

CLIMATE CHANGE LAW, POLICY AND PRACTICE SERIES

# An Inconvenient Deliberation

The Precautionary Principle's  
Contribution to the Uncertainties  
Surrounding Climate Change Liability

By Miriam Haritz

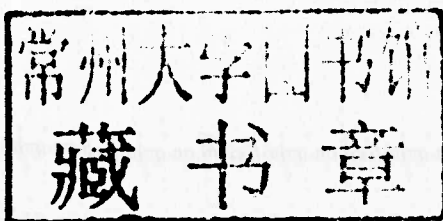


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to the Uncertainties Surrounding Climate  
Change Liability**

**Miriam Haritz**



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## An Inconvenient Deliberation

## Climate Change Law, Policy and Practice Series

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### VOLUME 5

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The aim of the Editor and Publishers is to publish works of excellent quality that focus on Climate Change.

Through this series the Editor and Publishers hope:

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- to facilitate cooperation between academic and non-academic communities in the field of climate change throughout the world.

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*The titles published in this series are listed at the end of this volume*

*To my son,  
Gaspar Salomon,  
my inspiration and most persisting reason for  
never giving up*



## About the Author

Miriam M. Haritz was born in Aachen on September 4, 1973 to a German father and a Spanish mother. Growing up in Germany and Belgium, she completed the *Abitur* at the *Kaiser-Karls-Gymnasium* in Aachen. Thereafter, she studied law at the University of Cologne, Germany, and at University College London, in the UK. Upon graduation, she obtained her law degree from the High Court of Cologne (*Erstes Juristisches Staatsexamen*) in 1998, and continued studying the interdisciplinary European Public Affairs Master program offered jointly by Maastricht University and the European Institute of Public Administration (EIPA). She graduated *cum laude* in 2000 and returned to Germany, where she trained as a judge and as a lawyer. After giving birth to her son, Gaspar, she obtained her second legal degree (*Zweites Juristisches Staatsexamen*) from the Ministry of Justice of the Land North Rhine-Westphalia in 2003.

In 2004, Miriam started working as a junior lecturer at the Faculty of Social Sciences in the European Studies Bachelor program at Maastricht University. In 2005, she changed to the Faculty of Law where she worked as a Ph.D. researcher at the International and European Law Department and the Maastricht European Institute for Transnational Legal Research (METRO). Next to her research on the topic of the present dissertation, she was involved in research, teaching and organizational activities on European Institutional Law and international risk regulation. She completed the training of the *Ius Commune* Research School and was a fellow of the *Netherlands Organization for Scientific Research* (NWO), who funded her Ph.D. research within the multidisciplinary VAM project group (the social, legal and behavioral aspects of Climate Change Vulnerability, Adaptation and Mitigation). She defended her Ph.D. thesis successfully at Maastricht University on December 17, 2010.

Since 2010, Miriam has served as a Legal Advisor to the German Federal Office of Civil Protection and Disaster Assistance (*Bundesamt für Bevölkerungsschutz und Katastrophenhilfe*, BBK) in Bonn, an independent agency in the portfolio of the German Federal Ministry of the Interior.

*“We would be taking a great risk  
with future generations if,  
having received this early warning,  
we did nothing about it . . .”*

Margaret Thatcher\*

*“On voit se dessiner la proposition philosophique  
d’un élargissement de la responsabilité,  
non plus seulement tournée vers le passé,  
pour la réparation des dommages causés,  
mais également tournée vers l’avenir,  
en une exigence de prudence,  
de prévention, et de précaution  
qui rejaillit sur l’humanité à venir.”*

Catherine Thieberge\*\*

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\* Extract from a speech on the occasion of opening the Hadley Center for Climate Prediction and Research, UK, May 25, 1990.

\*\* *Libres propos sur l’évolution du droit de la responsabilité—vers un élargissement de la fonction de la responsabilité civile?*, in: *Revue trimestrielle de droit civil (RTDC)*, nr. 3, July–September 1999, 561–584 (577).



## Preface

The book takes into account the state of affairs until October 2010.

In December 2010, the U.S. Supreme Court decided in the case *Connecticut v. AEP* to accept an appeal of the defendants to grant a *petition of certiorari* over the questions of standing and the political question doctrine (the case is now *American Electric Power v. Connecticut*, 10-174, decision of December 6, 2010).

The Court will consider and decide the case in the first half of 2011, with Justice Sotomayor, who was on the 2nd Circuit panel that heard the case, not taking part in the Supreme Court's consideration of the issue. The outcome of the case may be in favor of the defendant companies, in favor of the plaintiff states and organizations or it could be that the court could split in a 4-4 voting, leading to upholding the previous court's decision without a Supreme Court precedent, allowing for a trial on the merits.

Also in December 2010 the Cancún Climate Summit that started already with much lower expectations compared to the chronology of an anticipated failure that we witnessed in Copenhagen in 2009, ended with some respectable regional and sectoral advances (such as the Green Climate Fund for financing adaptation) and the reiteration of the intent to come to a successor to the Kyoto Protocol at some point. Yet, the international community failed once more to agree on substantial binding commitments on a global scale in terms of emissions reductions.

Whatever the outcome of the new Supreme Court case is, it is clear that while public regulation would be indeed a more desirable tool to get hold of Climate Change, the question of judicial intervention, should public regulation stay behind what precautionary considerations dictate, remains of fundamental importance.

Coming back to the initial quotes in my book from Margaret Thatcher and Catherine Thieberge, the words of the former British Prime Minister, who is not

Preface

renowned for her ambitions in the field of environmental protection, should be viewed from the perspective of Thieberge’s findings that translate as follows:

We see the dawn of a philosophical proposition of an extension of liability, not just turned towards the past, for reparation of damage that has been caused, but equally turned towards the future, by means of demanding prudence, prevention and precaution, shedding its light onto the mankind to come.

Public and private decision-makers need to be judged by the meaning of their words, with corresponding legal consequences if *words of precaution* are not followed by *deeds of precaution*.

Miriam Haritz  
December 2010

## Acknowledgments

When I commenced my legal studies immediately after graduating from high school, I did so for very idealistic reasons: I wanted to help those in need of help; law, to me, translated into legal justice, and I somehow thought—with the naivety of youth—that I could contribute to making this world a better place.

Seventeen years later, the world has certainly not become a better place, but I have nonetheless succeeded in maintaining my idealism despite having become a lawyer.

Out of this idealism, the safeguarding of human life and our living environment has always been at the heart of my professional interest, and very soon I realized that assuming only a legal perspective would always fall short of grasping the full picture. This insight brought me to Maastricht University for the first time where I followed an interdisciplinary Master program after having completed my legal studies in Germany and the UK.

Another couple of years later, I returned to my *Alma Mater* in The Netherlands to commence a Ph.D. project, of which the present book is the outcome (the thesis was defended at Maastricht University in December 2010).

I am grateful for all the support that I received from numerous people over the course of the past years, of which I can only mention a few here.

First and foremost, I would like to express my gratitude to my two supervisors, Prof. Dr. Ellen Vos and Prof. Dr. Michael Faure of Maastricht University, who have always supported me and assisted me with their profound legal understanding. I also owe thanks to many other academic and secretariat staff from Maastricht University that made my years of working and researching there so rich and so full of valuable experiences.

I also wish to thank NWO/VAM for generously funding my Ph.D. and for enabling me to cover my research expenses for books, travel and research time abroad. In this context, I also want to express my gratitude to all the people who

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made my stay at the U.S. Universities of Berkeley and Stanford so valuable during spring 2007, most notably Prof. Dr. Robert Rabin, Stanford University, Prof. Dr. Stephen Sugarman, U.C. Berkeley, Prof. Dr. Daniel Farber, U.C. Berkeley and the late so-called “climate warrior” Prof. Dr. Stephen Schneider, Stanford University.

I also thank the Assessment Committee composed of Prof. Dr. Marjan Peeters, Maastricht University, Prof. Dr. Joyeeta Gupta, Vrije Universiteit Amsterdam / UNESCO-IHE and Prof. Dr. Jaap Spier, Advocate General at the Supreme Court of the Netherlands, for reading and commenting on my Ph.D.

Finally, I thank my family, my partner and my friends, for all their invaluable support, patience and thus contribution to the realization of this book over the course of the past years.

Miriam Haritz  
Cologne, December 2010

## List of Abbreviations

AOSIS	Alliance of Small Island States
ATCA	Aliens Tort Claim Act
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	The Ad Hoc Working Group on Long-term Cooperative Action under the Convention
BBK	Bundesamt für Bevölkerungsschutz und Katastrophenhilfe (Federal Office of Civil Protection and Disaster Assistance, Germany)
BGB	Bürgerliches Gesetzbuch
BMU	Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety)
BSE	Bovine Spongiform Encephalopathy (the so-called <i>Mad Cow</i> Disease)
C	Celsius, centigrade
CC	Climate Change
CCAs	Climate Change Agreements
CCS	Carbon Capture and Storage
CEC	Commission of the European Communities
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act (USA)
CERT	Carbon Emissions Reduction Target
CFCs	Chlorofluorocarbon
CH <sub>4</sub>	Methane
CJD	Creutzfeld-Jakob-Disease (the human variant of BSE)

## *List of Abbreviations*

CO <sub>2</sub>	Carbon Dioxide
CoP	Conference of the Parties (to the UNFCCC)
DES	Diethylstilboestrol
DKKV	Deutsches Komitee Katastrophenvorsorge e.V. (German Committee for Disaster Reduction)
EC	European Communities
ECHR	European Court of Human Rights
EEA	European Environment Agency
EC	European Community
ECJ	European Court of Justice
ECT	Treaty establishing the European Community
EPA	Environmental Protection Agency (USA)
ETH	Eidgenössische Technische Hochschule (Swiss Federal Institute of Technology, Zurich)
ETS	Emissions Trading Scheme (in the European Union EU ETS)
EU	European Union
FSM	Federated States of Micronesia
GWP	Global Warming Potential
G7	Group of seven major industrial nations (France, Germany, Italy, UK, USA, Canada).
G8	Informal group of eight countries: G7 + Russia
G77	Informal group of 77 founding developing countries (by now including 130 developing countries)
GDP	Gross Domestic Product
GHG	Greenhouse Gas
GMO	Genetically Modified Organisms
HFCs	Hydrofluorocarbons
HMT	Her Majesty's Treasury (UK)
IACHR	Inter-American Court of Human Rights
ICCF	The International Council for Capital Formation
ICTM	International Center for Toxicology and Medicine (USA)
ICJ	International Court of Justice
IEA	International Energy Agency
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
ISA	International Studies Association
ISDR	International Strategy for Disaster Reduction
KNMI	Koninklijk Nederlands Meteorologisch Instituut (Royal Netherlands Meteorological Institute)
MoP	Members of the Protocol (the Kyoto Protocol as attached to the UNFCCC)
MTBE	Methyl-T-Butyl-Ether (fuel oxygenate responsible for drinking water contamination)
N.A.	Not applicable



NASA	National Aeronautics and Space Administration (USA)
NCDC	National Climatic Data Centre (USA)
N <sub>2</sub> O	Nitrous Oxide
NO <sub>x</sub>	Nitrogen Oxide
NWO	Nederlandse Organisatie voor Wetenschappelijk Onderzoek (Netherlands Organisation for Scientific Research)
OAS	Organization of American States
ODP	Ozone Depletion Potential
ODS	Ozone Depleting Substance
OECD	Organisation for Economic Co-operation and Development
PCBs	Polychlorinated Biphenyls
PFCs	Perfluorocarbons
PP	Precautionary Principle
PPM	Parts per Million (quantification of atmospheric CO <sub>2</sub> concentration)
R&D	Research and Development
SBSTA	Subsidiary Body for Scientific and Technological Advice (UNFCCC)
SF <sub>6</sub>	Sulfur Hexafluoride
SME	Small- and Medium-Sized Enterprise
SO <sub>2</sub>	Sulfur Dioxide
SRU	Sachverständigenrat für Umweltfragen (The German Advisory Council on the Environment)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union (New article numbering following the ECT after the Lisbon Treaty)
UK	United Kingdom
UKMO	United Kingdom Meteorological Office
UN	United Nations
UNCED	United Nations Conference on Environment and Development (3-14 June 1992, Rio de Janeiro, Brazil)
UNEP	United Nations Environment Program
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFSA	United Nations Fish Stocks Agreement
UNU-EHS	United Nations University, Institute for Environment and Human Security
U.S.	United States
USA	United States of America
VAM	Vulnerability, Adaptation and Mitigation
WBGU	Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderungen (German Advisory Council on Global Change)

*List of Abbreviations*

WHO	World Health Organization
WMO	World Meteorological Organization
WRR	Wetenschappelijke Raad voor het Regeringsbeleid (Dutch Scientific Council for Government Policy)
WTO	World Trade Organization
WWF	World Wide Fund For Nature
WWW	World Wide Web

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