ L 12, 18 January 2000, p. 16.

\textsuperscript{156} Law against unfair competition, 3 March 2010, BGBl I 2010, p. 254.


\textsuperscript{158} LG Berlin, 7 December 2010, 16 O 560/10.
image transfer (from the ‘good’ image of windpower to the ‘bad’ image of nuclear power), which is generally forbidden in Germany under the UWG. The LG Berlin also granted injunctive relief against a campaign in which Vattenfall described as ‘CO₂ free’ a coal-fired power station equipped with carbon capture facilities.¹⁵⁹

Stakeholder information

15.104 There have been efforts to use general company law provisions on stakeholder rights to information about company risks in a climate context. While there are no court decisions on this issue, it seems that most large companies in Germany are currently not complying with, for example, the obligation in § 289 of the commercial code (‘HGB’)¹⁶⁰ to report on regulatory and factual climate risks.¹⁶¹

(E) Conclusion

15.105 While courts fully acknowledge the importance of climate protection in Germany, there is relatively little case law actually enhancing obligations to reduce emissions. This is due to legislative efforts to enforce climate protection targets through substantive law. However, it is not unreasonable to expect that, with growing evidence of the impacts of climate change, if the substantive law proves insufficient, courts will increasingly be willing to challenge authorities’ decisions. Especially with standing requirements being eased in respect of NGOs, there is now real scope for claims promulgating energy efficiency in installations or based on Article 20a GG.

15.106 In terms of civil law it appears possible to claim protective measures against the impacts of climate change, or even damages; however, it is unlikely that the courts would order reductions in emissions as a remedy in a nuisance case. Many legal and factual problems remain that only the courts – in the context of concrete cases – will be able to resolve.

¹⁵⁹ LG Berlin, 4 December 2007, 97 O 297/07.
¹⁶⁰ 10 May 1897, RGBl 1897, 219, last amended 1 March 2011, BGBl I 288 (Nr. 8).
Poland

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(A) Introduction

The Polish legal system

16.01 Poland is a republic with a civil law legal system. The primary Polish legislation is its Constitution of 19971 ('the Polish Constitution') and the main sources of law are: (i) ratified international treaties (including the treaties concerning participation in the European Union and the secondary European legislation in the form of regulations that have direct effect in Member States); (ii) statutes (acts passed by the Parliament and executed by the President); and (iii) executive orders (issued by the Government or relevant ministers).

The governmental stance on climate change

16.02 Poland is both Party to the FCCC and a member of the European Union. Consequently its obligations related to climate change result from these two legal regimes.

16.03 There are several public authorities involved in climate change matters in Poland, including the Ministry of Environment (responsible for overall climate-related legislation), and the National Centre for Emission Balancing and Management, responsible for the maintenance and operation of the European Union Emissions Trading Scheme in Poland.

1 Journal of Laws 1997, No. 78, item 483, as amended.
Studies conducted in 2009 reveal that, in the view of most Poles, climate change has become a problem. According to 73.5% of those questioned, climate change affects their everyday life. Even though the public appears to recognise both climate change and the need to counter it, 72.2% of respondents felt that there were more important issues to prioritise. The view that climate change is a natural phenomenon not requiring human intervention is held by 29.4% of those polled, although the majority (63.1%) does not share this opinion.²

The Polish government is also aware that climate change consequences need to be properly addressed. In December 2009, the Minister for the Environment, Maciej Nowicki, stated: 'Countries that emit the most carbon dioxide and other greenhouse gases should commit to specific obligations to reduce such emissions, whereas developing countries, in particular the least developed countries, should obtain financial, technological and organisational assistance in adapting to climate change, as well as for their rapid social and economic development. This is called for by human solidarity.'³

Polish commitment towards climate change challenges was specifically demonstrated during the COP14 conference that was held in Poland (in the city of Poznań) in December 2008.

Emission Allowances Trading Act 2011

The primary Polish legislation concerning greenhouse gas (‘GHG’) emissions is the Greenhouse Gases Emission Allowances Trading Act dated 28 April 2011⁴ (the ‘EATA’) that implements the provisions of Directive 2003/87/EC⁵ into the Polish legal system.⁶

The European Union Allowances are granted to entities running installations in line with the National Allocation Plan.

⁶ The new legislation came into force on 21 June 2011 and it substituted the previous regulation as of 22 December 2004 (the ‘former EATA’).
An installation that commences activity during the settlement period is granted allowances in the form of a permit for participation in the emission trading scheme.

16.09 The entities running these installations are obliged to disclose their emission allowances and their actual level of emissions in the given year of the settlement period.

16.10 The allowances that were not applied to actual emissions remain valid for the subsequent years of a settlement period. The allowances remaining in the account of an entity at the end of a settlement period, therefore, are replaced by the number of allowances for the subsequent period.

16.11 If an entity lacks the necessary number of allowances it will have to pay a monetary penalty.

16.12 While the European Union emission allowances are tradable, any sale contract must be notified to the national register by the relevant entity running an installation situated in Poland.

**Industrial and natural resources context**

16.13 The Polish economy is characterised by high energy consumption and a high coal ratio in primary fuel use (Poland holds the second place in the EU for the level of coal used in its national energy mix), which, in turn, explains the high emission rate of the Polish economy.

16.14 According to data for 2009, 55.84 per cent of electrical power production in Poland originated from coal and 33.66 per cent from brown coal. However, it should be noted that the production of energy from coal has decreased. In 2007 electrical power plants in Poland produced 93,100 GWh from coal, decreasing to 86,500 GWh in 2008, and in 2009 a further decrease took place with production at the level of 84,200 GWh.

16.15 In total, heavy industry (steel, chemical and mineral industries) has an approximate 60 per cent share of the total energy consumption of the country.

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consumption by the processing industry. In recent years a percentage increase was noted in the rate of chemical and paper industry consumption. By contrast, the percentage share of the foodstuffs, textiles and machine industries decreased. The decrease in energy consumption noted in the steel industry was primarily caused by production limitations.8

16.16 Poland belongs to a small number of countries that have no problem with meeting Kyoto targets. The emission of GHGs in Poland decreased dramatically in the first stage of a systemic transformation from 1989–91 and subsequently stabilised at a level of approximately 30 to 35 per cent less emissions than in the base year. At the same time, however, the government forecasts that CO$_2$ emissions may begin to grow in the next few years as a result of rapid economic development. This may prove to be a hindrance in achieving the EU reduction goal by 2020.9

National climate change risks

16.17 Climate forecasts for Poland show that a temperature increase of approximately 3.0°C to 3.5°C is expected by the final decade of the twenty-first century.10 The temperature increase will be smaller in the summer, but summers will feature lengthy periods of sunshine with frequent heatwaves punctuated by thunderstorms. This will lead to strong evaporation and possible periods of drought.

16.18 A serious threat, particularly to the Baltic Sea, is an increase in sea level. Until now, the level has increased by approximately 1.5 to 2.9 mm per year and it is estimated that it will increase by as much as 0.1 m to 0.97 m by 2080. It is estimated that 1789 km$^2$ of the coastal area is prone to flooding. If the sea level increases, Gdańsk, for example, will face danger since 880 ha of its area lies

one metre below sea level and 1020 ha from 1 to 2.5 metres above sea level.\textsuperscript{11}

16.19 A significant risk related not so much to climate change itself as to actions intended to prevent such change is the threat of so-called emission leakage. As Poland has high emission levels, local companies will be heavily encumbered by costs related to reduction efforts. These costs could directly affect the selection of a production location or impact on the volume of exports. According to recent studies, the introduction of an auctioning system from 2013 might lead to a situation where electrical power producers will be forced to shift some of their costs to energy consumers. This will cause an increase in production costs and may result in indirect emissions leakage (as an effect of the increase in electrical power prices).\textsuperscript{12}

(B) Public law

Overview

16.20 This section is intended to address the procedures through which entities (individuals, NGOs and entrepreneurs) may challenge the public authorities (including both their activity and inactivity), as well as the decisions they make concerning or involving climate change matters (including court decisions).

Grounds for judicial review

16.21 There are two distinct avenues under Polish law for challenging laws: (i) proceedings to declare legislative measures unconstitutional; and (ii) proceedings to overturn or amend an individual decision.

16.22 Laws may be subject to review, particularly to assess their conformity with the Polish Constitution as well as international treaties ratified by Poland. The Constitutional Tribunal

\textsuperscript{11} \url{www.chronmyklimat.pl/theme/UploadFiles/analiza_zmiany_klimatu_polska.pdf}.

\textsuperscript{12} \url{www.kashue.pl/materialy/opracowania/Analiza_sektorow-CL_24_08_2009.pdf}. 
exercises such review at relevant bodies’ requests.\textsuperscript{13} If a given law is declared unconstitutional, it will fully or partially lose force. Moreover, a Constitutional Tribunal ruling on non-compliance with the Polish Constitution, an international treaty or a law on which a binding decision was made, constitutes grounds for an individual\textsuperscript{14} to restart proceedings, overturn a decision or adopt another resolution through relevant proceedings.

16.23 To the extent that such a constitutional review is of an abstract nature (i.e. it does not deal with a specific factual situation), anyone whose constitutional freedoms or rights have been violated may file a complaint with the Constitutional Tribunal. Such a complaint must relate to a law’s compliance with the Polish Constitution or any other legal enactment on the basis of which a court or public administrative body ultimately ruled on the complainant’s freedoms or rights or on his/her duties as specified in the Polish Constitution. Although such a complaint is filed on an individual and specific basis, a decision as to the unconstitutionality of a law is effective \textit{erga omnes}. The right of an individual to such a complaint is also likely to apply to claims for unconstitutionality of climate change related legislation.

16.24 A request by a relevant body to assess a law’s constitutionality is not limited in time, whereas an individual constitutional complaint must be filed within three months of the handing-down of the legally binding, i.e. final, judgment, decision, etc.

16.25 It is possible in principle for final and binding administrative decisions (i.e. establishing rights and duties of individuals such as a permit for participation in the emission trading scheme) to be overturned through one of the following means: (i) a complaint filed by a party before an administrative court claiming illegality of a decision; or through the adoption of one of the following extraordinary procedures concerning legally binding administrative decisions: (ii) renewal of administrative proceedings (e.g. in the event that a decision was based on false evidence or as a result of an offence); or (iii) declaration by an administrative

\textsuperscript{13} Such relevant bodies, authorised to apply for constitutional review of legal acts include, in particular, the President, the Speakers of both Houses of Parliament, the Prime Minister, fifty members of the Sejm (Lower House of Parliament) and thirty senators.

\textsuperscript{14} Supreme Court ruling dated 6 November 2009, I CZ 62/09, LEX No. 599746.
body of invalidity of a decision, which, for instance, was issued without legal basis or in glaring violation of the law. The final two procedures have an exceptional nature, however, and in practice a complaint before an administrative court essentially serves as a tool to abolish final administrative decisions.

16.26 A complaint may be brought before an administrative court by either the party whose rights and duties are impaired by a decision concerned (e.g. the entity running an installation), or, in particular, by anyone having a legal interest therein (e.g. the entity which may be affected by the operations of the installation), or by a prosecutor, Citizens’ Rights Ombudsman, Children’s Rights Ombudsman or (under certain conditions) an NGO. The appellant must file a complaint within thirty days of the handing-down of the relevant decision, whereas the prosecutor, Citizens’ Rights Ombudsman and Children’s Rights Ombudsman can file a complaint within six months from the date of delivery of a decision to a party in an individual case. The deadline for filing a motion to renew proceedings is one month from the date when a party learnt of the circumstances constituting the basis to renew proceedings. As to the procedure for a declaration of invalidity, a decision can be invalidated at any time unless such decision has resulted in irrevocable legal consequences. Invalidation, in some instances, is also not possible ten years after the date of service or announcement of a decision.

*Grounds for liability of State Treasury for illegal activity of administrative bodies*

16.27 Irrespective of the ability to overturn legislation, Polish law provides for the ability to pursue claims against the State Treasury in connection with damage incurred by an entity as a result of (i) the passing of a law, legally binding decision or judgment, (ii) failure to pass a law, judgment or decision required by law, and (iii) illegal actions or negligence in exercising public authority. If damage was caused through either the passing of or failure to pass a law, decision or judgment, remedy may be sought by means of bringing proceedings for unconstitutionality or illegality. This process may, in principle, also apply to matters involving climate change legislation or judgments.
16.28 The State Treasury is liable to compensate if the following preconditions jointly arise: (i) damage occurs (ii) which is either the consequence of an illegal action or lack of action by an authority and (iii) there is an adequate causal relationship between the damage and action by the authority.

16.29 The obligation of the public authority to act must derive from law. It cannot be derived from general axiological assumptions such as a pressing need to regulate an issue for moral or social reasons. Liability for damage caused by legislative negligence only arises if individual rights, granted by law in an obvious and unconditional manner, cannot be exercised due to the failure to adopt an appropriate law.\(^\text{15}\)

16.30 The compensation claims noted above expire three years from the date when the injured party learnt of the damage and of the person (entity) liable to remedy it. However, this cannot be longer than ten years from the date when the event causing damage actually occurred.

*Examples in practice*

16.31 There are no adjudication judgments by Polish courts to date that deal with climate change liability. A small number of proceedings based on Polish climate change regulations concern the allocation of emission allowances, or allocation to new installations\(^\text{16}\) as well as the classification of emission allowances for tax purposes.\(^\text{17}\)

16.32 There is, however, an absence of unequivocal conditions justifying recognition of direct State liability for climate change. This is because the law does not provide for precise environmental goals that should be achieved by the State through clearly specified means and the lack of performance or improper performance of which could lead to entities’ direct harm.

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\(^{15}\) See Supreme Court ruling dated 4 August 2006, III CSK 138/05, OSNC 2007, No. 4, item 63.

\(^{16}\) E.g. Supreme Administrative Court judgment dated 5 November 2009, II OSK 891/09, Provincial Administrative Court in Warsaw judgment dated 18 May 2010, IV SA/Wa 356/10.

\(^{17}\) E.g. Provincial Administrative Court in Wroclaw judgment dated 26 March 2010, I SA/Wr 85/10.
State Treasury liability for delay in issuing a National Allocation Plan

16.33 According to the former EATA, a National Allocation Plan for the current settlement period (2008–12) should have been adopted and announced by September 2007. However, in light of the dispute pending between Poland and the European Commission concerning the total number of emission allowances to be distributed in the National Allocation Plan, the National Allocation Plan was only passed on 1 July 2008, therefore, after the commencement of the second commitment period.

16.34 The delayed issue of the National Allocation Plan significantly hindered plant operators from undertaking investment decisions, both in relation to the budget allocated to limit production emissions and to the purchase of missing allowances. In light of this, a compensatory liability of the State toward these operators could therefore be potentially considered.

16.35 It should nevertheless be noted that the liability on this basis may arise only if specific guarantees for individuals (or units) clearly and unconditionally arise from the primary source of law (the former EATA in this case). The meaning of legislative negligence concerns those situations when ‘the obligation of specific action by a public authority is specified by law and it can be determined what specific action was to be taken by a public authority to avert damage’.  

16.36 This scenario, however, should be treated only as a possibility. Effective pursuit of claims in this area would require a declaration of not only negligence on the part of a State body (the Council...
of Ministers), but also the demonstrated existence of a causal link between such negligence and damage (i.e. loss or forfeited benefit) suffered by an operator of a specific installation.

*Expected trends in the development of climate change challenges*

16.37 Since regulations introduced to address climate change are increasingly harsh, resulting in higher limits to emissions levels and the need to incur outlays to minimise the environmental impact of high-emission projects, it appears that the number of court cases initiated by entrepreneurs might increase in the near future (especially in the post-Kyoto period, after 2012).

16.38 As noted, administrative courts already hear cases concerning the allocation of emission allowances and participation in the European Union Emission Trading Scheme. The introduction of a system of allowance auctioning might, depending on its final legal architecture, entail additional complaints of entrepreneurs citing procedural flaws relating to the method of allocation, or even questioning the constitutionality of limiting commercial freedom in this way.

16.39 Potential court proceedings could also be initiated by individuals, such as those living close to planned projects which will emit GHG. It should be pointed out that under the current legal system individuals, as well as NGOs whose scope of statutory activity encompasses the legal interests of others (e.g. environmental organisations), can under certain legally specified instances, be parties to administrative proceedings and even appeal final decisions before an administrative court. Quite apart from this, as described in the section on private law (see para. 16.48 ff below), such entities may file compensation claims against investors or operators of the relevant installations.

16.40 In the case of any activity which definitely or potentially negatively impacts the environment, it is necessary, prior to obtaining an investment permit, to conduct an environmental impact

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22 See Supreme Administrative Court in Warsaw resolution dated 12 December 2005, II OPS 4/05.
In principle, within the EIA procedure, the investor drafts a report, which sets out the environmental conditions of the investment. The law specifies the content of this report very generally by stating, inter alia, that it must include a description of the predicted effects on the environment caused by the planned undertaking, in particular on the surface of the earth, the climate and the landscape. If it can be demonstrated that climate change should be considered as a predicted effect of a given project, a description of the climate change that an investment may cause should be an integral part of an EIA report.

Presently, the practice of the administrative bodies and entities drafting the reports does not provide for a specific requirement to draft an EIA report with consideration of a project’s specific climate change effects. However, the possibility of the introduction of such a requirement in the future cannot be excluded.

Environmental administrative liability

It is possible to envisage the pursuit of climate change related claims based on the Polish law implementing the environmental liability Directive. The liability introduced by Directive 2004/35 encompasses both a preventive liability (prevention of damage) and restitutional liability (restoration to a previous State). Directive 2004/35 does not, however, impose a duty to provide compensatory mechanisms for the damaged party.

Polish law, similarly to the environmental liability Directive, provides for initial assumptions in relation to environmental protection and especially to prevention of environmental damage.

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damage. It applies to damage inflicted to protected natural areas and species, and to the activity of entities that use this environment and create a risk of harm thereto, in the latter case irrespective of the fault of such entity (i.e. liability on the basis of risk). Polish law contains a list of such activities and this includes most of the activities conducted on the basis of environmental permits. The environmental liability under the law implementing Directive 2004/35 is an administrative liability, which means that the administrative authorities are responsible for its application (with access to court on appeal). The remedies of injured parties to the proceedings are limited, and there are no grounds for compensation under this regime.

16.44 The law covers damage not only to protected areas and species, but also to ground and water. Damage to ground means a negative ecological, chemical or quantitative effect on water. Damage within the ambit of this law would therefore cover an activity causing an increase in water level, including sea level.

16.45 The obligation to prevent such damage applies in the event of imminent threat of environmental damage, i.e. if there is a high probability of environmental harm that can be foreseen.

16.46 Similarly to Directive 2004/35, Polish law can only be applied to environmental damage or the imminent threat of such damage, if it is possible to establish a causal link between the damage and the activities of individual operators.

16.47 In many cases, as in cases of tortious liability, it is necessary to demonstrate this causal relationship in order for an administrative body to impose a preventative or restitutional obligation. In relation to climate change litigation this is exceptionally difficult (see para. 16.48 ff below).

(C) Private law

Basic information on tort liability

16.48 There are no examples yet in Poland of private law claims for compensation based on climate change related damage. Such claims could be pursued on the basis of present tort law, but the biggest problem would be demonstrating the causal relationship that is necessary to ascribe liability.
16.49 Basic torts that could be applied toward claims relating to climate change liability include the liability of (i) a public authority and (ii) industrial operators.

16.50 According to the basic principle of tort liability, anyone who through his/her own fault inflicts damage on another party is obliged to redress it. The basic precondition for liability is therefore the wrongdoing of the perpetrator (however in some circumstances, described below, the liability is based on risk, without any consideration of the fault of the party inflicting damage). If it were possible to prove that a factory emitting GHGs inflicted damage on somebody through culpable activity (e.g. it became impossible due to global warming to operate cold water fish breeding and the wrongdoing arose from transgression of allowable norms governing the emission of gases into the atmosphere or failure to install a legally required catalyser), and it was also possible to specify the damage, one might potentially seek compensatory damage from the perpetrator.

16.51 The concept of fault is not defined in Polish law. According to established case law, a culpable act is generally an act which is illegal, and such a term should be interpreted broadly taking into account the principles governing social existence. A first defence by a company accused of contributing to climate change would be that the relevant activity is in conformity with the legally required sector permits (which in turn are compliant with the law). The potential effectiveness of such defence could only be weakened by a future ruling, e.g. deeming that actions contributing to climate change without appropriate preventative action to minimise their negative impact are illegal (irrespective of environmental permits and terms thereof).

16.52 The prevailing trend in recent years has placed greater emphasis on the subjective (the awareness and will of the perpetrator) rather than on illegality. In relation to climate change actions, such a distinction with clear non-intentional fault (negligence) would obviously have fundamental significance.

The burden of proof rests with the victim, who must demonstrate the existence and level of damage, the causal relationship and the culpable actions on the part of the perpetrator.

**Who can claim?**

It is currently difficult to demonstrate that certain damage suffered by an individual arose because of climate change. Once those suffering damage from climate change can demonstrate a causal relationship between the actions of a perpetrator and the damage sustained, they might be entitled to compensation based on tort law.

**Who would be the defendants?**

The polluters are likely to be potential defendants in litigation concerning climate change damage. Although everyone is to a certain degree responsible for climate change, in practical terms, the greater the impact by a given entity (e.g. the greater the emission of GHG), the easier it is potentially to demonstrate that the influence of such entity on the climate is sufficiently significant to ascribe liability to it. However, it is most important to demonstrate the causal relationship between the damage and the actions of the perpetrator. This might turn out to be very difficult in view of the current level of knowledge and certainty on the origins of climate change.

**Liability of public authorities**

As already discussed in the section on public law (see 16.20 ff above), entities exercising public authority are liable for their actions or negligence if such actions are ‘inconsistent with the law’.

**Issues of causation**

A causal relationship constitutes the basic precondition for liability and must exist between an event that under law causes liability (e.g. emission of CO₂ into the atmosphere over permissible levels) and damage. Moreover, the causal relationship
also determines the level of compensation. The perpetrator is only liable for the normal consequences of actions or negligence from which damage results. According to the prevailing concept, the term ‘normal consequences’ refers to a sufficient objective causal relationship whereby a specific effect is linked to the event triggering liability (the so-called necessary condition test). It must therefore be considered whether the harm would have arisen if the event constituting the basis for liability had not occurred.

**Liability relating to the conduct of business**

16.58 With regard to climate change related issues, the liability of a business operator running a plant powered by natural forces (steam, gas, electrical power, liquid fuels, etc.) could have a fundamental significance. The business must be based around the operation of such machines and facilities. It is not sufficient that the business operator only makes use of them for supplemental activities.

16.59 A business operator is liable, irrespective of fault, on the basis of risk of damage to persons or property caused through the operation of his business. He can only be exempt if he proves that damage occurred as a result of *force majeure* or exclusively due to the fault of the victim or a third party for whom he is not liable. The owners of mechanical means of communication (e.g. cars) and operators of businesses using or producing explosive materials are liable on the same grounds. Additionally, the same principle applies to so-called ‘high-risk business’, meaning a business causing a threat of industrial accident due to the types, categories and quantities of hazardous substances situated therein.28

16.60 Also in such a case, the basic precondition for liability is an adequate causal relationship between the function of the business and the resulting damage. According to Supreme Court

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adjudication, such liability covers, for example, damage resulting from the effects of sewage, factory smoke and gases on humans and agriculture, cattle and bees, even if an enterprise emits poisonous substances into the atmosphere at levels not exceeding established norms.\(^{29}\) Liability here is therefore independent of fault and illegality.

**Obligation to prevent harm**

16.61 Within the framework of tort liability the law not only imposes the duty to remedy damage, but also to prevent it. Anyone, who as a result of actions by another party is at threat of damage, can demand that such party undertakes measures necessary to reverse the threatened danger, and, if necessary, to provide appropriate security. In such cases, the source of danger must be the (objectively) illegal actions of another party.

16.62 Additionally, those directly at threat of damage or who have suffered damage may ask for remedy from the entity liable for such threat or violation as well as the adoption of preventative means (particularly through the installation of facilities or equipment) of protecting against such a threat or violation. If this is not possible or is excessively difficult, they can demand the cessation of the activity causing the threat or violation. If the threat or violation concerns the environment as a common good, public authorities or NGOs can also put forward such a claim.

16.63 A separate issue (assuming that the above regulation would apply toward climate change in the future) is what methods should be recognised as necessary to reverse impending danger caused by climate change, and to restore a state consistent with the law. Again, it is necessary in such case for the victim to demonstrate an adequate causal relationship.

**Civil claims arising from creation of an area of limited use**

16.64 In principle, the use of a facility should not cause a transgression of environmental quality standards. However, Polish

environmental protection law provides exceptions to this rule on the basis of which various types of limitations to the use of property may be introduced.

16.65 For example, areas where use is restricted may be established in certain cases where environmental quality standards cannot be maintained beyond the site of a plant or other installation, despite the application of available technical, technological and organisational solutions.

16.66 A reduction in environmental quality standards on neighbouring real estate may reduce its value. For this reason, if the use of a property, on which limitations have been imposed as described, has become impossible or severely limited, a property owner may demand a buyout of the real estate or its part. An owner can also demand compensation for damage.

16.67 Areas of limited use are specially created around sewage treatment plants, municipal dumps, airports, electrical power lines and stations.  

16.68 Unlike the case of facilities that directly affect neighbouring properties, where the area of impact is limited (e.g. airports generating noise affecting neighbouring properties), it is difficult in the case of climate change to set the boundary of impact. Therefore, it would be difficult to create an area of limited impact, which is one precondition to pursue compensation on the basis discussed here. However, this does not exclude the pursuit of compensation on general principles.

**Other factors**

**Co-liability**

16.69 If several persons are liable for harm inflicted under a tort, their liability is joint. The precondition for such a liability is a prohibited act committed by several persons (although they may be held liable on the basis of various principles and in connection with

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30 See, e.g., a judgment concerning the creation of a limited use area for a military airport – F-16 base: Supreme Court ruling dated 25 February 2009, II CSK 546/08, Supreme Court ruling dated 6 May 2010, II CSK 602/09, Supreme Court ruling dated 12 December 2008, II CSK 367/08.

31 See Supreme Court ruling dated 6 May 2010, II CSK 602/09.
various events). The result of a prohibited act or acts must be a single tort. This unity of tort is determined by its indivisibility or such type of joint harmful act that there can be no distinction of damage for which specific persons are liable. Finally, a sufficient causal relationship must exist.

16.70 Polish law allows a victim to seek remedies from any jointly liable tortfeasor; and, in cases where there are several jointly liable tortfeasors, the issue of their relative contribution to the damage will be addressed by the courts. If one tortfeasor remedied the relevant damage, he/she will be entitled to claim from other jointly liable parties.

Limitation issues

16.71 Claims for damage for prohibited acts and harm to a person expire three years from the date when the victim learnt of such damage and of the party obliged to remedy it. As for property damage, the limitation statute provides that it cannot be longer than ten years from the date when the event causing the damage took place.32

Class action

16.72 It has recently become possible to seek compensation (among others) from tort law in group proceedings after fulfilling certain preconditions described in the Act on Group Proceedings33 (such as, for example, the number of claimants and the unity of the event causing damage).

Remedies

16.73 The level of compensation due is set according to general rules. Remedies may be sought upon demonstration that (i) a certain event occurred that created an obligation to remedy damage (e.g. river pollution by industrial activity powered by natural forces), (ii) damage was caused, and (iii) there is a causal relationship between the event and the damage.


The law does not define damage. The case law has established various meanings to it, and the most common one sets out that damage alone is a loss to goods or legally protected interests that the victim suffered against his/her will.

16.75 Damages may be to property or to a person. In the latter case the victim’s loss may be in the form of tangible or intangible damage.  

16.76 In the case of material damage, the Polish legal system distinguishes between the loss (damnum emergens) and lost benefit (lucrum cessans). Both types of damage should be, in principle, considered whenever compensatory liability arises. In order to determine the extent of damage, a comparison must be made of the actual assets of the victim with hypothetical ones that would exist but for the event causing harm. The material consequences of an event should also be assessed in the context of an adequate causal relationship.

16.77 The burden of proving damage rests with the victim, which is difficult in many cases. In the case of climate change, the quantum of the damage (assuming the ability to prove a causal relationship between atmospheric emissions and damage incurred) is likely to be complicated, because a quantitative appraisal of damage caused, for example, by an increase in temperature, is very difficult. For instance, many factors would have to be considered if a glacier melts as a result of a temperature increase and a ski resort becomes unusable. Changes to property value, lost benefits, and the consideration of benefits obtained, are only some of such elements (in the order of priority). In a situation where it is difficult to assess the damage a court may award an appropriate sum in a judgment at its own discretion based on consideration of the circumstances of the case.

16.78 In principle, the victim decides whether the remedy should be through restoration to a previous state or through payment of appropriate damages. Since restoration to the previous state in the case of climate change claims may prove impossible or

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34 See more in Z. Radwański and A. Olejniczak, Zobowiązania – część ogólna, 9th edn (C. H. Beck, 2010); A. Szpunar, Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie, 1st edn (Branta, 1999); A. Szpunar, Zadośćuczynienie za szkodę niemajątkową, 1st edn (Branta, 1999).
excessively difficult, it would have to be assumed that the victim’s options would be limited to compensation.

Protection of property against emissions

16.79 In addition to tort liability, protection of rights of a material nature (actio negatoria) could also apply in the case of climate change. In protecting the environment it is possible to use methods which protect property against emissions. Such claims of property owners, however, would primarily have a preventative nature and be intended to cease emissions. Additionally, material law provides rights to owners both of restitutional and compensatory nature: (i) to restore a status consistent with the law as well as (ii) to remedy the effects of any violations. An example of such violation would be an action that disturbs the use of neighbouring properties beyond an average level. The latter might not be easy to prove for climate change related claims, as one would again have to prove the causal relationship.

(D) Other law

Human and constitutional rights

16.80 The Polish Constitution recognises the natural environment as subject to special protection and interest on the part of public authorities. Primary law refers to the duty of the Republic of Poland to ensure freedom and human rights as well as protection of the environment through the principle of sustainable development. However, the law does not specifically regulate environmental rights in the section dedicated to human freedoms and rights.

16.81 The normative construction adopted in the Polish Constitution imposes a duty on public authorities to pursue a policy ensuring environmental security to present and future generations. The

35 See Supreme Court ruling dated 28 December 1979, III CRN 249/79, OSNC 1980, No. 7–8, item 144.
36 Article 74 together with Article 5, Polish Constitution.
37 However, environmental protection reasons may justify limitations in the exercise of constitutional freedoms and rights. These limitations, however, cannot violate the essence of freedoms and rights. See Article 31 (3), Polish Constitution.
law directly states that environmental protection is an obligation of public authorities. This duty to care for the environment and bear liability for its deterioration is also imposed on individuals.

16.82 Despite the rather extensive regulation of principles governing environmental protection and sustainable development, no clear connection can be found in the Polish Constitution between the right to the environment and human rights. This law therefore does not provide a solid basis to make such a clear connection and provide grounds for possible individual claims. It is recognised in the case law that no subjective rights can be derived from obligations of the State. This position has been confirmed in a judgment of the Constitutional Tribunal in which it stated that the definition of the duty of public authorities to maintain a policy ensuring environmental security entails general State policy and, therefore, it does not directly entail any subjective rights on the part of an individual.

16.83 Moreover, the constitutional norms only contain so-called ‘programme norms’ primarily addressed to parliament on which the speed and manner of implementation depends. Fulfilment of these measures, however, is entrusted to all public authorities, legislative as well as executive, as well as to judicial and local governmental bodies.

16.84 The concept of personal interests in Polish civil law may, however, prove helpful when attempting to bring claims that arise from detrimental climate change. Personal interests are certainly intangible and are strictly related to human personality. Their range is open and dynamic, thus it is possible to (flexibly) rely on them according to need. A party whose personal interests have been threatened by another party’s actions may demand cessation

43 Ibid.
of such actions. In turn, in the event of a violation, the claimant may demand that the violating party takes action to eliminate its effects. If material damage was inflicted through a violation of personal interests, the victim may demand its remedy according to the general principles provided in civil law.

16.85 The Supreme Court has found that tolerance by administrative bodies of noise levels exceeding the legally permissible limit is an illegal act that can violate the personal interests of individuals. The Court supported the trend in recent judgments to recognise the right to a clean biological environment and satisfaction of aesthetic regard for natural beauty through civil law means. Consequently, the Court stated that specific obligations of administrative bodies ‘may constitute a sufficient legal basis, in relation to relevant civil code regulations, for establishing claims of a civil law nature’.

16.86 Such views had already been expressed much earlier. In the 1970s, the Court stated that the human right to a clean biological environment and satisfaction of aesthetic regard for natural beauty can be protected by the relevant legal instruments related to the protection of personal interests. The Court added, however, that this is possible only if a violation of such right also constitutes a violation or threat to personal interests. A somewhat different view was expressed in a Supreme Court ruling where the right to benefit from a clean environment was explicitly recognised as a personal interest within the meaning of civil law provisions.

16.87 The ability to express a personal interest in the form of right to the environment is however a debatable issue. The above rulings have also met with criticism from certain legal commentators.

16.88 Such criticism nevertheless does not forestall the ability to consider a subjective right to the environment, which can indeed

44 Supreme Court ruling dated 23 February 2001, II CKN 394/00.
45 Supreme Court ruling dated 10 July 1975, I CR 356/75 OSPiKA 1976/12, item 232 with critical remarks by S. Grzybowski.
47 See also Supreme Court ruling dated 2 April 1981, I CR 80/81 Nowe Prawo 1983/5, p. 121, OSNCP 1981/12, item 241 with critical remarks by W. Katner.
be sought on the basis of liability principles regarding violation of personal interests. The case law in relation to this is quite vast, yet the extent to which this can be applied in the context of GHG emissions and their contribution to climate change is unclear.48

16.89 Such a concept would nevertheless be highly attractive because it is not necessary to prove fault on the part of the obligated entity. Therefore, the obtaining of evidence is significantly facilitated. Moreover, a threat to a personal interest (and not actual violation) suffices. Such simplifications, however, do not adequately reflect the need to practically apply these measures towards environmental degradation and the unfavourable effects of climate change. The fundamental difficulty would be the proper identification of the obligated entity.

Criminal law

16.90 In principle, criminal liability in Polish law is based on the liability of natural persons. Liability of legal entities is present and specified in a separate law, but nevertheless has a specific nature. It is established under a different procedure than that provided under Directive 2008/99/EC.49 Under Polish law, in principle, the collective entity50 is subject to liability only if the prohibited act committed by a given representative of an entity was confirmed through a legally binding judgment convicting such representative.51 The result, in practice, is that criminal liability of legal persons does not arise in Polish law. It can be anticipated as a result that the need to primarily determine criminal liability of

50 A collective entity is a specific concept under Polish criminal law and includes not only legal persons, but also organisational units without legal personality, except for the State Treasury, local self-government authorities, etc.
a natural person will prevent the application of liability rules in relation to legal persons in the event of any acts causing detrimental climate change.

16.91 Also significant is the fact that the global and cross-border nature of climate change is a major obstacle in applying criminal regulations and the proper attribution of liability. Emissions of gases and substances will often only cause harm after accumulating from numerous sources, and that harm may only materialise in the distant future.

(E) ‘Soft’ law

16.92 Poland is a member of the OECD and it is, therefore, possible to submit a complaint to a national contact point\(^\text{52}\) against actions of multinational companies violating the OECD Guidelines for Multinational Enterprises (‘the Guidelines’), which contain a series of guidelines on proper activities by a multinational company. The scope of these guidelines includes, in particular, transparency of information, sound management systems, activities relating to corporate social responsibility as well as environmental protection. In this respect, they may concern the issue of climate change.

A complaint may be filed by Parties interested in resolving a dispute, including NGOs, trade unions and business groups.

The observance of the Guidelines is voluntary and is not subject to legal enforcement.

16.93 The filing of a complaint against a corporation violating the Guidelines leads to an eventual mediation between the Parties. If the Parties do not resolve the dispute, a mediator issues a statement and eventually makes recommendations on guideline implementation. Upon consultation with interested Parties, the mediator may publicly announce the outcome of the proceedings unless their confidential nature and the interests of all Parties dictate that they should not be made public.

\(^{52}\) There is a national contact point in Poland at the Polish Information and Foreign Investment Agency (PAiIZ) (see www.paiz.gov.pl).
(F) Practicalities

Finding jurisdiction

16.94 The jurisdiction of Polish courts is determined by reference to the defendant, his/her/its place of residence or ordinary presence, or registered office (if a legal person or other organisation), in accordance with the principle *actor sequitur forum rei*.

16.95 This principle, on the basis of which a defendant should be sued in the courts of the country where a harmful event took place or may have taken place, has key significance in relation to climate change compensation claims.

16.96 In deciding which law is applicable, a court will in particular rely on Council Regulation (EC) No. 864/2007 dated 11 July 2007 on the law applicable to non-contractual obligations (‘Rome II’). Pursuant to Rome II, a plaintiff may select the law of the country in which an event giving rise to the damage took place or the law of the country where damage occurred.

16.97 For a foreign claimant from outside the EU, the choice of law is based on Polish private international law principles, and for climate change claims the applicable law is that of the country in which the event causing damage took place.

16.98 There is a series of exceptions to these regulations and their discussion exceeds the scope of this publication. Even if it is assumed that these exceptions do not apply, mere determination of the place ‘where an event causing damage took place or could have taken place’ may prove to be a significant challenge in the climate change context.

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53 Procedural regulations on the basis of which the jurisdiction of Polish courts is established (understood to be an international attribute) are found in the Civil Procedure Code of 17 November 1964 (Journal of Laws 1964, No. 43, item 296, as amended), as well as in Council Regulation (EC) No. 44/2001, Council Regulation (EC) No. 2201/2003 (of lesser interest to us due to its subject matter), and other international law provisions, including the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. International treaties, including bilateral agreements not listed here as well as Council Regulations, have priority over national code provisions.

54 Article 5(3), Regulation 44/2001, and Article 5(3), Lugano Convention.
The concept of public interest litigation is not practised in Poland, although the law in principle allows for such litigation. Polish law provides that NGOs whose statutory aims include environmental protection can intervene in such cases, with claimant consent, to proceedings at any stage.\(^{55}\) Irrespective of this right, Polish environmental protection law provides for further rights of environmental organisations.\(^{56}\) They may, if an environmental threat or violation affects the common good, demand restoration from the entity responsible for such threat or violation to a state consistent with the law, as well as an undertaking of preventative measures. If this is impossible or excessively opposed, a cessation of the relevant activity giving rise to the threat of damage or violation may be sought.

In principle, foreign civil judgments are recognised in Polish law provided that there are no obstacles listed in specific regulations (e.g. mandatory jurisdiction of Polish courts in a case or contradiction to fundamental principles of the legal order in Poland). Each public body faced with the issue of effectiveness of a foreign judgment assesses it for the purposes of pending proceedings, although other bodies are not bound by such assessment. For this reason it is possible to put forward a motion in court to determine whether a foreign court judgment should be recognised.

In relation to arbitration court rulings, Poland is Party to the New York Convention on the recognition and enforcement of foreign arbitral awards. Court judgments and settlements concluded before, or approved by, foreign courts are subject to implementation in Poland upon issue of an enforcement clause by a Polish court.

\(^{55}\) Article 61, para. 3, Civil Procedure Code of 17 November 1964 (Journal of Laws 1964, No. 43, item 296, as amended).

Ancillary orders

16.102 Any party to proceedings or participant therein may apply for an injunction if a claim is rendered probable and there is a legal interest in granting such injunction. Such legal interest is deemed to exist if the lack of an injunction would prevent or seriously hinder implementation of a judgment rendered in a case or in another manner prevent or seriously hinder achievement of the goal in case proceedings. An injunction may be applied for prior to, or in the course of, proceedings.

16.103 In deciding on the type of injunction the court will consider the interests of the parties: due legal protection to be provided to the entitled party but not to the extent that the injuncted party would be encumbered beyond necessity, as such an injunction could not satisfy a claim.

Costs/funding

16.104 A court usually rules on costs in a final judgment in any given instance. The losing party is under an obligation to pay, on demand, its opponent’s costs; these include all costs necessary to pursue rights and prepare an effective defence including court fees and attorney remuneration limited to a level set in separate regulations. This is usually lower than the actual amount of fees agreed between lawyer and client, thus it is usually not possible to obtain full payment of professional legal services from the opponent.

16.105 In the event of only partially favourable judgment, costs are split or proportionally allocated between the parties. A court may, however, oblige one of the parties to reimburse all costs if

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57 According to theory, rending probable (semiplena probatio), understood as an alternative measure to evidence in the strict sense and which does not provide certainty, but only a probability of an assertion about some fact. It constitutes an exception to the general rule of demonstrating asserted facts in favour of the party, which the law allows in a particular case to give credence to a fact on which it relies, instead of proving it. It is exempted as a measure from the formalism of ordinary evidentiary proceedings – its aim is to speed up proceedings in the case. However, it is at the discretion of the court to decide whether the findings made on the basis of rending probable are sufficiently reliable to be considered as credible facts.
its opponent lost only an insignificant part of his/her claims or when civil law provisions do not include strict criteria to specify the amount of the claim.

16.106 The costs related to the issue of a temporary injunction in injunction proceedings are initially borne by the plaintiff, who may demand reimbursement of these costs from the defendant together with other costs of proceedings.

**Receipt of information**

16.107 During the course of proceedings, a court may request a party or third party to disclose a document in its possession if it contains evidence that is vital in resolving the case. This is an exception to the principle that no one is obliged to disclose a document which harms their own case, since a party cannot refuse to disclose a document on the basis that it may result in the loss of a case (although not necessarily the case in question). This exemption refers to disclosure of a privileged document, as defined in separate regulations.

16.108 In addition to court proceedings, the regulations concerning access to public information and to information on the environment and its protection are of relevance. Information can be sought from public administrative bodies on the basis of both of these regimes, and anyone can submit an appropriate request without having to demonstrate a legal or material interest in such information.

**Conclusion**

16.109 As discussed in this chapter, Polish law provides a number of legal avenues that allow both individuals and companies to seek satisfaction in a variety of procedural forms. However, the unusual characteristics of climate change claims make liability based on the same seem very hypothetical and uncertain at this stage. Moreover, the lack of case law in this area does not enable one to draw firm conclusions as to the future of climate change liability in Poland.
England

SILKE GOLDBERG AND RICHARD LORD QC

(A) Introduction

The English legal system

17.01 England is part not only of the United Kingdom of Great Britain and Northern Ireland (‘UK’), but of the European Union, and this dual status is important in considering its law. England is a constitutional monarchy, but has no written constitution. It has a common law legal system. The main sources of the law are: (i) legislation, which may be ‘primary’ in the form of statutes passed by Parliament, secondary legislation, or European legislation in the form of Regulations, which have direct effect as a matter of English law; and (ii) the common law to be found in decided cases and as developed by the courts using a system of precedent. The law of tort, and much administrative law, is common law based.

The governmental stance on climate change

17.02 The Department of Energy and Climate Change (‘DECC’) was created in October 2008, to bring together energy policy and climate change mitigation policy. DECC is responsible for all aspects of UK energy policy, and for tackling global climate change on behalf of the UK. The global challenge of climate change is now firmly established on the political agenda of the UK.\(^3\) The rising

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1 The law of England includes, for present purposes, that of Wales.
2 Reports of most of the recent cases decided by English courts are available free on www.bailii.org.
3 See, for example, the establishment of the Department of Energy and Climate Change (‘DECC’) in October 2008 (DECC’s website is available at www.decc.gov.uk/default.aspx).
importance of addressing climate change in the UK was recently expressed in a case before the Planning Inspector,\(^4\) who noted that.\(^5\)

[t]here is no dispute over the national need to address climate change and the importance attached by the Government to the role of exploiting sources of renewable energy in doing so. This is manifest from a range of publications including, for example, the Renewable Energy Strategy 2009, the Energy Act 2008 and the Climate Change Act 2008.

17.03 In September 2010, Prime Minister David Cameron stated that he wanted his Coalition Government to be the ‘greenest Government ever’.\(^6\) Although he acknowledged the UK was lagging behind its European counterparts in introducing renewable energy into its energy mix and that the current budget deficit would be a huge challenge to overcome, the Secretary of State for Energy and Climate Change Chris Huhne claimed that the UK was ‘in a unique position to become a world leader in [the renewable energy] industry. [The UK] … should be harnessing our wind, wave and tidal resources to the maximum’.\(^7\)

Climate Change Act 2008

17.04 The UK has international commitments to combating climate change and reducing greenhouse gas (‘GHG’) emissions. As a signatory to the Kyoto Protocol, the UK is required to reduce its GHG emissions by 12.5 per cent (below 1990 levels) in the period 2008–12\(^8\) and although no legally binding treaty was agreed upon at the Copenhagen Conference in December 2009, the UK pushed for an international agreement to cut global emissions by 50 per cent by 2050 or on 80 per cent reductions by developed countries.\(^9\) The European Climate Change Programme (‘ECCP’)

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\(^4\) In England and Wales, the Planning Inspectorate is in charge of appeals and related casework under the applicable planning and environmental legislation.


\(^8\) http://unfccc.int/files/national_reports/initial_reports_under_the_kyoto_protocol/application/pdf/report_final.pdf.

set even more ambitious targets and policies to be collectively achieved by the Member States of the European Union. The ECCP aimed to (i) cut GHG emissions by 20 per cent below 1990 levels by 2020; (ii) improve energy efficiency by 20 per cent; and (iii) increase energy from renewable sources to 20 per cent of all energy.\(^{10}\)

17.05 The Climate Change Act 2008 (‘CCA’) set legally binding national targets. The CCA provides that it is the duty of the Secretary of State to: ensure that the net UK carbon account for the year 2050 is at least 80 per cent lower than the 1990 baseline;\(^ {11}\) set up the Committee on Climate Change (‘CCC’, an independent body established to advise the Secretary of State); and establish an emissions trading scheme.

17.06 Carbon budgets are set for five-year periods by the Secretary of State (advised by the CCC) and represent the limit of the GHG that may be emitted over that time. Last year the Government announced that the carbon budget for 2020 is 34 per cent below the 1990 baseline.\(^ {12}\) The CCA does not provide for any sanctions for failure to meet its target but as the targets are legally binding, the Government could be liable for judicial review. An action for judicial review allows the courts to make a declaration that the Government has failed to comply with its obligations under the CCA and exposes the Government to public criticism and loss of credibility in international negotiations.\(^ {13}\) Even if a direct action for judicial review based on breach of obligations imposed by the CCA is unlikely, the existence and content of the legislation are already influential in case law as illustrated by the references to it in the Heathrow Airport cases.\(^ {14}\)

17.07 The CCA also gave power to the Government to introduce national emissions trading schemes which led to the establishment of the mandatory Carbon Reduction Commitment Energy Efficiency Scheme (‘CRC’) that applies to large businesses and

\(^{10}\) www.carbontrust.co.uk/policy-legislation/international-frameworks/european-union-policy/pages/europeanunionukpolicy.aspx.

\(^{11}\) Section 1(1) of the 2008 Act.

\(^{12}\) www.publications.parliament.uk/pa/cm200910/cmselect/cmenergy/193/19305.htm.

\(^{13}\) http://uk.practicallaw.com/5–242–0025#a315662.

public sector organisations. Under the CRC, allowances are sold by the Government at a fixed price per tonne of CO₂ or traded on a secondary market. Participants will have to surrender a number of allowances that matches their level of emissions in the relevant compliance year at the end of that year. The money raised from the auctions will be ‘recycled’ back to the participants according to their performance during that year thus incentivising large businesses to lower GHG emissions.¹⁵

*Industrial and natural resources (emissions sources and energy mix)*

17.08 In 2009, gas-fired generation accounted for 44 per cent of total electricity generation; coal-fired generation for 28 per cent; other renewables for 3 per cent; wind for 2.5 per cent; hydro for 1.3 per cent; and nuclear power stations for about 18 per cent.¹⁶

17.09 The UK has oil and gas reserves in the North Sea and although these resources are in decline, Oil & Gas UK (an industry trade body) stated¹⁷ that the oil and gas fields could still be delivering 1.5 million barrels per day by 2020, enough to satisfy 35 per cent of UK energy demand but only if high fuel prices and tax breaks are combined to make viable a growing backlog of exploration and development projects in the North Sea.

17.10 According to figures published by the Government, the following are the main sources of GHG emissions in the UK:¹⁸ 35 per cent comes from the power and heavy industry sectors; 20 per cent comes from workplaces; 20 per cent comes from transport; 13 per cent comes from water and space heating in domestic premises; and 11 per cent comes from farming, changes in land use and waste.

17.11 A report prepared for The Energy Intensive Users Group and the Trades Union Group¹⁹ has stated that power and heavy industry

¹⁶ www.world-nuclear.org/info/inf84.html.
in the UK (such as steel-making, ceramics and chemicals companies) will be most affected by the climate change initiatives, which make operations in the UK more expensive as compared to other countries.

National climate change risks

17.12 According to UK Climate Projections\(^{20}\) average UK temperature has risen since the mid-twentieth century, as have average sea-level and sea-surface temperatures around the UK coast. Trends in precipitation are harder to identify, although it is thought that winters will become wetter and summers drier throughout the UK.\(^{21}\) Climate change will mean the UK has an increased risk of flooding, coastal erosion, damage to essential infrastructure due to intense rain events and increased levels of UV radiation.\(^{22}\)

(B) Public law

Overview

17.13 This section addresses the process whereby decisions of public bodies may be reviewed by the courts (hence the common term ‘judicial review’). The legal principles form part of English administrative law, and judicial review cases are generally brought in the Administrative Court.\(^{23}\)

17.14 Because of their nature, judicial review proceedings are likely to be the most common type of legal action brought in relation to climate change issues. A number of different types of action can be envisaged: (i) review of decisions which implement or purport

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\(^{20}\) The UK Climate Projections (UKCP09) make available climate information for adaptation purposes. Funded by a number of UK ministries, including the Department of Energy and Climate Change, they carry out research in partnership with several academic and scientific institutions, including the Environment Agency Marine Climate Change Impacts Partnership (MCCIP), the Met Office, Newcastle University, Proudman Oceanic Laboratory (POL), Tyndall Centre and University of East Anglia (UEA). Further information is available at: http://ukclimateprojections.defra.gov.uk/content/view/868/531/.

\(^{21}\) http://ukclimateprojections.defra.gov.uk/content/view/512/499/.


\(^{23}\) This section contains only the broadest summary of a very large body of law. For further detail see, for example, Michael Fordham QC, *The Judicial Review Handbook*, 5th edn (Hart Publishing, 2008).
to implement regulations directly concerning climate change; (ii) review of decisions in spheres of public body activity where it is alleged that climate change issues arise; (iii) review of decisions of public bodies in relation to private sector activity which allegedly fail to take into account climate change factors; and (iv) challenges on ancillary matters such as right to information and to protest. So for example in the first category, actions taken in purported compliance with duties owed under the Climate Change Act 2008 could be challenged. In the second category (into which the famous US case of Massachusetts v. EPA would fall) a failure by environmental government agencies to address climate change might be challenged. In the third category a whole host of decisions on planning, licensing or permitting private projects with climate change implications might be challenged, including permissions for airports, power plants or mines, or government financial support for such activities.

**Grounds for judicial review**

17.15 The courts do not have unfettered discretion to intervene in decisions of public bodies whenever they like, and the circumstances in which they may do so are strictly circumscribed. The court may intervene and undertake a review in three basic categories of circumstances: (i) unlawfulness of a decision; (ii) unreasonableness of a decision; and (iii) unfairness/procedural impropriety. There may be scope for review on other less well-developed grounds (such as frustration of legislative purpose, substantive legitimate expectation, or error of fact). Decisions involving Human Rights Act 1998 (‘HRA’) violations are susceptible to review. Where a decision is reviewed, the issue is whether it was a reasonable one and the court will not generally substitute its own views for those of the decision-maker, or undertake a broader merits review.

**Other aspects of judicial reviews**

17.16 The following issues are also important:
- Generally there must be a ‘decision’ of a public authority, but the want of an identifiable decision is not necessarily fatal (*R v. Secretary of State for transport, ex p. London Borough of Richmond Upon Thames and Ors (No. 3)* ²⁴).

²⁴ [1995] Env LR 409, 413.
A claimant must be able to show ‘sufficient interest’: the case law relating to interest groups (including in environmental law challenges) indicates a liberal approach where there is genuine concern (R v. HM Inspectorate of Pollution, ex p. Greenpeace25). In addition to the claimant and defendant, other ‘interested parties’26 who are directly affected (within Civil Procedure Rules (‘CPR’) 54.1(2)(f)) may have the right to be involved in the proceedings.

• The remedy is discretionary (Dimmock v. Secretary of State for Education and Skills,27 a case where the claimant unsuccessfully sought judicial review of a governmental decision to distribute to every State secondary school in the UK a copy of Al Gore’s well known film about climate change, ‘An Inconvenient Truth’). A claimant may seek (under CPR 54.2, 54.3) any of the following – a quashing order, a mandatory order, a prohibiting order, an injunction, or a declaration. There can be a claim for damages, restitution or recovery of sum due (CPR 25.1) or the obtaining of alternative remedies such as obtaining a reference to the ECJ.

• Procedure generally is governed by the CPR Part 54. Timing is important (CPR 54.5): an action must be commenced promptly (this is important where other interests are affected) and in any event not later than three months after ‘the ground arose’.

17.17 Costs are discretionary (Bolton MDC v. Secretary of State for the Environment28). They generally follow the event with costs liability for the unsuccessful claimant. They may include costs in favour of third parties who opposed unsuccessful challenges (Bolton MDC). The court may be influenced in decisions about costs by the public-interest nature of litigation and importance of issues.29 Protection against costs exposure may be obtained (including for interest groups) by applying for a protective costs order (Corner House Research, R (on the application of) v. Secretary of State for Trade and Industry30).

17.18 The Aarhus Convention,31 a UN Convention which the UK ratified in 2005, requires that access to justice is not barred

29 R (on the application of Friends of the Earth Ltd and Anor) v. Secretary of State for Environment, Food and Rural Affairs and Ors [2001] EWCA Civ 1950 (7 December 2001).
by inappropriate costs rules. In August 2010 the Compliance Committee found the UK to be in breach of its obligations.\textsuperscript{32} In December 2010 in \textit{R (Edwards \& Pallikaropoulos) v. Environment Agency \& DEFRA}\textsuperscript{33} the Supreme Court considered for the first time Article 9 of the Aarhus Convention, which in the EU has been implemented by Article 10a of the Environmental Impact Directive.\textsuperscript{34} Article 9 stipulates that environmental litigation should not be ‘prohibitively expensive’. In order to ascertain what costs might be considered prohibitively expensive, the UK Supreme Court made a reference to the Court of Justice of the European Union (‘CJEU’) regarding the correct test to be applied in relation to cost orders in environmental cases. A decision of the CJEU is expected in 2011 or early 2012.

\textbf{Examples in practice}

\textbf{Direct and indirect challenges}

17.19 Challenges directly related to climate change have to date been few. If the US trend crosses the Atlantic,\textsuperscript{35} there may be a rise in actions both from environmental groups seeking to compel public authorities to regulate in relation to climate change and from industry seeking to prevent or curtail such regulation.\textsuperscript{36}

17.20 Challenges may also be made against activities which contribute to climate change and their effects, such as aircraft movements, whose noise was challenged in the ‘Night Flights’ series of cases (including \textit{Hatton v. UK}\textsuperscript{37}). Other examples are the Heathrow third runway case (\textit{Hillingdon LBC v. Secretary of State for Transport}\textsuperscript{38}).

\textsuperscript{32} [2010] UKSC 57.
\textsuperscript{34} As frequently occurs, although the US legislation on climate change is very different from the UK legislation.
\textsuperscript{35} Opposition by the aviation industry to the inclusion of aviation emissions in phase III of the EU ETS took the form of a challenge to certain UK regulations in relation to the relevant EU Directive in \textit{R (Air Transport Association of America Inc) v. SSECC} [2010] EWHC 1554 (Admin). The matter will apparently be referred to the European Court.
\textsuperscript{36} ECHR, 36022/97, 8 July 2003.
\textsuperscript{37} [2010] EWHC 626 (Admin) where express reference was made by Carnwath LJ to the CCA and Government Climate Change Policy. In \textit{Barbone v. Secretary of State for Transport} [2009] EWHC 463 (Admin) one of the grounds of the unsuccessful challenge to the granting of planning permission to increase capacity of Stansted airport was that it

17.21 Challenges may concern not climate change itself but ancillary issues (such as the right to protest against climate change and the right to inform/educate/publicise concerning climate change). There are examples of challenges against climate change information/protests (*Dimmock v. Secretary of State for Education and Skills, Heathrow Airport Ltd v. Garman*[^40]). But in other areas, there are examples of positive challenges to defend/secure a right to protest (*Taberнакle v. Secretary of State for Defence*[^41]).

17.22 Challenges concerning the interpretation and enforcement of EU law and international obligations may provide for a lower threshold of review or more extensive relief than purely domestic law cases (including injunctions against the Crown) (*Rockware Glass Ltd, R (on the application of) v. Quinn Glass Ltd and Anor*[^42]).

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**Human rights law and judicial review**

17.23 Article 8, European Convention on Human Rights (‘ECHR’) (right to private and family life) could potentially be engaged (as in *Hatton* – see below at para. 17.27) by climate change impacts, as might Article 1, Protocol 1, ECHR (right to peaceful enjoyment of possessions) where there is damage to or interference with property. It is conceivable that Article 2 ECHR (right to life) could be engaged if there are serious enough effects, although this seems unlikely in the UK in the foreseeable future.

17.24 Many of the ECJ’s decisions are predicated on the generally applicable principles from the case of *X + Y v. Netherlands*[^43] where the State was held liable for not preventing a human rights violation by failing to put in place adequate systems to prevent a girl from being abused. In the environmental context, the case of *López Ostra v. Spain*[^44] proved a landmark decision. The applicants were

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[^42]: [2006] EWCA Civ 992. See also *Cemex UK Cement Ltd v. DEFRA*, [2006] EWHC 3207 on the EU emissions trading regime.
[^43]: (1986) 8 EHRR 235.
residents of Spain who complained that a waste treatment facility near their home violated their right to privacy and family security guaranteed by Article 8 of the ECHR. It was held that severe environmental pollution may infringe the Article 8(1) right, irrespective of whether health is seriously endangered. Another noteworthy case in this context is Guerra v. Italy [1998] ECHR 7 in which Article 8(1) was held to be violated by the State’s failure to inform residents near a factory about the health and safety risks posed by that factory.

17.25 In claims involving alleged breaches of human rights, the claimant must be a victim of that violation.\(^45\) Given that even codified human rights can be very uncertain in terms of their scope and crystallisation towards the individual, one must face the problem that there is no clear defined environmental right to be a victim of. The relevant ground of judicial review would appear to be irrationality in relation to governmental environmental decision-making, but this is a very hard threshold to meet given that Wednesbury unreasonable\(^46\) requires a decision so unreasonable that no reasonable authority could have come to it. In the human rights context, particularly post HRA, there is some authority to suggest that this threshold will be lowered with regard to questions of interference in human rights\(^47\) and that where the decision interferes with human rights, the court will require substantial justification for the interference in order to be satisfied that the response fell within the range of responses open to a reasonable decision-maker. This remains to be tested in an environmental context, but given that such a trend is highly qualified by judicial emphasis of the importance of not undermining governmental authority, one can envisage that a court will be far less inclined to interfere in decision-making that does not conflict with a clearly codified right.

\(^{45}\) Section 7(1) of the Human Rights Act 1998. The victim, with the exception of governmental organisations, can however be a non-natural person (Österreichischer Rundfunk v. Austria (35841/02), [2006] ECHR 1043).


17.26 It is worth considering the interesting recent employment case of *Nicholson v. Grainger Plc.*\(^48\) The Employment Appeal Tribunal held that the employer had discriminated against Nicholson’s fundamental philosophical belief in environmental protection contrary to the Employment Equality (Religion or Belief) Regulations 2003 which defines the ground for discrimination as ‘religious belief or philosophical belief’ with the caveat that a philosophical belief must be akin to religion. While this may be more a case of discrimination against non-standard beliefs, it does provide an example of environmentalism being recognised by the courts from an individual’s perspective.

17.27 In a domestic context, *Hatton v. United Kingdom*\(^49\) held that a government scheme imposed in 1993 that altered the regulation of noise arising from night flights out of Heathrow Airport was not in violation of the Article 8 right to respect for private and family life. Until the entry into force of the Human Rights Act 1998 there was no facility in English law, for the national courts to consider whether an alleged increase in night flights was a justifiable limitation on the right to respect for the private lives of those who lived near the airport. Therefore, it was held that there had been a violation of the Article 13 right to an effective remedy.

17.28 A case of interest is the action brought in 2009 in *Platform, People and Planet v. Commissioners of HM Treasury*\(^50\) where two NGOs sought to challenge the Government’s actions or inactions in its capacity as major shareholder in RBS, a large bank which was part nationalised after the 2008 financial crash. Specifically it was alleged that RBS’s lending practices involved support for many projects and companies which contributed to significant GHG emissions, that RBS policies contravened the Government’s own policies on GHG emission, and that in formulating policies to be adopted by it as shareholder the Government failed to follow its policy, under a ‘Green Book’, of assessing the environmental impact of provision of funds to RBS.

17.29 The claimants alleged (i) a legitimate expectation that public funds would not be used to allow RBS to act in contravention of the public interest in mitigating climate change, (ii) failure in

\(^{50}\) [2009] EWHC 3020 (Admin).
drawing up the policies to take into account other so-called ‘Green Book’ policies, and (iii) breach of Article 6 of the EHCR. The court dismissed the first and third grounds as hopeless. The second ground was also rejected (although after a lengthier discussion), on the basis that none of the materials relied upon restricted the Government’s wide discretion. The case adds nothing to administrative law, neither does it provide guidance (except in relation to its own special facts) on climate change related issues which may be amenable to review, but is an example of an indirect approach in a legal challenge to the perceived problems of climate change.

Property rights and planning law

17.30 In Arscott v. Coal Authority\textsuperscript{51} the claimant argued that the ‘common enemy’ rule in the law of nuisance (i.e. flood preventative action does not constitute nuisance if it results in flooding on another’s land) breached Article 8 of the ECHR or Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The court dismissed his claim stating that the ‘common enemy’ principle was inoffensive to those rights and struck a fair balance between the right of the occupier to do what he liked with his own land and the right of his neighbour not to be interfered with. Furthermore, the rule balanced the interests of persons whose homes and property were affected and the interests of the general public.\textsuperscript{52} Although this case does not relate directly to climate change one can see that the principle is applicable to climate change.

17.31 Human rights issues frequently arise in planning matters, especially given the Protocol to the ECHR Article 1 right to ‘the peaceful enjoyment of possessions’. Here, any environmental agenda can be both the beneficiary and the victim of the human rights argument. In \textit{R (on the application of Littlewood) v. Bassetlaw District Council},\textsuperscript{53} one of the grounds of the Littlewoods’ application for judicial review against the planning grant of a pre-cast concrete manufacturing facility close to their home was that the local authority failed to consider the impact of the development on climate change. The court held that the grant was not

\textsuperscript{51} [2004] EWCA Civ 892.
\textsuperscript{52} Marcic v. Thames Water Utilities Ltd [2004] 2 AC 42 applied.
\textsuperscript{53} [2009] Env LR 21.
unreasonable as adequate environmental reports and statements were made despite climate change not specifically being dealt with.

17.32 Contrast this with Bradford v. West Devon BC\textsuperscript{54} where the claimants appealed the refusal of planning permission for two wind turbines. The local council’s decision cited the adverse effects on surrounding landscapes and the residential amenities of nearby occupiers. Although the planning inspector acknowledged the importance of the need to combat global warming, and in spite of the fact that the project would have supplied electricity to more than 1,200 homes, it was decided that the benefits were outweighed by the unacceptable harm to the character and appearance of the distinctive local landscape.

17.33 The increase of coastal erosion and inundation due to climate change may affect rights of owners of coastal property and bring them into conflict with local or national authorities who are accused of inaction or the wrong type of action.\textsuperscript{55} There is a duty on the Crown to ‘protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers’,\textsuperscript{56} although this is not an absolute one to prevent all erosion by any means. It is also conceivable that a party dissatisfied with action on coastal defences could seek to rely on Article 1 of the First Protocol to the ECHR which protects property rights, although apart from other difficulties with such a claim there would appear to be no deprivation of property (as opposed to failure to protect property).

(C) Private law\textsuperscript{57}

Preliminary considerations

17.34 The possibility of private law remedies (that is where one ‘private’ (non-State) legal person sues another for damages or an injunction) for loss or damage caused by climate change is one that has

\textsuperscript{54} [2007] PAD 45.
\textsuperscript{55} An example of litigation in relation to coastal erosion is Boggis v. Natural England [2009] EWCA Civ 1061.
\textsuperscript{56} Attorney-General v. Tomline 1880 14 Ch D 58.
\textsuperscript{57} For a detailed discussion of liability under English law generally, see Giedré Kaminskaité-Salters, Constructing a Private Climate Change Lawsuit under English Law (Kluwer Law
generated much interest and discussion, and equal measures of excitement (for environmentalists) and alarm (for sectors of industry and their insurers).

17.35 A discussion of possible private remedies in a chapter on English law necessitates consideration of procedural law and conflict of law as well as substantive law. English law in this context is most likely to be relevant only in litigation before English courts. This is in turn likely to occur only (in simplified terms) where (i) the person sued (defendant) or one of them is domiciled in England, and/or (ii) the persons suing (claimants) are able to found jurisdiction against a foreign-based defendant in respect of damage occurring in England. Even where an action is brought against a defendant domiciled in England, English conflict of law rules may require application of a different substantive law (for example when damage is suffered other than in England). For this reason the laws in relation to establishing jurisdiction and in relation to applicable law are important in terms of the practicalities of private law claims.

17.36 There have been no significant private law claims in England based directly on allegations of actual or anticipated damage from climate change. It should be emphasised at the outset that the authors see no reason to suppose that one could be brought today with any realistic chances of success. This section thus focuses on potential bases for such liability. The prospect of this kind of liability being established is widely thought to become more likely if and when the impacts of climate change become more severe, especially if no satisfactory international regulatory regime is agreed. The analysis involves a consideration of the applicability of existing legal principles of tort (delict) to climate change scenarios, borrowing on discussion and actual cases in the USA and elsewhere.


58 In this section ‘C’ and ‘D’ are used where appropriate to denote claimant(s) and defendant(s).

59 By parity of reasoning it is of course possible that English law could be applied in an action other than in England if damage was suffered in England.

60 The main US cases (including Connecticut v. AEP, Kivalina v. Exxon and Comer v. Murphy) are discussed in Chapter 20. Whilst there are significant differences between
Whether or not ‘direct’ cases involving actions against emitters and similar defendants for damages for the effect of climate change are successful, it is very likely that there will be much litigation against professionals, public bodies, utility companies and other categories of defendant, for damage allegedly caused or contributed to by climate change. These cases typically involve allegations that the defendant failed to factor in the effects of climate change, whether in designing buildings, planning civil engineering projects, or auditing accounts of a company exposed to climate-related risks. This type of potential for liability is of great significance not only to those directly at risk from such actions, but to their investors, lenders, insurers and professional advisers.

The two principal ‘torts’ under which a ‘direct’ climate change related claim could be brought are ‘nuisance’ and ‘negligence’. Although these sometimes overlap, they have distinct origins and are aimed at different types of conduct. Each is discussed below. Because both torts are ‘common law’ torts, with the principles to be found in numerous decided cases, it is regrettably difficult to summarise their scope succinctly, and impossible without reference to such cases.

What damage might be actionable?

Fundamental to any analysis is a consideration of what type of harm or damage a claimant might allege, and what type of defendant he/she may claim against. English law most readily affords a remedy in the case of ‘physical’ injury or damage, specifically where the claimant is injured or made ill (or killed) or his/her property is physically damaged. The law recognises the right to recover where a claimant is economically harmed, but in much more limited circumstances. As discussed in Chapter 2, some types of climate damage are (or are likely in future to be) much easier to show as ‘caused’ by climate change than others. Damage may include almost any kind of adverse change (hotter,
colder, wetter, drier, windier), and in a climate context any significant change may potentially be adverse, especially if it occurs too quickly to allow the relevant property or ecosystem to adapt to the change. However examples of damage in England which may give rise to claims are (i) damage to property caused by sea level rise, (ii) illness or disease caused by heatwaves or warmer mean temperatures, and (iii) damage to property caused by extreme weather events, either in isolation or by reference to increased incidence, such as heavy rain leading to flooding, strong winds, and damage to property due to change in precipitation patterns (floods or shrinkage damage). Harm in terms of economic loss alone is less likely to be actionable.

Who might claim

17.40 This depends largely on who suffers the damage referred to above. Claimants could be individuals, corporations, NGOs/charities or local or national governmental institutions. For various reasons large property owners might be the most likely claimants, suing on the basis of losses aggregated over time and/or at different locations. These could include local government bodies who may also have a public interest in bringing claims for public nuisance.

Who might be defendants?

17.41 Turning to the question of who may be sued, the most likely targets of any litigation are those most likely to be alleged to be ‘responsible’ (to use a neutral word) for climate change. One of the hurdles for any private law claim is that virtually every individual in the world is in some (if minute) sense ‘responsible’ for GHG emissions, but the larger the organisation (usually a corporation) concerned the more easily it may be said that its activities contribute to climate change in a sufficiently material way to attract liability. The types of activity are likely to be those that involve energy-intensive activities and GHG emissions or those that develop products or services that in turn contribute to GHG emissions.

Nuisance

17.42 The paradigm case of nuisance is ‘a condition or activity which unduly interferes with the use or enjoyment of land’.\(^{62}\) However

\(^{62}\) *Clerk & Lindsell on Torts*, 20th edn (Sweet & Maxwell, 2010), § 20–01.
nuisance is not necessarily limited to claims against defendants in respect of their use of land or by claimants in relation to use or enjoyment of their land. The definition of nuisance is complicated by a distinction between ‘private’ nuisance, most often taking the form of an unreasonable use of D’s land affecting the use of enjoyment of the land of his neighbour, C, and ‘public’ nuisance, which is a crime and a tort actionable in damages. Although the two are not mutually exclusive, for present purposes public nuisance is the more relevant, and has been the subject of a number of recent cases. In summary:

1. Public nuisance is a crime the essence of which is an act or omission the effect of which is to endanger the life, health, property, [morals] or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all subjects with the relevant area or sphere of operation.

2. At common law public nuisance includes a very diverse group of activities, all causing (at least) annoyance or inconvenience.

3. It is only actionable when a private individual has suffered particular damage over and above that suffered by the public generally.

17.43 Thus public nuisance covers a potentially wide range of activities and, unlike private nuisance, is not limited to activities on D’s property affecting C’s rights in relation to his/her property. Acts which are otherwise intrinsically lawful may constitute public nuisance, although not everything which causes

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63 See, for example, Hunter v. Canary Wharf [1997] AC 655.
64 Tate & Lyle v. GLC [1983] 2 AC 509.
67 The potential width of the tort arises in part from the fact that the ‘rights’ referred to are not apparently positive rights in the formal legal sense, but more the right to go about one’s normal daily business unperturbed.
68 Thus Rimmington (see n. 66 above), § 9 includes references to ‘erecting a manufactory for hartshorn, erecting a privy near the highway, placing putrid carrion near the highway, keeping hogs near a public street and feeding them with offal, keeping a fierce and unruly bull in a field through which there was a footway, keeping a ferocious dog unmuzzled and baiting a bull in the King’s highway’. This list is cited in a book on climate change not so much for amusement, but to demonstrate the potential width of the tort (and crime) of public nuisance.
69 Clerk & Lindsell on Torts (see n. 62 above), §§ 20–03 to 20–05.
annoyance or inconvenience to the general public is an actionable nuisance.

17.44 One of the difficulties applying the nuisance analysis to climate change damage is that unlike the classic nuisance cases involving noise, smells, smokes etc., there will be no geographic connection between C and D. This however is simply an unusual consequence of the nature of climate change rather than a fundamental requirement of nuisance.

17.45 The four key questions which would need to be addressed in any such claim would be:

1. What was the nature of the harm or damage suffered by C?
2. Could it be shown to be caused by D’s activities?
3. Were D’s activities such as could in the circumstances amount to a nuisance (this is linked with (1) and (2))?  
4. Would a defence of statutory authority be available?

Negligence

17.46 The limits of the tort of negligence are difficult to define, but the essence of the tort is easily stated: in general terms D ‘must take reasonable care to avoid acts and omissions which [he] can reasonably foresee would be likely to injure [his] neighbour’,[70] and a breach of that duty will sound in damages. Whilst economic loss may in limited circumstances be recoverable, the ‘damage’ must generally be to C’s property or person.

17.47 A preliminary question in the context of climate change liability is whether D owes any duty to C to take reasonable care, and this issue, which considers who is one’s ‘neighbour’, is the subject of much case law.

17.48 Many attempts have been made to reformulate a universally applicable test[71] in a way which allows the law to react to new situations without opening the ‘floodgates’ to tort claims based on a general principle of uncertain scope. In Caparo a threefold test was adopted whereby a duty of care existed if and only if: (i) there

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was sufficient proximity between the parties; (ii) the damage was foreseeable; and (iii) the imposition of a duty of care was just, fair and reasonable. Even this approach asks as many questions as it answers, when ‘proximity’ is itself an elusive concept, not used in a geographical sense, and ‘just, fair and reasonable’ are all almost infinitely elastic. However the ‘just, fair and reasonable’ requirement can be used as a ‘catch all’ provision whereby the courts deny expansion of the tort to cover new types of conduct, on policy grounds, even where logic and first principle might be said to justify this. Broad social and economic considerations may militate against a general expansion of tortious liability, and as noted in Chapter 5, this factor has been reflected in a number of Australian decisions. The pendulum has swung in some common law jurisdictions away from a ‘universal’ test and back towards an ‘incremental’ approach. This raises similar questions in a different form, as to when a court should recognise a duty in a new situation, but with the burden on the claimant to justify the existence of a duty it militates against extension of negligence to cover GHG emissions.

17.49 One of the ironies of the common law is that, despite judicial protestations of unwillingness to make decisions which are effectively policy rather than legal ones, the common law nature of negligence liability allows judges to do just that. Lord Atkin’s famous exposition of the ‘neighbour’ principle was preceded by this passage:

The liability for negligence whether you style it such or treat it as in other systems as a species of ‘culpa,’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

17.50 This sentiment has been echoed in modern times, for example by Lord Bingham who said that ‘the public policy consideration

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72 See for example Sutradhar v. NERC [2006] UKHL 33, especially para. 32, where the House of Lords held that an English defendant was on the facts under no duty of care in respect of alleged arsenic poisoning suffered by the claimant in Bangladesh.

73 Para. 5.54 ff.

74 Echoed in the ‘justiciability’ issue raised in the US climate change cases.

which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy’. In the context of such uncertainty about the scope of a duty of care, it lends credence to those who take the ‘broad brush’ view that whether and when a duty will be found to exist will depend on how seriously people or property are damaged in future, and how those said to be in part responsible have conducted themselves. Different possible scenarios in ten, twenty or fifty years’ time may provide different answers to the question whether GHG emission is at least in some circumstances and for the purposes of the law of tort ‘moral wrongdoing for which the offender must pay’.

**Issues of damage**

17.51 On the basis of the IPCC reports as to future trends as well as actual evidence of damage to date, there are a number of types of damage which would be recognised as qualifying for compensation in nuisance or negligence if other hurdles were overcome. These include damage to land and buildings caused by sea level rise, and damage from floods or ‘extreme weather events’, soil shrinkage or subsidence due to drought.

17.52 A consideration which might be relevant on the issues of damage, causation, reasonable conduct or ‘duty of care’ is the ‘net benefit’ point. Put simply the question is whether, if (for example) a heatwave causes death or harm to 500 people, those 500 can claim without reference to an assertion by D which says that the same climate change means that 300 (or even 600) less people die of cold in winter, in the same or even in different locations. Another possible aspect of ‘net benefit’ is a temporal one; as explained in Chapter 2, climate change may make autumn floods in a specific location more likely but at the same time make spring floods in the same place less likely.

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77 See para. 3.23 above. This section focuses on types of damage which are likely to occur in the UK. Other countries may suffer other types of damage (e.g. from glacier/snowpack melt, desertification etc.).
A further problem is the question of mitigation of (or adaptation to) damage which potentially arises in an acute form where climate change occurs progressively over a relatively long period, in contrast to much damage (which is the subject of litigation) which happens instantly or more quickly. This issue arises in equally acute form in the FCCC negotiations. One of the oddities of the FCCC terminology is that ‘mitigation’ (which to an English tort lawyer means avoiding the damage caused by a harmful event) is used to describe something else (avoiding the harmful event of climate change itself) and what a tort lawyer would call mitigation is called adaptation. Leaving aside such semantic issues, if it can be seen that C’s property will be damaged in the future as a result of the tortious conduct of D, to what extent (i) is C entitled to expend money to avoid or minimise the damage and reclaim it from D; (ii) is C bound to expend such money to minimise the damage, in the context of any claim against D; and (iii) is the cost and value of such action measured in purely economic terms, or do social, cultural and human rights considerations play a part?\footnote{Thus for a small island threatened by sea level rise, relocation of inhabitants may in economic terms be cheap compared to building flood/storm defences, but it may not be ‘reasonable’ to require the cheaper option to be taken.}

**Issues of causation**

Any claim of this type involves at least two basic links in terms of the ‘chain of causation’: (i) Was the damage (or the event which caused the damage) caused by ‘climate change’ as opposed to ‘ordinary’ weather/climate, the passage of time or something else? (ii) To what extent was D’s conduct a contributory factor in this? Before considering these, more general issues in relation to causation need to be addressed.

‘Specific causation’

The English law of causation has developed by reference to resolution of factual issues and whether the claimant can show ‘on balance’ of probabilities that damage A was caused by event B. Recognising that many consequences have more than one cause, in general it is sufficient to show that B was ‘an effective cause’, an
undefined expression connoting a narrower test than a ‘but for’ test but a wider one than sole or dominant cause. When the event is ‘damage’ there is also the question of whether the damage is ‘indivisible’ or not. A house which is destroyed by an explosion may be contrasted with one which progressively crumbles over many years due to erosion or subsidence. Where the damage is divisible it may be possible to apportion different parts of it to different causes. Even in the case of indivisible damage with more than one potential cause, there are two potentially overlapping issues: one of factual inquiry (and the role of presumption or statistics in that inquiry) as to which out of several potential causes was in scientific terms a cause; and the other a legal inquiry as to which of several ‘scientific’ causes are sufficiently ‘direct’ or ‘effective’ to be ‘legally causative’.

17.56 The traditional approach to causation may work well enough for damage directly attributable to mean temperature increase or sea level rise. These are instances of damage where the (or the main) underlying cause is on the basis of the science ‘known’ or provable to the requisite standard of proof – for example the emissions of a large number of GHG emitters. Here the causation problem in relation to D is not necessarily a conceptual one, because the contribution of each emitter may well be calculable, but whether as a matter of law the ascertainable contribution is sufficiently material to make it, in legal terms, a cause. The difficulty in showing the materiality (in causative terms) of the effect of the GHG emissions of any given D or group of Ds remains perhaps the most significant obstacle to private law claims. One potential way around this obstacle in the case of long-term progressive damage is to analyse it as divisible, so that a D who is (for example) ‘responsible’ for 1 per cent of total emissions is 100 per cent liable for 1 per cent of the damage. This may have a similar effect to apportionment of liability for indivisible damage, and issues of joint or several liability (see para. 17.63 below) but is conceptually distinct.

17.57 The traditional approach works less well for the consequences of extreme weather events (‘EWEs’), which are more likely to be seen as (at least in part) ‘indivisible’. Where an allegation is made that these are caused or contributed to by climate change,
the likely response is that such events have always happened, and that it is impossible to tell which if any are caused or contributed to by climate change.

17.58 A possible counter-argument from C is to argue that (for example) a given type of EWE used to happen every twenty years but now happens every twelve-and-a-half, ten, or five years and thus the chance of a given event increases by 60 per cent, 100 per cent, or 200 per cent. C may rely on the acceptance by the courts that if factor X doubles (or more) the risk of event Y happening, then in some circumstances, if event Y happens, on balance of probability it is ‘caused’ by event X. This doctrine is potentially significant for climate change claims where a 100% increase in frequency of EWEs can be said to equate to a doubling of risk, but needs however to be adopted with caution, partly to prevent the conclusion that all of the events in a given period were ‘caused’ by climate change and partly because as emphasised in the recent Supreme Court decision in *Sienciewicz v. Grief*, this approach may be more appropriate where there are alternative competing causes rather than concurrent causes with cumulative effect. It is however significant that analyses have been undertaken which calculate the increase attributable to anthropogenic emissions in the risk of certain EWEs happening, including heatwaves and flooding.

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79 And this conclusion has been accepted by the courts of appeal in some cases involving contracting illness or disease, where if the risk of an event is more than doubled by factor X, that is tantamount to proving that on balance of probability factor X has caused the event: *Novartis Grimsby v. Cookson* [2007] EWCA 1261, at 74, *Ministry of Defence v. AB* [2010] EWCA 1317, at 153, *Sienciewicz* (see n. 80 below) at 72–93 although differing views on ‘doubling the risk’ were expressed by different judges.


81 At para. 93. Although unnecessary to the actual decision which turned on the scope of a special rule for mesothelioma cases, there was a wide-ranging discussion in the case about the role and relevance of statistical evidence in proof of causation.

82 For a description of the scientific approach including the concept of Fractional Attributable Risk, see Myles Allen et al., ‘Scientific Challenges in the Attribution of Harm to Human Influence on Climate’, *University of Pennsylvania Law Review*, 155 (2007), 1353. As the authors observe, it is essential that the lawyers and scientists agree on what the right causation question is.

83 See for studies of this nature in relation to the 2003 European heatwave and the 2000 UK floods, the work of Allen et al. in, respectively, *Nature*, 421 (2003) and 470 (2011). See also Chapter 2.
A different approach – ‘material increase in risk’

17.59 A further possible line of argument by C is to move away from traditional notions of proof of causation and look at epidemiological and statistical evidence to assess D’s contribution to the risk of an occurrence.

17.60 English law has given some recent support to this approach albeit to a limited extent, specifically in *Fairchild v. Glenhaven* [84] and subsequent cases applying and considering it. [85] These cases establish that in appropriate cases it may not be necessary to prove that on balance of probability event X caused event Y in the traditional sense but rather that X gave rise to a ‘material increase in risk’ of Y occurring. However as these cases make clear, the conditions for application of such a principle are currently very stringent, and arise largely out of issues peculiar to the disease of mesothelioma. *Fairchild* also addresses an issue different in kind from many climate change causation issues because (i) the actual cause of the claimant’s illness was known to be one (or more) fibres from one of the defendants, the problem being from which one; and (ii) mesothelioma and other diseases are discrete medical conditions caught only once by the sufferer, unlike climate change which is itself (by definition) a change in an existing state of affairs leading to a series of different weather conditions. [86]

17.61 Whilst the *Fairchild* approach could, if some of the restrictions on its application are relaxed as the law develops, [87] apply in future in a climate change context, in relation to the basic issue of materiality of contributions of specific actors to climate change as a global phenomenon, it is not necessary to invoke it and neither does it provide a solution for C on this issue.

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[84] [2003] 1 AC 32.


[86] For a more detailed discussion of *Fairchild* in a climate change context, see Kaminskaité-Salters, n. 57 above, pp. 161–172. *Sienciewicz* suggests that the ‘material increase in risk’ doctrine is unlikely to be extended into the general law of causation.

[87] Whilst commentators have suggested that the *Fairchild* approach could be of less restricted application than *Fairchild* itself suggests (Clerk & Lindsell, see n. 62 above, § 2–53), in *Ministry of Defence v. AB* (see n. 85 above) the Court of Appeal took a conservative view as to the likelihood of its wider application as did the Supreme Court in *Sienciewicz*. 
17.62 D’s argument that something actionable if done by one person is not actionable if done by many persons where each person undertakes a small part of the action in question may be unattractive, and English law has recognised that at least in nuisance cases what is relevant is the cumulative effect of actions by many people, and it is no defence for any one of them to claim he/she contributed only minimally to that overall effect.\(^{88}\)

17.63 Is a tortfeasor liable for his/her ‘share’ of all damage or, as logically might be the case on a traditional analysis, only a share of damage caused by that temperature rise attributable to non-anthropogenic or non-tortious conduct? The orthodox English law approach is that where there are several tortfeasors\(^{89}\) liable for the same damage (as would be the case unless the damage caused by different factors could be divided up – see para. 17.55 above) each is liable for 100 per cent of the damage subject to a right to recover a contribution from other tortfeasors.\(^{90}\)

17.64 In a climate change context the only practical approach would appear to be based on liability only for a proportionate share of the damage.\(^{91}\) A powerful argument by defendants is that it is impossible to make anyone liable at all when everyone is an emitter. This can be expressed either by saying that any contribution by an individual defendant is not ‘material’ or invoking a principle similar to the US concept of ‘fair traceability’ between damage and conduct. However the distribution of emissions is highly skewed. Although quantification of ‘share’ of emissions

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\(^{89}\) The word ‘several’ is used both to mean ‘many’ and to mean ‘several as opposed to joint’. Climate change litigation is not concerned with joint tortfeasors (those acting together or in concert) except possibly in the conspiracy cases as discussed more fully in Chapter 20.

\(^{90}\) However in appropriate situations the court may apportion liability for apparently indivisible damage by reference (for example) to degree of exposure to asbestos (*Barker v. Corus* [2006] 2 AC 572). The actual result for mesothelioma cases has been reversed by statute by s. 3 of the Compensation Act 2006, but the underlying reasoning remains valid.

\(^{91}\) In *Fairchild* the House of Lords referred to the ‘market share’ approach as adopted in *Sindell v. Abbott Laboratories* 26 Cal. 3d 588 (1980), one of the US ‘DES’ cases. In *Sienciewicz*, at para. 17, the Supreme Court endorsed an ‘apportionment’ approach of liability for a share of damage in appropriate cases.
depends on methodology, it is not difficult to argue that a few hundred corporations are directly or indirectly 'responsible' for significant percentages of total anthropogenic emissions. A further issue arises in relation to the time lag between emission and effect. In approximate terms, CO₂ emitted is likely to ‘remain’ active for climate change purposes for many years, and the time lag between emission and effect may be similarly significant. There may also be a further time lag between the change in climate itself and the resulting damage. Thus damage in year 2010 may be ‘caused’ by conduct many years before, and, for example, Allen has referred to a time lag of perhaps a quarter of a century, as well as emphasising the importance of the TCR (Transient Climate Response) and not the more widely quoted ECS (Equilibrium Climate Sensitivity).

**Issues of fault and foreseeability**

**Negligence and fault**

Whereas some tortious liability is ‘strict’ in the sense that it depends only on proof of harm caused to X by Y, in others Y is only liable if he has been at fault in some sense. As the name of the tort suggests, liability in negligence requires C to show that any damage was caused by a lack of reasonable care on the part of D. In nuisance, the position is less clear cut, but the essence of the tort is unreasonable use of land. This requirement presents

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92 Whilst it is relatively straightforward in the case of direct emitters such as power companies burning fossil fuels, it is less so for ‘producers’ such as oil and gas production companies or ‘facilitators’ such as car manufacturers, who may contend that any responsibility is that of the purchasers of their products.

93 Although it refers to environmental damage as a whole and not just climate change damage, the October 2010 Trucost report at www.trucost.com/news_more.asp?sectionID=5&pageID=34&newsID=100 is of interest in attributing about one-third of the US$ 6.6 trillion costs of human activity in 2008 to only about 3,000 corporations. Similar exercises undertaken in connection with the US cases (referred to above) and elsewhere conclude that a relatively small number of energy corporations are ‘responsible’ for significant percentages of total global emissions, although much depends on methodology and the definition of attribution.

94 With the beginning of climate change for present purposes being traced to the beginning of the industrial age, and the cause being cumulative effect since that time. In Kivalina the allegation is that 35 per cent of the GHG increase since pre-industrial times has occurred since 1980.

95 Allen (see n. 82 above).
serious obstacles in the way of private law claims at the present time, due to the likely strength of D’s assertion that its activities were overall reasonable, essentially meeting a market demand, and/or that there was no real alternative. These defences may however become increasingly difficult if with the passage of time the adverse effects of GHGs become clearer and the choices of alternative low-carbon technologies more practical.

Allegations of deliberate wrongful conduct

17.67 Tortious liability depends primarily on whether what D did was unreasonable, and whether he knew it was so is irrelevant. However it may be much more difficult for D to say conduct was reasonable if he actually knew that it was damaging and/or that there were viable forms of alternative conduct.

17.68 It is also possible that C may focus on not only D’s conduct in relation to emissions as such, but also in relation to allegations of the dissemination of (mis)information or lobbying activities. In two of the US cases, conspiracy allegations have been raised to the effect that energy sector groups conspired to suppress the truth and/or discredit opponents for the purposes of preventing regulation of GHG emission. There is of course a distinction between vigorous expression of a genuinely held view and deliberate falsehood.

Foreseeability of damage

17.69 ‘Foreseeability’ of damage is relevant in the tort of negligence at the stage of examining the existence or scope of D’s duty of care, which arises only in relation to foreseeable (types of) damage. Foreseeability is closely linked with fault or negligence in the sense of lack of reasonable care, as the content of the duty to act reasonably is limited to where the consequences of one’s actions can be foreseen to be harmful. Three aspects of this are that: (i) the test is objective with the question being what is reasonably foreseeable as opposed to actually foreseen by D; (ii) it is the type and not the extent of damage which needs to be foreseeable; and (iii) what needs to be foreseeable is a risk of damage not the certainty of it. It is now established

96 *Kivalina* and *Comer*.
that foreseeability of harm is also a prerequisite of recovering damages in nuisance.97

17.70 In factual terms there may therefore be significant focus on when the risk of adverse effects of GHGs became sufficiently well known. The complaint in the US case of *Kivalina*98 sets out a detailed chronology of events alleged to be relevant in terms of foreseeability, starting with calculations by Arrhenius in 1896.

17.71 There exists a tort of breach of statutory duty, but this is unlikely to be relevant in a climate change context. So for example the remedy of a person alleging breach of duties imposed by the CCA would be a public law remedy of judicial review and not a claim in tort for breach of statutory duty.99

*Issues of statutory authority and non-justiciability*

17.72 A major ‘threshold’ issue arises as to whether, even if the requirements of tortious conduct are otherwise made out, the courts will entertain private law actions. Two overlapping reasons which may be relied upon by D are those of ‘non-justiciability’ and ‘statutory authority’. Whilst there is a danger in relying on US jurisprudence, it is instructive to consider the arguments and decisions in the US cases where defendants have argued both that private law claims are ‘non-justiciable’ as raising ‘political questions’ and that by ‘pre-Emption’ or ‘displacement’ their actions have been authorised by Federal Regulation such as the Clean Air Act.100 Some courts have held that climate change related claims are non-justiciable because the regulation of GHG emission is within the exclusive province of the government and/or executive and is a matter of foreign and/or national policy.101

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99 *Clerk & Lindsell*, see n. 62 above, § 9–33.
100 In *AEP v. Connecticut*, the US Supreme Court held that the Clean Air Act displaced any federal common law rights of action, reversing the Second Circuit’s decision on this issue (10-174, 2011 WL 2437011 (US June 20, 2011)).
101 *Kivalina*, but contrast *Massachusetts v. EPA, Comer v. Murphy* and *Connecticut v. AEP*. 
While the UK has its own domestic law on ‘non-justiciability’, this is not likely to be applicable in the context of such claims. However the issue of statutory authority may be more relevant, when there is a great deal of regulation of industry under environmental and pollution control legislation, which might be said to give statutory authority to emit GHG to the extent that this is not prohibited. In addition it might be argued that the CCA and Kyoto Protocol have authorised any emissions which do not involve breach of their provisions.

It would appear that none of the current legislation gives sufficiently direct authorisation to emissions to prevent an otherwise valid common law claim.

In Budden v. BP Oil and Shell Oil [1980] JPL 586, the claimant alleged damages in negligence and nuisance alleging damage to health as a result of excess levels of lead in petrol. One of the grounds that the claim failed was that the lead levels were within the statutorily permitted maximum. This case may however be distinguished for present purposes in that by the statute in question Parliament could be taken to have provided for determination (by the Secretary of State under the Regulations) of a reasonable level of lead in petrol. The case was not one of statutory authority as such but rather one where the fact that

As explained in Berezovsky v. Abramovich [2011] EWCA Civ 153, § 100: ‘This can arise in two separate circumstances. The first is in a Buttes Gas & Oil v Hammer [1982] AC 888 type case where the court has no measurable standard of adjudication or is in a judicial no-man’s land. That was the position in that case where a decision would have required consideration of the territorial claims of four different states each with its own laws. The other case arises if there is reason to suppose (usually as a result of a communication from the Foreign Office) that an investigation into the acts of a foreign state would embarrass the government of our own country.’

The grant of planning permission for an activity will not necessarily provide a defence to an action in nuisance (Wheeler v. Saunders [1995] Env. LR 286), although statutory authority to construct or operate a facility does authorise the activities which that necessarily or naturally entails (Allen v. Gulf Refining [1981] AC 1001); cf. Tate & Lyle Industries v. GLC [1983] 2 AC 509 where the House of Lords held that statutory authority will not provide a defence in respect of ‘more harm than was necessary’.

conduct was within legal limits, provided, on those facts, a
defence to a claim in tort. Furthermore the environmental pol-
lution/control legislation does not address CO$_2$, the main GHG,
or the issues of climate change, so an argument that a corpor-
ation acting within the terms of its licence cannot be liable in
tort faces difficulties.

17.76 Further reliance could be placed on the Kyoto Protocol by defend-
ants in States which have ratified it, if sued in respect of their post-
Kyoto actions. For example an English corporation could argue
that emission of CO$_2$ within its allocation under the National
Allocation Plan (‘NAP’) pursuant to the EU ETS Directive$^{105}$
cannot be actionable, as the purpose of the EU ETS Directive and
the relevant NAP is to help EU Member States meet their Kyoto
Protocol targets. However Kyoto does not purport to legislate for
safe or even reasonable maxima of emissions, and the CCA only
provides broad duties on the Government to achieve a long-term
objective. Thus Kyoto arguably does not provide a defence of
statutory authority.

Other factors

Limitation issues

17.77 An action in tort must, if governed by English law, normally be
brought within six years of the accrual of the cause of action$^{106}$
which is when the relevant damage occurred, or, in the case of
progressive damage, when some damage occurred. An alterna-
tive period, under the Latent Damage Act 1986, of three years
from when (in simplified terms) the claimant was or should have
been aware of the right to claim, might apply. Difficult questions
of limitation might apply to actions alleging damage as a result of
climate change, for example as to when sufficient damage, caused
by the action complained of, had occurred to trigger accrual of

2003 establishing a scheme for GHG emission allowance trading within the

$^{106}$ Limitation Act 1980, s. 2. Where the relevant substantive law is foreign law, the for-
eign limitation period will generally apply under the Foreign Limitation Periods Act
1984.
the cause of action, or when the claimant was fixed with relevant knowledge for triggering an alternative three-year period.

Remedies

17.78 In private law claims there are two important categories of remedy which may, depending on the facts, be sought. The first is damages, assessed on a compensatory principle of putting the plaintiff, as nearly as possible, in the position he/she would have been in but for the damage caused by the tort, subject to complex rules limiting damages to what is not ‘too remote’. The second, which may be applicable in nuisance cases, is the discretionary remedy of the injunction whereby the defendant may be required to abate the nuisance.107

(D) Other law

Criminal law

17.79 In 2008, the ‘Kingsnorth Six’, who had successfully scaled a smokestack at Kingsnorth power station in Kent and painted the name of the Prime Minister on it to draw attention to its harmful effects on the environment, avoided criminal prosecution by establishing that the ‘lawful excuse’ defence of Criminal Damage Act 1971, s. 5 extended to protection of other property endangered by climate change.

17.80 The protesters’ defence to the charges of criminal damage was that they believed they had a ‘lawful excuse’ as defined in s. 5 of the Criminal Damage Act. The defence is available where there is a belief in the immediate necessity of damage to protect other property. Crucially, the belief is subjective – that is, it is immaterial whether the belief is justified, so long as it is honestly held. They successfully argued an honest belief that by damaging the property at Kingsnorth they might protect far more property globally from climate change damage (resulting from Kingsnorth’s CO₂ emissions). The expert evidence supplied by the defendants included that of several leading climate change

107 This is the remedy claimed in the US case of Connecticut v. AEP (see Chapter 20, para. 20.64ff).
scientists who confirmed that climate change was a direct result of human action.

17.81 While this may appear to be unequivocal judicial acceptance of the importance of action against climate change, it is worth positing this case against that of the ‘Drax 29’ (post-Kingsnorth Six). The twenty-nine protesters stopped and unloaded a coal train on its way to Drax power station and were prosecuted for obstructing a train contrary to s. 36 of the Malicious Damage Act 1861. This Act does not contain the ‘lawful excuse’ defence and the defendants instead relied on the general common law defence of necessity to avoid imminent threat of death or serious injury. One can easily see how this was applied in the context of climate change related deaths; however, the judge held that the former did not offer them a defence as a matter of law, and further refused to allow all their climate change experts’ evidence saying it would allow the protesters ‘to hijack the trial process as surely as they hijacked the coal train’.

The influence of international law on climate change liabilities in the UK

17.82 The UK is a Party to the two principal international treaties aimed at tackling the problems associated with climate change, the FCCC and the Kyoto Protocol.

17.83 Against this background, one might expect international law to have exerted a strong influence on climate change liabilities within the UK. Yet, while the increased statutory regulation of this area has led to a greater willingness on parties to litigation in the UK to base submissions on domestic climate change

110 An interesting postscript is the collapse in January 2011 of the prosecution of six protesters against a similar power station, on the basis that one of them was an undercover police officer, whose conduct may have encouraged or provoked any criminal activity.
policy documents and regulations, international law has scarcely been referred to directly by courts in the UK.

Therefore, whilst several principles of international environmental law, such as the precautionary principle and the principle of sustainable development, have been given effect in the UK through several Government policy strategy documents, when interpreting these principles UK courts have tended to limit themselves to domestic sources.

Standing before UK courts

In some cases, non-governmental organisations have relied on their observer status at meetings of the Parties to international environmental treaties in order to demonstrate a ‘sufficient interest’ to bring a case. For example in *R v. Inspectorate of Pollution ex p. Greenpeace Ltd (No. 2)*, which concerned an application for judicial review by Greenpeace challenging a variation of an existing authorisation granted by the Government to British Nuclear Fuels plc in respect of a new thermal oxide nuclear reprocessing plant, Otton J held that in order to determine whether Greenpeace had standing it was appropriate to take into account the precautionary principle and the principle of sustainable development.

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112 See, for example, *R (on the application of People and Planet) v. HM Treasury* (2010) Official Transcript, at para. 11, where Justice Sales dismissed the submission that s. 1 of the Climate Change Act created a legitimate expectation; and *R (on the application of Hillingdon LBC) v. Secretary of State for Transport* (2010) Official Transcript, where Carnwath LJ held that the Secretary of State for Transport’s policy support for a third runway and new passenger facilities at Heathrow Airport was not immutable and was subject to review in light of developments in climate change policy, symbolised by the Climate Change Act 2008.

113 The only instance in which an international climate change treaty has been directly referenced is in the case of *J & A Young (Leicester) Ltd v. The Commissioners for Her Majesty’s Revenue & Customs* (2008) Official Transcript, at para. 16, where the Kyoto Protocol was cited to explain the purpose of the Climate Change Levy (CCL): ‘The objective of the CCL is to encourage energy efficiency. It is also intended to stimulate investment in energy saving equipment. The aim of the legislation is to address issues of climate change, GHG emission and pollution standards set by the Kyoto protocol.’


115 On this point, see Khalastchi, *ibid.*, at pp. 225–6.

account, inter alia, ‘the nature of the applicant and the extent of the applicant’s interest in the issues raised’. In confirming that Greenpeace had sufficient interest to bring the case, Otton J in particular noted that:

Greenpeace International has […] been accredited with consultative status with the United Nations Economic and Social Council (including United Nations General Assembly). It has accreditation status with the UN Conference on Environment and Development. They have observer status or right to attend meetings of 17 named bodies including Parcom (Paris Convention for the Prevention of Marine Pollution from Land Based Sources).

17.86 In light of this and other similar cases, it is conceivable that a non-governmental organisation could rely on its consultative or observer status to an international climate change treaty for the purpose of demonstrating a sufficient interest to bring an application for judicial review.

Public trust – might the doctrine be applied in the UK?

17.87 The unique nature of the problem of climate change has led to innovative thinking in relation to extending the trust concept from private property to public goods such as the environment itself or specific parts of it. The essential theory, as discussed in US jurisprudence, is that sovereign States and/or public bodies are trustees of public goods for the benefit of the beneficiaries (the public at large) who may be able to compel the trustees to ensure proper care is taken of the trust property. Whilst the English law of trusts is well developed, and there are statements in early cases which might support a general principle of public trust in appropriate circumstances, it is difficult to

117 Ibid., at para. 78. 118 Ibid., at para. 80.
120 The foremost exponent of this doctrine in the US is Prof. Mary Wood, and references to many of her works on the subject can be found at www.law.uoregon.edu/faculty/mwood/publications.php.
121 The case of Robert Arnold v. Benajah Mundy, Supreme Court of New Jersey, 6 N.J.L. 1, 1821, N.J. is an 1821 decision of the New Jersey Supreme Court, which cites extensively early English authority in support of the doctrine of public trust as a common law doctrine.
see this doctrine being of any practical significance in English law, especially where the statutory provisions of the CCA are in place.

**Competition/anti-trust law**

17.88 The EU State aid regime is the main area of competition law which has influenced climate change policy arrangements, and in turn climate change litigation developments, in the UK context. In the UK, State aid considerations figure prominently in (i) the UK Emission Trading Scheme, (ii) the Carbon Reduction Commitment Energy Efficient Scheme (‘CRC’), (iii) Renewables Obligations Certificates (‘ROCs’) and (iv) Feed-In Tariffs.

17.89 Affected parties who believe that any of these four policy arrangements distort competition and want to challenge certain allocation rules in light of Article 107 are entitled to lodge a claim with the European Commission\(^\text{122}\) or ask a national court to block aid. However, Commission decisions in relation to these policy arrangements and case law appear to suggest that the Commission takes a prima facie view that the allocation modes are compatible with the common market in light of the *Guidelines on State Aid for Environmental Protection*.\(^\text{123}\) The Commission held the UK Emission Trading Scheme to be State aid but compatible with Article 107(3)(c) (Decision N416/2001). The Commission also found that the ROCs are State aid but compatible with Article 107(3) in light of the Environmental Guidelines at points 61 and 62 concerning green certificates systems in its Decision N504/2000, and further changes to the scheme in 2008 fall within the scope of the Guidelines at point 110 (Decision 414/2008). Concerning the UK FITs scheme, the Commission held this to be compatible with Article 107(3) in light of points 107 to 109 and 119 of the Environmental Guidelines.

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\(^{122}\) The Department for Business, Innovation & Skills (‘BIS’) State Aid Branch has responsibility for State aid policy in the UK and provides further guidance to UK companies for lodging a complaint.

\(^{123}\) This has been suggested by commentators in relation to the case *EnBW Energie Baden-Württemberg AG*. See, for example, J. De Sepibus, *The European Emission Trading Scheme put to the Test of State Aid Rules* (Working Paper No. 2007–34, NCCR Trade Regulation, 2007).
As a result, the main competition law challenge to UK climate change policy has been by the Commission itself and not individual companies using legal action in national courts or the European Court of Justice (‘ECJ’). These challenges have been structured as legal arguments that do not directly refer to considerations of anti-competitive practices, and are more procedural than substantive in question. For example, in Case T-178/05 the Commission attempted to argue that the UK’s amendments to its national allocation plan (‘NAP’) under Article 9 of Directive 2003/87, increasing the total number of allowances, are inadmissible. However, the ECJ found that the Commission made an error of law, as this rejection was not based on either the NAP’s incompatibility with the criteria of Annex III or with Article 10 of the Directive, which directly refer to the EU State aid rules.\footnote{See also Drax Power and Ors v. Commission of the European Communities, where the applicant contended that the Commission wrongly rejected the United Kingdom National Allocation Plan (‘NAP’) for a second time following its decision in Case T-178/05.}

As a result, competition litigation is unlikely to either further or impede climate change policy in the UK context.

**World heritage**

There are twenty-eight UNESCO World Heritage Sites in the UK, subjecting the State to obligations to protect them under Articles 4, 5 and 6 of the 1972 World Heritage Convention which engage climate change mitigation, including in relation to the Devon and Dorset coasts.

**Liability in public international law**

The potential liability of the UK as a State under public international law is beyond the scope of this book, and is thus mentioned here only very briefly for the sake of completeness. As an Annex I Party to the FCCC, the UK is subject not only to the vague commitments set out in Article 4(1), such as the obligation to promote and cooperate in the development, application and diffusion of technologies that control, reduce or prevent anthropogenic emissions,\footnote{Article 4(1)(c), FCCC.} but also to the slightly
more stringent commitments set out in Article 4(2), such as the commitment to ‘take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of GHGs and protecting and enhancing its GHG sinks and reservoirs’.\textsuperscript{126}

17.94 As a Party to the Kyoto Protocol, the UK is also subject to the very specific quantified emission limitation or reduction commitments specified as a percentage of the base year or period in Annex B to the Protocol (for the UK, this is 92 per cent).\textsuperscript{127}

17.95 A breach by the UK of its specific commitments could potentially give rise to State responsibility. Under the compliance mechanism of the Kyoto Protocol,\textsuperscript{128} Annex I Parties can be held accountable for failures to meet emission reduction and related inventory and reporting commitments. Issues as to the compliance of Parties with the Kyoto Protocol are decided by the Compliance Committee, which consists of a facilitative branch and an enforcement branch. Whereas the facilitative branch assists Parties to the Kyoto Protocol in their compliance with advice in relation to the same, the enforcement branch determines consequences for any Protocol Party that does not meet its commitments.

17.96 In theory, a violation of binding commitments in the Protocol would entitle another Protocol Party to invoke the UK’s responsibility and could bring a relevant case before the International Court of Justice. However, in practice, this is highly unlikely given the international political ramifications such an action would have.

17.97 The situation is different in relation to the FCCC, as the language of the commitments in this treaty renders them difficult to enforce. It appears that the effect of Article 14(1) of the FCCC may be limited as it does not provide for enforceable primary legal norms of international law, but only a general framework without the required specificity.

\textsuperscript{126} Article 4(2)(a), FCCC. \textsuperscript{127} Annex B, Kyoto Protocol. \textsuperscript{128} A detailed description of the compliance mechanism under the Kyoto Protocol is outside the scope of this chapter. For an introduction to the topic by the FCCC, see ‘An Introduction to the Kyoto Protocol Compliance Mechanism’, available at http://unfccc.int/kyoto_protocol/compliance/items/3024.php, last accessed on 31 March 2011.
Consideration has also been given to the viability of actions between States based on the public international law principle of ‘no harm’, as a State must take measures to ensure that activities undertaken within its territory and its jurisdiction do not cause adverse effects on human health and the environment in other States or areas beyond national jurisdiction, even when there is no conclusive evidence demonstrating the link between the activity and the effects (‘precautionary principle’). However, a lack of available forum makes this problematic.\(^{129}\)

(E) ‘Soft’ law

The UK is a member of the OECD and it is thus possible to bring a complaint before the national contact point\(^ {130}\) for failure of a multinational enterprise to comply with the OECD Guidelines containing recommendations for ‘responsible business conduct consistent with applicable law’. Detailed provisions are made for matters such as disclosure of information and implementation of environmental management plans. Such complaints have been brought in Germany, for example against Volkswagen, the car manufacturer.\(^ {131}\) As indicated in the section on public law (see 17.13 ff above), review of decisions of public bodies may be undertaken on the basis that a whole host of activities may adversely affect climate change or conversely on the basis that activities likely to cause climate change may accordingly infringe regulations for the protection of the environment generally. It is beyond the scope of this book to assess ‘liability’ in every environmental, planning or other context which may invoke or affect climate change. It is clear however that because of the potential scope of harm from climate change, in terms of longevity, magnitude and variety of types of harm, there is a correspondingly long list of types of ‘liability’, both in ‘hard’ and ‘soft’ law where climate change is a relevant factor.

One area of law which may become increasingly relevant is in relation to the obligations of investors or other stakeholders.


\(^{130}\) In the case of the UK, the Department for Business, Innovation & Skills.

\(^{131}\) [www.germanwatch.org/corp/vw-besch-e.pdf](http://www.germanwatch.org/corp/vw-besch-e.pdf); these are discussed in Chapter 15.
in corporations as to Socially Responsible Investment (‘SRI’). Attempts to regulate activity may be made, either by reference to alleged fiduciary duties of trustees or shareholders to consider objectives wider than pure financial profit, or by reference to directors’ duties under section 172(1)(d) of the Companies Act 2006. A study of this issue is beyond the scope of this chapter. In very brief summary, legal liability is unlikely to be engaged merely by corporations or their stakeholders taking a narrow view of legitimate interest in financial terms only,\(^{132}\) although commercial pressure from SRI investors, lenders, insurers or international financial institutions may be very significant.

(F) Practicalities

*Founding jurisdiction for a claim*

17.101 The procedural rules governing the exercise of jurisdiction by an English court over a non-English domiciled defendant are complex, and there exist two parallel and potentially conflicting regimes. Where D is domiciled in the EU, the rules are governed by EU Regulation 44/2001. For present purposes the key provisions are Article 5(3) which provides for the defendant to be sued in tort in the State where ‘the harmful event occurred’ (a very difficult concept for climate change) and Article 6.

17.102 For D who is not EU domiciled the position is governed by the common law and the Civil Procedure Rules. 6BPD (Practice Direction 6B) 3.1(9) provides for service out of the jurisdiction on D sued in tort where the damage was sustained within the jurisdiction, or resulting from an act committed within the jurisdiction.

17.103 It is not necessarily the case that an English court will apply substantive English law in a tort claim with an international element. The relevant law will be determined by Regulation (EC) 864/2007, known as ‘Rome II’. The general rule under Article 4 of Rome II is that the applicable law is that of the country in which the damage occurs, although under Article 7 for ‘environmental damage or damage sustained by persons or property as a

\(^{132}\) See for example Cowan v. Scargill [1985] 1 Ch 270.
result of such damage’, C has an option to choose the law of the country in which ‘the event giving rise to the damage occurred’. The Rome II regime is of potentially great significance in climate change litigation, where nationals in developing countries may allege damage suffered in those countries as a result of actions by corporations domiciled in the EU. Such corporations may be sued in their State of domicile, with the claimant able to rely on the law of his/her own State.

17.104 The most important ‘ancillary’ powers which the courts have are a ‘freezing’ order, where the defendant may be prohibited from using or dissipating funds or other assets, and a ‘search’ order where C’s lawyers may be empowered to search the defendant’s premises for documentary or other evidence where there is reason to suppose it may be destroyed without such an order.

Enforcement

17.105 Numerous enforcement mechanisms exist such as by seizure of a defendant’s assets or winding up a corporation. Foreign arbitration awards can be enforced under the New York Convention,133 or by an action on the award. Foreign judgments may be enforced (i) in the case of those from EU courts (generally) under Regulation 44/2001, and (ii) in other cases by an action on the judgment or under statutes specifically providing for enforcement.134

17.106 Public interest litigation is common in England. Typically this is either by determined individuals, as in the case of the celebrated ‘McDonalds libel’ case of McDonalds v. Steel,135 or NGOs, environmental NGOs such as Greenpeace and Friends of the Earth (often aided by one of the numerous groups or firms of public interest lawyers), or even large/City firms acting on a pro bono basis.

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134 Specifically the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.


**Litigation costs**

17.107 In general in civil litigation in England, each party funds its own costs as matters progress. At the conclusion of the litigation and/or at certain intermediate stages, the court may order a party who has been unsuccessful to pay at least the majority of the costs of the party who is successful in a claim or on a specific part of the proceedings. Thus the basic rule is that the loser pays and the winner recovers.

17.108 A party may in certain limited circumstances (which may include ‘public interest’ litigation) apply for a Protective Costs Order limiting his/her future liability for costs.

17.109 Cases can be funded by Conditional Fee Agreements (‘CFAs’) which in loose terms are ‘no win no fee’. These are often accompanied by insurance to cover any of D’s costs which C may be ordered to pay.

17.110 Class actions are not recognised as such but in practice can be run either under Group Litigation Orders (‘GLOs’), under CPR Part 19 or under appropriate directions in an ordinary multi-party action.

**Obtaining information**

17.111 ‘Knowledge is power’ it is said, and this is likely to apply in the climate change field, especially when one of the complaints often made is of the ‘information asymmetry’ in favour of industry and governments. See generally Philip Coppel, *Information Rights: Law and Practice*, 3rd edn (Hart Publishing, 2010).

17.112 The regulations and practices concerning (i) retention of documents and records by corporations, and (ii) accessing or disclosing the information contained in them are complex and a detailed discussion of them is beyond the scope of this book. This section governs how the law may aid ordinary research processes in obtaining information.

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136 State funding by way of ‘legal aid’ is in some circumstances available to pursue or oppose civil claims, but is unlikely to be relevant in most climate change related cases.

Disclosure (formerly ‘discovery’) in civil litigation

17.113 The Civil Procedure Rules govern disclosure of documents and information in the context of actual civil proceedings. CPR Part 31 requires a party to litigation to disclose certain documents in his/her control [31.8] including those which adversely affect his/her case [31.5]. In some instances persons who are not parties to the action may be required to disclose relevant documents, and in limited circumstances pre-action disclosure may be ordered [31.16]. ‘Document’ is widely defined to include electronic records [CPR 31.4]. This process is only of any use in the context of existing (or sometimes contemplated) litigation.

The Freedom of Information Act 2000

17.114 This Act gives wide-ranging rights to the general public to obtain information in the possession of the Government on a broad spectrum of matters. In environmental matters the Environmental Information Regulations (see below) may be more relevant.

Other statutory/regulatory sources of information

Environmental Information Regulations 2004 (SI 2004/3391)

17.115 These give the general public the right to request environmental information from public bodies including central and local government and utility companies. Their scope, in terms of the definition of environmental information (Regulation 2), retrospective application and breadth of right to disclosure of information held, make them significant, and the list of exceptions to the obligation to disclose information is narrower than under the Freedom of Information Act. A detailed analysis of the Regulations is beyond the scope of this chapter.138

Companies Act 2006/Climate Change Act 2008

17.116 Section 85 of the CCA requires the Secretary of State to make, by 6 April 2012, regulations under s. 416 of the Companies Act 2006, requiring the directors’ report of a company to contain information ‘about emissions of GHGs from activities for which the company is responsible’.139

138 See Coppel, ibid., Ch. 6.
139 Although of no direct relevance to English law, the US SEC guidance given in February 2010 to companies on disclosure of climate change related information in mandatory reports has been seen as highly significant.
The right to information as a human right

Attempts to use human rights instruments, whether Article 10 of the ECHR or Article 19 of the ICESCR, have generally been unsuccessful although recent ECHR cases have begun to show recognition of a right under Article 10 to access to information which, in the public interest, should be disseminated.\textsuperscript{140} It can be argued of course that information concerning climate change is a paradigm issue of public interest.

Document retention requirements

Corporations and public bodies are under obligations of various kinds to retain documentation and records. A detailed analysis of these requirements is beyond the scope of this chapter.

Disclosure obligation

Right to Information is closely allied to obligations to disclose. Apart from the specific instances referred to above, there is increasing pressure from multiple sources on corporations and public bodies to disclose climate change related information, either publicly or to specific recipients. These include ‘hard-edged’ legal requirements from regulators, as well as pressure from shareholders, investors,\textsuperscript{141} insurers, lenders and environment groups. The availability of such information is likely to lead to an increase in the attempts to use it for purposes of imposing liability (in the broadest sense) of public and private actors for climate change.

(G) Conclusion

As with other actions or claims under English law, each climate change related action will necessarily turn on its own facts. This chapter shows that, whilst climate change has been used both as a ground for action and a defence in lawsuits and prosecutions brought in the UK, no specific regime for climate change liability

\textsuperscript{140} Matky v. Czech Republic App no. 19101/03 ECHR, 10 July 2006; Tarsasaga v. Hungary App no. 37374/05 ECHR, 14 April 2009.

\textsuperscript{141} Whether individual investors or one of the numerous groups of investors (well-known examples being those associated with the Carbon Disclosure Project and the IIGCC group) interested in climate change issues.
has developed as yet and the jurisprudence in this area is still in an early phase. However there is significant potential for the law to develop, not by quantum leaps of jurisprudence but rather by building on existing principles. This could result in the increasing imposition of liability, in respect of climate change and its consequences, in the public law, private law and human rights fields in the medium-term future.
(A) Introduction

The Russian legal system

18.1 The legal system of the Russian Federation (‘Russia’ or ‘RF’) is based on civil law principles. Its heritage lies in Soviet law (1917–91), Russian Imperial legislation (1649–1917) and dozens of other legal systems operating simultaneously (including the customary law of various tribes and peoples, Islamic law, Baltic law, canon law and Judaic law), and its development has been influenced by foreign laws (such as Byzantine, Roman, Tartar, Polish, Swedish, German, French, Italian, Dutch and Lithuanian law).¹ The Civil Code 1994 (the ‘Civil Code’),² which is broadly similar to the German Civil Code, is a central piece of legislation. There is also a substantial amount of special legislation. Whilst there is no system of binding precedent, the higher courts have the power to issue general guidelines, and, in practice, the decisions³ of the higher courts are frequently followed.

The authors would like to thank Alexey Kokorin (Head of Climate Change Programme, WWF Russia, Moscow) for his invaluable advice and comments; also Anna Gryaznova for her support. Statements made in this chapter by the authors do not constitute or purport to constitute legal advice.

18.2 The supreme source of Russian law is the 1993 Constitution of the Russian Federation (the ‘Constitution’). The courts are guided by the Constitution and, in the event of inconsistency, constitutional provisions prevail over federal, regional and local laws.

18.3 The predominant sources of law are federal statutes, enacted by way of legislative process. Frequently such statutes are enacted as a code for given areas (for example, in forestry law, the Forest Code 2006), whilst supplemental legislative acts further develop certain provisions of a code.

18.4 Russian law also includes the following sub-laws:
- *Presidential decrees* – the President has the power to enact normative and non-normative decrees, which must comply with constitutional provisions and federal laws.
- *Governmental directives* – the Government may issue directives, which have normative character.
- *Agency regulations* – agencies are permitted to enact regulations, provided these do not contradict the Constitution or any relevant codes.

18.5 Each of the eighty-three subjects (or ‘Regions’) of the Russian Federation has its own constitution or charter, as well as legislation. According to the Constitution (Article 76) ‘the laws and other legislative acts of the subjects of the Russian Federation may not contradict federal laws’. Thus, federal laws are ‘superior’ to regional laws.7

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4 Adopted by national vote on 12 December 1993, as amended by the Amendments to the Constitution of the Russian Federation on 30 December 2008 (№ 6-FKZ) and 30 December 2008 (№ 7-FKZ).


6 I.e. twenty-one Republics, forty-six Oblasts (provinces), nine Krais (territories), one Autonomous Oblast (the Jewish Autonomous Oblast), four Autonomous Okrugs (districts) and two federal cities (Moscow and St Petersburg).

Governmental stance on climate change

18.6 Russia is the largest country in the world in terms of territory and the world’s third largest emitter of greenhouse gases (‘GHGs’) after China and the USA, accounting for about 17.4 per cent of global GHG emissions.8 It has a population of approximately 142 million9 living within a vast territory of about 17 million square kilometres, stretching over 11 time zones. With respect to human development, social disparities between the Regions and within cities are pronounced. Furthermore, Russia is ranked at 146th place (out of 180 countries) in the Transparency 2009 Corruption Perceptions Index.10

Environmental awareness and education

18.7 Partly due to the low level of environmental awareness and education,11 the misconception that global warming and climate change are substantially to the benefit of Russia is common among the Russian general public. The upsides most commonly cited include a milder climate, the considerable decrease in expenditure on heating, increases in crop yields and the development of the Northern Sea Route.12 However, the Government and

and Subsoil Use’ in Real Federalism; and M. M. Brinchuk, Ekologicheskoe pravo (Uchebnik, Moskva: Vyshoe obscovanie, 2005).


9 However, Russia’s demographic profile is considered unfavourable for the long-term economic outlook, with a falling and ageing population, low life expectancy and a declining working-age population – L. Kekic, Country Forecast: Russia (Economist Intelligence Unit, July 2010) (‘EIU Russia Forecast 2010’).


NGOs\textsuperscript{13} are trying to increase environmental awareness, including awareness of the negative effects of climate change.\textsuperscript{14}

**Governmental climate change agencies**

18.8 Enforcement with respect to environmental matters falls within the jurisdiction of the Ministry of Natural Resources and Ecology (‘MNR’), which is the main governmental authority responsible for environmental protection and natural resources.\textsuperscript{15} Climate monitoring is conducted by the Global Climate and Ecology Institute of the Federal Service for Hydrometeorology and Environmental Monitoring (‘Roshydromet’) and the Russian Academy of Sciences (‘RAS’).

18.9 In 2008, Roshydromet, the governmental agency primarily in charge of climate-related matters, published a two-volume report\textsuperscript{16} on the effects of climate change on Russia. The report confirms that warming observed on the Russian territory is above the world average, and that significant effects on socio-economic activity can be expected. This is significant, as sceptical views on the anthropological contribution to, as well as the seriousness of, global warming have been expressed by some key Russian climatologists.

**FCCC and Kyoto Protocol**

18.10 Russia signed and ratified both the FCCC (on 28 December 1994) and the Kyoto Protocol (on 18 November 2004),\textsuperscript{17} and participated in the negotiations for a new global agreement on

\textsuperscript{13} E. G. A. O. Kokorin and E. V. Smirnova, \textit{Izmenyeniye Klimata: Posobiye dlya pedagogov starshikh klassov} (Moscow: WWF Russia, 2010).


\textsuperscript{15} Municipal and local governmental responsibilities and authorities are not discussed in this chapter; see D. N. Ratsiborinskaya, ‘Russian Environmental Law – An Overview for Businesses’, above n. 7, Mucklow, pp. 49–50 (‘Ratsiborinskaya’), regarding responsibilities and functions of the MNR.


\textsuperscript{17} L. A. Henry and L. McIntosh Sundstrom, ‘Russia and the Kyoto Protocol: Seeking an Alignment of Interests and Image’, \textit{Global Environmental Politics}, 7(4) (2007); ‘Russia and the Kyoto Protocol: From Hot Air to Implementation?’ in K. Harrison and L. McIntosh
climate change in Copenhagen (December 2009) and in Cancun (December 2010). Russia is an ‘Annex Me’ country, classified as a country undergoing the process of transition to a market economy.

18.11 In accordance with Annex B of the Kyoto Protocol, Russia must stay below 1990 GHG emission levels to comply with its Kyoto commitments.

18.12 Although the expectation was that energy consumption and emissions would continue to rise in Russia after 1990, the change in regime and subsequent economic decline resulted in a dramatic drop in GHG emissions. The income that Russia is expected to obtain from selling surplus quotas through the Kyoto Protocol’s emissions trading mechanisms is seen from the Russian perspective as akin to compensation for the hardships that Russia has endured during the transition phases. However, the implementation of the Kyoto mechanisms under Russian law has been slow, particularly with regard to establishing domestic rules on joint implementation (‘JI’).

Post 2012

18.13 Following the Copenhagen negotiations, Russia submitted its quantified emissions reduction target for 2020 of 15 to 25 per cent (with 1990 as the base year) and stated that the range of its future GHG emission reductions will depend on the following conditions:

- appropriate accounting of the potential of Russia’s forestry in contributing to meeting its anthropogenic emissions reductions obligations; and
- entry into undertakings on the part of all major emitters, of legally binding obligations to reduce anthropogenic GHG emissions.


20 See also M. Gutbrod, S. Sitnikov and E. Pike-Biegunksa, Trading in Air: Mitigating Climate Change through the Carbon Markets (Moscow: Infotropic, 2010) (‘Gutbrod/Sitnikov/Pike-Biegunksa’), Ch. 4.
Accordingly, at COP16 and CMP6 in Cancun, the Russian negotiating team focused, amongst other points, on (i) pushing for a new legally binding international agreement (and not for the extension of the Kyoto Protocol); (ii) keeping Russia’s status as an economy in transition and obtaining more access to technology (and capacity building and training) for Annex I countries; and (iii) forestry/land-use, land-use change and forestry (‘LULUCF’).

Climate change laws and policy

Russian law does not directly or specifically address climate change liability. Nor is there any specific code or legislation addressing climate change mitigation as such. Laws that might be applied in climate change liability proceedings can be divided into two categories for the purposes of this chapter:

1. general environmental and human rights laws;
2. specific laws relating to the implementation of the FCCC and the Kyoto Protocol (‘Kyoto legislation’).

There is no real overlap between these two categories of law. For example, the Law on Air Protection 1999 (‘LAP’) has not been updated to regulate GHG emissions, nor has it been linked to Russia’s international obligation to mitigate climate change.

The discussion below offers a brief overview of the principal environmental and human rights laws that might be applied in climate change litigation proceedings, as well as the Kyoto legislation. However, in order to understand these laws, the role of Soviet law will briefly be addressed.

Role of Soviet law

Under Soviet law, environmental law was administrative in nature and the State owned almost everything (including all natural resources and means of production). The law only regulated how this property was to be used and protected. The biggest

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21 Personal communication from Alexey Kokorin, WWF Russia, Moscow, 23 November 2010.
23 Nystén-Haarala, above n. 7, Mucklow, p. 104.
emphasised was placed on natural resources, and laws were usually classified according to the type of resource being regulated (forests, water, agriculture etc.). Thus, general environmental law is not viewed within a holistic ‘ecology cycle’ framework whereby the environment has intrinsic value, but from the perspective that the environment is valued in the context of, and understood to comprise, natural resources.

18.19 The Soviet legal system was not focused on monetary rewards or compensation. Hence, compensation and costs reimbursement were minimal during Soviet times. This has not greatly changed today, though the focus and understanding of the function of the law has altered somewhat in that monetary punishments and costs reimbursements are awarded, albeit at very low levels. However, the legal system is being reformed and modernised, though the approach to quantum has not yet been addressed.

Principal environmental laws

18.20 Principal environmental laws that might be applied in climate change proceedings are:

- the Constitution;
- multilateral environmental agreements (as ratified);
- Environmental Protection Law (‘EPL’);
- Water Code 2006 (‘Water Code’);
- LAP;
- Forest Code;
- Law on Fauna 1995;

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25 Nystén-Haarala, above n. 7, Mucklow, p. 105; and see n. 15, Ratsiborinskaya; and O. Razbash, ‘Russian NGOs and public participation – Legal and practical perspectives’, above n. 7, Mucklow, pp. 69–83.
26 Articles 42 (‘Everyone shall have the right to a favourable environment, reliable information about its state and to restitution for damage inflicted on [his/her] health and property by ecological transgressions’) and 58 (‘Every citizen is obliged to protect nature and the environment, treat and carefully [preserve] the riches of nature’).
27 E.g. 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer (both ratified, as amended); the 1992 Convention on Biological Diversity (ratified); 1973 Convention in International Trade of Endangered Species of Wild Fauna and Flora (ratified).
• Law on Subsoil Resources 1992;
• Law on Payment for Land 1991;
• Law on Environmental Expertise 1995;
• Law on Licensing of Various Functions 2001; and

18.21 The rules on civil liability for damage to the environment are set out in the Civil Code (Part I, 1994) and in the Code on Administrative Offences 2001 (Part VIII).  

18.22 There is no explicit or direct provision which would enable a claimant to establish the liability of another party for causing harm or damage to the environment by emitting GHGs and so contributing to global warming or for failing to mitigate climate change. An argument might be constructed with respect to establishing liability for emitting ‘harmful substances’ into the atmosphere (though not explicitly GHGs).

18.23 In general, it is very unlikely that the above federal environmental laws could provide a basis upon which to establish a claim for liability for contributing to (or failing to mitigate) climate change, as these laws do not directly establish a person’s responsibility for mitigating climate change.

18.24 Ownership structures. An additional level of complexity is added to Russian environmental law due to the struggles of ownership over natural resources between the federal and regional governments.

18.25 Public trust doctrine. The courts show no signs of embracing the public trust doctrine, as has been done in other countries of the BRIC (Brazil, Russia, India and China) group, including India. It is unlikely that the courts will adopt this doctrine in the near or mid-term future.

31 Articles 8(21) and 8(22), Administrative Code.
Principal human rights laws

18.26 The subject of individual human rights in Russia is controversial. As Bowring states, ‘Russia has, like all its European neighbours, a long and complex relationship with human rights – and with the rule of law and judicial independence, which are its essential underpinnings.’

18.27 Principal human rights laws that might be applied in climate change liability proceedings are:
- the Constitution;
- human rights conventions (as ratified);
- the EPL;
- the Law ‘On the General Principles of Organising Communities of Numerically Small Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation’;
- the Law ‘On Territories of Traditional Nature Use of Numerically Small Indigenous Peoples of the North, Siberia and Far East of the Russian Federation’;
- various codes (e.g. the Land Code, the Water Code and the Forest Code) applicable to indigenous peoples’ rights.

36 Chapter 2 (Rights and Freedoms of Man and Citizen).
38 Article 3.
Under the ECHR, a private party alleging breach of the ECHR may file a suit against Russia directly. Many such cases involving Russia have been heard by the European Court of Human Rights (‘ECtHR’). To date, there has only been one air pollution related case, namely Fadeyeva v. Russia. Domestic implementation of ECtHR decisions was not straightforward until February 2010, when the Constitutional Court adopted a decision which altered Article 392 of the Civil Code to the effect that ECtHR decisions must be implemented.

Despite these major steps towards incorporating human rights within domestic Russian law, the Russian Human Rights Ombudsman, Vladimir Lukin, has observed that the ‘human rights situation in Russia is unsatisfactory’, but that ‘this is not discouraging, because building a lawful state and civil society in such a complex country as Russia is a hard and long process’.

There are over 160 distinct peoples in Russia, making it one of the most ethnically diverse countries in the world. The law protects the rights of certain indigenous peoples through the Constitution, ‘in accordance with the generally accepted principles and standards of international laws and the international treaties of the Russian Federation’ (Article 69).


Application Nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 Budayeva and Others v. Russia (ECHR 20–03–2008); Application Nos. 4916/07, 25924/08 and 14599/09 Alekseyev v. Russia (ECHR 21–10–2010) (see www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/).

Application No. 55723/00, ECHR 09–06–2005.


Focus is on ‘small-numbered indigenous peoples of the North, Siberia and Far East’ which covers about forty-six indigenous peoples of Russia (see http://base.garant.ru/181870/#1000), but does not apply to all groups (UNGA Report; and see above n. 33, Henriksen).
In 2009, the government adopted a ‘Concept Paper on the Sustainable Development of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation’.49 It is described as an ambitious and a comprehensive document;50 however, the effectiveness of the implementation of the laws relating to indigenous peoples’ rights has been criticised.51 With respect to climate change liability, these laws do not specifically address the adverse effects of climate change on ways of indigenous life – though they do address the right of indigenous peoples to receive compensation for damage to their traditional environment due to industrial activities. Due to environmental awareness issues, poverty and other reasons set out above, it is very unlikely that indigenous peoples will commence legal proceedings in Russian courts with the aim of establishing liability for climate change.52

Human rights litigation

The practice of human rights litigation in Russia is not widespread, and cases are not commonly successful. Thus, after avenues of domestic proceedings have been exhausted, legal proceedings are sometimes commenced at the ECtHR.

Other principles of law

Whilst, in particular, Article 10 of the Civil Code gives a basis for courts to rely on the requirements of good faith, reasonableness and justice, as well as principles of equity and fairness and other general principles of law, they do so comparatively rarely. It is unlikely that this will change in the context of environmental (including climate change related) disputes.

50 Above n. 34, UNGA Report, p. 8. 51 Ibid., p. 7.
52 As regards indigenous peoples’ challenges relating to implementation of their environmental rights, see О. О. Мironov, ‘Экология и нарушение прав человека. Специальный доклад Уполномоченного по правам человека в Российской Федерации’ (ЭКОС-Информ. – №2. – 2003), available at www.ecoculture.ru/ecolibrary/art_18.php.
53 Article 38(1)(c), 1946 Statute of the International Court of Justice.
There are various legislative, policy and strategy instruments that address climate change, and some regulations which address particular aspects of the Kyoto Protocol. In particular, the following instruments address climate change mitigation and implement the FCCC and Kyoto Protocol provisions (directly and/or indirectly).

**Climate Doctrine 2009.** The Climate Doctrine was adopted in 2009 and signed by President Medvedev in early 2010. The Climate Doctrine states that its aim is to coordinate activities to support the safe and sustainable development of the Russian Federation, taking into account climate change. It is addressed primarily to the Government with the aim of coordinating its activities in the area of climate policy along the lines of the Doctrine. The Climate Doctrine does not touch upon the subject of liability, but concentrates on general issues of governmental climate policy.

**Energy efficiency.** The Russian energy efficiency policy is set out in the current ‘Energy Strategy through 2030’ (‘Energy Strategy’). The Energy Strategy makes it clear that the improvement of energy efficiency is viewed as a vital part of economic policy and envisages halving the energy intensity of Russia by 2030 (as compared to 2005). It states that the previous energy strategy (the ‘2020 Energy Strategy’) was adequate, but, based on the recent successes of the 2020 Energy Strategy, proposes a higher reduction of energy intensity in Russia, namely a 50 per cent reduction (on average) in 2000 levels by 2020.

There are various codes and laws which address energy efficiency in Russia. These are as follows.

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54 Order of the RF President № 861-rp ‘On the Climate Doctrine of the Russian Federation’, 17 December 2009 (‘Climate Doctrine’).
The Law On Energy Efficiency and Changes into Some Legislative Acts of the Russian Federation 2009 (‘Energy Efficiency Law’)\(^ {59}\) states that a person who breaches the Energy Efficiency Law may be subject to disciplinary, civil and/or administrative liability, according to the relevant legislation. Other relevant laws are the Law ‘On Heat Supply’ 2010,\(^ {60}\) as well as draft federal laws that are being developed: the draft Law ‘On the Support of Renewable Energy Sources’ and the draft Law ‘On the Use of Alternative Types of Motor Fuels’. These legal developments on renewable energy are not discussed further here due to space constraints.

**JI Regulations 2009.** The Government adopted the following with respect to JI projects in Russia:

- Government Resolution No. 843 On Measures to Implement Article 6 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2009;\(^ {61}\)
- Regulations On Implementation of Article 6 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2009 (‘JI Regulations’).\(^ {62}\)

The JI Regulations provide the guidelines and rules relating to JI projects in Russia.\(^ {63}\) Sberbank (a Russian State bank) acts as the carbon units operator. It arranges the tender selections of the applications of Russian legal entities for approval of JI projects. The Ministry of Economic Development (‘MED’) approved the rules for tender selection of applications for JI projects.\(^ {64}\) However, none of the Kyoto-related laws and regulations address liability for causing (or failing to mitigate) climate change.

An attempt to establish liability for contribution to climate change could, in theory, be based upon a combination of the above two

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\(^ {60}\) Federal Law № 190-FZ, 27 July 2010.


\(^ {62}\) Ibid.

\(^ {63}\) Above n. 20, Gutbrod/Sitnikov/Pike-Biegunska, Ch. 3; M. Yulkin, ‘Involving Russian Business in Kyoto’, above n. 7, Mucklow, pp. 189–201.

\(^ {64}\) Order of MED № 485 ‘Rules for the Tender Selection of Applications for Approval of Projects Developed Under Article 6 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change’, 23 November 2009.
areas, of general environmental and human rights laws, and of the Kyoto legislation. However, to date no such arguments have been brought in any court, and legal proceedings are unlikely to emerge in the near-to-medium term.

18.43 Nevertheless, by issuing the Climate Doctrine and in developing the draft Plan for Russian Climate Doctrine Implementation (not public at the time of writing), Russia is now on the road to developing its climate change policy and perhaps, at a later date, specific climate change laws.

18.44 Green investment scheme (‘GIS’). There appear to be no draft regulations related to the GIS mechanism yet, though they are understood as being in preparation.

Regional initiatives

18.45 Belarus, Kazakhstan and Ukraine are said to plan to establish a carbon market with Russia. The market participants would be able to carry out JI projects and attract investment subject to the fulfilment of certain conditions. Establishment of a single market for these countries should be possible, as there is a similarly operating regional carbon market in the EU. However it is questionable whether there is a real need for this regional market, and how effective it is likely to be, without connecting it to the EU Emission Trading System (‘EU ETS’) market and reforming the existing system of pollution regulation in Belarus, Russia and Kazakhstan.

18.46 It is noted that in the Commonwealth of Independent States (‘CIS’) region, some countries are developing specific laws relating to climate change. For example, Belarus is in the process of adopting a new draft ‘Law on Climate Protection’, whilst Kazakhstan is in the process of adopting legislation on emissions trading. These regional developments may affect the ways in which Russian law evolves in the future.

Industrial and natural resources

18.47 Russia has a wide range of natural resources, which include major deposits of oil, the world’s largest natural gas reserves

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65 Personal communication from Alexey Kokorin, WWF Russia, Moscow, 23 November 2010.
and second largest coal reserves, many strategic minerals and timber.

18.48 Russia has inherited a large arsenal of heavy industry from Soviet times. The infrastructure is, in many instances, still in need of repair and modernisation. This has a direct effect on, in particular, the GHG emission levels of heavy industry, coal-fired electric plants and the transportation sector (especially in cities). Furthermore, Russia’s energy efficiency is poor.

18.49 The consequences of heavy and partially non-modernised industry in Russia include air pollution, industrial, municipal and agricultural pollution of inland waterways and the coastline, deforestation, soil erosion, soil contamination from the improper application of agricultural chemicals, scattered areas of sometimes intense radioactive contamination, and groundwater contamination from toxic waste, poor urban solid waste management and abandoned stocks of obsolete pesticides.66

18.50 Despite the privatisations of the 1990s, these industries and natural resources typically remain in the ownership (or part ownership) of the Government. Foreign direct investment (‘FDI’) activity in Russia has meant that some of these sectors display a level of foreign ownership, too. Such industries predominantly exist within or overlap with the public sector.

18.51 The following are the main sources of GHG emissions in Russia: 83.3% from electricity and heat production; 1.1% from the residential sector; 7% from the industrial sector; 8% from transport; and 0.6% from other sectors (including agrarian sources).67

National climate change risks

18.52 Data published by Roshydromet show that between 1990 and 2000 the mean annual surface air temperature increased by 0.4°C, with temperatures in the Arctic rising at almost double the rate of the global average. The effects of climate change are felt in Russia in terms of milder winters, melting permafrost, changing


precipitation patterns, the spread of disease and the increased incidence of drought, flooding and other extreme weather events. The effects are likely to (i) negatively affect agricultural crop yields and biodiversity, coastal populations (due to coastal erosion and flooding) and the way of life of indigenous peoples; and (ii) create increased internal migration and socio-economic and socio-political stresses. Such effects are likely to (i) negatively affect agricultural crop yields and biodiversity, coastal populations (due to coastal erosion and flooding) and the way of life of indigenous peoples; and (ii) create increased internal migration and socio-economic and socio-political stresses.

18.53 For example, the heatwave in the summer of 2010 (the hottest in recorded history) led to widespread fires and a state of emergency in seventeen states of Russia. The fires also destroyed 30 per cent of crops, which led to a shortage of grain and government-imposed restrictions on the export of grain.

*Climate change litigation in Russia*

18.54 At the time of writing there have not been any specific cases in the Russian courts which can be classified as climate change litigation.

18.55 Despite the dramatic consequences of the extreme heatwave, forest fires and intense smog conditions in summer 2010, no claimant (including government authorities) has filed a lawsuit against any company, claiming, for example, that the defendant company, by failing to cap or reduce their CO₂ (or other GHG) emissions, so contributed to climate change that this then led to increased death rates and loss of crops. Nor have there been any legal proceedings arising from loss or damage due to coastal erosion, droughts or floods, or in relation to the widespread loss of species and biodiversity, in which causation has been alleged through action or inaction in the face of climate change.

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71 The definition of climate change litigation embraced in this chapter excludes any litigation as regards compliance with general environmental standards (as there is an array of such litigation in Russia).
Sectors at risk

18.56 The risk posed to business from climate change litigation is low, given the current absence and low likelihood of future claims. On the basis of the arguments set out below, and due to State ownership structures in Russia, the sectors most at risk are likely to be companies in the private sector (and perhaps foreign companies in particular) taking part in JI projects.

18.57 Under the Strategic Investments Law, various sectors in Russia have been designated as 'strategic'. Areas included as strategic are those in which the performance of works influences hydrometeorological or geophysical processes. Climate change litigation is very unlikely to occur with respect to companies or other entities which are deemed to fall within such strategic sectors.

Future of climate change litigation

18.58 The risk of increased climate change litigation in the future is likely to remain low to very low. In the short and medium term, the impact of the global financial crisis, the slow economic recovery in Russia and the uncertain investment climate mean that the focus is more likely to be on economic development. In addition, 14 per cent of the Russian population is still living below the poverty line. The year 2009 saw a nearly 50 per cent drop in FDI, whilst Russia strongly relies on export receipts from climate change related products, i.e. oil and gas, other raw materials and basic manufactures including timber, metals and chemicals. Furthermore, since around 2005, the role of the State in the economy has significantly increased and culminated in the aforementioned rules on State intervention in strategic sectors.

Thus, governmental and regulatory activities are more likely to

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72 Federal Law № 57-FZ 'On Procedures for Foreign Investments in Companies of Strategic Significance for National Defense and Security', 28 April 2008 ('Strategic Investments Law'); this law imposes restrictions on foreign investors seeking to buy shares or acquire control over Russian companies that are deemed strategic.


74 Above n. 9, EIU Russia Forecast 2010, 'Russia: Foreign direct investment: Stocks and flows'.

75 Two-thirds of Russia's export receipts come from these sectors; see above n. 9, EIU Russia Forecast 2010.

76 See para. 18.57 above.
focus on facilitating the continued domestic economic recovery, trade, infrastructure investments and modernisation, as well as on attracting FDI, rather than on enabling (through legal reform) or participating in climate change litigation.

18.59 Additionally, as evidenced by the adoption of the NGO Law\textsuperscript{77} in 2006, it is government policy to regulate the activities of NGOs. Aggressive action or litigation by NGOs, although theoretically possible, is, therefore, unlikely in the near or mid-term future.

18.60 Finally, Russian procedural rules are not favourable to claims by governmental authorities, cities, NGOs, industries suffering from global warming (e.g. fisheries, agriculture, timber and tourism), indigenous peoples or victims of natural catastrophes, based on climate change. A prerequisite for any such claim would be evidence that the ‘concrete rights’ (‘\emph{неотчуждаемые/основные права человека}’) of the claimant had been violated,\textsuperscript{78} and no such violation would be recognised in the case of GHG emissions or other environmental damage.

18.61 Therefore, litigation relating to climate change in Russia is more likely to take place in the context of Kyoto legislation related commercial proceedings (including with respect to contractual terms of Emissions Reduction Purchase Agreements, investment agreements for JI projects in Russia, carbon asset development agreements or services agreements), rather than focusing on a defendant’s liability for contributing to climate change per se or being based upon environmental and human rights law.

(B) Public law

18.62 Given that climate change litigation is relatively unlikely to take place in the near to mid-term future, the discussion as to who might be best placed to enforce any right or bring claims in


\textsuperscript{78} Article 131, Civil Procedural Code 2002 (‘CPC’).
relation to damage (actual or anticipated) arising from climate change is primarily theoretical at present, both in the context of public and of private law proceedings.

Potential claimants

18.63 Under general environmental and human rights law or with respect to Kyoto legislation, claims alleging liability in respect of climate change could potentially be brought by:
- environment-related government agencies;\(^{79}\)
- individuals;\(^{80}\)
- companies;\(^{81}\) or
- environmental NGOs.\(^{82}\)

18.64 Given aforementioned circumstances, the environment-related regulatory agencies (local, national or governmental bodies) are the most likely parties to commence proceedings, if at all, and such proceedings are most likely to arise in the context of administrative or commercial matters.\(^{83}\)

18.65 In Russia, class actions were substantially unknown in litigation practice until 19 July 2009, when the Federal Law ‘On the Introduction of Changes into Some Legislative Acts of the Russian Federation’\(^{84}\) was adopted. This law added Chapter 28.2 (Claims on rights and lawful interests’ protection of a group of plaintiffs) to the Arbitration Procedural Code.\(^{85}\) Under this code, a class action is only possible if there are at least five claims brought by individuals, agencies or organisations in the framework of the same action.\(^{86}\) However, to date, to the authors’ knowledge, no such actions have been brought in the Russian courts alleging liability for climate change.

\(^{79}\) Article 5, EPL.
\(^{80}\) Article 11(2), EPL.
\(^{81}\) Under Article 62(3) of the Constitution, foreign and Russian Parties are accorded equal treatment in Russian court proceedings.
\(^{82}\) Article 12(1), EPL.
\(^{83}\) However, in the Khimkinskiy Forest case, NGOs initiated the legal proceedings; see Decision of the Supreme Court of the Russian Federation of 1 March 2010, N ГКИИ09–1767 ‘On Dismissing the Application for Invalidation of Paragraph 1 of the Decree of the Government of the Russian Federation of 5 November 2009, N 1642-p’.
\(^{86}\) *Ibid.*, Article 225(1) and (2).
Under the Constitution, anyone can submit a claim to a relevant court whereby decisions, activity or inactivity by the Government or public bodies may be reviewed or challenged. The type of court to which such claims can be brought depends on the breach of rights/freedsoms and the claimants concerned.

Under broader environmental and human rights laws, the following activities relating to climate change liability could potentially be subject to review by, or challenged before, the courts:

- general regulatory activity;
- planning (for GHG-intensive projects);
- permits (to emit or carry on potentially emitting activities, or approve/finance them); and
- actions taken under general public law.

In general, all basic legal environmental principles indirectly relating to the regulation of climate change issues, are summed up in Article 3 of the EPL. Thereunder, governmental and public bodies are responsible for ensuring a favourable environment and ‘ecological safety’. Together with private entities and citizens, these agencies are obliged to protect the environment.

Thus, decisions, acts and failures to act on the part of governmental or public bodies may be reviewed or challenged in the courts. At least in theory, there is a strong focus on procedural environmental rights, including the right to access to environmental information, the right to public participation and the right to access to justice.

The judicial system is comprised of the Constitutional Court, civil courts, arbitrazh courts and military tribunals. Private parties and NGOs have standing in such courts. The arbitrazh courts have jurisdiction over proceedings involving legal entities and

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87 Article 46(1) and (2).
88 Chapter XIV, EPL, on environmental liability.
89 Regarding the planned reform of the court system, see interview with V. Radchenko, Deputy President of the RF Supreme Court, at www.supcourt.ru/vscourt_detale.php?id=1528&w[]=\%D0%E0%E4%F7%E5%ED%EA%EE.
business persons. The civil courts will only become involved on issues concerning the recognition of decisions from foreign civil and arbitrazh courts or appeals against decisions by Russian arbitration courts.

Review of public decisions

18.71 The Federal Law ‘On the Procedure for Reviewing Applications of the Citizens of the Russian Federation’ regulates how a Russian citizen can realise his/her constitutional right to address State bodies and local government bodies and prescribes the procedures to be followed within State bodies and local government and by civil servants. Despite the title, this law also covers applications and claims filed by foreign citizens and persons without citizenship (Article 1(3)). An applicant can file written and oral suggestions, claims and complaints (Article 4), and the government bodies/civil servants usually have thirty days to react to the filed application (Article 12). This law does not explicitly address areas which a party can complain about. Thus, theoretically, it could be used to request the review of the legality of the decisions of government bodies relating to environmental matters.

Planning (for GHG-intensive projects)

18.72 Generally, Russian legislation empowers individuals and entities to file applications with the courts to review the legality of acts, failures to act and decisions of governmental agencies if such action results in infringement of the rights and freedoms of a person, creates obstacles to the exercise of a person’s rights and freedoms or unlawfully imposes a duty on a person or unlawfully holds him/her responsible. If so, the court may invalidate the relevant action or decision. The same principles apply to enactments concerning GHG-related activities.

Environmental permits

18.73 The permit system in Russia regulates the issuance of permits for environmental pollution. There are separate permits for airborne pollution.
emissions, water discharge and waste disposal, and for the handling of hazardous waste.\footnote{92}{See Articles 3 and 30, EPL and other environmental laws and sub-laws.}

18.74 Under the Federal Law ‘On Complaining to Court About Activities and Decisions which Violate the Rights and Freedoms of Citizens’,\footnote{93}{Federal Law № 4866–1, 27 April 1993, as amended on 9 February 2009.} a party can request the courts to review the legality of a permit or its compliance with the applicable law. The law allows the claimant to choose the body to which it turns for restoration of his/her environmental right. This can be a court as such, but also a superior governmental body, a municipal agency, a company, an organisation or a civil servant. The complaint must be dealt with within thirty days, whilst the application for judicial review must be dealt with within three months.

18.75 In addition, the Federal Law ‘On the Sanitary and Epidemiological Well-being of the Population’ can be used in support of challenges to permits relating to ‘nature use’. According to this law, citizens have the right to a safe living environment, to full and reliable information on the use of natural resources by companies and organisations and their effects on the environment.\footnote{94}{Article 8, Federal Law № 52-FZ ‘On Sanitary and Epidemiological Well-Being of the Population’, 30 March 1999, as amended on 28 September 2010, № 243-FZ.}

18.76 However, usually, the review of permits is left to institutional enforcement agencies, namely the Federal Service for Supervision of Natural Resource Use (‘Rosprirodnadzor’) that has been given major control tasks at the federal and regional levels.\footnote{95}{Decree of the RF Government № 717 ‘On introduction of changes into Government Decrees related to competences of Ministry of Natural Resources and Ecology, Federal Agency for Surveillance in the field of Nature Use, Federal Agency for ecological, technological and nuclear control’, 13 September 2010.} For each area there is a separate Rosprirodnadzor inspection department, with its own chief inspectors, competent to launch administrative cases. It should be noted that Rosprirodnadzor is not an independent agency, but a body within the MNR structure.\footnote{96}{See V. Sapozhnikova, Environmental Protection in Russia, pp. 183–8, at www.inece.org/conference/7/vol1/Sapozhnikova.pdf.}
Enforcing and striking down legislation

18.77 The Constitutional Court has the power to strike down or annul any legislation for being illegal or invalid.

General public law actions

18.78 In practice, general public law actions almost never succeed as the courts often deem them too ‘broad’ and lacking in concrete interests.

Remedies under Russian law

18.79 There is no specific legislation rendering unlawful activities which impact on air quality or contribute to climate change. General norms may, however, be applied. Article 78 of the EPL, for instance, provides that a party must compensate another for environmental damage that was caused by it breaching environmental law. The definition of ‘damage’ includes actual expenses incurred to rehabilitate the affected environment, as well as financial damages and (expected) losses of profit. Article 79 of the EPL focuses on compensation for damage to citizens’ health and property (as a result of breach of environmental legislation). Such damage is to be fully compensated and is further regulated by the Civil Code (Chapter 59).

18.80 Under Article 80 of the EPL, when legal or private persons act in breach of environmental law, citizens can claim the limitation or termination of relevant activities.

18.81 An enterprise can appeal the decisions of a government body in relation to any matter in which it believes its interests have been affected. For example, the Law ‘On Ecological Expertise’ provides for the possibility to challenge the results of an ‘expertise’ (Article 18(8)), the latter of which is an examination of project documents as regards their conformity with ecological requirements set out under Russian law. All cases are reviewed by a court of general jurisdiction, except for cases where there is an economic interest at stake. Thus, the arbitrazh courts can review, amongst other matters, industries’ appeals against license/permit refusal. Neighbouring enterprises and other government authorities can also be involved in the process in different ways: as co-plaintiffs, co-defendants and third parties (if recognised by the court).
Private parties can challenge the decisions of government bodies on license or permit issue or refusal, if such decisions constitute breach of citizens’ constitutional rights.

NGOs and the general public can, as well, bring a claim or a plea aimed at the protection of common environmental interest(s) (Articles 10 and 12, EPL).

(C) **Private law**

*Overview*

Generally, potential claims between private parties with respect to climate change liability face similar issues to those under public law.

Individuals\(^{97}\) (including individuals as participants in class actions), NGOs\(^{98}\) and governmental bodies (federal, regional, local and municipal governments)\(^{99}\) could potentially make a claim for climate change liability before the courts.\(^{100}\) In the current general climate, however, governmental bodies are most likely to be best placed to enforce any rights or bring claims in relation to harm or damage (actual or anticipated) from climate change.

However, as set out above, it is very unlikely that such actions will take place in the near to mid-term future or that they would be successful if attempted. With respect to claims arising out of contracts (relating to JI projects or other emissions reduction projects), it is difficult to predict the timing of potential proceedings.

**Possible defendants**

As is the case for potential public law proceedings, possible defendants in private law proceedings are more likely to be corporations and businesses which are climate change causing industries. Given the non-litigious nature of Russian society and possibly the current political situation, it is very unlikely

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\(^{97}\) Articles 3 and 4, CPC.  
\(^{98}\) Ibid.  
\(^{99}\) Ibid.  
\(^{100}\) Article 22, CPC.
that the Government or governmental agencies would be made defendants in climate change proceedings. Often corporations are co-owned by the Government (in particular, in the case of corporations with national interests, e.g. gas, oil and other natural resources). Thus, the Government might become a defendant, directly or indirectly, by way of being co-owner of a given corporation.

18.88 Corporations, lenders and banks. In Russia, corporations and banks can be government-owned, partially government-owned or privately owned. It is unlikely that there will be a dramatic increase in climate change litigation in the oil and gas industry for the reasons set out above. In particular, as the oil and gas industry is predominantly owned (or part-owned) by the Government, the industry is unlikely to have to prepare itself for an increase in climate litigation as has happened, for example, in the USA.

18.89 Government. As mentioned above, the Government and governmental agencies are unlikely to be claimants or defendants in private law climate liability proceedings.

18.90 Shareholders. Shareholders generally cannot be held liable for the action of their companies. Whilst there have been some exceptions to this rule, in particular when shareholders consciously initiated bankruptcy of their companies, such exceptions are unlikely to be applied in case of environmental damage caused by climate change.

18.91 Directors and officers. Company directors’ and officers’ duties are subject to administrative, criminal and civil liability. It is a general rule that a director of a company is responsible for his/her decisions relating to the company’s actions and operations. At the same time, the individual employees of a company have limited responsibility as they can be held liable only for the consequences of their own actions. Thus, it is unlikely that litigation (including climate change litigation) would be targeted at directors and officials of a company.

18.92 Auditors. There are no specific rules for holding auditors liable in relation to climate change matters. The general basis for holding

101 E.g. Article 14(1), Administrative Code.
Auditors liable is for breach of contract and breach of civil law connected with the negligent rendering of services. The Federal Law ‘On Audit Activities’ provides for the responsibility of auditors for signing false reports; it also provides for the right of audit organisations/individual auditors to insure its/their responsibility for breach of the audit services contract or for causing damage to property of other parties as a result of audit activity. Additionally, the Criminal Code 1996 provides that auditors can be held responsible for economic crimes (for instance, for the illegal receipt and disclosure of classified commercial, tax or banking information) and any abuse of their authority.

18.93 **Regulators.** Whilst, frequently, the possibility of legal action against regulators for breach of duty is provided for in law, such lawsuits are not frequently brought. As a rule, the courts are unlikely to be well disposed towards such lawsuits. There is no experience in Russia with (and no clear basis for) lawsuits based upon the understanding that a regulator should have acted and has failed to do so.

18.94 **Insurers.** There is no basis in Russian law for the responsibility of insurers towards third parties. The Russian insurance market and law are still nascent and developing. Given reports that climate change risks could make emerging markets ‘uninsurable’, it is unlikely that, in the future, Russian insurers will insure risks relating to damage caused by climate change or provide climate change cover for businesses which potentially could be held liable for contributing to or failing to mitigate or prevent climate change. If such cover were, however, to be provided, the insurance premium levels would be likely to be exorbitantly high.

*Tort law*

18.95 Article 1064(1) of the Civil Code allows a party to claim damages for any harm caused to property in general and Article 1065(1)

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of the Civil Code specifically allows claims for future damage, which is to be expected but remains uncertain. In theory, the basis for launching claims in a Russian court, based on environmental violations, is broad.

18.96 However, despite a number of catastrophes over the past few years (e.g. in coal mines or hydro plants, causing many deaths), this does not seem to have resulted in a substantial increase in tort litigation. Furthermore, compensation paid has been comparatively low. On the basis that there have been few successful tort claims in Russia, in addition to other factors mentioned in this chapter, we believe that potential claimants are not likely to engage in climate change litigation in Russia.

18.97 Legally, we believe there are two primary factors hindering the prospects for success of climate change liability claims in Russia, namely:

- For lawsuits to be successful, the causal nexus between an action of the defendant and the harm or damage incurred must be established. The courts, however, operate within the tradition that only the immediate consequences of an action are considered as a basis for a claim. This is a technical reason why parties suffering from harm or damage caused by climate change have not brought claims up to now.

- For a claim based on tort to be successful, the defendant must be unable to prove that his/her actions were not ‘culpable’ (Article 1064(2), Civil Code). A Russian court sets the standard for an action to be considered ‘culpable’ at a relatively high level. This means that to establish culpability, evidential proof is required that the defendant had reasons to believe that the harm or damage would occur as a result of his/her actions.

**Damages for harm to health and the environment**

18.98 The EPL guarantees the right of citizens to claim for harm to the environment (Article 12(2)). Yet in practice, such claims are rare due to the problems in providing sufficient evidence.

18.99 In addition to the problems in providing sufficient evidence for a claim, claimants will have difficulties in proving quantum. Russian law generally limits damages to property damage
(Article 15, Civil Code) – that is, damage that has a value that can be expressed in monetary terms. Thus, for example, costs for medical treatment (e.g. due to increased respiratory illnesses) are unlikely to be easily quantifiable because the State health system, in theory, affords treatment free of charge.

18.100 The same difficulties would be faced if trying to establish sufficient quantitative evidence of damages to substantiate a claim for climate change liability, e.g. with respect to proving that a defendant contributed to climate change due to excessive GHG emissions and, thus, caused damage or harm to property or health.

18.101 Punitive damages or damages for suffering, including death, are not recognised under civil law. Accordingly, the ability to claim substantial sums in compensation for actions that harm the environment (including the climate) is very limited.

18.102 The continued decay of infrastructure causes an increased (and often underestimated) likelihood of accidents occurring and could expose the following parties to a risk of claims:
- local, municipal and federal agencies that finance and build public infrastructure in vulnerable areas, as well as those that own and operate vulnerable infrastructure;
- private investors and owners of vulnerable buildings and other physical property;
- property and casualty insurers;
- creditors holding vulnerable infrastructure directly or indirectly as collateral; and
- vulnerable businesses, NGOs, households and citizens.

18.103 These parties could potentially claim the following types of damages in the context of climate change proceedings:
- ecological damage,\(^{105}\)
- economic damage,\(^{106}\) and
- social damage.\(^{107}\)

18.104 The general framework relating to damages, compensation and remedies is set out in Chapter 59 of the Civil Code.

\(^{105}\) Article 8(21), Administrative Code.
\(^{106}\) Article 14, EPL.
Remedies

18.105 A court can order the payment of compensation to a claimant for loss directly caused by a company’s breach of environmental legislation – if, for example, emission levels exceed those stated in a permit, or the chemical composition of emissions differs from those which are approved and defined in the company’s permit, causing loss. In order to obtain compensation, the claimant(s) must prove they were negatively affected by the emissions (for example by presenting medical statements).

(D) Other law

Competition/anti-trust law

18.106 Russian competition and anti-trust laws are quite vague and their rules are generally based on the principle of determination of a market share or activities aimed at malicious prevention or limitation of competition. From this perspective, entities engaged in fair activities aimed at increasing their competitive potential (e.g. by putting in place GHG-emission reduction measures) would be very unlikely to be treated as preventing or limiting competition under Russian legislation. Similarly, it is unlikely that those companies that do not put in place GHG-emission reduction measures would be treated as acting in an uncompetitive manner under Russian law.

18.107 In any event no party, other than the Federal Anti-Monopoly Service, is able to commence anti-monopoly proceedings, including, for example, with respect to any companies operating with high GHG emissions (which might therefore obtain an unfair advantage over competing companies which have reduced their GHG emissions in accordance with government policy).

Principles of international environmental law

18.108 Attempts have been made to integrate principles of international environmental law into general environmental law, including,

indirectly, the principle of preventative action, the polluter pays principle,\textsuperscript{109} the principle (or concept) of sustainable development\textsuperscript{110} and the precautionary principle. However, some authors argue that, despite these trends, Russian environmental law has remained much the same since Soviet times.\textsuperscript{111}

18.109 Practice shows that a court would refrain from adjudicating solely based on the violation of the aforementioned principles, as they are considered ‘vague’, ‘non-concrete’ – and considered ‘soft law’.\textsuperscript{112}

Criminal law

18.110 Criminal law could be invoked by the State and others against those contravening environmental laws or failing to perform public duties.

18.111 Chapter 26 of the Criminal Code addresses ‘ecological crimes’. Those that could potentially be of relevance to climate change liability include:

1. violation of the rules for environmental protection when performing work (Article 246);
2. violation of the rules for handling ecologically dangerous substances and wastes (Article 247);
3. pollution of the atmosphere (Article 251);
4. destruction of critical habitats for organisms entered in the Red Book of the Russian Federation (Article 259);
5. destruction or damaging of forests (Article 261); and
6. violation of the regime of specially protected nature territories and nature objects (Article 262).

18.112 There is no direct provision under criminal law which makes it a crime for a person to cause, or to fail to mitigate, climate change.

\textsuperscript{109} E.g. Article 32, LAP.


\textsuperscript{111} Nystén-Haarala, above n. 7, Mucklow, p. 105.

18.113 The penalties for ecological crimes include fines, confiscation of property, obligatory works, imprisonment and limitations to hold certain official positions.\textsuperscript{113} Most criminal cases, including any ecological crimes, are tried in the district (\textit{rayonnyy}) courts.

(E) ‘Soft’ law

18.114 ‘Soft law’ is not considered a source of law, nor is it likely to be applied or referred to directly by a judge in a Russian court. Officially, ‘soft law’ is not recognised as a source of law in the Russian judicial system. Despite this, principles contained in ‘soft law’ may, in some cases, be used by scholars and judges as part of an argument relating to public policy.\textsuperscript{114}

\textit{International institutions}

18.115 It is unlikely that institutions or treaties such as the OECD, CITES, United Nations Educational, Scientific and Cultural Organization (‘UNESCO’) World Heritage, the Equator Principles, or the United Nations Principles of Responsible Investment would be able to assist in Russian legal proceedings, whether dispute resolution, mediation or conciliation.

\textbf{European Union}

18.116 In 1994, Russia and the European Union concluded a Partnership and Cooperation Agreement (‘PCA’).\textsuperscript{115} Since June 2008, negotiations have been under way for a new EU-Russia Agreement, which is to replace the PCA, but are yet to be concluded.\textsuperscript{116} The new EU-Russia Agreement will include legally binding commitments in many areas, including economic cooperation, trade, investment and energy, and will also touch on climate change. However, the current draft Agreement does not address climate change liability matters.

\textsuperscript{113} Above n. 1, Butler, p. 549.
\textsuperscript{115} EU-Russia Partnership and Co-operation Agreement, 24 June 1994; EIF, 30 October 1997.
\textsuperscript{116} Negotiations have seen a new push following the EU-Russia Summit, 7 December 2010 (see www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118284.pdf).
Russia is not a member of the OECD. However, during the first half of 2011, Russia has intensified its relations with the OECD, and over time this may lead to a different regulation of climate change liability.

**Liability under public international law**

Russia’s potential liability relating to climate change under public international law is outside the scope of this chapter. It is unlikely that Russia will be a claimant in public international proceedings concerning international climate change liability. Furthermore, there is the fundamental difficulty of identifying which forum would have jurisdiction in such proceedings.

Whilst Russia borders fourteen countries and has concluded a number of bilateral and regional agreements with neighbours and former Soviet countries, few of these international agreements (including the investment treaties) deal with environmental issues. Even in relation to the existing treaties with neighbouring countries, litigation is the exception, rather than the rule. Accordingly, the potential for international climate change litigation initiated by Russia appears to be low.

**(F) Legal practicalities**

*Founding jurisdiction*

A party not resident or domiciled in Russia can be made party to proceedings in a Russian court under Article 4 of the Federal Law ‘On the Legal Status of Non-Residents in the Russian Federation’ 2005. Non-residents in Russia have all the rights and responsibilities of residents under the law, except insofar as is specifically stated in federal law.

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177 Russia has not commenced any legal proceedings at the International Court of Justice (‘ICJ’), to date. Note, however, that in August 2008, the Republic of Georgia commenced proceedings against Russia at the ICJ for violations of the 1965 Convention on the Elimination of all Forms of Racial Discrimination, in the context of Russia’s interventions in South-Ossetia and Abkhazia between 1990 and August 2008 (see www.icj-cij.org/docket/index.php?p1=3&code=GR&case=140&k=4d).

Enforcement

18.121 This chapter does not discuss enforcement of court judgments in Russia as the likelihood of a court judgment being issued with respect to climate change liability is extremely low.

Public interest litigation

18.122 There is no widespread culture or tradition of ‘public interest litigation’ in Russia, in the sense of legal proceedings commenced with the aim of benefiting the public at large. However, numerous cases have been litigated concerning environmental issues, especially relating to instances in which the defendant is alleged to have harmed the environment, resulting in a detrimental impact on others’ health.

Litigation costs

18.123 Litigation is usually funded by the party making the claim. Also, the unsuccessful party must reimburse the other party for legal costs incurred due to the proceedings. Costs are, however, reimbursed at very low rates, which has the effect of discouraging litigation.

18.124 Article 48 of the Constitution sets out that citizens of limited means are entitled to free legal assistance. In practice, however, free legal representation for those of limited means (funded by the Government) is not easily available, is restricted, occurs infrequently and is usually provided in relation to criminal proceedings.

Obtaining information

18.125 Although Russia does have specific provisions for access to environmental information, there is no law relating to freedom of information at the federal level. Russia has signed, but not yet ratified, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Therefore, public access to
environmental information is hindered,\textsuperscript{119} and the mechanisms for requesting and obtaining information from the authorities are underdeveloped, while the authorities rarely proactively disseminate information on their functions and activities to the public.

18.126 Despite the practical hurdles, Article 42 of the Constitution and Article 3 of the EPL proclaim everybody’s right to reliable environmental information as one of the general principles of environmental protection (repeated in Article 11(1) of the EPL). Article 5 of the EPL provides that one of the responsibilities of governmental bodies is to deliver reliable environmental information to the population. Furthermore, Article 11(2) stipulates that such information is to be reliable, timely and up to date.

\textit{Immunity}

18.127 Under the Constitution, all legal persons are equal before the law (Article 19). Thus, government and public institutions do not, by law, enjoy immunity from suit.\textsuperscript{120} This is not to be confused with parliamentary immunity, a notion from constitutional law,\textsuperscript{121} giving private persons – deputies and senators – the privilege to enjoy immunity from prosecution for (alleged) administrative or criminal offences.\textsuperscript{122} In general, however, it is unusual for a government or public institution to be sued in court, in particular with respect to environmental matters.

\textbf{(G) Conclusion}

18.128 This chapter shows that climate change has not been used as a ground for legal actions in Russia and that climate change liability proceedings are highly unlikely in the short-to-medium term. There is no specific regime in place that would enable such litigation, and the jurisprudence in this area has yet to develop.

\textsuperscript{119} Centre for Environmental Information (EcoInfoCentre), St Petersburg (see \url{www.ecocentrum.ru}).

\textsuperscript{120} There is personal immunity of Duma Deputies, high officials (Federal law \# 3-FZ, ‘On the status of a Federation Council member and the status of State Duma member’, 8 May 1994), as well as the President of Russia (Article 91, Constitution).

\textsuperscript{121} Article 98, Constitution.

\textsuperscript{122} Federal Law \# 3-FZ, (see n. 120 above).