

# **Liability for Climate Change**

## **Cases, Challenges & Concepts in Civil and Common Law**

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## **Factual Starting Point**

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- Various natural forcing mechanisms.
- Human behaviour does have an influence.

IPCC AR5: "It is extremely likely that more than half of the observed increase [...] from 1951 to 2010 was caused by the anthropogenic increase in GHG."

## International Framework

- 1992: UN Framework Convention on Climate Change:  
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- 1997: Kyoto Protocol  
emissions trading system
- 2016: Paris Agreement  
*„ambitious national contributions“* to achieve max +2°
- ILA Principles / Oslo Principles

## CC Cases: Bread and Butter

- Austria: *Vienna International Airport* – 3rd Runway Case
  - Federal Administrative Court: Construction would improve infrastructure, create new jobs, and increase air safety. The significant increase in greenhouse gas emissions would have a severe impact on public health. Thus, the public interest in climate protection prevails over the public interest in realizing the project.

## CC Cases: The American Way I

- *Massachusetts v EPA*, 549 U.S. 497 (2007)
  - Clean Air Act: „The [EPA] shall prescribe standards applicable to the emission of any air pollutant from new motor vehicles, which cause, or contribute to, air pollution, which may reasonably be anticipated to endanger public health or welfare”



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- *Kivalina v Exxon Mobil* (9<sup>th</sup> Circuit Court; no certiorari)
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  - No damages because of displacement
- *Comer v Murphy Oil* (5<sup>th</sup> Circuit Court)
- „*The federal common law of public nuisance died after a long illness on Sept. 21, 2012.*”

## CC Cases: The European Theatre I

- *Urgenda v The Netherlands* (District Court The Hague)
  - Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures

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- *Klimaseniorinnen* (Switzerland; Government; Administrative Court)

## **CC Cases: The European Theatre II**

- *Lliuya v RWE* (Landgericht Essen)

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- Yet to come?
  - Consequential Damage
  - Pure Economic Loss
  - Ecosystem

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- Aggregate v Individual Level

## **Misconduct II**

- Public authorization
  - Environmental impact assessment
  - Emission trading scheme
- Limits of authorization
- Policy question

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- But-for test – *conditio sine qua non* formula: eg *Comer*
- CO<sub>2</sub>: 9-26 % contribution to global warming
  - Alternative causation including hazard
- Lifetime 30-95 years

## **Conclusions**

- CC policy is subject to judicial review.
- CC litigation in the US has died.
- CC litigation in Europe is in its infancy.
- CC has become a case for law, but probably not a case for tort law.