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## Russia

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### (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).<sup>1</sup> The Civil Code 1994 (the 'Civil Code'),<sup>2</sup> 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 decisions<sup>3</sup> of the higher courts are frequently followed.

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<sup>1</sup> W. E. Butler, *Russian Law*, 2nd edn (Oxford University Press, 2003) ('Butler'), Ch. 15, § 3; see also W. Partlett, 'Reclassifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field', *Columbia Journal of Eastern European Law*, 2 (2008), 1 (available at <http://ssrn.com/abstract=1197762>); and D. J. B. Shaw, *Russia in the Modern World: A New Geography* (Oxford: Blackwell, 1999).

<sup>2</sup> Part I of the Civil Code of the RF № 51-FZ, 30 November 1994; Part II of the Civil Code of the RF № 14-FZ, 26 January 1996; Part III of the Civil Code of the RF № 146-FZ, 26 November 2001; and Part IV of the Civil Code of the RF № 230-FZ, 18 December 2006.

<sup>3</sup> See [www.garant.ru](http://www.garant.ru) or information bulletins of the Supreme Arbitrary Court and Supreme Court of Russian Federation.

- 18.2 The supreme source of Russian law is the 1993 Constitution of the Russian Federation (the 'Constitution').<sup>4</sup> 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),<sup>5</sup> 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')<sup>6</sup> 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.<sup>7</sup>

<sup>4</sup> 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).

<sup>5</sup> Federal Law № 200-FZ 'The Forest Code of the Russian Federation', 4 December 2006, as amended on 22 June 2010.

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

<sup>7</sup> See further S. Nystén-Haarala, 'Mechanics to Promote Green Business in Russia', in W. Th. Douma and F. M. Mucklow (eds.), *Environmental Finance and Socially Responsible Business in Russia: Legal and Practical Trends* (The Hague: Asser Press, 2010) ('Mucklow'), p. 106; V. Leksin, 'The New Russian Federalism' in P. H. Solomon Jr (ed.), *The Dynamics of 'Real Federalism': Law, Economic Development, and Indigenous Communities in Russia and Canada* (Centre for Russian and East European Studies, University of Toronto, 2004) ('Real Federalism'); V. Kriukov, V. Seliverstov and A. Tokarev, 'Federalism and Regional Policy in Russia: Problems of Socio-Economic Development of Resource Territories

*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.<sup>8</sup> It has a population of approximately 142 million<sup>9</sup> 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*.<sup>10</sup>

## Environmental awareness and education

- 18.7 Partly due to the low level of environmental awareness and education,<sup>11</sup> 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.<sup>12</sup> However, the Government and

and Subsoil Use' in *Real Federalism*; and M. M. Brinchuk, *Ekologicheskoe pravo* (Uchebnik, Moskva: Vyshee obrasovanie, 2005).

<sup>8</sup> See F. Mucklow and W. Th. Douma, 'Environmental Finance and Socially Responsible Business in Russia – An Introduction', above n. 7, Mucklow, p. 1; and R. Perelet, S. Pegov and M. Yulkin, Climate Change: Russia Country Paper, *Human Development Report 2007/2008*, 'Fighting Climate Change: Human Solidarity in a Divided World', Human Development Report Office, Occasional Paper (Moscow: UNDP, December 2007), p. 2.

<sup>9</sup> 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').

<sup>10</sup> 'EIU Russia Forecast 2010'; Transparency International, *Annual Report 2010* (Transparency International, July 2010), p. 49.

<sup>11</sup> T. Guseva, 'Environmental Education and Capacity Building in Russia', above n.7, Mucklow, p. 133.

<sup>12</sup> W. Douma, M. Kozeltsev and J. Dobrolyubova, 'Russia and the international climate change regime' in S. Oberthür and M. Pallemerts (eds.) with C. Roche Kelly, *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (Brussels: VUB Press, 2010); and J. P. Milhone, *Russia's Fires Breathe New Life into Climate Picture* (Carnegie Endowment for International Peace, Commentary, 16 August 2010).

NGOs<sup>13</sup> are trying to increase environmental awareness, including awareness of the negative effects of climate change.<sup>14</sup>

#### 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.<sup>15</sup> 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<sup>16</sup> 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),<sup>17</sup> and participated in the negotiations for a new global agreement on

<sup>13</sup> E.g. A. O. Kokorin and E. V. Smirnova, *Izmenyeniye Klimata: Posobiye dlya pedagogov starshih klassov* (Moscow: WWF Russia, 2010).

<sup>14</sup> See J. D. Oldfield, A. Kouzmina and D. J. B. Shaw, 'Russia's Involvement in the International Environmental Process: A Research Report', *Eurasian Geography and Economics*, 44(2) (2003), 157–68; and W. Douma and D. Ratsiborinskaya, 'The Russian Federation and the Kyoto Protocol' in W. Douma, L. Massai and M. Montini (eds.), *The Kyoto Protocol and Beyond: Legal and Policy Challenges of Climate Change* (The Hague: Asser Press, 2007), pp. 135–45.

<sup>15</sup> 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.

<sup>16</sup> <http://climate2008.igce.ru/v2008/htm/index00.htm>.

<sup>17</sup> L. A. Henry and L. McIntosh Sundstrom, 'Russia and the Kyoto Protocol: Seeking an Alignment of Interests and Image', *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.<sup>18</sup> 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)<sup>19</sup> 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.<sup>20</sup>

Sundstrom (eds.), *Global Commons, Domestic Decisions: The Comparative Politics of Climate Change* (Cambridge, MA: MIT Press, 2010); S. Agibalov and A. Kokorin, 'Copenhagen Agreement – A New Paradigm for the Climate Challenge Solution', *Vaprosi Ekonomiki*, RAN, 9 (2010).

<sup>18</sup> A. Moe and K. Tangen, *The Kyoto Mechanisms and Russian Climate Politics* (London: The Royal Institute of International Affairs, Energy and Climate Programme, 2000), p. 2.

<sup>19</sup> [http://unfccc.int/files/meetings/application/pdf/russiacphaccord\\_applengl.pdf](http://unfccc.int/files/meetings/application/pdf/russiacphaccord_applengl.pdf).

<sup>20</sup> See also M. Gutbrod, S. Sitnikov and E. Pike-Biegunska, *Trading in Air: Mitigating Climate Change through the Carbon Markets* (Moscow: Infotropic, 2010) ('Gutbrod/Sitnikov/Pike-Biegunska'), Ch. 4.

- 18.14 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').<sup>21</sup>

*Climate change laws and policy*

- 18.15 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; and
  - (2) specific laws relating to the implementation of the FCCC and the Kyoto Protocol ('Kyoto legislation').
- 18.16 There is no real overlap between these two categories of law. For example, the Law on Air Protection 1999 ('LAP')<sup>22</sup> has not been updated to regulate GHG emissions, nor has it been linked to Russia's international obligation to mitigate climate change.
- 18.17 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

- 18.18 Under Soviet law, environmental law was administrative in nature and the State owned almost everything (including all natural resources and means of production).<sup>23</sup> The law only regulated how this property was to be used and protected. The biggest

<sup>21</sup> Personal communication from Alexey Kokorin, WWF Russia, Moscow, 23 November 2010.

<sup>22</sup> Federal Law № 96-FZ 'On Atmospheric Air Protection', 4 May 1999, amended on 27 December 2009, № 374-FZ.

<sup>23</sup> Nystén-Haarala, above n. 7, Mucklow, p. 104.

emphasis was placed on natural resources, and laws were usually classified according to the type of resource being regulated (forests, water, agriculture etc.).<sup>24</sup> 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:<sup>25</sup>
- the Constitution;<sup>26</sup>
  - multilateral environmental agreements (as ratified);<sup>27</sup>
  - Environmental Protection Law ('EPL');<sup>28</sup>
  - Water Code 2006 ('Water Code');<sup>29</sup>
  - LAP;
  - Forest Code;
  - Law on Fauna 1995;

<sup>24</sup> *Ibid.*; and I. A. Ikonickaya, *Zemelnoe Provo Rossiiskoi Federacii* (Moscow: Iurist, 2002).

<sup>25</sup> 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.

<sup>26</sup> 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').

<sup>27</sup> 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).

<sup>28</sup> Federal Law № 7-FZ 'On the Protection of the Environment', 10 January 2002, amended by № 374-FZ on 27 December 2009.

<sup>29</sup> Federal Law № 74-FZ 'The Water Code of the Russian Federation', 3 June 2006, as amended on 23 July 2008 № 160-FZ.

- Law on Subsoil Resources 1992;
  - Law on Payment for Land 1991;
  - Law on Environmental Expertise 1995;
  - Law on Licensing of Various Functions 2001; and
  - Law on the Protection of Juridical Persons and Entrepreneurs in Applying State Control 2001.
- 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).<sup>30</sup>
- 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).<sup>31</sup>
- 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.<sup>32</sup>
- 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.<sup>33</sup> It is unlikely that the courts will adopt this doctrine in the near or mid-term future.

<sup>30</sup> Federal Law № 195-FZ ‘Code on Administrative Offences of the Russian Federation’, 30 December 2001, as amended on 29 December 2010 (‘Administrative Code’).

<sup>31</sup> Articles 8(21) and 8(22), Administrative Code.

<sup>32</sup> Nystén-Haarala, above n. 7, Mucklow, p. 107.

<sup>33</sup> M. Wood, ‘Atmospheric Trust Litigation Across the World’ in K. Coghill (ed.), *Fiduciary Duty and the Atmospheric Commons* (Australia: Ashgate Publishing, forthcoming, [www.law.uoregon.edu/faculty/mwood/forlawyers.php](http://www.law.uoregon.edu/faculty/mwood/forlawyers.php)), p. 7.



## Principal human rights laws

- 18.26 The subject of individual human rights in Russia is controversial.<sup>34</sup> 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’.<sup>35</sup>
- 18.27 Principal human rights laws that might be applied in climate change liability proceedings are:
- the Constitution;<sup>36</sup>
  - human rights conventions (as ratified);<sup>37</sup>
  - the EPL;<sup>38</sup>
  - the Law ‘On Guarantees of the Rights of Numerically Small Indigenous Peoples of the Russian Federation’;<sup>39</sup>
  - 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’;<sup>40</sup>
  - the Law ‘On Territories of Traditional Nature Use of Numerically Small Indigenous Peoples of the North, Siberia and Far East of the Russian Federation’;<sup>41</sup> and
  - various codes (e.g. the Land Code, the Water Code and the Forest Code) applicable to indigenous peoples’ rights.<sup>42</sup>

<sup>34</sup> See J. Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, on the situation of indigenous peoples in the Russian Federation*, 23 June 2010 (UNGA, A/HRC/15/37/Add.5, available at <http://unsr.jamesanaya.org/PDFs/Russia%20Report%20EN.pdf>) (‘UNGA Report’), p. 5; *Report by Alvaro Gil-Robles on his Visits to the Russian Federation* (Council of Europe, Commissioner for Human Rights, 20 April 2005).

<sup>35</sup> B. Bowring, ‘Russia and Human Rights: Incompatible Opposites?’, *Göttingen Journal of International Law*, 1(2) (2009), 257–78, at 259.

<sup>36</sup> Chapter 2 (Rights and Freedoms of Man and Citizen).

<sup>37</sup> 1948 Universal Declaration of Human Rights (signed, not ratified); 1966 International Covenant on Civil and Political Rights (ratified, 1973; Optional Protocol ratified, 1991); 1966 International Covenant on Economic, Social and Cultural Rights (ratified, 1973); 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’) (ratified, 1998).

<sup>38</sup> Article 3.

<sup>39</sup> Federal Law № 82-FZ, 30 April 1999, as amended on 5 April 2009.

<sup>40</sup> Federal Law № 104-FZ, 20 July 2000, as amended on 2 February 2006.

<sup>41</sup> Federal Law № 49-FZ, 7 May 2001, as amended on 3 December 2008.

<sup>42</sup> C. Henriksen, ‘Indigenous peoples and industry. Complex co-existence in the Barents Euro-Arctic Region’ in A. Staalesen (ed.), *Talking Barents: People, Borders and regional cooperation, Barents Review 2010* (Kirkenes: Norwegian Barents Secretariat, 2010), pp. 97–107, available at [www.barents.no/index.php?cat=141647](http://www.barents.no/index.php?cat=141647) (‘Henriksen’), pp. 98–9;

**ECHR**

- 18.28 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').<sup>43</sup> To date, there has only been one air pollution related case, namely *Fadeyeva v. Russia*.<sup>44</sup> Domestic implementation of ECtHR decisions was not straightforward until February 2010, when the Constitutional Court adopted a decision<sup>45</sup> which altered Article 392 of the Civil Code to the effect that ECtHR decisions must be implemented.
- 18.29 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'.<sup>46</sup>

**Indigenous peoples**

- 18.30 There are over 160 distinct peoples in Russia, making it one of the most ethnically diverse countries in the world.<sup>47</sup> 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).<sup>48</sup>

See also I. Øverland, 'Indigenous Rights in the Russian North' in *Russia and the North* (University of Ottawa Press, 2009); 'Conference on Indigenous Constitutional Rights in Russia: Summary', *Indigenous Peoples Issues & Resources* (11 January 2010).

<sup>43</sup> E.g. 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/](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/)).

<sup>44</sup> Application No. 55723/00, ECHR 09-06-2005.

<sup>45</sup> Resolution of the Constitutional Court of the Russian Federation, 26 February 2010, № 4-P 'On the Constitutionality of Clause 2 of Article 392 of the Civil Procedure Code of the Russian Federation'.

<sup>46</sup> V. Lukin, *The Report of the Commissioner for Human Rights in the Russian Federation for the Year 2006* (13 April 2007).

<sup>47</sup> Above n. 34, *UNGA Report*, p. 5.

<sup>48</sup> 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).

- 18.31 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'.<sup>49</sup> It is described as an ambitious and a comprehensive document,<sup>50</sup> however, the effectiveness of the implementation of the laws relating to indigenous peoples' rights has been criticised.<sup>51</sup> 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.<sup>52</sup>

#### Human rights litigation

- 18.32 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

- 18.33 The courts tend to be very reluctant to apply international law in the guise of 'general principles of law recognised by nations',<sup>53</sup> unless they have been formally incorporated into Russian law.
- 18.34 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.

<sup>49</sup> Decree of the Government of the Russian Federation № 132-r 'On the Concept paper on the Sustainable Development of Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation', 4 February 2009.

<sup>50</sup> Above n. 34, *UNGA Report*, p. 8. <sup>51</sup> *Ibid.*, p. 7.

<sup>52</sup> As regards indigenous peoples' challenges relating to implementation of their environmental rights, see O. O. Mironov, 'Экология и нарушение прав человека. Специальный доклад Уполномоченного по правам человека в Российской Федерации' (ЭКОС-Информ. – №2. – 2003), available at [www.ecoculture.ru/ecolibary/art\\_18.php](http://www.ecoculture.ru/ecolibary/art_18.php).

<sup>53</sup> Article 38(1)(c), 1946 Statute of the International Court of Justice.

## Kyoto legislation

- 18.35 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).
- 18.36 **Climate Doctrine 2009.** The Climate Doctrine was adopted in 2009 and signed by President Medvedev in early 2010.<sup>54</sup> 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.
- 18.37 **Energy efficiency.** The Russian energy efficiency policy is set out in the current 'Energy Strategy through 2030' ('Energy Strategy').<sup>55</sup> The Energy Strategy makes it clear that the improvement of energy efficiency is viewed as a vital part of economic policy<sup>56</sup> 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.<sup>57</sup>
- 18.38 There are various codes and laws which address energy efficiency in Russia.<sup>58</sup> These are as follows.

<sup>54</sup> Order of the RF President № 861-rp 'On the Climate Doctrine of the Russian Federation', 17 December 2009 ('Climate Doctrine').

<sup>55</sup> Order of the RF Government № 1715-p 'On the Energy Strategy through 2030', 13 November 2009.

<sup>56</sup> See Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects PEEREA *Russian Federation: Regular Review of Energy Efficiency Policies 2007* (Brussels: Energy Charter Secretariat, December 2007) ('Energy Efficiency Review'), available at [www.encharter.org/fileadmin/user\\_upload/document/EE\\_rr\\_Russia\\_2007\\_ENG.pdf](http://www.encharter.org/fileadmin/user_upload/document/EE_rr_Russia_2007_ENG.pdf).

<sup>57</sup> Decision of the RF Government № 1234-p, 28 August 2003 (ES-2020).

<sup>58</sup> See *Energy Efficiency Review*, p. 17.

- 18.39 The Law On Energy Efficiency and Changes into Some Legislative Acts of the Russian Federation 2009 ('Energy Efficiency Law')<sup>59</sup> 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,<sup>60</sup> 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.
- 18.40 **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;<sup>61</sup>
  - Regulations On Implementation of Article 6 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2009 ('JI Regulations').<sup>62</sup>
- 18.41 The JI Regulations provide the guidelines and rules relating to JI projects in Russia.<sup>63</sup> 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.<sup>64</sup> However, none of the Kyoto-related laws and regulations address liability for causing (or failing to mitigate) climate change.
- 18.42 An attempt to establish liability for contribution to climate change could, in theory, be based upon a combination of the above two

<sup>59</sup> Federal Law № 261-FZ, 23 November 2009, as amended on 27 July 2010.

<sup>60</sup> Federal Law № 190-FZ, 27 July 2010.

<sup>61</sup> Decree of the RF Government № 843 'On Measures to Implement Article 6 of Kyoto Protocol to the United Nations Framework Convention on Climate Change', 28 October 2009.

<sup>62</sup> *Ibid.*

<sup>63</sup> Above n. 20, Gutbrod/Sitnikov/Pike-Biegunska, Ch. 3; M. Yulkin, 'Involving Russian Business in Kyoto', above n. 7, Mucklow, pp. 189–201.

<sup>64</sup> 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.<sup>65</sup> 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

<sup>65</sup> 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 ground-water contamination from toxic waste, poor urban solid waste management and abandoned stocks of obsolete pesticides.<sup>66</sup>
- 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).<sup>67</sup>

#### *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

<sup>66</sup> See Central Intelligence Agency (CIA), *World Factbook: Russia* (as at September 2010), at <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html>.

<sup>67</sup> Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), *Russian Federation: Regular Review of Energy Efficiency Policies 2007*, p. 46.

precipitation patterns, the spread of disease and the increased incidence of drought, flooding and other extreme weather events.<sup>68</sup> 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.<sup>69</sup>

- 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,<sup>70</sup> 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.<sup>71</sup>
- 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 CO<sub>2</sub> (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.

<sup>68</sup> National Intelligence Council, *Russia: Impact of Climate Change to 2030: A Commissioned Research Report* (Special Report NIC 2009–04D, April 2009), pp. 3 and 8.

<sup>69</sup> *Ibid.*

<sup>70</sup> According to the Ministry of Agriculture, this equates to 26 billion roubles (approximately US\$859 million) of damage (experts' investigation in 18 Regions); see [www.mk.ru/incident/news/2010/10/12/535998-za-leto-v-rossii-byilo-unichtozhenno-30-posevov-zerna.html](http://www.mk.ru/incident/news/2010/10/12/535998-za-leto-v-rossii-byilo-unichtozhenno-30-posevov-zerna.html); <http://en.rian.ru/russia/20100814/160200814.html>; and <http://en.rian.ru/russia/20100810/160134883.html>.

<sup>71</sup> 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,<sup>72</sup> 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.<sup>73</sup> The year 2009 saw a nearly 50 per cent drop in FDI,<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> Thus, governmental and regulatory activities are more likely to

<sup>72</sup> 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.

<sup>73</sup> United Nations Development Programme, *The National Human Development Report in Russia 2010* (Moscow: UNDP, 2010).

<sup>74</sup> Above n. 9, *EIU Russia Forecast 2010*, 'Russia: Foreign direct investment: Stocks and flows'.

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

<sup>76</sup> 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<sup>77</sup> 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’ (*неотчуждаемые/основные права человека*)<sup>78</sup> of the claimant had been violated,<sup>78</sup> 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

<sup>77</sup> Federal Law № 18-FZ ‘On Introducing Amendments to Certain Legislative Acts of the Russian Federation’, 10 January 2006 (known as the ‘NGO Law’), which amended the Civil Code, the Law on Public Associations 1995, the Law on Non-profit Organisations 1996, and the Law on Closed Administrative Territorial Formations.

<sup>78</sup> 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;<sup>79</sup>
  - individuals;<sup>80</sup>
  - companies;<sup>81</sup> or
  - environmental NGOs.<sup>82</sup>
- 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.<sup>83</sup>
- 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’<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> However, to date, to the authors’ knowledge, no such actions have been brought in the Russian courts alleging liability for climate change.

<sup>79</sup> Article 5, EPL.    <sup>80</sup> Article 11(2), EPL.

<sup>81</sup> Under Article 62(3) of the Constitution, foreign and Russian Parties are accorded equal treatment in Russian court proceedings.

<sup>82</sup> Article 12(1), EPL.

<sup>83</sup> 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 ГКПИ09–1767 ‘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’.

<sup>84</sup> Federal Law № 205, 19 July 2009.

<sup>85</sup> Federal Law № 95-FZ ‘The Arbitration Procedural Code of the Russian Federation’, 24 July 2002, as amended on 27 July 2010.

<sup>86</sup> *Ibid.*, Article 225(1) and (2).

*Basic legal principles of public law review*

- 18.66 Under the Constitution,<sup>87</sup> 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/freedoms and the claimants concerned.
- 18.67 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.
- 18.68 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.
- 18.69 Thus, decisions, acts and failures to act on the part of governmental or public bodies may be reviewed or challenged in the courts.<sup>88</sup> 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.

## Court system

- 18.70 The judicial system is comprised of the Constitutional Court, civil courts, *arbitrazh* courts and military tribunals.<sup>89</sup> Private parties and NGOs have standing in such courts. The *arbitrazh* courts have jurisdiction over proceedings involving legal entities and

<sup>87</sup> Article 46(1) and (2).

<sup>88</sup> Chapter XIV, EPL, on environmental liability.

<sup>89</sup> 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](http://www.supcourt.ru/vscourt_detale.php?id=1528&w[]=%D0%E0%E4%F7%E5%ED%EA%EE).

business persons.<sup>90</sup> 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.<sup>91</sup> 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

<sup>90</sup> It is noted that the *arbitrazh* courts in Russia are the courts where commercial matters are heard. They differ from the courts where actual arbitration takes place (e.g. the International Commercial Arbitration Court (MKAS)).

<sup>91</sup> Federal law № 59-FZ, 2 May 2006, as amended on 29 June 2010.

emissions, water discharge and waste disposal, and for the handling of hazardous waste.<sup>92</sup>

- 18.74 Under the Federal Law ‘On Complaining to Court About Activities and Decisions which Violate the Rights and Freedoms of Citizens’,<sup>93</sup> 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.<sup>94</sup>
- 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.<sup>95</sup> 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.<sup>96</sup>

<sup>92</sup> See Articles 3 and 30, EPL and other environmental laws and sub-laws.

<sup>93</sup> Federal Law № 4866–1, 27 April 1993, as amended on 9 February 2009.

<sup>94</sup> 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.

<sup>95</sup> 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.

<sup>96</sup> See V. Sapozhnikova, *Environmental Protection in Russia*, pp. 183–8, at [www.inece.org/conference/7/vol1/Sapozhinikova.pdf](http://www.inece.org/conference/7/vol1/Sapozhinikova.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).

- 18.82 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.
- 18.83 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*

- 18.84 Generally, potential claims between private parties with respect to climate change liability face similar issues to those under public law.
- 18.85 Individuals<sup>97</sup> (including individuals as participants in class actions), NGOs<sup>98</sup> and governmental bodies (federal, regional, local and municipal governments)<sup>99</sup> could potentially make a claim for climate change liability before the courts.<sup>100</sup> 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.
- 18.86 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*

- 18.87 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

<sup>97</sup> Articles 3 and 4, CPC. <sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* <sup>100</sup> 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.<sup>101</sup> 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

<sup>101</sup> 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'<sup>102</sup> 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 ('Criminal Code')<sup>103</sup> 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',<sup>104</sup> 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)

<sup>102</sup> № 119-FZ, 7 August 2001, as amended on 30 December 2008.

<sup>103</sup> Federal Law № 63-FZ 'Criminal Code of the Russian Federation', 13 June 1996, as amended on 4 October 2010 (№ 270-FZ).

<sup>104</sup> businessGreen, *Climate risks could make emerging markets 'uninsurable'* (1 December 2010), at [www.businessgreen.com/bg/news/1929033/climate-risks-emerging-markets-uninsurable](http://www.businessgreen.com/bg/news/1929033/climate-risks-emerging-markets-uninsurable).

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(1)). 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;<sup>105</sup>
  - economic damage;<sup>106</sup> and
  - social damage.<sup>107</sup>
- 18.104 The general framework relating to damages, compensation and remedies is set out in Chapter 59 of the Civil Code.

<sup>105</sup> Article 8(21), Administrative Code.

<sup>106</sup> Article 14, EPL.

<sup>107</sup> Article 18, Federal Law № 68-FZ ‘On Protection of Population and Territories from Environmental and Man-caused emergency situations’, 21 December 1994.

*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.<sup>108</sup> 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,

<sup>108</sup> Federal Law № 135-FZ 'On Competition Protection', 26 July 2006, as amended on 29 November 2010.

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

- 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’.<sup>112</sup>

#### *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.

<sup>109</sup> E.g. Article 32, LAP.

<sup>110</sup> Presidential Decree № 236 ‘Concerning the State Strategy of the Russian Federation for the Protection of the Environment and the Ensuring of Sustainable Development’, 4 February 1994; Presidential Decree № 440 ‘Concerning the Concept for the Transition of the Russian Federation to Sustainable Development’, 1 April 1996; and see 1998 draft ‘Strategy for Sustainable Development’.

<sup>111</sup> Nystén-Haarala, above n. 7, Mucklow, p. 105.

<sup>112</sup> S. A. Vogoliobov, *Ecological Law (Экологическое право)* (Moscow: HORMA, 2001), Учебник для вузов, [www.bibliotekar.ru/ecologicheskoe-pravo-1/77.htm](http://www.bibliotekar.ru/ecologicheskoe-pravo-1/77.htm); see also (E) ‘Soft’ law above, at para. 18.114 ff.

- 18.113 The penalties for ecological crimes include fines, confiscation of property, obligatory works, imprisonment and limitations to hold certain official positions.<sup>113</sup> Most criminal cases, including any ecological crimes, are tried in the district (*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.<sup>114</sup>

*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.

European Union

- 18.116 In 1994, Russia and the European Union concluded a Partnership and Cooperation Agreement ('PCA').<sup>115</sup> 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.<sup>116</sup> 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.

<sup>113</sup> Above n. 1, Butler, p. 549.

<sup>114</sup> G. Ginsburgs, R. Clark and F. Feldbrugge, *International and National Law in Russia and Eastern Europe* (The Hague: Kluwer Law International, 2001), p. 462.

<sup>115</sup> EU-Russia Partnership and Co-operation Agreement, 24 June 1994; EIF, 30 October 1997.

<sup>116</sup> 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](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118284.pdf)).

## OECD

- 18.117 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*

- 18.118 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.<sup>117</sup> Furthermore, there is the fundamental difficulty of identifying which forum would have jurisdiction in such proceedings.
- 18.119 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*

- 18.120 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.<sup>118</sup> Non-residents in Russia have all the rights and responsibilities of residents under the law, except insofar as is specifically stated in federal law.

<sup>117</sup> 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](http://www.icj-cij.org/docket/index.php?p1=3&code=GR&case=140&k=4d)).

<sup>118</sup> Federal Law № 115-FZ, 25 July 2005, as amended on 28 September 2010.



*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,<sup>119</sup> 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.

#### *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.<sup>120</sup> This is not to be confused with parliamentary immunity, a notion from constitutional law,<sup>121</sup> giving private persons – deputies and senators – the privilege to enjoy immunity from prosecution for (alleged) administrative or criminal offences.<sup>122</sup> In general, however, it is unusual for a government or public institution to be sued in court, in particular with respect to environmental matters.

#### (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.

<sup>119</sup> Centre for Environmental Information (EcoInfoCentre), St Petersburg (see [www.ecocentrum.ru](http://www.ecocentrum.ru)).

<sup>120</sup> 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).

<sup>121</sup> Article 98, Constitution.

<sup>122</sup> Federal Law № 3-FZ, (see n. 120 above).