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Reports & Essays on Climate Change Litigation

Edited by
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Reports & Essays on Climate Change Litigation, edited by Elena D'Alessandro and Davide Castagno

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Foreword

The so-called "Last Judgment" – i.e. the claim against the Italian Government supported by more than 200 activists – has marked the beginning of climate change litigation in Italy, a worldwide phenomenon that has grown exponentially in recent years.

Obviously, the aim of this kind of litigation is not to burden the courts with the task of finding a solution to climate change, but rather to push national governments to protect the environment, within a global framework of strategic litigation. Nevertheless, from a procedural point of view, this kind of litigation raises several procedural issues, like legal standing, forum choice and burden of proof, which involves complicated scientific issues. Moreover, in climate change disputes, justiciability itself is a stake, as the courts are often required to be involved in political matters, which should instead be the responsibility of the legislative and executive branches of government.

In this perspective, we took the initiative to organise a comparative workshop on climate change litigation, to deepen these aspects in a friendly, international environment, made up of young academics and researchers, presenting national and international climate cases, procedural concerns and other interesting related topics.

This book contains the proceedings of the workshop, which took place in Turin on 9th June 2023, jointly organised by the University of Turin and the Universidade Católica Portuguesa, as part of the Law Schools Global League (LSGL).

The first part of the book is dedicated to country reports on climate change litigation and is divided into two sections. The first section opens with a very interesting summary of the Italian case *Giudizio Universale*, presented from the inside perspective of Luca Saltalamacchia, the lawyer representing, with other colleagues, the plaintiffs who sued the Italian government before the Court of Rome. The contribution by Gianni Ghinelli (University of Bologna) also focuses on the same case,

providing the reader with an overview of the problem of the justiciability of climate change litigation in Italy. The section then moves on to an in-depth analysis of some other relevant cases that occurred across Europe. In particular, the decision of the Irish Supreme Court in *Climate case Ireland* is discussed by Rónán Kennedy and Maeve O'Rourke, from the University of Galway, and Cassie Roddy-Mullineaux, solicitor at AWO Agency. The case of *Klimatická žaloba*, the first Czech strategic climate lawsuit, is then presented by Eva Balounová (Institute of State and Law of the Czech Academy of Sciences), with a focus on the cross-fertilisation of court decisions in climate change litigation. The analysis of the Swiss *KlimaSeniorinnen* case concludes the session, with a very detailed and informative report on this case, currently pending before the European Court of Human Rights, made by Geraldine Cattilaz from the University of Fribourg.

The second section, in contrast, focuses on climate change litigation across the world and opens with the challenge to authority and forging accountability in the case of *EarthLife Africa Johannesburg*, presented by Saajidah Patel from the University of Pretoria. The section also includes a contribution by Monika Feigerlová (Institute of State and Law of the Czech Academy of Sciences) on the petition to the Commission on Human Rights of the Philippines made by *In re Greenpeace Southeast Asia*, discussing how a national human rights body can uncover climate-related corporate responsibility, between extraterritoriality and human rights due diligence.

The second part of the book, on the other hand, presents some essays that address interesting topics related to climate change litigation. The contributions of the editors, Elena D'Alessandro and Davide Castagno, open this part, addressing respectively potential long-term impact of vertical climate actions and the problem of claimants' legal standing in such actions. Eleonora Ebau (University of Turin) then focuses on the costs in climate change disputes, investigating the possibility of third-party funding in this field, while the contribution of Ana Filipa Morais Antunes (Catholic University of Portugal, School of Lisbon) deals with "contract design" in climate change litigation.

Finally, the conclusions of Professor Armando Rocha, chair of the LSGL Environmental Regulation Research Group, enrich the volume, deepening the role of courts as agents of change in climate litigation and presenting further food for thought.

The editors extend their heartfelt gratitude to the workshop participants who have chosen to contribute to this publication initiative. They

sincerely hope that this book will serve as a launching pad for further research on the topic, benefiting colleagues and researchers alike.

A special thank goes to the LSGL Environmental Regulation Research Group and the Law Department of the University of Turin for their invaluable support in bringing this project to fruition.

Elena D'Alessandro and Davide Castagno

Part I
Country Reports

Section 1
Climate Change Litigation Across Europe

Luca Saltalamacchia*

Giudizio Universale: Insights from a Pending Leading Case

1. *Introduction*

Giudizio Universale is a strategic case seeking an order to reduce emissions in compliance with the 2015 Paris Agreement temperature targets. This paper shares insights from the case, currently pending before the Court of first instance of Rome, discussing how the legal team is overcoming key substantive and procedural law hurdles[1].

Para. 2 provides a factual and personal background to the case. Para. 3 explores the causal link in strategic litigation against governments. Para. 4 deals with the burden of proof and the fascinating cooperation between lawyers and scientists in a matter as complex as climate change. Para. 5 explains the plaintiffs'arguments to establish standing. Para. 6 presents the idea that, under the Italian Constitution, it is possible to recognise the implied right to a safe and stable climate.

2. *Background Considerations*

"*Giudizio Universale*" is the name that marks the campaign in support of the first climate lawsuit launched against the Italian state; by extension, it also stands for the actual litigation pending before the Civil Court of Rome.

* Luca Saltalamacchia (Rete Legalità per il Clima) is the Italian lawyer representing, with other colleagues, the NGO A Sud and the individual plaintiffs who sued the Italian government before the *Tribunale di Roma* in the historical case nicknamed *Giudizio Universale*.

1. For the sake of clarity, it must be stressed that all information discussed hereafter are based only on the summons, which was published on the website of the "A Sud" association www.asud.net (accessed on 31 August 2023). Other court documents are confidential and will not be discussed.

How does this litigation arise? It should be premised that Italy is a "climate hot spot"; recalling the words of the *Consiglio Nazionale delle Ricerche*,

> climate change is not the same in all areas of the Earth. There are "hot spots" areas that are warming more rapidly than others, causing important variations in mean values and inter-annual variability of temperature and precipitation to be observed.

If the planet has overheated – compared to the late 1800s – by about 1.2°C, things are worse in Italy, as the average increase in temperatures stands at about 2.4°C, twice the world average temperature.

It is, therefore, all to see that climate impacts plague our country: in recent months, we have witnessed a severe drought, sudden and violent floods, heat waves, windstorms, and fires.

These figures – which are extremely worrying – are echoed by the fact that Italy has always signed all international climate agreements and all IPCC reports. There is, therefore, full awareness on the part of the Italian state regarding:

a. the climate emergency and the dangerous situation resulting from the ongoing global warming;
b. its fatal impacts to the detriment of the population;
c. the fragility and vulnerability of the Italian territory;
d. the need to achieve a drastic reduction in greenhouse gas emissions.

However, the awareness of the climate emergency and its impacts is not reflected in the measures taken by the Italian State in terms of climate policy. In fact, after a continuous and gradual increase, Italy's total greenhouse gas emissions peaked in 2005 and have been slowly declining ever since, with a 2019 reduction of about 19% from 1990 levels.

In June 2021, the Italian State was served with a summons with an invitation to appear before the Civil Court of Rome. This is not a lawsuit with compensatory or punitive content; rather, it is an experiment in civic activism launched by 203 plaintiffs, consisting of associations (24), individuals of age (163), and minors (16).

The premise is that we are in a climate emergency, a circumstance that is not denied – but rather corroborated – by the Italian State, which, however, has not achieved, nor planned to achieve, emission cuts capable of significantly contributing to the achievement of the target set by the Paris Agreement. The litigation thus stems from the contradiction between the

emission reduction measures that the Italian State should adopt to effectively counter global warming and the inadequate initiatives put in place.

The climate measures planned by Italy in the Integrated National Energy and Climate Plan (NIPEC) – assuming they will be implemented – aim to reduce emissions in 2030 by 36% compared to 1990 levels.

However, this reduction is incompatible with the "fair effort" (fair share) that the Italian State would be required to make, i.e., the fair contribution of emission reductions that Italy is required to implement to meet the 1.5°C target of the Paris Agreement. This effort has been calculated by the prestigious institute Climate Analytics according to which – in respect of the principle of common but differentiated responsibilities and the principle of equity enshrined in international agreements, while also taking into account Italy's historical emission responsibilities and its current technological and financial capabilities – the Italian State, to contribute fairly to achieving the 1.5°C global warming target, should cut its emission levels by 92% by 2030 compared to 1990 values.

The plaintiffs asked the Civil Judge to take – among others – the following measures:

a. to ascertain the State's liability primarily under Article 2043 of the Civil Code or, in the alternative, under Article 2051 of the Civil Code;
b. to order the State to take the necessary steps to reduce greenhouse gas emissions to 92% below 1990 levels by 2030 or to an extent deemed more appropriate.

The State denies that ordinary courts can review its climate policy and condemn it "to do something" under the separation of powers doctrine. The government also made preliminary motions to dismiss the case for lack of standing and justiciability. The next hearing, called for closing arguments, is set for 13 September 2023. Publication of the ruling is expected for the end of this year or the beginning of 2024.

3. *The Causal Link*

In tort law cases, plaintiffs must prove the causal link between the defendant's conduct and the alleged harmful event. The terms of the causal relationship may vary, depending on the relief sought by the plaintiff. In an action for damages, to recognise the legal liability of the defendant, a specific harmful event must be linked to a particular conduct originating from the defendant. This demonstration can be quite complex.

However, strategic climate litigation, including *Giudizio Universale*, does not seek monetary compensation. The claim aims to an injunction "to do something" – cut emissions. In this type of lawsuit, plaintiffs must prove the causal relationship between a conduct and a dangerous situation – climate emergency – not between a conduct and a harmful event.

We sued the State because national emissions are inadequate to counter the climate emergency or, to put it another way. After all, the State's conduct cannot remove the existing state of danger, the climate emergency.

Clearly, this causal relationship is different from the first, and the burden of proof is different and is mainly addressed to link the conduct with the state of danger; in this case, scientific findings play a decisive role (this point will be developed in a while).

Given that the conduct of the State is inadequate to counteract global warming, which is a phenomenon caused by the excessive release into the atmosphere of climate-stimulating emissions, the occurrence of which participate multiple conduits of multiple agents (including that of the Italian State), it must be understood whether a single State can be considered responsible for the inappropriacy of the measures put in place in this field, or – in other words – why never the Italian State should be regarded as legally responsible of the climate emergency since the Italian emissions are not the cause of the same.

It is, therefore, a matter of understanding whether it is possible to reconstruct an individual responsibility in front of a subject when a given event is realised thanks to the concurrence of the conduct of several parties.

The Italian State has lifted this exception, believing that no State can be held responsible for global warming. Under Italian law, Article 2055 c.c. addresses this problem:

> If the harmful event is attributable to several persons, they are all firmly obliged to compensate for the damage. The person who has compensated for the damage has recurred against each of the others to the extent determined by the severity of the respective fault and the magnitude of the consequences arising therefrom. In the case of doubt, individual faults are presumed to be equal.

Reading the provision, it is possible to assume that Italy is responsible – or at least co-responsible – for the danger posed by the climate emergency; in any case, it is obliged (in solid with the other countries) to put in place the initiatives suitable to remove it (regardless of what they will do).

The content of article 2055 c.c. has then been further specified by various interventions of the case law, according to which the rule established by the first paragraph applies in the case where the same damage is a consequence of actions or omissions attributable to several subjects, also independent from each other, but together competing in its production. The above applies if the damage results from several acts or omissions, intentional or intentional, constituting separate unlawful acts, even if carried out in different periods.

The solidarity of responsibility makes irrelevant the relationship between damaged and damaging, the unequal causal efficiency of the individual conduct of the co-responsible, or the different severity of their faults. Moreover, the principle of individual responsibility of each State – although global warming is a global phenomenon caused by the conduct of all States – has also been recognised in other climate disputes, including the one promoted by Urgenda against the Netherlands.

It should also be noted that the Italian State is highly industrialised and that according to the data of the International Energy Agency, it is one of the top 20 countries in the world in terms of absolute emissions, as well as a country that has a level of emissions per capita above the world average.

4. *The Burden of Proof and the Cooperation Between Lawyers and Scientists*

We must now consider the current state of the art for using science in court. The use of science in court changes widely in the various national legal systems because it is regulated differently. In Italy, we have many case law precedents that recognise a limitation of the discretion of policymakers when a specific issue is covered by scientific knowledge.

The use of science also depends on the kind of litigation and may be different within the same legal system; for example, in environmental proceedings concerning preventive injunctions, plaintiffs need to prove that conduct can, in the abstract, produce a specific harm or a situation of danger. In such cases, science's power and weight are much stronger than in other kinds of litigation, such as in compensatory litigation, where plaintiffs must prove that a specific conduct produced a particular event.

Regarding how we chose scientific sources and used them in court, our lawyers'team was assisted by a party consultant, a scientist with whom we had a constant exchange of information. Hence, we pinpointed the scientific documentation, starting with the IPCC reports, and then expanded

on them. We also used many papers published in authoritative journals, such as *Nature* and *The Lancet* – particularly on the health impacts of climate change.

Science provides lawyers with content to lay the claims' factual ground. Lawyers must then put such substance into a container – the civil proceedings. If the content is incompatible with the container, it is not helpful. So both sides, the scientific and the legal, should walk hand in hand.

We extensively used scientific reports to check whether the State's climate policy aligns with the Paris Agreement's targets. It is important to stress again that the language of science is quite different from the language of law – this is crucial to understand. Scientists and lawyers must sit down for dialogue and find a common language.

In our case, we have worked with scientists from *Climate Analytics*, who drafted a report on the climate policy of the Italian State. The first draft they wrote was almost incomprehensible to us lawyers. In particular, some of the language used by the scientists was potentially subject to different interpretations. So, we included a very detailed glossary at the beginning of the report to explain the meaning of terms and rephrased some critical passages in simplified – but scientifically correct – terms.

5. *The Government's Objections on the (Alleged) Lack of Standing*

The Italian government objected that standing can only be granted when plaintiffs demonstrate that they hold a different and specific position from any other subject. In support of its defence, the state refers to the case of *Armando Carvalho et al. v. Council and European Parliament* before the European Court of Justice, which declared the inadmissibility of the application for the lack of standing under Article 263 of the EU Treaty. This provision recognises the existence of standing only when: «[…] an act is of direct and individual concern to the applicant».

It should be noted that the ruling handed down by the Court of Luxembourg was delivered in the context of the European system, while Italian civil procedural law sets different access to justice and standing rules.

Article 263 of the EU Treaty identifies which subjects – and under what conditions – may challenge an "act" issued within the European system. In *Giudizio Universale*, we do not challenge an act but complain about conduct, arguing that this conduct threatens the enjoyment of individual rights that belong to others. If the climate issue is an emergency for each human being and the entire planet, how could it be possible for

an individual to demonstrate that they have a specific and differentiated position from others?

In our opinion, there is a distinct and individual interest even in situations that impact entire communities undifferentiated, as the European Court of Human Rights recognises in cases such as *Cordella vs. Italy*, *Di Sarno vs. Italy*, *Okyay vs. Turkey*. These principles of law apply to already concluded harmful events – as in the case of *Taskin vs. Turkey* – and to a foreseeable health risk, even if it is impossible to establish with precision when the actual and concrete damage will occur. The climate emergency constitutes a foreseeable risk. Therefore, if the climate emergency threatens the enjoyment of everyone's fundamental rights, legal standing should be granted to everyone.

6. *The Right to a Stable Climate*

A key passage in the climate litigations we are working on is the relationship between climate change and fundamental human rights. Among the human rights that we consider to be violated and included in our litigation, we recognise the human right to a stable and safe climate. More precisely, such a right could be defined as a right to «a stable climate, a safe climate, and to climate-friendly emissions». It could also be recognised as the right "to a climate balance". What is the content of this right? It consists of the claim to maintain the functionality of the climate system and the possibility of monitoring the "anthropogenic activities" that affect the climate system.

We believe denying such a right would be paradoxical, as it would mean that people can seek protection only for individual harmful events. However, they cannot do anything for the anthropogenic disaster process that causes those single damaging events or phenomena.

In the Italian legal system, the human right to a safe and stable climate can be recognised by the intersection between the international standards on climate change and the fundamental rights foreseen by the constitution. The Italian Constitution does not provide for a closed list of fundamental rights but is open to recognising new rights. Even if such a right is not written anywhere (nor in our constitution, special laws, or international treaties), it is possible to recognise its existence.

In Italy, even the right to a healthy environment has not been mentioned explicitly for years (till 2021), but courts and legal scholars have recognised this right for at least 40 years as a derivation of the right to

health. Hence, we believe the time is ripe for the recognition in Italy of the right to a safe and stable climate, digging deeply into the right to health in light of the international rules on climate change. I believe recognising a human right to a stable and safe climate can no longer be avoided or postponed internationally. Further, such a right has already been recognised at the international level. It was mentioned in Article 2 of the European Parliament's Resolution of 15 January 2020.

Finally, the recognition of the human right to a stable and safe climate is critical as the main threat to the survival of humankind derives from climate instability caused by anthropogenic emissions; the only chance to effectively address this threat is to recognise that every human being is fully entitled to the protection of climate stability.

Gianni Ghinelli

Justiciability and Climate Litigation in Italy

1. *Introduction*

This paper deals with the procedural law issue of justiciability in the Italian legal system. After describing the legal background to the objection of justiciability, the paper argues that Italian ordinary courts have jurisdiction and should, therefore, decide the merits of the first Italian climate case – *Giudizio Universale*[1].

The case was launched by 203 individuals and multiple NGOs and is still pending before the *Tribunale di Roma*. The plaintiffs rely on fundamental rights protected under the Italian Constitution, the 2015 Paris Agreement and tort law. The claim pursues strategic objectives – a court order to reduce emissions in compliance with the 2015 Paris Agreement and IPCC Reports.

Para. 2 introduces the notion of justiciability in the Italian legal context. Understanding its potential different meanings, helps focus on the arguments that could be leveraged in court. Para. 3 pinpoints case law trends on the issue of justiciability. Para. 4 looks into what is happening in investment arbitration, where the Italian government accepted the arbitrator's jurisdiction over its environmental policies. Para. 5 draws a conclusion on the issue of justiciability in *Giudizio Universale*. Par 6, more broadly, considers how the court could – hopefully – decide the key procedural and substantive law questions posed by *Giudizio Universale*. Para. 7 concludes that *Giudizio Universale* stands out as a leading case; it offers a unique opportunity to reinforce the judiciary's critical role in protecting collective rights and the public interest.

1. A Sud *et al.* v. Italy (*Giudizio universale*), available at www.climatecasechart.com (accessed on 31 August 2023).

2. *Justiciability in Italy: Preliminary Definitions*

Despite the novelty of climate court claims, the conflict between the judiciary and the other branches of government is not new. Hence, looking into the case law helps establish the justiciability of strategic claims.

Before diving into that, it is important to pinpoint the meaning of justiciability in the Italian legal framework. Justiciability can be translated as "*giustiziabilità*". Yet this expression is foreign to the Italian legal system; it can, however, be linked to three areas of procedural law. Hence, the following subsections will succinctly depict the concept of justiciability in the Italian legal system.

2.1 *Justiciability and* Possibilità Giuridica

Justiciability resonates with the notion of *possibilità giuridica*, which refers to the abstract availability, within the legal system, of the rights and remedies sought by the plaintiff. According to the 20th century legal scholars who shaped Italian procedural law, *possibilità giuridica* constitutes a condition that plaintiffs must meet to establish the right of action – the right to a decision on the claim's merits[2].

The Code of Civil Procedure does not explicitly provide this requirement. Recent case law downplayed its role, finding that the lack, within the legal system, of the right or remedy sought by plaintiffs is a matter of merits. Hence, in such circumstances the claim must be rejected for lack of legal base rather than procedural grounds[3].

2. Right of action is the translation of *diritto d'azione.* Chiovenda, Redenti, Calamandre, Liebman, Satta are some of the scholars who crafted the provisions of the *Codice di procedura civile* and the theories on the right of action that are still applied today in court. See G. Chiovenda, *Istituzioni di diritto processuale civile*, Padova, 1933. For a comprehensive study of Chiovenda's work, M. Taruffo, *Considerazioni sulla teoria chiovendiana dell'azione*, in *Rivista trimestrale di diritto e procedura civile*, 2003, 1139. Further, see P. Calamandrei, *Istituzioni di diritto processuale civile secondo il nuovo codice, I Premesse storiche e sistematiche*, 111 ff.; E.T. Liebman, *L'azione nella teoria del processo civile*, in *Rivista trimestrale di diritto e procedura civile*, 1950, 54; S. Satta, *Diritto processuale civile*, Padova, 1967.

3. *Corte di cassazione, sezioni unite*, No. 18052 of 2010, found that «*nella giurisprudenza di queste Sezioni Unite è stato da tempo affermato, infatti, che la questione della configurabilità, o meno, di una situazione giuridicamente rilevante e tutelata non rientra tra le questioni di giurisdizione, costituendo, invece, questione di merito, che deve essere pertanto rimessa alla valutazione del giudice del merito* […]. *Il principio è stato sviluppato, in particolare, con riferimento alle federazioni sportive ed è stato dichiarato che la censura diretta ad escludere ogni*

This notion of justiciability is peculiar to the Italian legal system, as it is linked to the theoretical debate on the right of action (*diritto d'azione*) – which traces back to the work of 19th century German legal scholars. Justiciability as *possibilità giuridica* is relevant for the plaintiffs in *Giudizio Universale* only insofar as the government objected to the existence of the rights claimed – such as the implied right to a safe and stable climate. This would be, however, an objection concerning the merits, not the existence of a judicial power to adjudicate the claim made by the plaintiffs.

2.2 *Justiciability and the Limits of Jurisdictional Power*

The second meaning of justiciability concerns the scope of ordinary courts' judicial power. This notion overlaps with one of jurisdiction – *giurisdizione* – and its limits:

a. the boundaries of the judiciary toward foreign jurisdictions;
b. other particular jurisdictions (such as administrative courts), and finally
c. the other branches of government[4].

The first two notions of jurisdiction (*difetto relativo di giurisdizione*) are not problematic for plaintiffs bringing tort law claims before ordinary courts. When suing the Italian government, Italian jurisdiction applies, while the issue of foreign jurisdiction might be more of a concern in cases against the private sector[5]. Further, in the Italian legal system, tort law claims fall under the jurisdiction of ordinary courts – not administrative courts. The main criterion to allocate jurisdiction is based on the distinction between *diritti soggettivi* and *interessi legittimi*. In tort law climate cases, plaintiffs do not seek the annulment of an administrative

forma di tutela giurisdizionale nei confronti di provvedimenti della FIGC, costituisce questione di merito (Cass. S.U. 29 settembre 1997 n. 9550)». The judgment is available in *Foro Italiano*, 2011, 1, 1, 125 and in the on-line database *Leggi d'Italia*.

4. C. Mandrioli - A. Carratta, *Corso di diritto processuale civile. I – Nozioni introduttive e disposizioni generali*, Torino, 2023.

5. In climate litigation, cross-border claims are more likely to be launched in suits against the private sector, as so-called Carbon Majors operate worldwide. In the EU, questions of international jurisdiction relating to civil and commercial matters must be solved under EU Regulation No. 1215 of 2012. Tort law claims are certainly civil matters; hence, the regulation applies, and under Article 7(2), jurisdiction is attributed to the «courts for the place where the harmful event occurred or may occur». See M.A. Lupoi, *Il coordinamento tra giurisdizioni nello spazio europeo: an update*, Bologna, 2018.

act – based on their *interessi legittimi* – but seek protection for their subjective rights – *diritti soggettivi*[6].

The third limit of ordinary jurisdiction (*difetto assoluto di giurisdizione*) is the one that might apply in strategic climate litigation, as defendants commonly object that ordinary courts lack jurisdiction to adjudicate political – non-justiciable – matters.

In cases across the civil and common-law jurisdiction spectrum, the plaintiffs faced similar objections: *Urgenda vs. The Netherlands*[7], *Milieudefensie, et al. vs. Royal Dutch Shell plc*[8], and *Environnement Jeunesse vs. Canada*[9]. In all such cases, governments resorted to the classic argument of a lack of jurisdiction, arguing that granting the relief sought by the plaintiffs would result in interference by the judiciary, with the political power held exclusively by the legislative and executive branches of government.

2.3 *Justiciability and Enforcement*

There is a third side to justiciability, implying the existence of the judicial power to enforce rulings favourable to climate plaintiffs. Most strategic cases against governments (and corporations) seek declaratory relief followed by an order to reduce emissions. While a mere declaration does not need any enforcement, an order is meaningful only insofar as it can be enforced in case of non-compliance.

This argument was raised about standing requirements – redressability – under Article III of the United States Constitution in *Juliana vs. The United States of America*[10]. The Court of Appeal held that even conceding that the court can order to draft a plan to reduce emissions, such a plan would not solve the issue of climate change. Further, the judiciary could not adequately protect plaintiffs' constitutional rights. An effective remedy would require an overview of the government's actions to implement the order.

6. The definition of *interessi legittimi* has been intensely debated. See O. Ranelletti, *Ancora sui concetti discretivi e sui limiti della competenza giudiziaria e amministrativa*, in *Foro italiano*, 1893, I, 470; M. Nigro, *Giustizia amministrativa*, edited by E. Cardi and A. Nigro, Bologna, 2002; *Corte di cassazione, sezioni unite*, judgment No. 500 of 1999.

7. *Gerechtshof Den Haag*, 9 October 2020, ECLI:NL:GHDHA:2018:2591.

8. *Gerechtshof Den Haag*, 6 May 2021, ECLI:NL:RBDHA:2021:5339.

9. *Environnement Jeunesse c. Procureur Général du Canada*, Cour Supérieure, Province de Québec, District de Montréal (Canada), 26 November 2018 and ENvironnement JEUnesse c. Procureur Général du Canada, Cour d'Appel, 13 December 2021.

10. *Juliana v. United States*, 217 F Supp 3d 122, D Ore2016 (Juliana I); *Juliana v. United States*, Case 18-36082, 9th Cir, 17 Jan 2020 (Juliana II).

The majority "reluctantly" concluded that the plaintiffs should pursue their claim through the democratic process:

> We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes[11].

The issue of enforcement is a practical one. Enforcing orders is crucial to justify the effort the plaintiffs and the judiciary put forward. This issue involves the limits of the judiciary and its function in the phase following adjudication. In some common-law systems, the problem has been solved by resorting to the concept of "appropriate remedy". Surprisingly, from a continental civil law perspective, some common-law courts crafted remedies that extend beyond the order and imposed on governments the duty to report back to the court what progress is being made. This happened, for example, in the Canadian case *Doucet-Boudreaut vs. Nova Scotia*, involving the protection of French-speaking minorities in the provincial school system[12]. In *Legahri vs. Pakistan*, the Lahore High Court ordered the government to undertake specific adaptation measures – implying public spending and rule-making; as part of the remedy granted to the plaintiff, the court instituted a Climate Change Commission to supervise the government's action and inform the court[13]. These cases are somewhat astonishing from a civil law perspective as they show the flexibility of common-law courts in crafting remedies that fit strategic claims. However, civil law jurisdictions are not necessarily incompatible with similar solutions – and the Italian law foresees interesting examples of order to draft labour and non-discrimination law plans.

For the sake of this paper, it is sufficient to mention that the lack of enforcement does not necessarily imply that the claim is not justiciable.

11. See Juliana I, 25.
12. *Doucet-Boudreau v. Nova Scotia (Ministry of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3.
13. *Ashgar Leghari* v. *Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 September and 14 September 2015. A further order was issued on 14 April 2015. The final judgment was rendered on 25 January 2018.

In Italy, this problem concerns the provision under Article 100, *Codice di procedura civile (c.p.c.)*, which requires plaintiffs to show sufficient interest in suing. In other words, a claim can be decided on its merits only if the civil proceedings and the relief sought are helpful and necessary to the plaintiff. Hence, defendants could argue that a claim that cannot be enforced is useless and must be dismissed under Article 100 *c.p.c.* The Italian supreme court – *Corte di cassazione* – found that claims seeking orders are admissible even when they cannot be enforced. Such an order can still help the plaintiff obtain spontaneous fulfilment. Further, if the order remains unattended, the plaintiff can later seek compensatory damages[14]. After all, a non-enforceable order looks pretty much like a declaratory ruling – a perfectly admissible request for relief. Therefore, enforcement should not worry the plaintiffs in *Giudizio Universale* about having their case decided on the merits. Enforcement of the order – if issued – remains a concern after the end of the proceedings. Nonetheless, nobody expects one single proceeding to solve a global problem. It can, however, contribute to the solution, which is necessarily based on individual – state and corporate – responsibility.

3. *Case Law Trends on the Issue of Justiciability*

The previous section pointed out that climate plaintiffs must be prepared to argue that ordinary courts have the power to adjudicate strategic claims despite the obvious political implications of strategic litigation.

The following sections propose strategies to overcome the hurdle of Justiciability. Para. 3.1 deals with the limit of political discretion under Article 7 of the *Codice del processo amministrativo (c.p.a.)*. Para. 3.2 considers the *Englaro* case and the, back then, uncharted territory of the living will.

14. *Corte di cassazione*, judgment No. 19454 of 2011 which stated the principle summed up by the CED as follows: «[…] *è ammissibile la pronuncia di condanna resa dal giudice nella ipotesi di infungibilità (e, dunque, di incoercibilità) del "facere" dell'obbligato, in quanto la relativa decisione non solo è potenzialmente idonea a produrre i suoi effetti tipici in conseguenza della (eventuale) esecuzione volontaria da parte del debitore, ma è altresì funzionale alla produzione di ulteriori conseguenze giuridiche (derivanti dall'inosservanza dell'ordine in essa contenuto) che il titolare del rapporto è autorizzato ad invocare in suo favore, prima fra tutte la possibile, successiva domanda di risarcimento del danno, rispetto alla quale la condanna ad un "*facere*" infungibile assume valenza sostanziale di sentenza di accertamento*».

Para. 3.3 reflects on the case law on the precautionary and best available science principles.

The case law shows that the Italian legal system is not new to politically relevant claims. These previous experiences could be replicated in *Giudizio Universale*. They could also reassure the judge – by deciding the merits of the claim, the court would not do anything subversive.

3.1 *Non-justiciable "Political Acts"*

Article 7 *c.p.a.* denies jurisdiction in cases where plaintiffs aim at the annulment of a political act, stating that: «Acts or measures issued by the government in the exercise of political power cannot be challenged».

This provision applies to the administrative jurisdiction – not to ordinary civil proceedings. Conversely, in strategic climate litigation, claims rely on tort law before ordinary courts, and plaintiffs do not challenge one specific act. Nevertheless, the way the case law construed the notion of "political act" could be of interest to climate litigants to argue in favour of the justiciability of their claims. Indeed, in strategic litigation, governments argue that their conduct expresses a policy decision, hence non-justiciable political acts. The administrative justice's definition of a "political act" could also apply before ordinary civil courts. In both cases, the political nature of the government's conduct leads to a lack of jurisdiction, hence the dismissal of the case on procedural grounds.

The breadth of the "political act" notion determines the scope of the jurisdictional power towards the government. Article 113 of the Constitution mandates that public authorities are subjected to judicial review. Further, the constitution recognises the principle of the "rule of law" to which the government is subjected. In light of this constitutional setting, scholars and courts have tried to limit the definition of "political act". This subsection will consider three cases and points out a relevant takeaway for the plaintiffs in *Giudizio Universale*.

3.1.1 Consiglio di Stato*, Opinion No. 2483 of 2019*

The case concerned a dispute between the Austrian honorary consul in Torino and the Italian Ministry of Foreign Affairs. The Austrian ambassador in Italy requested the Italian authorities for the honorary consul's appointment, but the Italian Ministry denied the *exequatur*. Hence, the ex-honorary consul challenged the act of the Italian Ministry. The Italian Ministry objected that granting the *exequatur*, under Article 12

of the 1963 Vienna Convention on Consular Relations, is a "political act". Hence, the decisions made by the Italian government were not justiciable under Article 7 *c.p.c. Consiglio di Stato* found that granting the *exequatur* is a purely discretional choice as – and this is key – no normative standard constrains the assessment of the Italian authorities in this matter. Indeed, the entire process involves the participation of the two sovereign states exclusively. Further, the host state is not even required to justify its decision to the other country. It found, therefore, that the Ministry of Foreign Affairs Act was a political and non-justiciable act under Article 7 *c.p.a.*

The key takeaway is that political discretion finds a limit as soon as a normative standard constrains it; climate litigants can rely on plenty of national and international provisions that limit political power. In the setting of ordinary jurisdiction – where plaintiffs do not seek the annulment of a specific act – strategic claims are justiciable as long as they rely on normative standards such as human rights and the Paris Agreement.

3.1.2 Corte Costituzionale, *Judgment No. 81 of 2012*

The Italian Constitutional Court decided a case between Campania Region and an individual who alleged the violation of gender equality laws[15].

The plaintiff argued that the appointment of a man violated the gender *ratio* under the gender balance rules provided by the Statute of the Campania Region. The regional government argued that appointing a council member is a non-justiciable political act under art. 7 *c.p.a.* The first instance court (*TAR Campania*) dismissed this argument, finding that the decree issued by the President of the Region violated the gender-balance provisions of the statute. Hence, the decree was annulled[16]. The appellate body upheld the judgment[17].

After exhausting all ordinary appeals, the Campania Regions resorted to the *Corte costituzionale* claiming a conflict between the executive and judicial branches of government – "*conflitto di attribuzione*" under Article 122(5) of the Constitution. The Region argued that the court lacked jurisdiction on political discretion as the council member's appointment is based on *intuitus personae* and free political assessment. In the Region's

15. *Corte costituzionale*, judgment No. 81 of 2012, available in the online database *Leggi d'Italia.*
16. *T.A.R. Campania*, judgment No. 1985 of 2011.
17. *Consiglio di Stato*, judgment No. 4502 of 2011.

view, judicial interference with the validity of a decree appointing the Regional Council undermined the powers assigned by the constitution to the President of the regional council.

The court dismissed the claim because it was leveraged as an improper means of appeal on the merits. It further found that the circumstance that the President of the regional council is a political body does not imply that its acts are all, *per se*, non-justiciable. In the court's view, justiciability under Article 7 *c.p.a.* must be evaluated with regard to the existence of a provision or principle that limits discretionary political power. Explicit provisions on gender balance applied in the case at stake, limiting the President's discretionary power of the regional council. Hence, claims concerning political choices are justiciable insofar as they are based on a legal provision that limits political power[18].

3.1.3 Corte di Cassazione*, Sezioni Unite, No. 18829 of 2019*

This case concerned the government's decree's annulment approving the construction of a chairlift in Livigno – a town nested in the Italian Alps. The environmental organisation *Legambiente ONLUS* challenged the approval decree based on advancing environmental and planning law arguments.

The first instance court (*TAR Lombardia*) found that the project implied dismantling two previously existing chairlifts, expanding the skiable area, constructing new parking lots, and requiring complementary plant works and structures. As a result, the court qualified it as a new plant rather than a mere technological upgrade of the pre-existing facility. The regional and provincial landscape territorial plans prohibited a new plant in that area. Thus, *TAR Lombardia* annulled the government's decree. After *Consiglio di Stato* upheld the first instance court's decision, the company that proposed the project and the municipality of Livigno appealed to the plenary session of the *Corte di cassazione*, alleging that the administrative courts violated the separation of powers by annulling a political and non-justiciable act, issued by the national government.

18. *Corte costituzionale*, judgment No. 81 of 2012, para. 4.3: «*La circostanza che il Presidente della Giunta sia un organo politico ed eserciti un potere politico, che si concretizza anche nella nomina degli assessori, non comporta che i suoi atti siano tutti e sotto ogni profilo insindacabili. Né, d'altra parte, la presenza di alcuni vincoli altera, di per sé, la natura politica del potere esercitato dal Presidente con l'atto di nomina degli assessori, ma piuttosto ne delimita lo spazio di azione. L'atto di nomina degli assessori risulterà, dunque, sindacabile in sede giurisdizionale, se e in quanto abbia violato una norma giuridica*».

Corte di cassazione dismissed the appeal; it held that lower courts rightly found the case justiciable under Article 7 *c.p.a.*[19]. The ruling clarifies that areas exempted from judicial review must be confined within strict limits. An act is political only if it is impossible to identify a legal parameter – rules of law or principles provided by the legal system – based on which to conduct judicial review. Any time the statutory law predetermines legality thresholds, policymakers must conform to such standards despite being at the apex of public administration. The court held that this principle is consistent with a system based on the "rule of law". The court further noted that this principle applies even in the case of discretionary power. In such cases, provisions and principles bind government and lower authorities despite a margin of directionality[20]. The court dismissed the appeal because the Council of Ministers' decree is subject to judicial review.

3.2 *Adjudicating Ethically Sensitive Issues*

The Italian legal order experienced a clash between the judiciary and the political power on the issue of euthanasia and the living will.

While medical science's development created the conditions to preserve human life even when patients lie in vegetative states for years,

19. The ruling relied on case law of *Corte di cassazione* (No. 21581 of 2011, No. 10416 of 2014, and No. 10319 of 2016, and No. 3146 of 2018) and *Corte costituzionale* (No. 81 of 2012 and No. 339 of 2007).

20. *Corte di cassazione, sezioni unite*, judgment No. 18829 of 2019, available in the online database *Leggi d'Italia*. The court expressed the principle summarised above as follows: «[…] *queste Sezioni unite (cfr. Cass. civ., sez. un., n. 21581 del 2011; n. 10416 del 2014; n. 10319 del 2016; n. 3146 del 2018) hanno già avuto modo di porre in rilievo, in consonanza con l'orientamento della Corte costituzionale (Corte cost. n. 81 del 2012; n. 339 del 2007), che l'esistenza di aree sottratte al sindacato giurisdizionale va confinata entro limiti rigorosi. Ed, infatti, per ravvisare il carattere politico di un atto, al fine di sottrarlo al sindacato del giudice, occorre che sia impossibile individuare un parametro giuridico (sia norme di legge, sia principi dell'ordinamento) sulla base del quale svolgere il sindacato giurisdizionale: quando il legislatore predetermina canoni di legalità ad essi la politica deve, appunto, attenersi, in ossequio ai principi fondamentali dello Stato di diritto. In concreto, quando l'ambito di estensione del potere discrezionale, quale che esso sia, sia circoscritto da vincoli posti da norme giuridiche che ne segnano i confini o ne indirizzano l'esercizio, il rispetto di tali vincoli costituisce un requisito di legittimità e di validità dell'atto, sindacabile, appunto, nei modi e nelle sedi appropriate*». Further, the decree the Council of Ministers issued resulted from an administrative procedure under Article 14-*quarter* of law No. 241 of 1990. The Court found that such an act could not be considered a "political act". Conversely, it qualified it as an "act of high administration" under Article 14-*quarter* (2) of such law.

the legislature failed to regulate this matter until 2018[21]. Before 2018, lacking legislative or government guidelines, courts dealt with the legal implications of such practices in the *Eluana Englaro* case. The judiciary was required to deal with ethical questions concerning the nature of the right to life, dignity, and self-determination – when patients lie for years in a vegetative state. All this while the government and the Parliament interfered with the pending judicial proceedings. The legislative and executive branches of government wielded the separation of powers doctrine to push through their political agenda.

A car crash left a young woman – Eluana Englaro – in an irreversible vegetative state. Before the accident, she had informally expressed to her friends the will to avoid medical treatment in case of irreversible vegetative conditions. Thus, to respect her will, her father – acting as her guardian – sought an order from the *Giudice tutelare di Lecco* to interrupt the ongoing medical treatments.

Initially, the court rejected the request made by Eluana Englaro's father; the court ruled that the right to life must be protected regardless of the will of the unconscious patient. Then, in 2007, following multiple appeals, *Corte di cassazione* finally reversed the lower courts' rulings, finding that Eluana Englaro had the right to have the medical treatments interrupted, according to her will[22]. More in detail, the court ruled that the guardian of an unconscious patient may seek a judicial order to interrupt treatments under two circumstances: first, the patient's vegetative state must be irreversible, and second, the request made to the court is backed up by evidence that the patient expressed, throughout their life, the will to avoid such life-preserving medical therapy, including the use of feeding tube. Following such principle, in 2008, the *Corte d'appello di Milano* finally allowed the interruption of the medical treatments and the force-feeding that kept Eluana Englaro alive[23].

Despite its tragic implication, this case sparked a heated – often disrespectful – political debate, which resulted in an unprecedented clash between the judiciary and the legislative and executive branches of gov-

21. Law No. 2019 of 2018 allows someone to pre-determine the treatments they are willing to accept.

22. See, *Corte di cassazione*, judgment No. 21748 of 2007.

23. See, *Corte d'appello di Milano*, judgment of July 9, 2008. This ruling, as well as *Cassazione* judgment No. 21748 of 2007, are analysed by G. Casaburi, *Autodeterminazione del paziente, terapie e trattamenti sanitari salvavita* and by R. Romboli, *Il conflitto tra poteri dello Stato sulla vicenda E.: un caso evidente di inammissibilità*, both articles in *Foro Italiano*, 132 (1), 2009, 35 ff.

ernment. Both chambers of Parliament – *Camera dei Deputati* and *Senato della Repubblica* – initiated a proceeding before the *Corte costituzionale*, requesting it to annul the judicial rulings rendered by the *Corte di cassazione* and *Corte d'appello di Milano*, based on the separation of powers doctrine[24]. The Italian Parliament argued that the ordinary courts had violated the separation of powers by stepping into the province of discretionary political power.

In the Parliament's view, the judiciary *de facto* created new legislation on a politically sensitive issue – such as the ethical problem of defining the "right to die" – despite the absence of explicit provisions. Further, the judiciary did so while political parties were discussing proposed legislation. Finally, the rulings relied on constitutional provisions that are not self-executing and need the "mediation" of the legislative power. Similar arguments are made by defendants in strategic litigation.

The Constitutional court dismissed the claims. It found that the judiciary had rightfully exercised its power by applying the statutory and constitutional law[25]. Lower courts did not enter the political province or "create" legislation. In the court's view, the Parliament used the proceedings before the constitutional court as an inadmissible "extra appeal" on the merits of the decisions. The political branches of government, however, cannot challenge the logic applied by the judiciary before the *Corte costituzionale*. The Parliament must accept the content of a decision as long as the judiciary applies the law[26].

This case shows that the judiciary cannot ignore the claims made by plaintiffs even when the legislator did provide specific rules. Judges must use fundamental rights in cases left unregulated by the other branches

24. Under Article 37 of Law No. 87 of 1953, the two branches of Parliament (*Camera dei Deputati* and *Senato della Repubblica*) initiated two separate proceedings based on similar arguments.

25. *Corte costituzionale*, judgment No. 334 of 2008.

26. R. Caponi - A. Proto Pisani, *Il caso E.: brevi riflessioni dalla prospettiva del processo civile*, in *Foro Italiano*, 132 (4), 2009, 984 ff. Despite this setback, the Italian government did not give up in its clash against the judiciary and proposed a bill that, if passed into law, would have stopped the enforcement of the judgments issued in the *Englaro* case. From a constitutional and procedural law perspective, the political motives of this draft law are concerning in many ways. It is outrageous that, while a judicial case is pending, the political branches of government try to interfere by passing legislation meant to apply to that very case. However, they could not have been applied to Eluana Englaro, as her "right" to interrupt medical treatments and forced feeding had already been recognised by a judicial decision, which produced the *res judicata* binding effect. The draft law was presented on 6 February, 2009. Eluana Englaro died three days later.

of government; this might create friction between courts and politics. However, enforcing rights is the judiciary's role, and the lack of specific legislation does not imply that claims are not justiciable.

The same pattern applies to climate litigation. Science proves that state and corporate policies can impact people's rights worldwide. Yet, lacking sufficient legislative or executive action, citizens resort to court – and the judiciary finds itself between the hammer and the anvil. Nonetheless, courts must exercise their role even when new societal challenges are unregulated.

3.3 *Precautionary and Best Available Science Principles*

This subsection deals with two cases that define the limits of political power in matters of scientific uncertainty. The case law found that facing new threats to fundamental rights, the political branches of government must act within the legal boundaries set by the precautionary and best-available science principles. Specularly, the judiciary can supervise whether the government or the legislator used such principles well. In other words, the precautionary and best-available science principles define the scope of political discretion. This applies to handling the pandemic, as well as climate change.

3.3.1 Consiglio di Stato*, Judgment No. 7045 of 2021*

This case tackles the issues of political discretion, individual rights, and science. More precisely, the court pinpointed the limits of political discretion in handling the COVID-19 pandemic and restricting individual freedoms to benefit general interests.

Under Article 4 of Law Decree No. 44 of 2021, medical professionals were subjected to mandatory vaccination. The claim was brought by healthcare professionals who sought the annulment of the administrative acts that, applying the law, suspended them from service. The plaintiffs argued that the law was unconstitutional and requested its disapplication.

The court rejected the claim. It found that policymakers must follow the best available science (*riserva di scienza*).

There is an inevitable margin of political discretion in handling national public health, economic, and social emergencies, such as the pandemic. Science needs time to reach conclusive scientific answers to the many unsolved issues. Yet, the executive and the legislative powers of government must act and find a balance between the opposing interests that come into play. The court maintained that the best available science

and precautionary principles guide political choices[27]. This ruling is helpful for the plaintiffs in *Giudizio Universale* in two ways: first, the government must apply the best available science (i.e., the IPCC Reports) and the precautionary principle to take action; second, such principles are the legal standard to evaluate the legitimacy of the political branches' action. This applies both in administrative cases, where plaintiffs seek the annulment of a specific act, and in tort law claims, aimed at an order to compensate or prevent harm from happening.

3.3.2 Corte costituzionale, *Judgment No. 282 of 2002*

A similar principle of law had previously been stated by *Corte costituzionale*. In a case involving the legislative power allocated to regions, the court ruled that regions may regulate health-related matters. However, the discretionary power of legislative bodies is restricted by the boundaries set by the best available science principle[28]. Once again, the Italian constitutional case law allows a judicial – in this case, constitutional – review of leg-

27. *Consiglio di Stato*, judgment No. 7045 of 2021, available in the online database *Leggi d'Italia*, stated the following principle: «*La riserva di scienza, alla quale il decisore pubblico sia livello normativo che amministrativo deve fare necessario riferimento nell'adottare le misure sanitarie atte a fronteggiare l'emergenza epidemiologica, lascia a questo, per l'inevitabile margine di incertezza che contraddistingue anche il sapere scientifico nella costruzione di verità acquisibili solo nel tempo, a costo di severi studi e di rigorose sperimentazioni e sottoposte al criterio di verificazione-falsificazione, un innegabile spazio di discrezionalità nel bilanciamento tra i valori in gioco, la libera autodeterminazione del singolo, da un lato, e la necessità di preservare la salute pubblica e con essa la salute dei soggetti più vulnerabili, dall'altro, una discrezionalità che deve essere senza dubbio usata in modo ragionevole e proporzionato e, in quanto tale, soggetta nel nostro ordinamento a livello normativo al sindacato di legittimità del giudice delle leggi e a livello amministrativo a quello del giudice amministrativo*».

28. *Corte costituzionale*, judgment No. 282 of 2002, available in the online database *Leggi d'Italia*, found that: «*Tutto ciò non significa che al legislatore sia senz'altro preclusa ogni possibilità di intervenire. Così, ad esempio, sarebbe certamente possibile dettare regole legislative dirette a prescrivere procedure particolari per l'impiego di mezzi terapeutici "a rischio", onde meglio garantire – anche eventualmente con il concorso di una pluralità di professionisti – l'adeguatezza delle scelte terapeutiche e l'osservanza delle cautele necessarie. Ma un intervento sul merito delle scelte terapeutiche in relazione alla loro appropriatezza non potrebbe nascere da valutazioni di pura discrezionalità politica dello stesso legislatore, bensì dovrebbe prevedere l'elaborazione di indirizzi fondati sulla verifica dello stato delle conoscenze scientifiche e delle evidenze sperimentali acquisite, tramite istituzioni e organismi – di norma nazionali o sovranazionali – a ciò deputati, dato l'essenziale rilievo che, a questi fini, rivestono gli organi tecnico-scientifici (cfr. sentenza n. 185 del 1998); o comunque dovrebbe costituire il risultato di una siffatta verifica*».

islative action. In the realm of tort law actions and climate change claims, this means that climate policies are restricted under scientific guidelines.

4. *Justiciability and Investment Arbitration*

Arguments to assert the justiciability of the claim made in *Giudizio Universale* can be gathered from a recent investment arbitration proceedings – *Rockhopper vs. Italy*[29].

Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Plc submitted a claim to the International Centre for Settlement in Investment Disputes (ICSID) against the Italian government. The claimants held that the offshore drilling legislation shift violated their investors' rights under the 1998 Energy Charter Treaty.

In 2005, Rockhopper obtained offshore exploration permits in the sea area named *Ombrina*. In 2008, Rockhopper applied for a production concession. Following protests driven by environmental concerns, the Parliament passed law No. 128 of 2010, which banned new offshore drilling projects. In 2012, the legislator made an exception for those applications approved before the 2010 law – including the drilling project presented by Rockhopper for the *Ombrina* area. Further, civic and political tensions led to law No. 208 of 2015, which removed the previous exception.

In its claim, Rockhopper argued that the Italian government violated the 1998 Energy Charter Treaty for impairing the company's investment by unreasonable or discriminatory measures, fair and equitable treatment, and unlawful expropriation. The arbitral tribunal ruled that Italy's conduct constituted unlawful "expropriation" and awarded damages for € 190.675.391, plus interest.

The Italian government objected to the tribunal's lack of jurisdiction but did so for reasons that do not concern the concept of sovereignty and political discretion. In particular, Italy held that the tribunal lacked jurisdiction because Rockhopper had already made the same claim before domestic courts (*lis pendens*). Further, the defendant sustained that jurisdiction between an investor based in the European Union (EU) and

29. *Rockhopper Exploration Plc, Rockhopper Italia S.P.A. and Rockhopper Mediterranean Ltd v. Italian Republic*, International Centre for Settlement of Investment Disputes, ICSID Case No. ARB/17/14, available at www.jusmundi.com (accessed on 31 August 2023).

an EU Member State should be denied. Both objections were rejected. In other words, Italy accepted that arbitrators adjudicate the lawfulness of Italian environmental policy.

The arbitrators tackled this issue indirectly, stressing in the award that the claim was all about the violation of the Energy Investment Treaty – not the Italian environmental policies:

> The Tribunal appreciates and is acutely sensitive to the fact that there are strongly-held environmental, civic and political views about offshore production in Ombrina Mare. However, the outcome of this case passes no judgment whatsoever on the legitimacy or validity of those views. […] the material factual circumstances which have led to the final result of this arbitration are both specific and discrete from the environmental considerations which have been argued before the tribunal.

It is undoubtedly true that the case was formally about the alleged violation of the Energy Charter. The arbitral panel did not directly assess the legality of Italian policy. Yet, although indirectly, the conduct that breached the investors' rights was – in effect – a political conduct based on environmental and climate concerns.

The arbitral tribunal's view expresses a formalistic conception of the law. Nonetheless, proclaiming that national policy is not under scrutiny is hardly believable and does not mitigate the potential interference with democratic state power. As pointed out by legal scholars, awards potentially interfere with public policies concerning human rights or common goods – such as the environment and the climate[30].

The takeaway for the plaintiffs in *Giudizio Universale* is that the Italian government accepts an arbitral tribunal's jurisdiction over its policies' lawfulness with regard to the Energy Charter; hence, it cannot deny the jurisdiction of its national courts over the alleged violation of the Paris Agreement through its insufficient policies.

The logical pattern is identical: state policies are the conduct; the standard of legality is an international treaty (and in climate litigation also the Italian constitution); a court (be it arbitrator or judges) assesses whether the conduct violates the normative standards set out by international law. If this logic applies to investor-state arbitration, it should also be valid before

30. See D. Bevilacqua, *La decisione degli arbitri internazionali e i principi della giustizia amministrativa*, in *Giornale di diritto amministrativo*, 3, 2023, 414.

national courts, composed of professional judges whose independence and impartiality are granted by national law.

This argument could help courts establish that courts have jurisdiction while the actual governments' non-contractual liability under tort law combined with the Paris Agreement concerns the merits. For this further reason, climate litigation is justiciable in Italy.

5. *Conclusions on the Issue of Justiciability*

The previous sections pinpointed that Justiciability poses a challenge for the plaintiffs in *Giudizio Universale*, as the government objects that plaintiffs make political – non-justiciable – claims.

This objection, however, is flawed.

The case law mentioned identifying a general trend; as soon as a legal standard exists, political discretionary power is limited. As a result, political choices can be subjected to judicial review.

In the realm of administrative law, this leads to the annulment of administrative acts; the constitutional court can assess the constitutionality of a law; on their end, civil courts have the power to adjudicate strategic claims framed under the terms of tort law.

Plaintiffs suing the national government before an ordinary court rely on the legality thresholds set forth by the Paris Agreement, international and constitutional provisions protecting human rights, and the precautionary and best available science principles. Furthermore, Italian case law also clarified that courts can adjudicate claims even when plaintiffs raise new issues on politically relevant but unregulated matters.

The *Rockhopper case* further shows that the Italian government accepts the principle that its policies are subject to judicial scrutiny – although indirectly – based on international law. The same logic should be applied to strategic claims made before national courts.

Given these arguments, the claim made by plaintiffs in *Giudizio Universale* is justiciable, and the court should have the courage to decide the case's merits.

6. *What to Expect from the Ruling?*

This section considers what the ruling should look like on the procedural and substantive law discussed in the previous sections – hoping to avoid "wishful thinking".

6.1 *The Right to a Safe Climate*

In the merits, plaintiffs seek protection for their individual human rights protected under the constitution as well as for the shared right to a safe climate. This request challenges the court to declare that anyone is entitled to a new right – not yet recognised by the law. Under Article 2 of the Constitution, the Italian legal system is open to the recognition of new rights. Advancing the protection of human rights and extending the scope of written provisions is courts' role[31].

Thus, in *Giudizio Universale* the court should resort to the vast scholarly and case law background to find that anyone, including the plaintiffs, is entitled to the right to live in a safe climate.

6.2 *Standing*

In *Giudizio Universale*, it is fair to expect that the court will find that plaintiffs have standing. The claim is, in fact, based on individual human rights coupled with tort law under the Civil Code's provisions. Article 81 *c.p.c.*, regulating *locus standi*, requires the plaintiffs to present themselves as merely entitled to the rights claimed in court. Whether such rights actually exist and plaintiffs are entitled to them is a matter of merits.

As pointed out by Luca Saltalamacchia (see *supra*, Part I, Section 1), the government's mention of *Armando Carvalho et al. v. Council and European Parliament* is quite irrelevant, also considering that Italian civil procedural law does not require to show individual concern.

Thus, under Article 81 *c.p.c.* establishing standing should be relatively straightforward, claiming that plaintiffs' fundamental rights have either been breached or threatened by the lack of climate action.

31. See A.A. BARBERA, *Costituzione della Repubblica italiana*, in *Enc. dir.*, *annali* VIII, 2015, 326. A. MARTELLI, *I nuovi diritti*, in L. MEZZETTI (ed.), *Diritti e doveri*, Torino, 2013, 609. In the context of tort law, see E. NAVARRETTA, *Diritti inviolabili e responsabilità civile*, in *Enc. dir.*, *annali* VII, 2014, 343 and ID., *Ripensare il sistema dei danni non patrimoniali*, in *Responsabilità civile e previdenza*, 1, 2004, 3.

6.3 *Justiciability*

Based on the case law principle mentioned above, expecting the court to reject the government's objection seems reasonable. After all, the plaintiffs brought strong arguments to support the impact of anthropogenic climate change on human rights and the courts' role in adjudicating rights.

Dismissing the case on procedural grounds would frustrate the judiciary's role within the separation of powers set.

6.4 *Burden of Proof*

Resorting to individual fundamental rights helps establish standing but might be challenging in proving the causal link between the defendant's conduct and individuals' harm.

Based on the little information available on the case, the court will rule based on the documents filed by the parties. The court has appointed no expert witnesses. Hence, Climate Analytics'and IPCC reports are expected to be crucial.

7. *Stakes are High*

Giudizio Universale already stands out as a leading case – whatever the ruling will be – as it is one of Italy's most important cases of public interest litigation.

The government's objection to the lack of standing and justiciability requires the court to take a stance on the role of citizens and courts in constitutional democracies.

On the merits, the claim made in *Giudizio Universale* also implies a ruling on whether a right to living in a safe climate exists and if international climate law can be enforced through national civil proceedings.

Seeking what has not been achieved politically through courts creates issues of standing and justiciability, and, on the merits, courts often seem unprepared to find that the national governments breached human rights through their insufficient climate policy.

The objection to standing goes hand in hand with the one of justiciability. Both imply taking sides on the function of the civil proceedings within the separation of powers principle.

The court is tasked to choose whether judicial proceedings should be available only to plaintiffs claiming individual rights or to vindicate

supra-individual interests, such as the environment and the climate[32]. This dilemma stands as a crossroad between an individualistic conception of civil procedural law and a collective one, where citizens can protect shared rights and common goods such as the right – or interest – to live in a safe climate. Italian procedural law is not new to collective redress mechanisms[33], but protecting the climate takes public interest litigation to a whole new level, considering that *Giudizio Universale* is also an example of private enforcement of international law.

Further, ruling on the existence of an implied right to a safe climate implies a decision on what the court's role should be in a field intensely debated as climate change: courts can either be the mere *bouche de la loi* or take on the challenge to contribute to the law-making function through the interpretation of abstract provisions to new societal needs for justice[34].

The plaintiffs' success in *Giudizio Universale* would significantly contribute to the idea that citizens and courts have a role to play in climate change governance[35]. Establishing the state's responsibility would also allow for further actions against government agencies and carbon majors.

32. On standing and the vindication of public interests through court proceedings, see H. Kötz, *Public Interest Litigation: A Comparative Survey*, in M. Cappelletti (ed.), *Access to Justice and the Welfare State*, Firenze, 1981, 102.

33. Consider, for example: the class actions under Article 840-*bis* and 840-*sexiesdecies c.p.c.*; the procedural devices that grant standing to trade unions for the protections of workers' collective interests; standing rules that allow environmental organisations to seek the annulment of administrative acts.

34. M. Cappelletti, *Giudici legislatori?*, Milano, 1984.

35. S. Rodotà, *Il diritto di avere diritti*, Roma, 2017.

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When is a Plan Not a Plan? The Supreme Court Decision in "Climate Case Ireland"*

1. *The Decision*

The recent Supreme Court decision in *Friends of the Irish Environment v Ireland*[1] was clearly going to be significant, and when delivered with commendable rapidity despite the constraints of the COVID-19 pandemic (with hearings conducted in the King's Inns rather than the Four Courts), it did not disappoint. Known as "Climate Case Ireland", it was an appeal from a decision of MacGrath J in the High Court[2] and had come to the Supreme Court through the "leapfrog" procedure (bypassing the Court of Appeal)[3]. A seven-judge panel decided the case, further underlining what the Court's leave to appeal determination acknowledged to be the "general public and legal importance"[4] of the issues raised.

Delivering judgment in July 2020, one month after oral argument, the Court found that the Government's July 2017 "National Mitigation Plan", developed pursuant to section 4 of the Climate Action and Low-Carbon Development Act 2015, was *ultra vires* that legislation because it lacked "specificity". The judgment also re-considered the question of standing to bring court challenges in environmental matters, established a new approach to rights not explicitly mentioned in the Constitution (for which the Court preferred the label "derived rights"), and stated that there is no constitutional right to a "healthy environment" or an "envi-

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1. [2020] IESC 49.
2. [2019] IEHC 747.
3. Supreme Court Determination in *Friends of the Environment CLG v Ireland* [2020] IESCDET 13 (Clarke CJ, Irvine J, Baker J) (13 February 2020).
4. [2020] IESCDET 13 [1].

ronment consistent with human dignity" (overruling an earlier dictum to that effect by Barrett J)[5].

2. *Background*

In 2015, the Oireachtas (Parliament of Ireland) passed the Climate Action and Low Carbon Development Act ("the 2015 Act"), the aim of which is to enable «the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the "national transition objective" [NTO])»[6]. The 2015 Act requires the Minister for the Environment to «make and submit to the Government for approval» two plans: a national mitigation plan (NMP), and a national adaptation framework (NAF). Following government approval these plans are to be published[7], and renewed at least every 5 years[8].

The NMP is concerned with the reduction of Ireland's greenhouse gas (GHG) emissions. Section 4(2) of the Act sets out what the NMP must contain as follows:

A national mitigation plan shall

(a) specify the manner in which it is proposed to achieve the national transition objective,

(b) specify the policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,

(c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and

(d) specify the mitigation policy measures (in this Act referred to as the "sectoral mitigation measures") to be adopted by the Ministers of the Government, referred to in subsection (3)(a), in relation to the matters for which each such Minister of the Government has responsibility for the purposes of

  (i) reducing greenhouse gas emissions, and

  (ii) enabling the achievement of the national transition objective.

5. *Friends of the Irish Environment v Fingal Co Co* [2017] IEHC 695 [264].
6. Climate Action and Low Carbon Development Act 2015, s 3(1).
7. NMP, s 4(10); NAF, s 5(6)
8. NMP, ss 3(1), 4(1); NAF, ss 3(1), 5(1).

The 2015 Act mandates that a draft of the NMP is consulted upon publicly for a period of up to two months. The Act also establishes an independent Climate Change Advisory Council (CCAC)[9]. The CCAC is required to publish an annual report which summarises the Environmental Protection Agency's (EPA) most recent inventory and projections of national GHG emissions and makes recommendations to government regarding achievement of the Act's national transition objective (NTO) and compliance with any EU law or other international treaty obligations[10]. The CCAC has further obligations and powers under the Act to conduct periodic reviews[11].

The Act's definition of the NTO does not state any particular percentage of GHG emissions reduction that must be achieved, either by the end of 2050 or at defined points along the way, in order to arrive at «a low carbon, climate resilient and environmentally sustainable economy» by the end of 2050. However, the Act does provide that when considering an NMP for approval, the Government must "have regard to", among other things, «the ultimate objective specified in Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC) […] and any mitigation commitment entered into by the European Union in response or otherwise in relation to that objective» and «any existing obligation of the State under the law of the European Union or any international agreement»[12]. The CCAC has described the NTO established by the Act as follows: «[…] the country should "transition to a low carbon, climate resilient and environmentally sustainable economy by 2050" taking into account the objectives of the UNFCCC and existing obligations under EU law»[13].

The Irish Government published its first NMP under the Act on 19 July 2017[14]. The 191-page document was immediately criticised by environmentalists[15], and (importantly for the judgment under discussion) the CCAC. The CCAC concluded on the basis of the NMP[16] that Ireland

9. S 9.
10. S 12.
11. S 13.
12. S 3 (2).
13. Climate Change Advisory Council, *Periodic Review Report 2017*, 13.
14. [2019] IEHC 747 [1].
15. For example, K. O'Sullivan, *Ireland can't Meet Simple Climate Change Targets. How Will It Meet Ambitious Ones?*, in *The Irish Times*, 19 July 2017, and T. O'Brien, *National Mitigation Plan: Climate Action or Regulatory Effort?*, in *The Irish Times*, 19 July 2017.
16. *Climate Change Advisory Council*, in *Periodic Review Report 2017*, i. The report notes «This report was finalised before the National Mitigation Plan was published. As a result,

was «unlikely […] by a substantial margin» to meet its EU target of a 20% reduction in non-ETS emissions[17] by 2020 compared to 2005 levels[18]. The CCAC's report called for «additional and enhanced policies and measures» to be identified in the NMP to help «address the gap in emissions reductions required to meet the 2020 targets and ensure that the anticipated 2030 EU targets will be achieved»[19]. The CCAC's report referred to the EPA's April 2017 emissions projections, indicating that «carbon dioxide emissions will increase between now and 2035», and noted that «[i]f this trajectory is followed then achievement of the low-carbon transition would become increasingly difficult and the costs would likely increase over time»[20].

Friends of the Irish Environment (FIE), an environmental non-governmental organisation (NGO), sought judicial review of the July 2017 NMP. It argued that (i) the NMP violated rights protected by the Constitution and the European Convention on Human Rights (ECHR), and (ii) the NMP was *ultra vires* for failing to comply fully with section 4 of the 2015 Act. FIE is open in stating that its decision to litigate was inspired by the *Urgenda* case, which culminated in a decision of the Dutch Supreme Court in January 2020 requiring the Netherlands to ensure a 25% reduction in greenhouse gas emissions in 2020 compared to 1990 levels[21].

3. *The Supreme Court Judgment*

3.1 *Preliminary*

The Supreme Court delivered only one judgment, although a seven judge panel heard oral argument. The decision of Clarke CJ is treated

the comments here are based on the draft National Mitigation Plan, published in March 2017. However, most of the comments will also apply to the final version of the National Mitigation Plan as published».

17. The EU Effort Sharing Decision (Decision 406/2009/EC) required Ireland to reduce non-ETS (e.g. transport, buildings, agriculture, waste, and non-ETS industry) emissions by 20% compared to 2005 levels. Ireland did not achieve this: see Environmental Protection Agency, GHG Emissions to 2020, text available at www.epa.ie (accessed 23 June 2023).

18. *Climate Change Advisory Council*, cit., i and 7. See also J. Fitzgerald, *Pay Now, Be Rewarded Later – The Political Hot Potato of Climate Change*, in *The Irish Times*, 28 July 2017.

19. *Climate Change Advisory Council*, cit., 10.

20. *Ivi*, 14.

21. See Climate Case Ireland, "Climate Case" (2020), text available at www.climatecaseireland.ie (accessed 30 September 2020), discussing Netherlands v Urgenda NL:HR:2019:2007.

here as a decision of the Court, similar to the single judgment delivered in Article 26 references[22], because it was clearly written on behalf of a unanimous Court.

The State did not oppose FIE's application for leave to appeal directly to the Supreme Court, or for a priority hearing[23]. There was no dispute between the parties regarding the scientific evidence, leading the Supreme Court to decide that a Court of Appeal hearing would not further narrow or clarify the issues of importance. This is more significant than it might initially seem; it means that the Government has accepted the scientific consensus on climate change, of which the Court provided a brief overview[24]. This will enhance litigants' ability to hold the State to account regarding its climate change-related legal obligations in the future.

The Supreme Court decided to address FIE's legality/statutory argument first, notwithstanding the Court's recognition that «[a]s the case evolved, the rights based elements of the argument took greater prominence»[25]. The Court's view was that, if it found the NMP to be *ultra vires*, this would affect whether and to what extent the Court would be required to address the rights issues. The Government did not dispute that FIE had standing to pursue the *ultra vires* challenge; it did, however, contest FIE's standing to raise constitutional and ECHR-based arguments.

3.2 *The Statutory Argument*

3.2.1 *Grounds of Appeal*

The Court identified five questions arising from the *ultra vires* argument, the first of which was procedural: did the grounds of appeal stated in FIE's written application for leave to appeal[26] include an argument that the Plan was *ultra vires* – specifically, in contravention of section 4 of the Act? The Government argued (and the Court agreed) «that it would require a somewhat strained interpretation of the grounds of appeal to

22. See N. Ní Loinsigh, *Judicial Dissent in Ireland: Theory, Practice and the Constraints of the Single Opinion Rule*, in *Irish Jurist*, 51, 2014, 123; N. Howlin, *Shortcomings and Anomalies: Aspects of Article 26*, in *Irish Student Law Review*, 13, 2005, 37 f.

23. *Friends of the Irish Environment CLG v The Government of Ireland, Ireland & The Attorney General*, Record No 2019/205, 9 December 2019, Respondent's Notice, text available at www.columbia.edu (accessed 5 October 2020).

24. [2020] IESC 49 [3.1-3.8].

25. [2020] IESC 49 [5.60].

26. Application for Leave to Appeal, 15 November 2019, text available at www.columbia.edu (accessed 5 October 2020).

suggest that the wider range of challenge set out in the written submissions and addressed in the Statement of Case come within those grounds»[27]. Nonetheless, the Court held that because

> […] those grounds were canvassed before the High Court, were set out in the written submissions of FIE and fully replied to on behalf of the Government and form part of the Statement of Case which sought to frame the parameters of the issues which would need to be debated at the oral hearing […] the Court should consider the issues[28].

3.2.2 *Interpretation of 2015 Act*

The second question was the interpretation of the Act: specifically, what did section 4 of the 2015 Act require the July 2017 NMP to contain?

First, the Court noted that, «the overriding requirement of a national mitigation plan is that it must, in accordance with s.4(2)(a), "specify the manner in which it is proposed to achieve the national transition objective"»[29]. This led the Court to find that the NMP, despite needing to be renewed at least every five years, was not simply a five-year plan but was in fact a 33-year plan which was subject to revision and could become more detailed over time as the state of knowledge improved. According to the Court, «the legislation contemplates a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved»[30].

The Court then identified «two important obligations which inform the statutory purpose» of every NMP under the Act: first, the section 4(8) requirement of what the Court described as «a significant national consultation whenever a plan is being formulated»; and second, «the very fact that there must be a plan and that it must be published» – which, the Court found, «involves an exercise in transparency».

27. [2020] IESC 49 [6.16].
28. *Ibidem*. For analysis of the significance of this procedural decision, see R. Kennedy - M. O'Rourke - C. Roddy-Mullineaux, *When is a Plan Not a Plan? The Supreme Court Decision in "Climate Case Ireland"*, in *Irish Planning and Environmental Law Journal*, 27(2), 2020, 60.
29. [2020] IESC 49 [6.18].
30. [2020] IESC 49 [6.20].

3.2.3 *Justiciability of the Plan*

The third question was the justiciability of the NMP. The Court summarised the Government's "central argument" on this issue as being that «the Plan simply involves the adoption of policy and […] courts have frequently indicated that matters of policy are not justiciable»[31]. The Court disposed of this argument relatively quickly on the basis that legislation existed in this case, mandating and prescribing many aspects of the NMP[32].

The Court then proceeded to address the Government's more nuanced argument: that whereas the "process" by which the NMP was created might be amenable to judicial review, the "substantive content" of the Plan was nonetheless pure policy and therefore outside of the Court's jurisdiction. The Court accepted that «there may be elements of a compliant plan under the 2015 Act which may not truly be justiciable»[33]. However, it continued:

> […] where the legislation requires that a plan formulated under its provisions does certain things, then the law requires that a plan complies with those obligations and the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day. […] a question of whether the Plan meets the specificity requirements in s.4 is clearly justiciable[34].

3.2.4 *Collateral Attack on 2015 Act*

The fourth question was whether FIE's challenge to the NMP amounted to an impermissible "collateral attack" on the 2015 Act. In other words, was FIE's claim that the Government acted unlawfully in the way that it discharged its obligations under the 2015 Act inevitably a challenge to the constitutionality of the 2015 Act?

The Court regarded this issue to be «a corollary of the jurisprudence which has followed from *East Donegal Co-Operative Livestock Mart Ltd. v Attorney General*»[35], according to which «a court must assume that any power or discretion available under a statute will be exercised in a

31. [2020] IESC 49 [6.23].
32. [2020] IESC 49 [6.24].
33. [2020] IESC 49 [6.27].
34. [2020] IESC 49 [6.27-6.28].
35. [1970] IR 317.

constitutional manner»[36]. The Court held that whether or not a claim of illegality in the exercise of a statutory power amounts to an attack on the constitutionality of the legislation concerned depends on the degree of latitude that the legislation provides to the decision-maker[37]. In this case, the Court held that «the claim that the Plan lacks the specificity required by s.4 does not, in any way, amount to a suggestion that the 2015 Act is inconsistent with the Constitution»[38].

3.2.5 *Plan Not Specific Enough*

Having decided the above questions, the Court considered «whether, on the merits, the Plan does meet [the] requirements of specificity» in section 4 of the 2015 Act.

The Court dismissed the Government's argument that the recent 2019 Climate Action Plan was «an example of how policy is evolving» and «build[ing] on the policy, framework, measures and actions» of the 2017 NMP[39]. While acknowledging that «there may be some merit in the suggestion that the document in question does provide greater detail in some areas», the Court held that the 2019 Climate Action Plan was not a "plan" in the sense of section 4 of the 2015 Act – partly because it had not been through the public consultation process required under that provision[40].

The Court held that the "real question" was «whether the [2017] Plan itself gives any real or sufficient detail as to how it is intended to achieve the NTO»[41]. In answering this, the Court took into account the purpose of the 2015 Act "as a whole", which it had already determined to include public participation and transparency in pursuit of the NTO. In a key passage concerning the interpretation of section 4 of the Act, the Court said that

> [t]he purpose of requiring the Plan to be specific is to allow any interested member of the public to know enough about how the Government currently intends to meet the NTO by 2050 so as to inform the views of the reasonable and interested member of the public as to whether that policy is considered to be effective and appropriate. […] the level of specificity required of a compliant plan is that it is

36. [2020] IESC 49 [6.28].
37. [2020] IESC 49 [6.29].
38. [2020] IESC 49 [6.31].
39. [2020] IESC 49 [6.34].
40. [2020] IESC 49 [6.35].
41. [2020] IESC 49 [6.36].

sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy[42].

The Court drew attention to CCAC reports from 2017 and 2018 which criticised, respectively, the fact that Ireland was «not projected to meet 2020 emissions reduction targets» and the fact that

[i]nstead of achieving the required reduction of 1 million tonnes per year in carbon dioxide emissions, consistent with the National Policy Position, Ireland is currently increasing emissions at a rate of 2 million tonnes per year[43].

The Court pointed to examples of the NMP's content concerning agriculture, and noted that «several of the proposals made in the agriculture chapter of the Plan involve carrying out "further research"»[44]. The Court continued:

This chapter of the Plan also contains somewhat vague proposals to continue to improve knowledge transfer and exchange to farmers by developing a network across State agencies and relevant advisory bodies and to further develop the range and depth of sustainability information collected for beef, dairy and other agriculture sectors[45].

Ultimately, the Court concluded that the content of the NMP did not meet the «clear present statutory obligation on the Government, in formulating a plan, to at least give some realistic level of detail about how it is intended to meet the NTO»[46]. The Court explained: «Some general indication of the sort of specific measures which will or may be required needs to be given. The legislation does, after all, require that a plan "specify" how the NTO is to be met»[47]. In particular, the Court held, the NMP needed to «specify in some reasonable detail the kind of measures that will be required up to 2050» because «[a]s noted earlier, this is not a

42. [2020] IESC 49 [6.38]. Emphasis added.
43. [2020] IESC 49 [6.42].
44. [2020] IESC 49 [6.44].
45. *Ibidem*.
46. [2020] IESC 49 [6.45].
47. *Ibidem*.

five-year plan but rather ought to have been a 33-year plan»[48]. The Court acknowledged that «matters such as the extent to which new technologies for carbon extraction may be able to play a role is undoubtedly itself uncertain on the basis of current knowledge»[49], but held «that is no reason not to indicate how and when particular types of technology are currently hoped to be brought on board»[50]. On that basis, the Court held «that the Plan does not comply with the requirements of the 2015 Act and, in particular, section 4 [and] should be quashed on the grounds of having failed to comply with its statutory mandate in that regard»[51]. The Court noted that its quashing of the NMP was «on grounds which are substantive rather than procedural»[52].

3.3 *Constitutional and European Human Rights*

Having adjudicated FIE's legality argument, the Court went on to respond (*obiter*) to some aspects of FIE's rights-based claims. The Court acknowledged that such consideration was arguably "purely theoretical" because the NMP, being quashed, would not fall to be reviewed again[53]. However, the Court opined, questions of FIE's standing to claim Constitutional and ECHR-based rights violations were «of some continuing importance because that issue would arise in any challenge sought to be brought by FIE, or indeed by any other corporate NGO in the environmental field, in respect of any future plan»[54]. The Court identified two questions concerning standing:

> [first] whether this case comes within one of those exceptions where a third party, including a corporate body such as FIE, may have standing to maintain a claim based on the rights of others[?][55]. [Second] whether it is possible for a party, who would not have standing before the ECtHR, to bring proceedings relying on the 2003 Act and, if so, what circumstances permit such a claim to be brought[?][56].

48. [2020] IESC 49 [6.46].
49. *Ibidem*.
50. [2020] IESC 49 [6.47].
51. [2020] IESC 49 [6.48].
52. [2020] IESC 49 [6.49].
53. *Ibidem*.
54. *Ibidem*.
55. [2020] IESC 49 [7.5].
56. [2020] IESC 49 [7.6].

Regarding the first question, the Court took as its starting point the foundational case of *Cahill v Sutton*[57], which established that any party seeking to bring a constitutional challenge must show that there is a potential interference with their rights[58]. It set out in detail some comments of Henchy J in that decision, to the effect that this was not a hard rule and might be relaxed in appropriate cases but this should be done sparingly[59]. It also considered the approaches taken by the Court in *Coogan*[60] and *Irish Penal Reform Trust*[61], where companies were permitted to bring a challenge on behalf of others (the unborn and prisoners, respectively).

However, the Court stated that:

> [o]ther than a suggestion that it was desire [*sic*] to protect individuals from a possible exposure to the costs of unsuccessful proceedings, no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE[62].

It dismissed the standing which was given to a company in *Digital Rights Ireland*[63] as irrelevant, as that company had asserted its own rights rather than those of others[64]. It therefore refused to relax the general standing requirements in this case[65]. It also dismissed any ECHR-related claims, on the basis that the rights involved are the same or analogous[66].

Although this would seem to have put an end to any other rights-based questions, the Court also addressed the question of the «right to a healthy environment», lest it be mis-understood as accepting by its silence the previous statements of Barrett J and MacGrath J in the High Court[67]. The Court said that «it would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated

57. [1972] IR 269.
58. [2020] IESC 49 [7.8].
59. [2020] IESC 49 [7.9-7.12].
60. [1989] IR 734 (SC).
61. [2005] IEHC 305.
62. [2020] IESC 49 [7.22].
63. [2010] 3 IR 251 (HC).
64. [2020] IESC 49 [7.20].
65. [2020] IESC 49 [7.22].
66. [2020] IESC 49 [7.23].
67. [2020] IESC 49 [7.25].

rights»[68], because «the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution»[69]. The "derived rights" label is meant to show

> […] that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. […] It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole[70].

The Court stated that this should not be «a narrow textualist approach», again citing with approval comments of Henchy J in *McGee*[71] and *Norris*[72] to the effect that «[t]he infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible»[73]. However, requiring a connection with an existing express Constitutional guarantee would guard against the "risk" of «a blurring of the separation of powers by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere»[74].

Following from this analysis, the Court held that

> the right to an environment consistent with human dignity, or alternatively the right to a healthy environment […] is impermissibly vague. It either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate[75].

The Court was strengthened in its conclusion by reference to a textbook by David Boyd[76], from which the Court deduced that similar rights

68. [2020] IESC 49 [8.4].
69. [2020] IESC 49 [8.5].
70. [2020] IESC 49 [8.6].
71. [1974] IR 284 (SC).
72. [1984] IR 36 (SC).
73. [2020] IESC 49 [8.7].
74. [2020] IESC 49 [8.9].
75. [2020] IESC 49 [8.11].
76. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, UBC Press, 2011.

have been added to national constitutions by explicit amendment rather than a process of judicial discovery[77]. The only exception is India, but as its constitutional order is different to Ireland's and the parties had not put any relevant arguments before the Court, this was not considered further[78]. However, the Court clarified that its conclusion did not mean that constitutional rights could not be pleaded in environmental cases[79]. The Court went so far as to muse on which particular constitutional rights «might play a role in environmental proceedings» in future, and

> […] would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances[80].

4. *Discussion*

4.1 *The* Ultra Vires *Finding*

The Court's judgment under the legality ground of appeal is somewhat confusing, as it engages in novel reasoning regarding both the meaning of "specify" in section 4 and the standard of review for determining whether the NMP was sufficiently specific, without referring to established principles of statutory interpretation or to the usual deference where the execution of a statutory duty involving a substantial degree of discretion is concerned[81].

To interpret the meaning of "specify", the Court first turned to the Act's purpose as stated in the statute's long title: the achievement of the NTO. On this basis, it found that inherent in the word "specify" was a requirement that each NMP set out a map of how the State is to get all the way to the Act's end goal in 2050. The Court identified this requirement in summary fashion, stating that due to the NTO's wording the NMP «was required to be a 33-year plan» and that «it seems to me to be absolutely clear that it would

77. [2020] IESC 49 [8.12].
78. [2020] IESC 49 [8.13].
79. [2020] IESC 49 [8.14-8.17].
80. [2020] IESC 49 [8.17].
81. G. Hogan - D.G. Morgan - P. Daly, *Administrative Law in Ireland*, 5th edn., Roundhall, 2019, Chapter 17, Section A.

be wrong to suggest that the legislation envisages that details be provided for only the first five years»[82] (MacGrath J, on the other hand, had concluded, in the Supreme Court's words, that «it was the 2015 Act, as opposed to the Plan, which provided for reaching the NTO by the end of the year 2050»[83]).

The Court went on to identify further content in the term "specify" based on its identification of «two important obligations which inform the statutory purpose», namely, public consultation and transparency[84]. According to the Court, any NMP adopted under section 4 needed to be specific enough to enable «a reasonable and interested member of the public» to make decisions about whether they were happy with how the government was dealing with this significant public policy issue, and to come to conclusions about how they might vote or otherwise act based on this assessment[85]. While this is undoubtedly sensible in a democratic state, the Court appears to have stepped outside the usual process of statutory interpretation in arriving at this conclusion, without clearly explaining why.

Section 5 of the Interpretation Act 2005 requires the courts to give a statutory provision a construction which reflects the "plain intention" of the legislature «where that intention can be ascertained from the Act as a whole», but only when a literal interpretation would be absurd. One of the usual starting points for determining this plain intention is the long title of an act (as used, at first, by the Court)[86]. There is no mention of consultation or transparency in the 2015 Act's long title, and approval of an NMP is clearly a matter for the cabinet, not the people. While section 4 does provide for public participation, the final decision on the acceptability of an NMP is «in the opinion of the government». Such executive decision-making has traditionally been off-limits for the courts, except in limited circumstances where the decision is in some way unreasonable[87]. A literal reading of the text of the Act, therefore, indicates that the specificity of the NMP is entirely a matter for government.

Furthermore, public consultation can have several purposes: the provision of information, filling information gaps, making information contestable, problem solving and social learning, influencing decisions,

82. [2020] IESC 49 [6.20].
83. [2020] IESC 49 [5.51].
84. [2020] IESC 49 [6.21-6.22].
85. [2020] IESC 49 [6.38]. Emphasis added.
86. D. Dodd, *Statutory Interpretation in Ireland*, Bloomsbury Professional, 2008, 3.04.
87. M. de Blacam, *Judicial Review*, Bloomsbury Professional, 2017, Chapter 27.

enhancing democratic participation, and enabling pluralistic representation[88]. It is not clear how or why the Court selected the second last of these as best representing the plain intention of the Oireachtas.

Once it had determined the meaning of "specify", the Court progressed to considering whether the 2017 NMP was, in substance, sufficiently specific to comply with the 2015 Act. Earlier in the judgment the Court had noted that

> [i]nsofar as the Court might be persuaded that there are *rights* which can be asserted by FIE in these proceedings […] then an issue potentially arises as to the appropriate standard of review which should be applied by the Court[89].

In relation to rights, the Court acknowledged, «issues of proportionality may possibly arise»[90] and the relevance of *Meadows* would need to be considered[91]. However, the Court refused to countenance constitutional or ECHR rights claims in this case, and the part of the judgment determining whether or not the 2017 NMP was sufficiently specific contains no explicit reference to an established standard of review, whether *O'Keeffe* unreasonableness[92] or *Meadows* proportionality.

In order to determine «whether the Plan gives sufficient detail to allow a reasonable and interested observer to understand how it is suggested that the NTO is to be met by 2050», the Court relied heavily on the views of the CCAC, which has been highly critical of Ireland's slow and inadequate progress towards the NTO. However, while the fact that the NMP will not achieve its statutory objective according to the CCAC (and FIE, among others) is a strong indicator that the plan is not sufficiently specific to enable individuals to form an opinion as to its adequacy, the second does not necessarily follow from the first.

In addition, the strong language of the CCAC on this lack of progress indicates that there is, in fact, a mechanism for ensuring that the public are properly informed built into the legislative framework, further undermining the Court's logic. The Court had no evidence on whether the

88. C. O'Faircheallaigh, *Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making*, in *Environmental Impact Assessment Review*, 30 (1), 2010, 20 f.

89. [2020] IESC 49 [5.53]. Emphasis added.

90. [2020] IESC 49 [5.54].

91. *Ibidem*, referring to *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 (SC).

92. *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 (SC).

putative "reasonable and interested member of the public" does or does not know how the government of the day intends to meet the NTO.

Had the Court applied the *O'Keeffe* test, the agreed scientific evidence might have provided a basis for finding that no reasonable authority could have formed the opinion that an NMP which provided for rising GHG emissions would achieve the NTO. It may be true that adopting an NMP which cannot meet its intended objective, as the CCAC states the Government did in 2017, «plainly and unambiguously flies in the face of fundamental reason and common sense»[93] (to use the language of Henchy J in *Keegan*, the precursor to *O'Keeffe*). However, it would have considerably elucidated the reasoning of the Court if this had been clearly stated, particularly when the legislation expressly reserves the approval of the NMP to the Government. It is interesting to consider whether the unique features of the cabinet as decision-maker in this case (perhaps being considered more political than any other decision-maker under administrative law) were behind the Court's use of the politically-engaged citizen's understanding as the measure by which to determine the NMP's specificity.

4.2 *Standing*

While the Court seems to have taken a radical approach to standards of judicial review, it demonstrated considerable conservatism in the face of FIE's arguments that the realities of the Irish litigation landscape, and of climate change, warranted a grant of standing to FIE in order to ensure access to justice regarding (potential) rights violations.

The Court was quick to dismiss FIE's contention that it had taken this case because the costs risks were too great for an individual litigant to bear: the judgment classified this as only a "suggestion" by FIE, finding that «no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE»[94]. The Court also opined that «[t]here does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate»[95]. However, the Irish legal costs regime (where costs ordinarily "follow the event") has been

93. *The State (John Keegan and Eoin J. Lysaght) v The Stardust Victims Compensation Tribunal* [1986] IR 642 (SC), 658.
94. [2020] IESC 49 [7.22].
95. *Ibidem*.

highlighted for decades by scholars and practitioners as a real and critical barrier to public interest and rights-based litigation[96]. While the courts retain discretion to depart from the ordinary costs rule in "exceptional" circumstances, the Supreme Court has declined to establish any hard-and-fast principles on the basis that any «[i]f there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation»[97]. Moreover, the current system of legal aid has been criticised repeatedly by the Free Legal Advice Centres (FLAC) among others as not fit for purpose; it suffers from long delays and excludes provision for multi-party actions[98]. The Oireachtas has not legislated for protective costs orders, and FLAC notes that «[w]hile the Irish courts have accepted in principle that PCOs can be granted, there are no specific rules or guidance on public interest litigation comparable to other common law jurisdictions»[99]. As Matthew Holmes argues, it is also unclear whether crowdfunding for litigation is permissible in light of Ireland's ancient maintenance and champerty rules[100]. A recent report of the EU Bar Association and the Irish Society for European Law recommended an overhaul of Ireland's collective action and crowdfunding rules, recognising these areas as key barriers to litigation in Ireland[101]. It is striking, and not a little disappointing, that the Court made such short shrift of FIE's claim that it had taken the legal challenge because an individual litigant could not. The financial barriers to rights-based and public interest litigation in Ireland surely raise issues under the Aarhus

96. See for example *Public Interest Law Alliance, The Costs Barrier & Protective Costs Orders: Report (FLAC 2010)*, text available at www.pila.ie (accessed 30 September 2020); G. Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, 2nd edn., Institute of Public Administration, 2015.

97. *Dunne v Minister for the Environment, the Attorney General and Dun Laoghaire-Rathdown County Council* [2005] IEHC 94 & [2007] IESC 60. See also *Ryanair Ltd v Revenue Commissioners* [2017] IEHC 272, where Barrett J applied the approach of Clarke J in *Cork County Council v Shackleton & Ors* [2011] IR 443 to identifying a "test case", but nonetheless noted (at [2]) that «Clarke J. does not closely define the meaning of what constitutes a "test case"».

98. See for example *Free Legal Aid Centres, Examining Access to Justice in the Draft Programme for Government 2020 (FLAC 2020)*, text available at www.flac.ie (accessed 30 September 2020).

99. *Free Legal Aid Centres*, cit., 9.

100. M. Holmes, *Two's Company, Fee's a Crowd*, in *Law Society Gazette*, October 2017, 30.

101. EU Bar Association, Irish Society for European Law, *Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions*, 29 January 2020.

Convention[102]; the case of *European Commission v the United Kingdom of Great Britain and Northern Ireland* is instructive[103].

The Court's conclusion that FIE's case was "a far cry" from *Coogan* and *Irish Penal Reform Trust*[104] is also worth querying. Article 1 of the Aarhus Convention[105] and several judgments of other national courts have recognised that states'actions *vis-à-vis* the environment and climate change concern future generations – perhaps not a "far cry" from *Coogan* after all. In *Urgenda*[106], the Dutch District Court accepted the NGO's standing on behalf of people outside the Netherlands and on behalf of future generations. Adelmant and others note that the Supreme Court of the Philippines has developed rules authorising suits by «any Filipino citizen in representation of others, including minors or generations yet unborn»[107], and that similar approaches have been adopted in Latin America and India[108].

The Court's judgment did not engage with FIE's argument that the particular phenomenon of climate change justifies an exceptional approach to standing. FIE had contended that it was relevant, bearing in mind the focus in *Irish Penal Reform Trust* on the NGO's unique ability to challenge problems that were systemic, that climate change is creating generalised impacts for which there may not be «an obvious standout plaintiff»[109]. To this point, Alston and others write:

102. FIE is litigating for access to legal aid on this basis; see *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 347. The Convention is part of European law – see Council Decision 2005/370/EC of 17 February 2005 on the conclusion on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

103. Case C-530/11 *European Commission v the United Kingdom of Great Britain and Northern Ireland* EU:C:2014:67, [2014] QB 988.

104. [2020] IESC 49 [7.22].

105. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (opened for signature 25 June 1998, entered into force 30 October 2001) 2161 United Nations Treaty Series 447, Article 1.

106. *Urgenda Foundation v The Netherlands* NL:RBDHA:2015:7145 (District Court of the Hague).

107.V. Adelmant - P. Alston - M. Blainey, *Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court*, in *Journal of Human Rights Practice*, 1, 2021, 7 f.

108. V. Adelmant - P. Alston - M. Blainey, *op. cit.*, citing Erin Daly and James May, Global Environmental Constitutionalism (CUP 2014), 131.

109. M. O'Rourke, *Note of Hearing*, 23 June 2020.

Despite the high likelihood that […] harms [caused by climate change] will materialise in the near future if adequate mitigation measures are not implemented, those likely to be most affected might not yet have suffered any particular harm or loss. Even if they are able to establish loss, the necessary causal linkages can be difficult to prove due to the multiplicity of actors responsible for causing climate change. In these circumstances, traditional doctrines of standing, causation and redressability often preclude climate litigants from obtaining adequate remedies[110].

4.3 *"Derived Rights"*

Given that the Court refused to adjudicate FIE's rights arguments, it is perhaps unfortunate that the Court still took the opportunity to state categorically that the concept of a right to an environment consistent with human dignity cannot exist as a "derived" right under the Constitution because it lacks sufficient definition. The admission by counsel for FIE that such a right would not add anything to FIE's case (because all of FIE's contentions were already encapsulated by its right to life and right to bodily integrity/right to respect for private and family life arguments)[111] indicates that these proceedings were never going to lead to a resounding affirmation of Barrett J's finding in *Fingal Co Council*. FIE's arguments were a reminder, too, that if the European Court of Human Rights is going to exercise jurisdiction over states'climate change-related actions it will have to do so within the strictures of the existing ECHR Articles. However, the Court could have left the door open to future interpretations of such a right, bearing in mind that climate change-related litigation is still in its infancy.

It remains to be seen whether the "derived" rights doctrine will present problems where litigants seek to expand the Irish courts' interpretation of, or obtain identification of a right linked to, an established "unenumerated" constitutional right that is not expressed in the text of the Constitution but has a corollary in the ECHR (bearing in mind the Court's statement that "derived" rights will be identified from «some root of title in the text or structure of the Constitution»[112]). Article 8 ECHR, which protects the right to respect for private and family life, is playing a central role in climate litigation in Europe at present, for example. In light of this new doctrine, how quick will the Irish courts be to discover "new" rights under

110. V. Adelmant - P. Alston - M. Blainey, *op. cit.*, 7.
111. [2020] IESC 49 [8.10].
112. [2020] IESC 49 [8.6].

the Constitution which the ECtHR might derive from Article 8? (The right to identity is an example of an "unenumerated" constitutional right[113], the equivalent of which the ECtHR derives from Article 8 ECHR.)

Finally, it is noteworthy that the Court acknowledged but did not comment on the reference by MacGrath J in the High Court to the decision of Fennelly J in *McD (J) v L (P) & M (B)*[114], to the effect that it is not for the Irish courts to interpret the ECHR in relation to issues (here, climate change) that the ECtHR has not yet addressed. In *McD (J)*, Fennelly J cited with approval the holding of Bingham LJ that «[t]he duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less»[115]. However, UK Supreme Court judgments since *Ullah*, and senior judges' additional *obiter* and extra-judicial statements, have departed from the seemingly strict approach of Bingham LJ in that case and instead have adopted an approach that seeks to follow the ECtHR where it has delivered clear judgments on an issue, but otherwise to allow the domestic courts to interpret the ECHR for themselves[116]. It appears that courts in other European jurisdictions – for example France and Germany, which (unlike Ireland) are monist – have also taken a proactive approach to interpreting the ECHR and have been encouraged to do so by the ECtHR[117].

5. *Consequences*

Despite the Supreme Court's rejection of FIE's rights-based arguments, the result of *Climate Case Ireland* is a monumentally progressive step into a new era of the Irish courts engaging with climate science and the all-encompassing and rapidly worsening effects of global warming. Prior to the Supreme Court's judgment, environmental activists worried that the Act lacked "teeth" – in other words, that its wording was not precise enough

113. *IO'T v B* [1998] 2 IR 321 (SC).
114. [2009] IESC 81.
115. *R (on the application of Ullah) v Special Adjudicator* [2004], 2 AC 323.
116. See for example, B. Hale, *Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*, in *Human Rights Law Review*, 12 (1), 2012, 65; N. Ferreira, *The Supreme Court in a Final Push to go Beyond Strasbourg*, in *Public Law*, 2015, 367; H. Fenwick - R. Masterson, *The Conservative Project to 'Break the Link between British Courts and Strasbourg': Rhetoric or Reality?*, in *Modern Law Review*, 80 (6), 2017, 1111.
117. E. Bjorge, *National Supreme Courts and the Development of ECHR Rights*, in *International Journal of Constitutional Law*, 9 (1), 2011, 5.

or strong enough to allow for its enforcement through the courts[118]. This case demonstrates that its creative use and application can yield results.

However, the Court's refusal to countenance recognising a "derived" right to a healthy environment, either now or in the future, likely means that the civil society campaign for a referendum vote will gain momentum in the coming years. The recently-concluded Citizens' Assembly on biodiversity loss has recommended that the Constitution be amended to include a range of environmental rights, both substantive and procedural human rights and substantive and procedural rights of nature, indicating public opinion may favour this[119].

The judgment will clearly have important and immediate consequences in terms of these very pressing areas of social, economic, and environmental policy. In the longer term, despite its opacity, its approach to judicial review and statutory interpretation should give pause to the Government and heart to activists, as the Court is clearly not willing to allow a pettifogging approach to implementation to undermine an ambitious policy framework. While its perspective on constitutional and European human rights is lamentably conservative, it takes care not to close the door to creative advocates in the future. Most significantly, it demonstrates that the Court understands the importance and seriousness of the climate crisis, and its role in making Irish society face its local, European, and global responsibilities in tackling this. All of these aspects of its reasoning, for better or for worse, will have consequences for litigation in environmental law and beyond for decades to come.

118. See for example, K. Crossan, *"It Was Just an Incredible Moment" – Reactions to the Historic Climate Case Ruling* (*Greennews.ie*, 7 August 2020), available at www.greennews.ie (accessed 30 September 2020); Stop Climate Chaos, Briefing Paper February 2015, *The Climate Action and Low Carbon Development Bill 2015 and the Recommendations of the Joint Committee on the Environment, Culture and the Gaeltacht*, text available at www.trocaire.org (accessed 30 September 2020), 1; S. O'Neill, *NUIG Human Rights Podcast*, 23 September 2019, available at www.soundcloud.com (accessed 30 September 2020). For academic commentary along similar lines, see R. Kennedy, *New Ideas or False Hopes?: International, European, and Irish Climate Change Law and Policy After the Paris Agreement*, in *Irish Planning and Environmental Law Journal*, 23, 2016, 75.

119. The Citizens' Assembly, "Citizens' Assembly on Biodiversity Loss", text available at www.citizensassembly.ie (accessed 26 May 2023).

Eva Balounová

The First Czech Strategic Climate Lawsuit with the Focus on the Cross-fertilisation of Court Decisions*

1. *Introduction*

The phenomenon of climate lawsuits has not bypassed the Czech Republic. There is currently a pending climate case against Czechia at the European Court of Human Rights (ECtHR) (Duarte Agostinho)[1]; several smaller cases related to airport expansion or renewable energy have emerged at the national level, and one strategic climate lawsuit was filed at the domestic level to challenge the State's climate policy. In this strategic climate case, Klimatická žaloba ČR, z.s. and Others v. Government of the Czech Republic and Others, the first-instance court – the Prague Municipal Court – issued a surprising decision in favour of the plaintiffs in June 2022. However, the appellate court – the Czech Supreme Administrative Court – overturned this decision in February 2023. Although the Supreme Administrative Court did not uphold the decision of the Prague Municipal Court on Czechia's climate obligations, it has not completely closed the door for future climate lawsuits in the Czech Republic. This paper, therefore, addresses both judgments in this Czech strategic climate case and places a special focus on courts' references to climate cases from other jurisdictions (cross-fertilisation of court decisions). More specifically, the Czech courts have not only addressed the landmark climate judgments from other European countries (Netherlands, Germany) but also referred to the climate cases pending in the European Court of Human Rights (that also concern the Czech Republic).

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1. ECtHR, *Duarte Agostinho and Others v. Portugal and Others* (communicated case), App no 39371/20.

2. *Czechia's Climate Performance*

Czechia's climate performance is relatively poor, not only in that the greenhouse gas (GHG) emissions/*per capita* are high with no significant decrease in recent years, but also because the current climate policies and legislation are not very ambitious. Although Czechia's GHG emissions have declined by 34% (including the Land Use, Land-Use Change, and Forestry (LULUCF) sector) below the 1990 levels, most of this decline appeared in the first years after 1989, when the communist regime collapsed and the economy and industry were transformed[2]. Now, the GHG emissions *per capita* in the Czech Republic are the third highest in the European Union (EU)[3].

Moreover, in the Czech Republic, there is no framework climate law (Climate Change Act (CCA)), and, beyond the adaptation and transposition of the EU legislation, only non-binding governmental policies are being adopted in the area of climate change mitigation. As noted by Müllerová and Ač, one of the reasons for Czechia's poor climate performance is the institutional chaos, caused by responsibility for climate policy being divided between several ministries[4]. The problem of fragmented responsibility for climate action appears in the Czech strategic climate litigation as well.

3. *Setting the Scene - the Lawsuit*

In April 2021, the Czech climate lawsuit was filed with the Prague Municipal Court (PMC) as an administrative procedure under the Code of Administrative Justice[5]. The plaintiffs included multiple entities led by The Czech Climate Litigation Association ("Klimatická žaloba ČR"), which had been created in 2019 to bring this case. Other plaintiffs included a municipality, individual persons, and representative groups of citizens affected by climate change, such as farmers, foresters and city residents.

2. H. Müllerová - A. Ač, *The First Czech Climate Judgment: A Novel Perspective on the State's Duty to Mitigate and on the Right to a Favourable Environment*, in *Climate Law*, 12 (3-4), 2022, 273-284, 275.
3. *Ibidem*.
4. *Ivi*, 276.
5. Act No. 150/2002 Coll., Code of Administrative Justice as later amended. English translation available at: www.unece.org (accessed 18 July 2023).

The diversity of the plaintiffs reflects the traditional practice in Czech environmental litigation, of involving several types of actors to meet the conditions for legal standing for at least some of them[6].

The defendants were the central government of the Czech Republic and four subsidiary ministries responsible for the area of climate protection (Ministry of the Environment, Ministry of Industry and Trade, Ministry of Agriculture, and Ministry of Transport).

The lawsuit was brought over an «unlawful interference», which, according to the applicants, consisted of general executive inaction regarding climate protection, concerning both mitigation and adaptation and hence causing harm to the plaintiffs' human rights. The plaintiffs claimed that their constitutional rights to a favourable environment, local self-government, property, carrying out economic activity, health protection, and to private and family life were being harmed. Particularly, the applicants were reasoning that the inaction rested in the defendants' failure to take adequate mitigation and adaptation measures to meet the State's commitments arising from the Paris Agreement[7]. The defendants had neither set adequate climate protection goals in relevant non-binding strategic documents, nor drafted relevant legislation.

The applicants therefore sought protection against the alleged continuing «unlawful interference», which should have commenced in 2017, when the Czech Republic ratified the Paris Agreement, in other words, become a party to it. Specifically, the applicants asked the court to order the defendants to take necessary and proportionate measures to reduce GHG emissions and to adapt to climate change within six months.

4. *First Instance's Judgment - An Unexpected Success*

The Prague Municipal Court, after a public hearing requested by the plaintiffs, issued a ruling on June 15, 2022, upholding the mitigation claim but dismissing the claim on adaptation[8]. The Court's points on

6. H. Müllerová - A. Ač, *op. cit*., 276.
7. Paris Agreement (adopted 12.12.2015, in force 4.11.2016) 3156 UNTS.
8. *Klimatická* žaloba ČR, *z.s. and Others v. Government of the Czech Republic and Others*, Judgment of the Prague Municipal Court, 15 June 2022, No. 14A 101/2021. The full Czech text is available at www.ceska-justice.cz (accessed 18 July 2023). An unofficial English translation of the judgment is provided by the Czech Climate Litigation Association at www.klimazaloba.cz (accessed 18 July 2023).

standing, causation, and the right to a favourable environment were quite remarkable.

The Prague Municipal Court rejected the adaptation claim on the ground that, under the Paris Agreement, the obligations concerning adaptation consist of increasing EU Member States' adaptive capacity, and not of achieving specific targets by a certain date. In particular, under the EU law (Article 5 of the European Climate Law)[9], States must adopt and implement a national adaptation strategy and plan based on analyses and up-to-date scientific knowledge. In the Czech Republic, not only had an adaptation plan, based on expert submissions, been prepared in 2021, but also new legislation regarding adaptation was adopted thereafter (amendment of the Water Act, adoption of the Erosion Protection Degree). Hence, in the view of the Court, the defendants were making progress in the area of climate change adaptation.

Also quite interestingly, although the Court upheld the mitigation claims against the ministries, it declared as inadmissible the action against the central government based on procedural reasons arising from the Code of Administrative Justice. According to the Court, the government does not have the status of an administrative authority regarding climate policy, as it mainly coordinates the ministries and does not address the general public; in other words, it does not act in the field of public administration, but only internally. As a result, it cannot be subject to judicial review under the Code of Administrative Justice. Hence, the claims against the central government as a whole were dismissed but the claims against the four subsidiary ministries remained.

4.1 *Upholding the Mitigation Claim Against the Ministries*

The Prague Municipal Court ruled that the State has a positive obligation to adopt precautionary measures to protect constitutional human rights (including the right to a favourable environment, explicitly guaranteed by Article 35 (1) of the Charter of Fundamental Rights and Freedoms of the Czech Republic)[10]. International law and generally accepted scientific standards serve as interpretative tools for determining the scope

9. The Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law").
10. Constitutional act No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms, as later amended. English translation available at: www.usoud.cz (accessed 18 July 2023).

of these positive obligations (230). The Court suggested that the second sentence of Article 4 (2) of the Paris Agreement imposes an obligation for the parties to implement mitigation measures aimed at achieving the objectives of their nationally determined contributions (NDCs).

The Court therefore analysed the Czech Republic's NDC, namely the European Union's NDC (EU NDC), which also serves as an NDC of the Czech Republic. The EU NDC commits the EU and its Member States, acting collectively, to GHG emissions reductions by 2030 of at least 55% compared to 1990 levels. This obligation is, according to the Court, sufficiently specific to be applicable directly and scrutinised under judicial review. The Court then examined whether the Czech Republic was properly complying with its obligation under the Paris Agreement in conjunction with the EU NDCs, namely whether it was implementing national mitigation measures leading to a reduction of GHG by 2030 by at least 55% compared to the 1990 levels.

In this context, the Assessment of the Climate Protection Policy in the Czech Republic (POK Assessment) prepared by the Ministry of Environment in 2021 served as proof. The POK Assessment states that, by 2030, the existing measures are only expected to lead to a 45.1% reduction, and that, to meet the 2030 target (55%), it will be necessary to maintain the effectiveness of existing measures and adopt additional GHG reduction measures. Additionally, according to the POK Assessment, 29% of the existing measures were not properly implemented. The Court thus found that the defendants had been late since December 18 2020, when the UNFCCC Secretariat received an updated EU NDC. The Court consequently ordered the defendants to take specific mitigation measures to achieve a 55% reduction in GHG emissions, relative to 1990 levels, by 2030.

The Prague Municipal Court reasoned that, in this case, the EU NDC must be interpreted as an individual, not just an EU-wide target. According to the Court, this interpretation not only arises from relevant Czech climate policies (i.e., from the POK Assessment) but also from the requirement to enable the effective monitoring of compliance with the Paris Agreement. The Court noted that the EU target is yet to be embodied in the EU legislation through the EU ETS Directive and the Effort Sharing Regulation (as the amendments of this EU secondary legislation were under negotiation at the time the decision was issued but were already proposed in the Fit for 55 package). Nonetheless, in the Court's view, EU climate protection does not supersede protection under the Paris Agreement – the two instruments work side by side and may overlap, and the Czech Republic could even have a more ambitious commitment than the EU's one.

Although the Court upheld the plaintiffs' claim that Czechia's mitigation effort is insufficient, the remedies ordered differed from those sought by the applicants. They demanded the adoption of necessary and reasonable measures for climate mitigation within six months, while ensuring that the specific climate budget was not exceeded. This climate budget was supposed to be for Czechia 800 Mt CO2 from January 2021 until the end of the century according to the calculations submitted by the applicants. Still, the Court reasoned that the alleged carbon budget does not represent a specific commitment by the Czech Republic under the Paris Agreement because it is not based on a general consensus of the international community or credible science. Although the Court found the global carbon budget drawn from the reports of the Intergovernmental Panel on Climate Change (IPCC report) to which the plaintiffs referred to be credible, it did not find credible the method of calculating the national carbon budget contained in the other evidence provided by the plaintiffs. The Court also did not set a time limit and, instead of «necessary and proportionate measures», instructed the adoption of «specific measures».

The Court did not examine whether the applicants were prejudiced in other rights as claimed. Although the Court limited its review to the constitutional right to a favourable environment, it is quite remarkable that the Court argued that global warming caused by GHG emissions adversely affects the climatic conditions necessary for human life, thereby interfering with the right to a favourable environment. The Court defined the right to a favourable environment (included in the Czech constitution, art. 35 of the Charter of Fundamental Rights and Freedoms of the Czech Republic) as a right to live in climatic conditions (encompassed in the term "environment") that allow the unhindered exercise of the needs of human life (the term "favourable"). Following the precautionary principle, citizens have, according to the Prague Municipal Court, the right to be concerned about the quality of their environment and do not have to wait for climate conditions to be so unfavourable that they do not allow their basic needs of life to be met. The right to a favourable environment is therefore also violated if there is a restriction on the fulfilment of the basic needs of life; there does not need to be a limitation of such needs.

4.2 *Court's Remarks on Standing and Causation*

Active legal standing was granted to all the applicants. According to the Court, even the association and the municipality have active legal standing to bring a claim based on the right to a favourable environment,

as the association protects the rights of its members and the municipality of its citizens. The fact that the interference concerned the rights of a relatively indeterminate set of other persons (in the population of the Czech Republic) did not in itself preclude the claim, as the adverse effects of climate change in the Czech Republic and Europe are so significant that the applicants were directly affected by them. Yet, according to the Court, the plaintiffs are only directly affected by some of the local impacts of climate change, such as the threat of water shortages at the local level, the increase in average temperature and the associated health impact, and the increased frequency of fires, droughts and floods. Other effects, such as the sea rise or mass extinction of species, were found by the Court not to impact the plaintiffs' legal sphere directly. Nevertheless, legal scholars have already highlighted the global interconnection of climate change impacts[11].

On causation, the Court decided that, if the defendants had properly fulfilled their obligations, climate change would have been milder, and averting dangerous climate change would have been more likely. The defendant's failure to act was therefore a partial cause of the current adverse impacts of climate change in the world. In addition, the Court stated that the individual responsibility of the parties to the Paris Agreement could not be ruled out by referring to the level of other parties' emission contributions. Such an approach would, according to the Court, make effective legal protection impossible if the State in question is not a significant emitter of GHG on a global scale. The Court argued that each country could be held accountable for its share of emissions and invoked the «principle of common but differentiated responsibilities». Finally, the Court stated that the link between climate change and human (in)action is so compelling and narrow that, when considering the directness of the interference, the two are an inseparable whole[12].

4.3 *On the Evidence Admitted*

Although the plaintiffs submitted a wide range of evidence, including an analysis and expert testimonials prepared specially for this case, the

11. T. Žuffová-Kunčová - M. Kovalčík, *Czechia's First Climate Judgment*, in *Verfassungsblog*, 2022, text available at www.verfassungsblog.de (accessed 18 July 2023).
12. E. Balounová, *Guest Commentary: An Unexpected Success for Czech Climate Litigation* in *Climate Law, A Sabin Center blog*, 2022, available at www.blogs.law.columbia.edu (accessed 18 July 2023).

Prague Municipal Court based its decision mainly on commonly available documents on climate change, such as the IPCC reports and other rather legal literature.

5. *The Supreme Court's Judgment - On the Character of the EU Climate Target*

Although the result was quite celebrated by the plaintiffs, after the four affected ministries filed a cassation complaint to the Supreme Administrative Court, the applicants also appealed. Subsequently, in February 2023, the Supreme Administrative Court of the Czech Republic overturned the Prague Municipal Court's decision and returned the case back to it for further proceedings[13].

The main reason for that was the collective character of the EU NDC and thus no binding obligation for the Czech Republic to reduce its GHG emissions by 2030 by at least 55%, as found by the Prague Municipal Court. Although the Supreme Administrative Court noted the relevant provisions of the Paris Agreement regarding parties acting jointly, the Court reasoned that whether the EU NDC is in compliance with these provisions is not a matter for the Czech courts but rather for the Conference of the Parties to the Paris Agreement and the (first) global stocktake.

The main reason for interpreting the EU climate target as strictly collective is, according to the Supreme Administrative Court, the ongoing negotiations of the national targets and consequent assessment of the EÙs collective progress. In the Court's view, the courts must not intervene in these political and legislative processes (by establishing the State's obligations). According to the Court, this intervention may lead to an undesirable deprivation of the State's necessary manoeuvring space. Although the Supreme Administrative Court is building its reasoning on the "very sense" of cooperation within the EU, the Court is, in the opinion of the author of this article, omitting the individual responsibility taken by the State when becoming a party to an international agreement (the Paris Agreement in this case).

As regards the alleged interference with the right to a favourable environment, the Supreme Administrative Court reasoned that there is cur-

13. *Klimatická* žaloba ČR, *z.s. and Others v. Government of the Czech Republic and Others*, Judgment of the Supreme Administrative Court of the Czech Republic, 20 January 2023, No. 9 As 116/2022-166. The full Czech text is available at www.klimazaloba.cz (accessed 18 July 2023).

rently no interference with its essential core, namely that the consequences of climate change in the Czech Republic are not so serious that they would make it impossible to receive the basic needs of human life. According to the Court, such consequences may only be predicted to occur in the more distant future. Unfortunately, the Court did not elaborate on this risk of future violation of human rights or on the possibility that current activities are already setting such conditions that rights might be affected in future[14]. The Court also did not address the other human rights, the violation of which was claimed by the plaintiffs. The Court generally failed to examine the plaintiffs' arguments in corresponding detail. However, it has not closed the door completely on future climate claims.

The Supreme Administrative Court ruled that the illegality of the State's climate action may be generally based on four grounds: i) on the obligations arising from international and EU law, ii) on a climate act, iii) on human rights obligations and iv) on sectoral legislation at national and EU level related to climate change. Although the Court dismissed the claim by ruling that there are no relevant international obligations (lack of certainty), no climate act (not adopted in Czechia), nor human rights obligations (their core not violated), the Court left open the possibility for a claim based on the sectoral legislation. However, as the plaintiffs had not based the lawsuit on the violation of sectoral legislation, the Court stated that it is not obliged to undertake a comprehensive analysis of that legislation (and its possible violation). The Court therefore instructed the Prague Municipal Court to determine whether the allegations in the climate action are sufficiently specific to enable an assessment of possible illegality in light of this sectoral legislation. If not, the Prague Municipal Court should instruct the plaintiffs to specify their allegations in further proceedings. For this reason, the case returned to the first instance court for further proceedings.

6. *The Cross-fertilisation of Courts' Decisions*

In both instances, the courts addressed climate case law from other jurisdictions.

14. As the courts did in *Neubauer, et al. v. Germany, Bundesverfassungsgericht* [BVerfG], Federal Constitutional Court), 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, available at www.bverfg.de (accessed 18 July 2023) or *Demanda Generaciones Futuras v Minambiente*, Supreme Court of Colombia, 5 April 2018, Case No. 11001-22-03-000-2018-00319-00.

6.1 *Cross-fertilisation in the Decision of the Prague Municipal Court*

The Prague Municipal Court referred to other climate change cases – specifically to the Urgenda Foundation v. State of the Netherlands (Urgenda)[15] and the Family Farmers and Greenpeace Germany v. Germany (Family Farmers)[16]. There are some significant similarities between these cases; the Czech case is a strategic climate-aligned litigation and a framework case against the national government (i.e. State) concerning its overall response to climate change and seeking to enhance and enforce its climate commitments. The case invoked human rights and did not challenge any specific climate law, as the Czech Republic has not yet adopted any framework climate law (a Climate Change Act - a CCA).

Regarding Urgenda, the Prague Municipal Court referred to it in several paragraphs of its judgment, explaining that this case is especially inspiring because it addresses the question of the legal sources of the State's climate protection obligations (paragraph 234 of the decision of the Prague Municipal Court). Based on Urgenda and the reference to the ECtHR case law in it, the Prague Municipal Court held that the Czech Republic is obliged to take proportionate measures to protect the climate under Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention)[17]. The right to effective judicial protection also entails the court's obligation to examine whether there is an adequate legal basis for this State's obligation and, where the obligation arises only from soft law, the specific obligation must be conclusively established (in both these statements, the Prague Municipal Court referred to Urgenda). The Prague Municipal Court noted that:

> The obligation to take appropriate measures under Articles 2 and 8 of the Convention also includes the obligation of the State to take precautionary measures to avert the danger, even if the occurrence of a disturbance is uncertain [Prague Municipal Court (224) referring to its translation of Urgenda (5.3.2)].

15. *The State of the Netherlands v. Urgenda Foundation*, The Supreme Court of the Netherlands (20 December 2019), case 19/00135, ECLI:NL:HR:2019:2007. English translation available at www.urgenda.nl (accessed 18 July 2023).
16. *Backsen and Others (German Family Farmers) v. Federal Republic of Germany*, Administrative Court Berlin (31 October 2019), VG 10 K 412.18. English translation available at www.climatecasechart.com (accessed 18 July).
17. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at www.refworld.org (accessed 19 July 2023).

Also, when ruling on the character of the EU climate target and on the possibility to have an even more ambitious individual commitment, the Prague Municipal Court based its reasoning on Urgenda (paragraphs 7.3.2. and 7.3.3.). Moreover, it also relied on Urgenda in its reasoning on causation:

> Partly in view of the serious consequences of dangerous climate change […] the objection that a State does not have to assume responsibility because other countries do not fulfil their partial obligations cannot be accepted. Nor is it a defence of the argument that the State's contribution to global GHG emissions is very small and that the reduction of these emissions would be of little significance on a global scale. Accepting these objections would hence mean that a State could easily avoid its share of responsibility by pointing to other countries or its negligible share [Prague Municipal Court (326) cited Urgenda (5.7.7)].

The Prague Municipal Court referred to Family Farmers twice. First, concerning the active legal standing: «The mere fact that the effects of climate change affect a very large number of people does not rule out individual interest from the outset» [(198) paragraph 73 of Family Farmers]. For the second time, touching upon the "drop in the ocean" problem:

> The percentage by which the 2020 climate protection target is exceeded represents a relatively small part of the annual emissions. However, States share a common but differentiated responsibility for mitigating climate change [see Article 2(2) of the Paris Agreement]. A State cannot avoid its responsibility by referring to the GHG emissions in other States. Individual legal protection in the field of climate protection is only conceivable if there is no excessive requirement of a causal link between the failure to take national climate protection measures and the impact on the protected legal status of the persons concerned [(326) Paragraph 74 of Family Farmers].

6.2 *Cross-fertilisation in the Decision of the Supreme Administrative Court*

The Supreme Administrative Court noted that the climate judgments from other jurisdictions are not binding for the Czech Supreme Administrative Court (163). Although the Supreme Administrative Court agreed that the argumentation on the "drop in the ocean" problem in Urgenda is inspiring, it reasoned that the situation in the Czech Republic and the Netherlands differs. In Urgenda, the Dutch courts used EU law to support the argument that the Netherlands should have a very ambitious climate

target as, under the EU legislation, it has one of the most ambitious climate targets. This argument is based on the targets in the Effort Sharing Regulation, where the individual national targets are established based on the gross domestic product (GDP) of the EU Member States. However, this argument cannot be used for the Czech Republic. The Czech Supreme Administrative Court argued that, on the contrary, the regulation imposes on the Czech Republic one of the lowest GHG emissions reduction targets among all the EU Member States. In fact, the target for the Czech Republic under the Effort Sharing Regulation is close to the average.

The Supreme Administrative Court focused instead on the case law of the European Court of Human Rights. First, it reminded the parties of the limits of "human rights greening", such as the problems of the admissibility of *actiones populares* in the ECtHR and the doctrine of political question (151). Then, it pointed out that there are some pending applications to the ECtHR concerning climate change. In this context, the Supreme Administrative Court noted that the case Verein *KlimaSeniorinnen* Schweiz and Others v. Switzerland[18] is quite similar to the Czech case; the Swiss lawsuit was dismissed by the Swiss Federal Court on the ground of being *actio popularis* and the applicants were referred to the political solution. However, as these climate applications are pending, the Supreme Administrative Court could not refer to ECtHR climate case law. Nevertheless, the Supreme Administrative Court has not decided to adjourn its decision until the ECtHR's ruling on climate matters.

The Supreme Administrative Court also remarked on the decision in Sacchi[19], where, even though the claim was not successful, the status of victims at risk of actual and substantial harm was acknowledged for the applicants (155). The Supreme Administrative Court is also aware of other climate cases in the Czech Republic [regarding airport expansion or renewables, (161)] and, as for Urgenda, it noted that it could imagine that private law instruments for protecting the right to a favourable environment would be applicable in proceedings before the civil courts in the Czech Republic as well (148).

18. ECtHR: *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, App No. 53600/20 (Communicated Case, 17 March 2021).
19. UN Committee on the Rights of the Child: *Sacchi v. Argentina*, No. CRC/C/88/D/104/20s19 (Oct. 8, 2021).

7. *Conclusion - What Future for Climate Litigation in Czechia?*

Although the Supreme Administrative Court dismissed the first Czech strategic climate case on the ground that the collective EU climate target cannot be interpreted as an individual target for the Czech Republic, the Court at the same time has not closed the door to further climate litigation in the Czech Republic.

First, regarding this case itself, the Court returned it to the Prague Municipal Court for further proceedings with specific instructions. The Prague Municipal Court was supposed to determine whether the allegations in the climate action were sufficiently specific to enable an assessment of the possible illegality of the State's climate action in the light of EU sectoral legislation as enumerated by the Supreme Administrative Court. If not, the Prague Municipal Court was supposed to instruct the plaintiffs to specify their allegations in that sense. It should be noted that the Prague Municipal Court is bound by the Supreme Administrative Court's decision[20].

Second, the Supreme Administrative Court highlighted that there are other climate cases, both on the international and national levels.

Third, the Supreme Administrative Court argued that it could imagine, similarly to in Urgenda, the engagement of private law instruments for the protection of the right to a favourable environment and consequent climate proceedings before the civil courts in the Czech Republic.

Last but not least, the Supreme Administrative Court, in its reasoning, clarified many issues that occur in climate litigation and its argumentation might be used in the Czech Republic in a future decision that is favourable for climate action. This includes the argumentation on the "drop in the ocean" problem and on the victim status, among others. Regarding these issues, the Supreme Administrative Court referred to climate decisions from other countries and UN bodies. Although the Supreme Administrative Court stressed that the foreign courts'rulings are not binding upon it, it found them inspiring.

20. The Prague Municipal Court dismissed the case in October 2023, primarily because the plaintiffs had not sufficiently elaborated, in the view of the Court, on how their rights were violated by not meeting the EU sectoral legislation targets (the plaintiffs have announced that they are willing to appeal on points of law and to file a constitutional complaint). Judgment of the Prague Municipal Court, 25 October 2023, No. 14A 101/2021 - 445.

These rulings of the Czech courts on the first Czech strategic climate case confirmed that climate judgments from other jurisdictions are of significant importance. While the Supreme Administrative Court highlighted the limited impacts of the foreign case law, it referred to some selected climate cases. Unfortunately, it did not refer to some landmark climate cases, not only from outside the EU but also from within the EU (such as the German Neubauer case). As a result, the decisions of international and regional bodies on climate issues (such as the expected decisions of ECtHR, the advisory opinions of the International Court of Justice (ICJ) and the International Tribunal for Law of the Sea (ITLOS), or the decisions of various UN Committees) may play an even more crucial role in future climate litigation in Czechia.

Géraldine Cattilaz

The *KlimaSeniorinnen* Case, the ECtHR and the Question of Access to Court in Climate Change Cases

1. *Introduction*

The European Court of Human Rights (ECtHR) has a long-standing jurisdiction on environmental matters. Even though – as the ECtHR has repeatedly held – the European Convention on Human Rights (ECHR) does not provide a right to a healthy environment as such, the court recognises that the exercise of certain Convention rights may be undermined by the existence of environmental harms or exposure to environmental risks. It has thus held that positive state duties derive from the ECHR, in particular from the right to life and to private and family life (including the home) guaranteed in articles 2 and 8 of the Convention, states thus having the duty to protect these rights from environmental risks and harms.

The question currently pressing is whether this jurisprudence also applies to the context of climate change. Indeed, the environmental cases dealt with by the ECtHR so far have all concerned environmental issues in a more traditional sense, such as dangerous industrial activities, waste disposal or others, and not climate change more specifically. Since several climate change cases are currently pending before the ECtHR, the latter will soon have the possibility to clarify whether – and if so, to what extent – states do have a duty to protect against the dangers of climate change.

While two cases have already been judged inadmissible and several other climate change cases have been adjourned[1], three cases (hereinafter: "main cases") have been relinquished to the Grand Chamber, thus reflecting their importance as raising a «serious question affecting the interpretation of the Convention or its Protocols»[2]. One of these three main cases is the Swiss *KlimaSeniorinnen* case.

1. Until decision by the Grand Chamber in the "main cases".
2. Article 30 ECHR.

In the *KlimaSeniorinnen* case, but also in the other (main) climate change cases pending at the ECtHR, admissibility issues as well as access to the court(s) are of particular importance. This has not only been thus in the context of national proceedings, but will also be the case in the context of proceedings before the ECtHR. Other than facing the challenge of applying its own admissibility rules to climate change cases, the latter will indeed have the important role of assessing whether the national admissibility requirements and their application in the climate change cases were in line with human rights guarantees deriving from the ECHR, thus helping to clarify the role of (national) courts in determining and enforcing legal obligations in the climate policy context.

With climate change cases challenging the traditional understanding of admissibility and access to court and the latter thus posing one of the main problems – if not the biggest hurdle – for climate change cases, at least in a European setting, we will focus on these aspects. Starting with an introduction to the *KlimaSeniorinnen* case and taking it as a starting point (para 2), several admissibility issues can be identified, which we will focus on in more detail in the following sections of the paper. These issues are the questions of justiciability and area of competence of courts (para 3), the admissibility requirement of «being affected in one's rights» (para 4) as well as the assessment of facts and its implications for climate change cases (para 5). Even though the focus will be on the *KlimaSeniorinnen* case, we will not only analyse the procedural provisions specifically applicable in that case. Because although the different national, regional or international courts do each have their own procedural codes and rules, some admissibility issues are of larger interest, *nota bene* seeing that (similar) procedural requirements might be stipulated in different jurisdictions, making some admissibility questions challenging independently of the specific procedural code or rule applicable. We will thus take a more general approach, looking at admissibility issues more largely, rather than (only) analyse specific procedural provisions in detail. In doing so, we will not only discuss how and why some admissibility requirements can be an issue in the context of climate change litigation, but rather argue that they do not represent an insurmountable hurdle, sometimes also discussing possible alternatives to the *status quo – de constitutione/lege lata* or *ferenda*.

2. *The* KlimaSeniorinnen *Case*

The applicants in the *KlimaSeniorinnen* case are the "*Verein KlimaSeniorinnen Schweiz*" – an association according to Swiss law and whose members are all women with an average age of over 72 – as well as four individuals – all women aged 74 or older at the time of the first request. They allege different omissions with regards to climate change and preventing its negative effects by the Federal Council, the Federal Department of the Environment, Transport, Energy and Communications (DETEC), the Federal Office for the Environment (FOEN), as well as the Federal Office of Energy (FOE), all federal governmental authorities belonging to the executive branch of government[3].

In particular, they claim that not only both the greenhouse gas (GHG) reduction target until 2020[4] as well as the (then) planned reduction target until 2050 are insufficient[5], but also the measures to reach these targets[6]. Furthermore, they claim that the respondents violate other (but related) duties, such as the duty to adequately and correctly inform the legislature of the dangers of climate change and the Swiss legal obligations to prevent its negative effects[7]. In the proceedings before the 2nd and 3rd Swiss instance, as well as in the proceedings before the ECtHR, alleged procedural insufficiencies are central[8].

The appellants request the respondents – in their respective area of competence – to undertake all actions that are necessary for the contribution of Switzerland to limiting global warming to comply with the "well below 2°C" target set in the Paris Agreement as well as to undertake all actions that are necessary to reach the national reduction targets, which should be fixed at a minimum of 25% until 2020 and of 50% until 2030.

3. For procedural reasons, however, it was the DETEC that issued the ruling which was subsequently appealed against at the Federal Administrative Court (hereinafter: FAC) and the Federal Court (hereinafter: FC), which is why in the proceedings before the FAC and the FC, the DETEC was the sole defendant.

4. *KlimaSeniorinnen* and four individual appellants, Request of 25 November 2016 to stop omissions in climate protection pursuant to Art. 25a APA and Art. 6 para. 1 and 13 ECHR, available at: www.klimaseniorinnen.ch (accessed 13 March 2023; hereinafter: Request), chap. 8.2 para. 292 ff.

5. Request, chap. 8.4 para. 321 ff.

6. Request, chap. 8.3 para. 316 ff. and chap. 8.5 para. 325 ff.

7. Request, chap. 8.2.1.1 para. 292 ff.

8. *Nota bene* the right to access to court and to an effective remedy (articles 6 and 13 ECHR).

Eventualiter, the applicants request that the respective omissions – to the requested actions – are to be declared unlawful[9].

The applicants claim that, through these alleged omissions, the respondents violate their right to life and to private and family life guaranteed in articles 2 and 8 of the ECHR as well as article 10 of the Swiss Constitution. Indeed, while the applicants have originally referred to a very varied set of legal sources, such as different obligations according to international law, the UNFCCC and the subsequent agreements and protocols in particular (especially the Paris Agreement)[10], but also the principle of precaution established in international as well as national law (on the national level see art. 74 para. 2 Cst.)[11], and to the principle of sustainable development fixed in art. 73 Cst.[12], they narrowed down their approach in the course of the national proceedings to a human rights narrative. Legal sources other than the human rights guarantees are only referred to in the context of the interpretation of the scope of human rights[13].

In procedural terms, the applicants argue that, as elderly women, they are particularly affected in their rights by the negative effects of climate change[14], from which fact they derive a right to access to court based on Swiss administrative law on the one hand – article 25a Administrative Procedure Act (hereinafter: APA) more specifically[15] – but also on the right to access to court guaranteed in article 6 ECHR[16] as well as the right to an effective remedy (article 13 ECHR)[17].

To substantiate their claims, the applicants refer to scientific data, proving, on the one hand, a temperature rise and (more frequent) occurrence of heatwaves in Switzerland, and that these temperature effects are caused by man-made climate change. On the other hand, they refer to scientific data indicating an increased mortality and morbidity rate for elderly women caused by these temperature effects. Furthermore, the four individual applicants provide medical proof that they have already suffered

9. Request, requests for legal remedy on pp. 3 ff.
10. See Request, chap. 5.1 para. 104 ff.
11. See Request, chap. 5.3 para. 116 ff.
12. See Request, chap. 5.2 para. 112 ff.
13. Namely to specify the right to life and private and family life and the duties possibly being derived from these guarantees in the context of climate policy; Reference is made particularly to the Paris Agreement and the precautionary principle.
14. Request, chap. 4.4 para. 88 ff.
15. Request, chap. 6.2 para. 207 ff.
16. Request, chap. 6.1.2 para. 190 ff.
17. Request, chap. 6.1.3 para. 201 ff.

different (health) impairments caused by heat – ranging from having to confine themselves to their houses up to having passed out during heat waves. From this, they conclude that – as elderly women – they are (already now) affected in their health – due to both the actual impairments suffered and to the higher risk of mortality and morbidity (which will increase with the scientifically predicted further temperature increase and more regular occurrence of heatwaves). The respondents – being aware of these facts and risks but still omitting to take all the necessary and adequate measures – would thus violate their duty to protect the rights invoked by the applicants.

In the national proceedings, it is admissibility, more precisely the procedural requirement of having to be particularly affected in one's right according to article 25a APA, that has been decisive. According to this provision, one can only act against omissions by public authorities if one is particularly affected in one's right by these omissions. If this requirement is met, one can – rather than directly challenge (alleged) omissions in court – request a ruling from the competent public authority regarding the (alleged) omissions, whereby that ruling can then be subject to an appeal at court[18].

Hence, the applicants, in a first step, requested a ruling from the competent public authority, namely the DETEC, which rejected their request on procedural grounds, thus not entering *in materiae,* arguing that the applicants did not meet the requirement of being particularly affected in their right(s)[19]. This ruling was subsequently upheld by the second and third national instances – the FAC and FC[20]. While the FAC justified its decision in this regard by holding that the applicants are not particularly affected in comparison to the general public, the FC held that the applicants – like the rest of the Swiss population – are not affected with sufficient intensity by the omissions[21]. It argues that the temperature rise

18. See art. 44 APA; see also art. 31 of the Federal Act on the Federal Administrative Court, according to which the FAC does in principle act in cases of an appeal against a ruling in the sense of the APA; see also art. 86 of the Federal Act on the Federal Court (hereinafter: AFC), according to which an appeal to the FC in public law affairs is only admissible against decisions of certain specific previous instances, amongst them the FAC.
19. DETEC, Ruling of 25 April 2017 on the Request of 25 November 2016 of the Appellants *Verein KlimaSeniorinnen et al.*, available at www.ainees-climat.ch (accessed on 13 March 2023; hereinafter: Ruling).
20. BGE 146 I 145 (hereinafter: FC, *KlimaSeniorinnen*); Decision A-2992/2017 of the Federal Administrative Court, 27 November 2018 (hereinafter: FAC, *KlimaSeniorinnen*).
21. See FC, *KlimaSeniorinnen*, para. 4.1 and 5.5.

limit of "well below 2°C" in terms of the Paris Agreement is not expected to be exceeded in the near future, that there is still some time available to prevent global warming exceeding this limit and that global warming can be slowed down by suitable measures[22].

The national instances have also concluded that the applicants could not derive a right to have their request treated on the merits from procedural human rights guarantees, namely articles 6 para. 1 (right to access to court) and 13 (right to an effective remedy) ECHR, arguing respectively that the actions requested by the applicants could not have directly reduced the general risk of danger stemming from global warming, hence there being no real dispute of a serious nature whose outcome would have been decisive for the applicants claims (FAC)[23], and – referring to its previous considerations according to which the applicants were not sufficiently affected in their rights – that the applicants could not assert an "arguable claim" under national law (FC)[24].

More generally, the national instances have concluded that the applicants' request does not serve their individual legal protection, but is rather aimed at reviewing the existing climate protection measures at the federal level and those planned until 2030 in the abstract with regard to their compatibility with the state's duty to protect derived from the rights invoked and indirectly – via the requested action of state authorities – to initiate the tightening of these measures. Such concerns should be addressed through political means, rather than pursued through courts. The applicants' request was thus qualified as an inadmissible *actio popularis*[25].

The *KlimaSeniorinnen* case is illustrative for three main admissibility issues which we will discuss in detail in the next sections, namely the question of the area of competence of courts as opposed to the political powers and related questions of justiciability, the requirement of having to be "(particularly) affected in one' s right(s)" as well as the assessment of facts, in particular scientific data.

22. See FC, *KlimaSeniorinnen*, para. 5.3. f.
23. FAC, *KlimaSeniorinnen*, para. 8.3 f.
24. FC, *KlimaSeniorinnen*, para. 6 f.
25. See FC, *KlimaSeniorinnen*, para. 5.5.

3. *Justiciability and Area of Competence of Court(s)*

A first important issue is what courts can or cannot or should or shouldn't decide, in terms of content and functionality, and thus questions with regards to justiciability and the area of competence of courts. Indeed, it is often argued that the questions raised in climate change cases – in particular if they concern mitigation rather than adaptation – can (or should) not be answered by courts – because they are political rather than legal questions and because the legal sources the applicants rely on are (only) addressed to the political powers, leaving the latter with a certain margin of appreciation, and also too vague for courts to deduce concrete (legal) obligations from them. The challenges associated with these questions are rendered more difficult in that in climate change cases, it is often not an act but a failure to act on the part of the state that is at issue.

National courts thus have to address separation of powers considerations – in particular the differentiation between legal and political questions and how to deal with the margin of appreciation of the political powers (or other actors more generally). In the context of the ECtHR, such or similar questions arise namely in connection with the principle of subsidiarity and the margin of appreciation doctrine.

3.1 *Areas of Judicial Competence in View of the Margin of Appreciation of Other Actors*

Contrary to what is sometimes asserted – and has been indirectly held by the Swiss instances in the *KlimaSeniorinnen* case – it is argued here that a general exclusion of judicial competences in cases in which (some of) the (legal) obligations are addressed to the political powers, leaving them with a – more or less far reaching, depending on the legal source – margin of appreciation as is the case in climate change cases cannot be justified with reference to the separation of powers principle. Rather, inherent to the principle of separation of powers are also ideas of checks and balances and mutual control and constraint of state powers[26]. An understanding of the separation of powers as a strict division of powers principally excluding

26. Elaborately, see e.g. C. Möllers, *The Three Branches, A Comparative Model of Separation of Powers*, Oxford, 2013, 43 f.; see also e.g. E. Carolan, *Balance of Powers*, in A.F. Lang - A. Wiener (eds.), *Handbook on Global Constitutionalism*, Cheltenham/Northampton, 2017, 212-221, as an example of a scholar deviating from the terminology of "separation", thus indicating even terminologically a shift away from the idea of "separation" (or even

judicial control over the political state powers is thus contrary to the very idea of separation of powers, which is to organise state powers in such a way as to prevent power abuse and to protect human rights of the citizens.

3.1.1 *Separation of Powers, Political Questions and Areas of Judicial Competence*

That the political powers – like all state powers – can be controlled, checked and if necessary restrained is justified because they are not outside the law, in a legal vacuum or lawless area, but rather bound and limited[27] by the law[28]. This is a fundamental principle deriving from the rule of law[29]. The state powers – including the political powers – are under a duty to comply with their legal obligations, such (binding) legal obligations arising from national as well as international law, in particular in the field of human rights. The constitutional system should hence be designed[30] in such a way as to guarantee compliance with these legal obligations, which can be best ensured by putting in place mechanisms controlling and checking the different state powers. Thus, not only can the separation of powers principle not justify the exclusion of control mechanisms of state actors, but rather, it requires suitable control mechanisms to be put in place in the constitutional system. Such control mechanisms should not only exist in the context of (allegedly) unlawful action, but also in the context of (allegedly) unlawful inaction.

This is all the more true since the "classical" understanding of the separation of powers[31] – which was based on the idea of the state as a Leviathan that has to be restrained from abusing its powers – only insufficiently apprehends the current conception and reality of the state. Indeed, the role and form of the state, its tasks and goals have changed

"division") of powers towards the conception of "balance" (or "organisation" or similar) of powers.

27. See e.g. article para. 1 Cst.

28. Instead of many: D. Grimm, *Rule of Law and Democracy*, in G. Amato - B. Barbisan - C. Pinelli (eds.), *Rule of Law vs Majoritarian Democracy*, Oxford / New York / Dublin, 2021, 43-61, 52 ff.

29. See e.g. J.R. Preston, *The Contribution of the Courts in Tackling Climate Change*, in *Journal of Environmental Law*, 28, 2016, 12.

30. On the separation of powers principle as a «design feature» for constitutional systems, see e.g. C. Saunders, *Theoretical Underpinnings of Separation of Powers*, in G. Jacobsohn - M. Schor, *Comparative Constitutional Theory*, Cheltenham/Northampton, 2018, 66-85, 67.

31. For a «comparative sketch» on the traditional understanding of the separation of powers, see C. Möllers, *op. cit.*, 16 ff.

considerably compared to the historical context at the time of the original development of the principle of separation of powers. This development has been – and still is – influenced by various aspects, including the increasing globalisation and inter- and transnational linkages. Not only have the state's responsibilities multiplied and become more complex compared to the times of Locke, Rousseau or Kant, but the state apparatus has also grown and its organisation and the factual situations to be regulated have become more elaborate. Indeed, the state is no longer conceived of as a classical-liberal *Nachtwächterstaat* which has to provide the framework for free market economy and the individual development of human beings within it and otherwise refrain from interfering with individuals' lives, but rather a social state that also has to provide certain state services, actively protect individuals rights and guarantee a minimum standard of social security[32].

Related to and illustrative of this development is the advancement of human rights guarantees. The catalogue of human rights that are guaranteed has grown steadily since their first recognition. Indeed, while first generation of human rights guarantees comprised primarily – if not exclusively – classical-liberal rights, so-called civil and political rights (e.g. right to life, procedural rights, freedom of expression, etc.), the second generation of human rights also included economic, social and cultural rights (e.g. right to housing or food, etc.)[33]. Moreover, while fundamental rights initially have solely been accorded a negative dimension, a so-called "duty to respect" in the sense of a duty to refrain from interfering with individuals' rights, positive dimensions are now recognised as well, in particular a "duty to protect" as well as a "duty to fulfil"[34]. These positive duties in turn include and require various types of state action – whether they be factual, legislative or administrative. Individuals therefore not only have the negative right to demand the state to refrain from unlawful interferences with their rights, but also positive rights to demand the state

32. See e.g. W. Haller - A. Kölz - T. Gächter, *Allgemeines Staatsrecht*, Zurich/Basel/Geneva, 2020, 157 f., for an account of the development of the social state; see also C. Möllers, *op. cit.*, 40 f.

33. See e.g. W. Kälin - J. Künzli, *Universeller Menschenrechtsschutz, Der Schutz des Individuums auf globaler und regionaler Ebene*, Basel, 2019, 36. The third generation of human rights is still developing and includes solidarity and group rights. This generation is particularly important in the field of climate change litigation.

34. In the context of the ECtHR, see e.g. W.A. Schabas, *The European Convention on Human Rights, A Commentary*, Oxford, 2015, Article 1, 90 f. on the positive dimension of human rights.

to act in order to protect their human rights. These developments towards a complex social welfare state have to be taken into account when looking at the separation of powers.

The principle of separation of powers requiring all state powers to be controlled and checked does not imply that the control mechanisms necessarily or imperatively need to be judicial[35]. However, it is argued here that courts are well suited to take the role of checks and balances to the political powers – also in the context of climate change litigation[36]. Considering that some obligations in the climate change context – even though addressed to the political powers – are of a legally binding character and not mere political statements – which is the case for most of the legal sources invoked by the applicants in climate change cases, such as the Paris Agreement[37] or the ECHR – areas of judicial competence do indeed exist, despite political margins of appreciation, and should be recognised as such.

The latter is what courts – other than the Swiss instances in the *KlimaSeniorinnen* case – have indeed argued convincingly. In the landmark case "*Urgenda*", the Supreme Court of the Netherlands has held that «in the Dutch constitutional system of [government,] decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard»[38]. However, as the Court also held, «it is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound»[39]. Such limits

ensue from the ECHR, among other things. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to

35. On the idea of political powers «enforcing constitutional limits on their own power», see e.g. M. Tushnet - F. Gonzalez-Bertomeu, *Justiciability*, in M. Tushnet - T. Fleiner - C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Oxfordshire/London, 2013, 111-120, 118 f.

36. See chap. 3.2.

37. L. Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in *Journal of Environmental Law*, 2016, 28, 337-358.

38. Supreme Court of the Netherlands, Stichting Urgenda v The State of the Netherlands, App. No. 19/00135, 20 December 2019, ECLI:NL:HR:2019:2007 (hereinafter: Urgenda), para. 8.3.2.

39. Urgenda, para. 8.3.2.

the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law[40].

In the presence of legally binding obligations, such as those derived from the ECHR and from the Paris Agreement, areas of judicial competence thus do exist. The difficulty rather lies with delimiting the political margins of appreciation from the limits provided for by law. Indeed, where political margins of appreciation exist, courts have to take these into account. However, since the assessment of these discretionary powers is often complex and requires a detailed examination of the legal bases and the facts of the case, the existence of such discretionary powers should not be an obstacle to admissibility, but rather be considered on the merits[41]. This is all the more true since procedural requirements oftentimes coincide with substantive requirements. Such an approach does not lead to an "unleashed" judiciary. Indeed, as has been rightly held,

> [T]he critical constraint on judicial interference with democracy lies not in the procedural conditions for judicial action but in the substantive standard that courts apply on the merits. Most fundamentally, it lies in the principle that courts do not review the wisdom of the actions of the political branches but only their legality[42].

Looking at the *KlimaSeniorinnen* case, we find that the national instances' engagement with and assessment of legal obligations, scientific facts and measures taken by the state have been rudimental and cursory[43]. Focusing on procedural aspects, they have indeed not directly addressed the (alleged) legal duties invoked by the appellants. Rather than assessing the question of whether such duties could be derived from the rights invoked, they have taken the position that such claims cannot be enforced by judicial means but have to be pursued by political instruments[44]. There has thus not been a detailed evaluation of and differentiation between what is a legally binding obligation (deriving from sources of law) and what

40. Urgenda, summary of para. 8.3.3.
41. Similarly, but specifically in the context of the procedural requirement of demonstrating a significant disadvantage: H. Keller - A.D. Pershing, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, in *European Convention on Human Rights Law Review*, 3, 2022, 23-46, 45 f.
42. J.R. Siegel, *A Theory of Justiciability*, in *Texas Law Review*, 86 (1), 2007, 73-140, 125; see chap. 5.2 regarding a discussion of the standard of review.
43. For more detail, see chap. 5.
44. See f.ex. FC, *KlimaSeniorinnen*, para. 5.5 *in fine*.

falls within the political margin of appreciation, amounting to excluding judicial areas of competence *prima facie*. This line of argumentation is not in line with the understanding of the separation of powers principle as elaborated before, providing a starting point for further criticism.

3.1.2 *Margins of Appreciation and Subsidiarity*

As we have seen, assessing margins of appreciation of other (state) actors is generally crucial for courts to delimit their area of competence, which is why we will discuss this aspect in the following.

In the context of the ECtHR, the principle of subsidiarity and the margin of appreciation doctrine are of particular importance in this regard. To discuss the principle of subsidiarity and the margin of appreciation doctrine – and particularly the differentiation between the two – in detail would exceed the scope of this paper. Indeed, both notions are rather complex and their scope and interpretation is not always clear[45]. I will thus limit myself to state that both have been introduced into the preamble of the ECHR and are closely linked, based on similar foundations and pursue similar goals[46]. Basically, they are methods dealing with the vertical relationship of powers between and impacting the respective areas of competence of the ECtHR – or the Council of Europe institutions more generally – and the Contracting Parties, which is «characterized by overlapping jurisdictions and institutional pluralism»[47]. Based on a functional criterium, they suggest that the competence to implement the ECHR and to assess and if necessary remedy violations should primarily lie with the Contracting Parties, the ECtHR thus having to grant deference to the contracting states' judgment, unless justified reasons require supranational oversight by the ECtHR, which is the case when a European consensus on a minimum standard exists, which the relevant national institutions do not recognise or cannot guarantee[48].

45. See e.g. M. Iglesias Vila, *Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights*, in *International Journal of Constitutional Law*, 15 (2), 2017, 393-413, 401 and 407.

46. For a more detailed discussion see e.g. M. Iglesias Vila, *op. cit.*, 400 ff. and 405 ff.; furthermore: A. Mowbray, *Subsidiarity and the European Convention on Human Rights*, in *Human Rights Law Review*, 15, 2015, 313-341, 321, with further references. The margin of appreciation doctrine is often qualified as one aspect of the subsidiarity principle, see e.g. A. Mowbray, 322 and 339 with further references.

47. Instead of many, see F. Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, in *iCourts Working Paper Series No° 15*, 2015, 7 ff. (quotation p. 8).

48. See e.g. F. Fabbrini, *op. cit.*, 8; M. Iglesias Vila, *op. cit.*, 400 ff. and 406.

It is sometimes argued that these principles would have a negative dimension only, in that they would limit and constrain the ECtHR in favour of the contracting parties, and not *vice versa*[49]. In the context of climate change litigation, this could mean – as is sometimes argued[50] – that the ECtHR has to restrain itself when assessing the contracting parties' (alleged) omissions with regards to climate change policy, in recognition of the principle of subsidiarity and the contracting parties' margin of appreciation. This, however, is not necessarily so. Rather, it follows from the principle of subsidiarity and the margin of appreciation doctrine being based on federalist ideas and functional criteria for power-sharing[51] as well as in recognition that the margin of appreciation of the contracting parties is not unlimited[52] that the ECtHR not only has the right, but the duty to intervene if the contracting parties cannot guarantee the necessary required safeguards or lack «the required impartiality for adequate protection», for example if, for structural or political reasons, they are not able to strike a just balance between competing interests[53]. Judicial restraint in favour of the contracting parties is thus normatively desirable, as I argue, where diversity is tolerable or even crucial. This is particularly the case in culturally sensitive areas such as religion[54]. Judicial restraint, however, should be limited where diversity cannot justify falling short of a required minimum standard, *nota bene* in the case of a global challenge demanding a uniform and consistent response such as climate change. The global nature of the climate change challenge and the necessity of a uniform response being widely recognised – and oftentimes invoked by respondent state parties in climate change cases –, it would indeed be contradictory to at the same time demand of the ECtHR to exercise judicial restraint in helping define such a uniform response[55].

49. See e.g. F. Fabbrini, *op. cit.*, 9; dissenting: M. Iglesias Vila, *op. cit.*, 402 f.; A. Mowbray, *op. cit.*, 340.

50. Most defendant states do indeed argue in this sense; see furthermore e.g. C. Schall, *Public Interest Litigation concerning Environmental Matters before Human Rights Courts: A Promising Future Concept*, in *Journal of Environmental Law*, 20 (3), 2008, 417-454, 446.

51. F. Fabbrini, *op. cit.*, 8.

52. M. Iglesias Vila, *op. cit.*, 406; see also chap. 3.1.1 above.

53. See e.g. *ivi*, 403, 411.

54. See e.g. ECtHR, *Osmanoğlu and Kocabaş v Switzerland*, App. No. 29086/12, 10 January 2017, para. 87 ff.

55. The question whether this conclusion should be differential with regards to mitigation vs adaptation or reduction targets vs. reduction measures will have to be discussed elsewhere.

That the ECtHR can derive new obligations form the ECHR despite the principle of subsidiarity and margin of appreciation doctrine is in line with the conception of the ECHR as a living instrument that evolves over time and for which a gradual and progressive implementation and enhancement of human rights protection and standards are essential[56]. As critics may highlight, the above defended line of argumentation is (partly) in disagreement with the European consensus approach, according to which the (minimal) standards of human rights protection that the ECtHR can legitimately derive from the ECHR have to correspond to what the "European consensus" on the matter is[57]. However, in light of the federal and functional idea and background of the subsidiarity principle and margin of appreciation doctrine, European consensus can only be relevant for matters in which the contracting parties are actually (better) suited to find an appropriate balance between diverging interests and ensure an adequate standard for human rights protection. Indeed, as is rightly held, «[C]citing lack of consensus, and thereby increasing state discretion, would be questionable if it were detrimental to the regional standard of [human rights] protection»[58].

The question of the scope and limits of the margin of appreciation of other actors is also relevant when looking at the national level. On the national level – and in contrast to the ECtHR context –, however, the focus mainly lies on considerations of horizontal separation of powers[59]. It can be observed that national courts – like the ECtHR – exercise judicial restraint in favour of other state actors[60]. For example, the German *Bundesverfassungsgericht* applies a very restrictive standard of review when assessing whether political powers have taken sufficient measures to ful-

56. See e.g. M. Iglesias Vila, *op. cit.*, 403 ff.; for the ECHR as a living instrument see also C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *The European Journal of International Law*, 33 (3), 2022, 925-951, 927; furthermore C. Schall, *op. cit.*, 434; furthermore W.A. Schabas, *op. cit.*, Introduction, 47 ff.

57. For a detailed discussion of the European consensus see e.g. J.T. Theilen, *European Consensus between Strategy and Principle, The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*, Baden-Baden, 2020.

58. M. Iglesias Vila, *op. cit.*, 410.

59. Even though questions with regards to vertical separation of powers do arise as well, mainly in the federal states. Indeed, there are climate change cases in which the federal element is crucial, for example in the Belgium climate change case discussed in another contribution to this publication.

60. On (deferential) standards of review in favour of the political powers see M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*, 112 ff.

fil duties to protect derived from fundamental rights ("*grundrechtliche Schutzpflichten*"). Indeed, it will find a violation of such a duty only

if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal[61].

It justifies this judicial restraint as follows:

The question of whether sufficient measures have been taken to fulfil duties of protection arising from fundamental rights can only be reviewed by the Federal Constitutional Court to a limited extent […]. There is an essential difference between the subjective, defensive rights against state interference that arise from fundamental rights on the one hand, and the state's duties of protection that result from the objective dimension of fundamental rights on the other. In terms of purpose and content, defensive rights are aimed at prohibiting certain forms of state conduct, whereas duties of protection are essentially unspecified. It is for the legislator to decide how risks should be tackled, to draw up protection strategies and to implement those strategies through legislation. Even where the legislator is under obligation to take measures to protect a legal interest, it retains, in principle, a margin of appreciation and evaluation as well as leeway in terms of design […][62].

A detailed discussion of these – or similar – justifications would go beyond the scope of this paper[63]. However, it can be argued with good reasons that judicial self-restraint that is too far-reaching is criticisable, in particular with reference to the rule of law and separation of powers as discussed above[64]. It is indeed questionable whether a standard of review limited to assessing whether any precautionary measures whatsoever have been taken at all, and whether these measures – if they have been taken – are manifestly unsuitable, completely inadequate or

61. BVerfG, Order of the First Senate, App. No. 1 BvR 2656/18, 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (hereinafter: *Klimabeschluss*), para. 152 with further references.
62. *Klimabeschluss*, para. 152 with further references.
63. In particular because they largely depend on the legal provision and the arising legal obligations at stake as well as on the state of the scientific data, at least in the climate change context.
64. See chap. 3.1.1.

fall significantly short of their goals can actually and effectively ensure compliance with minimum legal standards. In any case, however, the foregoing suggests that the evaluation of the margin of appreciation of other state powers should not be an obstacle to admissibility – after a cursory assessment on procedural grounds –, but rather be discussed in detail on the merits.

3.2 *Justiciability and Functional Suitability of Courts*

After establishing that judicial competences should not be excluded *per se* even in areas in which political powers are addressed and do have some margin of appreciation, we now have to discuss the scope – and limits – of judicial competences in these areas in terms of functionality. The question of what courts should and are able to decide or not is often framed in terms of justiciability.

Justiciability is a complex concept – it has indeed been metaphorically depicted as «something of a chameleon»[65]. For the purpose of this paper[66], justiciability is understood as an issue being «suitable for judicial resolution» and thus being decided on the merits by the appropriate court[67]. It hence encompasses procedural, institutional and substantive elements[68]. In the following, we will draw on considerations regarding the latter two to argue that and why the former, in particular admissibility requirements, should not be interpreted – or set up – too restrictively.

From a purely institutional perspective, justiciability does not only include the very broad rule of law, democracy and separation of powers considerations already addressed[69], but also the – very closely related – more specific institutional position and set-up of courts[70]. From a most basic institutional perspective, courts are apt to act as a check to the political powers because they are an institutional authority that is already in place – as opposed to some other institutional authority that would have

65. D. McGoldrick, *The Boundaries of Justiciability*, in *The International and Comparative Law Quarterly*, 59 (4), 2010, 981-1019, 981.
66. For a detailed discussion see e.g. M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*; specifically in the context of the US, see J.R. Siegel, *op. cit.*; in the context of the UK see: J. Mance, *Justiciability*, in *The International and Comparative Law Quarterly*, 67 (4), 2018, 739-757.
67. M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*, 111.
68. D. McGoldrick, *op. cit.*, 985 f.
69. Chap. 3.1.1.
70. D. McGoldrick, *op. cit.*, 985.

to be (newly) instituted. In more advanced terms and more importantly, courts are appropriate to balance and check political powers by virtue of their institutional separation and independence from the political powers as well as of the principle of impartiality required of judges[71].

From a substantive and cross-cutting perspective – what some might call justiciability «in the proper sense»[72] or in the strict sense – justiciability is a question of interpretation of the law to determine the scope of legal obligations and to delimit them from political discretion and the question of whether the respective court has «judicially manageable rules»[73] or judicially «manageable standards» and the «requisite "expertise" to judge the issues»[74] it is confronted with. Other than that justiciability understood in this sense largely depends on the legal provision at stake, several aspects are important to highlight.

Firstly, interpreting the law and assessing the conformity of acts (or omissions) with legal requirements and standards is precisely the area of competence of courts[75]. This is true even if the legal provision at stake contains very broad formulations or vague terms or if the assessment of the constitutionality or legality requires a complex balancing of interests[76]. Indeed, both interpreting broad legal terms as well as balancing of multi-faceted and competing interests are pivotal – and nothing new or uncommon – when it comes to judicial decision-making, particularly when constitutional law and human rights are concerned, but also in other areas of the law[77]. In this regard, it would be wrong to reduce the judicial function to simply and mechanically applying general and abstract legal provisions in concrete and individual cases, but it rather has to be recognised that the judicial function of interpreting and applying

71. Instead of many see: W. Haller - A. Kölz - T. Gächter, *op. cit.*, n. 935 ff.; see also J. Mance, *The Role of Judges in a Representative Democracy*, in G. Amato - B. Barbisan - C. Pinelli (eds.), *Rule of Law vs Majoritarian Democracy*, Oxford / New York / Dublin, 2021, 335-352 (hereinafter: J. Mance, *Judges*, cit.), 337.

72. M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*, 115.

73. *Ibidem*.

74. D. McGoldrick, *op. cit.*, 986.

75. See e.g. J.R. Preston, *op. cit.*, 11.

76. On the interpretation of the ECHR see e.g. W.A. Schabas, *op. cit.*, Introduction, 32.

77. For example if the criminal law court has to assess whether an act has been carried out to safeguard «interests of higher value» in order to decide whether the act was «legitimate […] in a situation of necessity» according to article 17 of the Swiss Criminal Code or if a public law court has to decide whether some specific psychological decision qualifies as disease according to article 3 of the Federal Act on the General Principles of Social Insurance Law.

the law also encompasses an element of developing the law – through the interpretation of the law, by applying it to novel circumstances as well as through filling legal gaps[78]. In doing so, the judges are not free to substitute political discretion by their own, but bound by the law they interpret and apply[79]. Other than by the text of the legal provision at stake, the court is also limited through its adherence to judicial methodology, applying «well-established approaches and methods»[80].

Secondly, as to the (allegedly lacking) expertise and know-how of courts in certain areas, I argue here that the existing possibilities of bringing such expertise and know-how into the judicial proceedings – in the form of (pieces of) evidence – are appropriate to sufficiently inform the judicial decision-making process. Looking at the Swiss case at hand[81], the court relies on means of evidence such as official documents – including official reports by recognised expert authorities in the field – and expert opinions, as well as information from the parties or third parties[82]. Indeed, the need for courts to rely on specialist expertise is not exclusive to climate change litigation, but rather frequent in other areas as well[83]. One could even argue that the evidence base in the climate context – as opposed to other areas where scientific facts are pivotal – is relatively well documented, at least in current times, in that quite a lot of widely recognised fora and centres for expertise do exist, collect data and impart their knowledge[84]. Just like the interpretation of the law, assessing such scientific findings and applying it to the (legal) case at hand is part of the "daily work" of courts[85].

78. See e.g. J. Mance, *Judges*, cit., 340 ff.; see also and more generally R.A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, in *Journal of Public Law*, 6 (2), 279-295; W. Haller - A. Kölz - T. Gächter, *op. cit.*, n. 640; furthermore on the role of courts in addressing normative gaps: A.HY. Chen - M. Poiares Maduro, *The Judiciary and Constitutional Review*, in M. Tushnet - T. Fleiner - C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Oxfordshire/London, 2013, 97-109, 104 ff.

79. See e.g. D. McGoldrick, *op. cit.*, 990 ff.

80. J. Mance, *Judges*, cit., 341 [with regards to common law, but the relevance of the disciplinary methods (as "limits" to the judicial reasoning) applies to civil law countries as well].

81. But presumably the situation is similar in most other jurisdictions.

82. Exemplary: article 12 APA for Swiss public proceedings in administrative matters.

83. E.g. psychological expertise to assess fault in criminal law, medical or biomechanical expertise to establish causality in criminal law or tort law, to name but a few examples.

84. The IPCC being the most iconic example, providing even summaries of its reports "for policymakers" that the courts should also be able to rely on in their decision-making process.

85. See chap. 5 and examples given therein.

In the context of the ECtHR, *amicus curiae* interventions – or third party interventions more generally[86] – can also be helpful with regards to advancing and interpreting scientific facts, but also with regards to the interpretation of law[87]. In order to facilitate climate change litigation – or other types of litigation where (understanding of) scientific facts or other forms of specialist expertise are essential, arguing in favour of establishing the possibility for such interventions in countries in which they are not (yet) allowed – as is the case in Switzerland – or of strengthening the possibilities for such interventions or their relevance might thus be one of the approaches to take. Should one consider – in spite of the above – that the existing mechanisms are insufficient, establishing specialised courts, as is the case, for example, for Patent Courts, might be a possibility to consider *de lege ferenda*.

Not least relevant is the fact that what is deemed to be suitable to be decided by courts is subject to change over time[88]. The boundaries of justiciability might indeed evolve. Such an evolution may be mediated in particular by determining justiciability not on the basis of and in order to perpetuate existing (and historically conditioned)[89] power relations between state powers, but rather by means of functional criteria (suitable to take into account current circumstances and developments as well). We should thus move away from the idea of judicial "no-go areas" *per se* reserved to the political powers and "forbidden" for courts, using functional and not historical criteria to differentiate between the areas of competence of the judiciary and the margin of appreciation of political powers the court can not interfere with, assessing these questions on the merits rather than holding the case to be inadmissible for lack of justiciability[90]. It is argued elsewhere that affirming justiciability, shifting the assessment of critical issues to the analysis on the merits indeed already is «the modern judicial trend»[91].

86. Article 36 ECHR.

87. On *amicus curiae* interventions as having elements of public interest litigation see C. Schall, *op. cit.*, 450 f.

88. D. McGoldrick, *op. cit.*, 983-985, with further references.

89. E.g. the criterion of «embarrassment in foreign relations» to affirm non-justiciability of foreign affairs and policy questions in the UK.

90. D. McGoldrick, *op. cit.*, *nota bene* 1017 ff., with an analysis of pertinent UK jurisprudence. Even though his comments and conclusions have been made specifically in the context of the UK, I hold that they are relevant for other jurisdictions too.

91. *Ivi*, 981 ff.

4. *The Criterion of "Being Affected in One's Rights"*

As has been shown, in the *KlimaSeniorinnen* case, the procedural requirement of having to be (particularly) affected in one's rights and its application in the climate change context has been pivotal. Switzerland, however, is not the only country stipulating this requirement. Rather, many other states – in particular in the European legal context – do so. In the ECtHR's realm, this requirement is reflected in the admissibility criterion of "victim status" stipulated in article 34 ECHR. An application to the ECtHR is only admissible if the applicant is – directly or indirectly – affected by the alleged violation of convention rights, and thus a victim in the sense of article 34 ECHR. The applicant has to be someone «to whom a violation could cause harm» or «who has a legitimate interest in seeing it brought to an end»[92].

The application of this requirement in the climate change context can be challenging. This is all the more true for legal systems that require the applicant to be "particularly" affected, thus more strongly affected than the general population, as is the case in Switzerland. Indeed, since the (negative) effects of climate change potentially affect a large number of people – if not the whole population – some actors argue that climate change actions aiming at having state actors taking further-reaching and more extensive measures to prevent climate change or to protect against its negative effects would indeed not serve the individual interests of the respective applicants, but would rather be of general interest. Establishing and proving that one is individually affected can be difficult, particularly because some of the negative (and more severe) consequences of climate change will only materialise in the future – even if scientific evidence of the likelihood of their (future) occurrence exists.

However, for various reasons, some of which we will discuss below, the requirement of «being affected in one's right(s)» should not prove to be an insurmountable hurdle to climate change litigation.

4.1 *Interpretation and Application of the Criterion of «Being Affected in One's Right»*

The requirement of having to be affected in one's right(s) is intended to delimitate admissible individual claims from *actiones populares*, which

92. Instead of many, see ECtHR, *Vallianatos and others v Greece*, App Nos. 29381/09 and 32684/09, 7 November 2013, para. 47.

are not permissible in Switzerland[93], in many other European countries[94] and before the ECtHR[95]. In this legal environment – and contrary to what is the case in other legal contexts where standing requirements are less restrictive in order to allow civil society actors to bring actions to court independently of a uniquely individual interest[96] –, the prevailing opinion is that claims can only be brought to courts if the applicants have a personal interest to defend their individual rights. The difficulty thus lies in differentiating between individual and general interests, on the one hand, and in assessing individual affectedness, on the other.

4.2 Actio Popularis *and Differentiation between Individual and General Interests*

The inadmissibility of *actiones populares* does not pose an insurmountable problem for climate change cases. This becomes apparent when considering what legal actions are to be (rightly) qualified as *actiones populares*, the latter being understood as legal actions in view of the protection of public interests – as opposed to private interests – which «could be brought by "any one among the people"»[97].

Indeed, it has to be specified and emphasised in that regard that – as the German constitutional court rightly points out in its *Klimabeschluss* – «the mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights»[98]. This is actually – and at least recently – also undisputed in Swit-

93. Paradigmatic: FC, *KlimaSeniorinnen,* para. 4.1 and 5.5 with further references.
94. See e.g. C. Schall, *op. cit.*, 421 ff.; C. Errass, *Zur Notwendigkeit der Einführung einer Popularbeschwerde im Verwaltungsrecht*, in *Aktuelle Juristische Praxis*, 2010, 1351-1372, 1358 ff. with further references; See also H. Keller - A.D. Pershing, *op. cit.*, who even hold – and in my opinion rightly so – that «the European human rights system has signalled a deep aversion to *actio popularis*», 41.
95. Instead of many: ECtHR, *Roman Zakharov v Russia*, App. No. 47143/06, 4 December 2015, para. 164, with reference to the Court's «consistent case law» in that matter.
96. See e.g. M. Murcott - M.A. Tigre - N. Zimmermann, *What the ECtHR Could Learn from Courts in the Global South*, in *Verfassungsblog*, 2022, 3 f.
97. *Nota bene* P. Mercer, *The Citizen's Right to Sue in the Public Interest: The Roman Actio Popularis Revisited*, in *University of Western Ontario Law Review*, 21 (1), 1983, 89-104, 97 ff. with a detailed discussion of the *actio popularis* of Roman origin and a comparison with other forms of public interest litigation (cit. on p. 97); on the concept of public interest litigation more generally see C. Schall, *op. cit.*, 419 f.
98. *Klimabeschluss*, para. 110.

zerland[99]. Hence, even if a large number of people is (potentially) affected, this does not necessarily mean that (only) general interests are at stake. Rather, (some) people can still be individually affected, signifying that an *actio* brought to court in these cases does not necessarily represent an inadmissible *actio popularis*.

Furthermore, the mere fact that a case is brought to court by an interest group does not mean that it necessarily is an *actio popularis*, and the same goes if general interests are at stake in addition to individual interests[100]. In fact, the ECtHR has held in a recent case concerning an interest association having intended legal action on behalf of two of its members without formal legal representation that

> even if there might have been an element of strategic litigation in the […] Association lodging the complaint on the applicants'behalf, this is irrelevant for the admissibility of the applicants' complaint. It suffices to note that the legal action brought by the […] Association was not an *actio popularis*, since it acted not on the basis of any abstract situation, […] but in response to specific facts affecting the rights of the two applicants – members of that association – under the Convention […][101].

Against this background, it can indeed be reasonably maintained that legal action is not necessarily an *actio popularis* even if some element of general interest is involved – provided that an individual interest of the applicant(s) exists.

The Swiss instances concluded that the *KlimaSeniorinnen*'s complaint concerns general interests. However, to conclude from this that their claim is an *actio popularis* is premature. Indeed, the Swiss instances have failed to examine whether and to what extent individual interests were affected

99. V. Marantelli-Sonanini - S. Huber, *Commentary on Article 48 APA*, in B. Waldmann - P.L. Krauskopf (eds.), *Praxiskommentar Verwaltungsverfahrensgesetz*, Zurich/Geneva, 2023, 1125-1188, N 14, with many further references to jurisprudence and scholarship; earlier see C. Errass, *op. cit.*, 1355 with examples and further references.
100. See also H. Keller - A.D. Pershing, *op. cit.*, 41, with further references; with regards to general interests existing in addition to individual interests see also ECtHR, *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, 27 April 2004, para. 45 f., where the court – even though not in the context of admissibility – considered that the defence of specific interests of the association's members were at stake «in addition to defence of the public interest», which it did not judge to be prejudicial to the applicants claims.
101. ECtHR, *Beizaras and Levickas v Lithuania*, App. no. 41288/15, 14 January 2020, para. 80.

in addition to the general interests they have identified. For example, they did not consider the applicants' line of argument, according to which they were *already currently* (and individually) affected by the consequences of climate change due to their age and gender. This is particularly true with regard to the four individual applicants who had claimed concrete and heat-related health impairments, which the Swiss instances did not address at all.

4.2.1 *Individual Affectedness in One's Right(s)*

The difficulty thus rather lies with establishing that one actually is individually affected. In this regard and first of all, we have to address the requirement of having to be particularly affected applied in Switzerland and which additionally specifies and narrows down the requirement of individual affectedness. This additional requirement – its applicability and appropriateness *per se* as well as its interpretation and application by the Swiss instances in the *KlimaSeniorinnen* case – is indeed criticisable.

As to its appropriateness in principle, the requirement of having to be particularly affected is justified by arguing that it would be necessary in order to distinguish an admissible individual claim from an inadmissible *actio popularis*[102]. This justification can easily be refuted by highlighting that the requirement of having to be (individually) affected in one's right alone – without the additional qualification of having to be particularly affected – allows a sufficient differentiation from an *actio popularis*. In its *Klimabeschluss*, the German constitutional court has explicitly emphasised this, holding that

> in constitutional complaint proceedings, it is not generally required that complainants are especially affected – beyond simply being individually affected – in some particular manner that differentiates them from all other persons[103].

This is all the more important because the requirement of being particularly affected furthermore is not suitable for determining questions of justiciability and its limits according to functional criteria[104].

102. See FC, *KlimaSeniorinnen*, para. 4.1 and 5.5; FAC, *KlimaSeniorinnen*, para. 6.2 *in fine*, 7.2 and 7.4.1.

103. *Klimabeschluss*, Para. 110.

104. Along these lines see M. Rehmann, *Besondere Betroffenheit als Element der Beschwerdebefugnis im Umweltrecht, Reformoptionen aus funktionaler und völkerrechtlicher Sicht*, Zurich/Baden-Baden/Vienna, 2024, 552 ff.; see also chap. 3.2 regarding justiciability.

Against this background, the applicability of the requirement of having to be particularly affected can be challenged in the Swiss context as well. Indeed, article 25a APA, pertinent in the *KlimaSeniorinnen* case, does not specify that one has to be particularly affected in order to be able to request a ruling. Rather, this qualificatory requirement of having to be particularly affected is stipulated by doctrine[105] and jurisprudence[106]. Other than the justification concerning the differentiation from inadmissible *actiones populares* addressed and refuted above, the requirement of particular affectedness is justified, on more technical terms, with reference to the general procedural requirements of administrative law, in particular the *locus standi* requirement set in article 48 para. lit. b APA, according to which a right of appeal is only accorded if one «has been specifically [particularly] affected by the contested ruling», which should also apply to article 25a APA[107].

This line of argumentation can be criticised for various reasons. First, it has to be highlighted that the requirements of article 48 apply to appeals against rulings, whereas article 25a APA opens up the possibility of requesting the issuing of such a ruling in the first place. Furthermore and more generically, the general procedural requirements, contrary to what is the case for article 25a APA, have been established with view to rulings – as opposed to factual administrative conduct ("real acts") or even administrative inaction. In light of these important differences, the application of the criterion of having to be particularly affected in the context of article 25a APA ("by analogy") can reasonably be criticised as inept. Indeed, in the presence of rulings, it is easy to establish that at least one person – the addressee of the ruling – is particularly affected. The same, however, is not necessarily the case in connection with factual administrative action – or inaction in particular – which do not have a specific addressee. Furthermore, a ruling has to be notified – to the addressee at least – which entails that at least one person is made aware of the regulation of rights and obligations contained in the ruling. Being (made) aware that one's rights are (potentially) affected is necessary in order to act against the source of such affectedness. In the case of factual administrative action – and

105. Instead of many (and with further references), see I. Häner, *Commentary on Article 25a APA*, in B. Waldmann - P.L. Krauskopf (eds.), *Praxiskommentar Verwaltungsverfahrensgesetz*, Zurich/Geneva, 2023, 635-656, n. 30 f.
106. Instead of many (and with further references), see FC, *KlimaSeniorinnen*, para. 4.1.
107. Instead of many (and with further references), see I. Häner, *op. cit.*, article 25a APA n. 31.

more so, inaction – which by nature are not notified externally, becoming aware of such action or inaction and the effect it can have on one's rights is at least substantially more difficult. Moreover, it is not necessary – and, as I argue, rather not appropriate – that the requirement for requesting a ruling on real acts in the first place is as restrictive as the requirement for filing an appeal against a notified ruling. All this justifies why the (strict) requirement of being particularly affected would not necessarily have to be applied in the context of article 25a APA[108].

This is all the more important since – as has been argued, in my view convincingly – a too strict interpretation of the requirement of having to be affected – generally, and not only if a particular affectedness is required – is not in line with procedural guarantees of the ECHR[109], as well as with standards stipulated in the Aarhus Convention[110]. The latter in particular, and more specifically its article 9 paragraph 3, would indeed ban a systematic exclusion of the possibility of appeal by individuals[111], which at least the interpretation and application of the requirement of having to be (particularly) affected in the *KlimaSeniorinnen* case would amount to[112]. In this respect, it is further relevant that article 25a APA was introduced precisely with view to human rights guarantees of access to court, more specifically in order to close a gap in legal protection[113].

Before this background, the interpretation and application of the requirement of having to be (particularly) affected in one's right(s) – generally and by the Swiss authorities – has to be (re)considered. This does not only concern the appropriate standard of review, level of proof and assessment of facts[114], but also – and particularly – the criterion by which individual (and particular) affectedness is assessed. Indeed, in the "classical" environmental cases predominant so far, the criterion to decide whether an applicant is affected or not has been geographical proximity to the "source" of their affectedness. In these cases, the "source" of the

108. Some argue, however, that there is not much difference in practice between whether the requirement is to be affected in one's right or the more strict requirement of having to be particularly affected. In the *KlimaSeniorinnen* case, it is only the FAC that has based its rejection of the applicants appeal based on the conclusion that they were not particularly affected.

109. M. Rehmann, *op. cit.*, 529, 540 ff., 543 ff.

110. *Ivi*, 487 ff., 543 ff.

111. *Ivi*, 433 ff., in particular 467 f., all with further references.

112. *Ivi*, 480.

113. I. Häner, *op. cit.*, article 25a APA n. 5, with further references.

114. See chap. 5.

applicant's affectedness has been a geographically clearly identifiable spot, such as a dangerous waste disposal site[115], an industrial site[116] or others. In such – or similar – circumstances, one can determine the group of (particularly) affected people by defining a perimeter (of geographical proximity) within which the effects on the rights of people were considered (or even presumed) to reach the required intensity. This system of «geographical reference point» to determine (particular) affectedness is not easily applicable in the context of climate change cases. If it may be possible where adaptation measures are concerned, it is difficult to imagine in cases in which mitigation is at the fore. Indeed, the sources – and effects – of mitigation omissions can not (easily) be spatialised/mapped to specific geographical areas. Since the known system of defining affectedness through geographical nearness only inadequately captures the context of climate change, courts have to develop new ways of assessing affectedness independently of – or not solely linked to – a geographical reference point. This is what the *KlimaSeniorinnen* argue in their case, taking not geographical factors, but their (particular) vulnerability due to gender and age as a "reference point" to determine their (particular) affectedness[117].

Vulnerability – in the sense of a "special", qualified vulnerability in comparison to the "standard vulnerability" of human rights applicants[118] – as criterion to assess affectedness offers many opportunities and is indeed an interesting approach that should be considered[119]. In fact, the ECtHR has repeatedly referred to vulnerability, not only to deduce from it special positive state duties, in particular with regards to the right to life[120] and private and family life[121] but also to justify measures of procedural facilitation. Invoking the criterion of vulnerability, the ECtHR has in-

115. ECtHR, Öneryildiz *v Turkey*, App. No. 48939/99, 30 November 2004.

116. Instead of many: ECtHR, *Cordella and others v Italy*, App. No. 54414/13 and 54264/15, 24 January 2019.

117. See in this regard also L. Kneubühler - J. Hänni, *Umweltschutz, Klimaschutz, Rechtsschutz*, in *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht*, 122, 2021, 479-502, 494 f.

118. On this differentiation in detail see S. Besson, *La vulnérabilité et la structure des droits de l'homme: l'exemple de la jurisprudence de la Cour européenne des droits de l'homme*, in L. Burgorgue Larsen (ed.), *La vulnérabilité saisie par les juges en Europe*, Paris, 2014, 59-85, 64.

119. On the potential avenues of vulnerability in the climate change context more broadly see nota bene C. Heri, *op. cit.*, 948 ff.

120. ECtHR, *Salman v Turkey*, App. No. 21986/93, 27 June 2000.

121. ECtHR, *Chapman v The United Kingdom*, App. No. 27970/02, 24 June 2008.

deed extended its interpretation of the indirect victim status[122], and it is conceivable that the court further extends this mechanism to the status of potential victim[123], which could be interesting – and would in fact be desirable – for the climate change cases pending before it. Furthermore, the ECtHR considers that vulnerability may impede on the effective exercise of the right to appeal to it and has thus referred to vulnerability to assert its jurisdiction in cases where the right of appeal could be limited[124]. Even if the ECtHR has made these considerations with regards to its own jurisdiction, it would not be too far-fetched to reason that similar considerations should also hold true for national courts and their jurisdictions. The Swiss instances have not entered into the debate on a potential less restrictive interpretation of admissibility requirements. However, it will be interesting to see the ECtHR's stance on this question.

Before this background, it is expedient to highlight that the requirement of victimhood according to the ECHR can be interpreted in such a way as to accommodate the described developments and notably the particular circumstances in the context of climate change. Indeed, the notion of victimhood is very broad, including not only direct, but also indirect and even potential victims[125], and not requiring the applicant to suffer any prejudice[126], merely temporary effects being sufficient[127]. Furthermore, the ECtHR has repeatedly held that the notion of victim and its interpretation can evolve with time and «in the light of conditions in contemporary society» and that it should not be interpreted in an excessively formalistic way[128]. This broad understanding of the victimhood status and its openness to develop with time to adapt to new circumstances leaves ample room allowing the ECtHR to include (individual)[129] applicants in climate change cases as fulfilling the requirements of victimhood[130].

122. ECtHR, *Ilhan v Turkey*, App. No. 22277/93, 27 June 2006, para. 54 f.
123. See also S. Besson, *op. cit.*, 77.
124. ECtHR, *Akdivar and others v Turkey*, App. No. 21893/93, 16 September 1996, para. 105.
125. Instead of many, see ECtHR, *Shortall and others v Ireland*, App. No. 50272/18, 19 October 2021, para. 47, where the court refers to and lists the different constellations in which it has accepted potential victimhood.
126. ECtHR, *Brumarescu v Romania*, App. No. 28342/95, 28 October 1999, para. 50.
127. ECtHR, *Monnat v Switzerland*, App. No. 73604/01, 21 September 2009, para. 33.
128. Instead of many. ECtHR, *Gorraiz Lizarraga and others v Spain*, App. No. 62543/00, 27 April 2004, para. 38.
129. For groups see chap. 4.2.1.
130. Along these lines see H. Keller - A.D. Pershing, *op. cit.*, 36 f.

4.3 *Alternatives to Individual Legal Claims*

In light of the challenges associated with having to bring an individual action to court as well as (potential) disadvantages of such an approach, we will in the following discuss alternatives to individual claims, in the form of group actions and access to court by associations on the one hand and the *actio popularis* or public interest litigation more generally on the other.

4.3.1 *Group Actions and Access to Court by Associations*

Group actions or the right of access to court by NGOs or other organisations may be one possible way of circumventing some of the challenges an individual would face when having to present a legal action on their own.

Indeed, grouping action(s) in environmental cases is rightly argued to promote efficiency and effectiveness of otherwise individual claims[131]. Not only can individuals through pooling their claims or bringing them to court via an association overcome otherwise (too) heavy financial burdens of bringing an individual claim to court[132]. Rather, they can also overcome structural disadvantages – such as lack of experience regarding judicial proceedings as opposed to the governmental authority they are acting against[133] – as well as profit from a larger pool of knowledge and expertise – or from easier access to it – in particular if they involve an NGO or any other knowledgeable association[134]. The pooling of legal actions, however, is not only beneficial for the individual claimants, but for courts as well. Indeed, not only will they be disburdened by having to deal with one legal action instead of with many (similar) ones, thus being able to concentrate their resources as well. Rather, they might also profit from the fact that the submissions by the parties may be qualitatively better – due to the described advantages for the applicants in terms of resource and knowledge concentration etc.

In view of these advantages, group actions or access to court by associations should be allowed extensively, as is argued here. This entails not interpreting the right of access to court of NGOs or other associations or the admissibility requirements for group actions overly restrictively

131. See nota bene *Urgenda*, para. 5.9.2; furthermore C. Schall, *op. cit.*, 444.
132. See e.g. H. Keller - A.D. Pershing, *op. cit.*, 38 f., who refer to studies on the costs of judicial proceedings in different European countries.
133. H. Keller - A.D. Pershing, *op. cit.*, 39 f.
134. See e.g. C. Schall, *op. cit.*, 444.

where such rights exist according to the procedural rules of the concerned jurisdiction on the one hand. On the other hand, it should be considered to introduce such rights if they do not yet exist.

The former conclusion is even more appropriate – or rather normatively required – as it can be argued that the obligation to allow for (some form of) right of access to courts by NGOs in environmental matters can be derived from international law, in particular the Aarhus Convention, whose objective – amongst others – specifically is to guarantee and promote «access to justice in environmental matters» (article 1). Although the Convention, and particularly its article 9 para. 2 and 3, reserve a certain margin with regards to national admissibility criteria[135], it precludes the contracting parties from systematically excluding the possibility of access to court – for individuals as well as for interest groups. This has been explicitly recognised nota bene in the Belgian *Klimaatzaak* case, where a right for NGOs to access national courts has been derived from article 9 para. 3 Aarhus Convention read in conjunction with articles 2 para. 4 and 3 para. 4, the latter two highlighting the important role of NGOs in the promotion of environmental protection and thus the relevance of their appropriate recognition and support through national law[136]. The court has held – with reference to other judgments (by the CJEU and the Belgian Constitutional Court) – that even though these provisions do leave a certain margin of appreciation to the states to determine through national law for which associations and under which conditions access to court shall be granted, they were not free to exclude access to courts for associations *per se*. Rather, access to court should be the rule in environmental cases, the presumption and not the exception[137]. Such a line of argumentation would be transposable to other member states of the Aarhus Convention, such as Switzerland.

The question thus is whether existing admissibility requirements can be interpreted as allowing access to court for NGOs or other organisations or whether they would have to be adapted *de lege ferenda* to grant access to courts for groups. In the context of proceedings before the ECtHR,

135. Leading some authors to question the effects the Convention might have on potential broadening of admissibility criteria, see e.g. C. Schall, *op. cit.*, 432 f., 438, 443, with regards to national jurisdictions as well as with regards to the ECtHR.
136. Tribunal de première instance francophone de Bruxelles, *ASBL Klimaatzaak v The State of Belgium and others*, App. No. 2015/4585/A, 17 June 2021 (hereinafter: *Klimaatzaak*), 51 ff.
137. *Klimaatzaak*, 52 f.

advocacy organisations and associations are not principally excluded from access to the court. Indeed, by stating that «any person, non-governmental organisation or group of individuals» may apply to the ECtHR, article 34 ECHR is very broad and does not exclude groups or NGOs from accessing the ECtHR. Furthermore – and as has already been said with regards to individual applicants – the notion of victim «must […] be interpreted in an evolutive manner in the light of conditions in contemporary society»[138]. There is thus nothing precluding the court from granting victim status to NGOs in the climate change context[139].

This is valid even though the ECtHR has so far been rather strict with granting standing to associations, in particular through not granting victim status to associations "simply" because their members, in whose interest they act, are (potential) victims[140]. Indeed, it can be argued, on the one hand, that the cases concerning applications by NGOs the ECtHR has been confronted with so far are different from climate change cases in that in the former, there have always been some individuals that were (relatively) clearly identifiable as victims, hence making the ECtHR conclude that it should principally be these individuals that have to apply. On the other hand, one can observe a tendency of the ECtHR to ease admissibility requirements for NGOs[141]. In particular, it has recently granted victimhood status to an association specifically set up to defend the interests of workers on the grounds of the association otherwise being deprived of fulfilling its statutory objectives by the contested state measures[142]. Furthermore, the ECtHR recognises and accepts that under certain circumstances, NGOs take part in domestic proceedings, instead of the individual applicants and defending the latter's interests. In this context, the ECtHR has even recognised that

> in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one

138. ECtHR, *Gorraiz Lizarraga and others v Spain*, App. No. 62543/00, 27 April 2004, para. 38.
139. Along these lines, see H. Keller - A.D. Pershing, *op. cit.*, 37 f.
140. E.g. ECtHR, *Nencheva and others v Bulgaria*, App. No. 48609/06, 18 June 2013, para. 90, 93, with further references.
141. See along these lines A. Kulick, *Commentary of article 34 ECHR*, in J. Meyer-Ladewig - M. Nettesheim - S. von Raumer (eds.), *Handkommentar Europäische Menschenrechtskonvention*, Basel, 2023, n. 25 with reference to case-law.
142. ECtHR, *Communauté Genevoise D'Action Syndicale (CGAS) v Switzerland*, App. No. 21881/20, 5 September 2022, para. 36 ff., in particular para. 41 f., currently pending before the Grand Chamber.

of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. […] The Court cannot disregard that fact when interpreting the concept of "victim". Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory[143].

This is what the association *KlimaSeniorinnen* is arguing, and it will be interesting to see the ECtHR's stance on the matter.

It may be of interest, in this context, to note the ECtHR's approach to NGOs in other fields. Indeed, the ECtHR has repeatedly highlighted the important function of NGOs in society and in the context of the protection of human rights. For example, it has recognised and highlighted the importance of NGOs as «public watchdogs»[144]. Even if this function has been attributed to NGOs in the context of access to information, it can be argued with good reason that NGOs play an important role in the context of climate change litigation as well and that the ECtHR would do good to apply a privileged status to NGOs in the context of environmental matters, *nota bene* through interpreting the admissibility requirements for NGOs in environmental cases extensively.

In the Swiss legal system, possibilities for group actions or actions by associations are limited. Indeed, actions by groups are only admissible in two constellations. Either an association's right of appeal has to be provided for by law, which is the case for some associations active with regards to environmental matters, but not for climate change associations[145]. Or legal standing is granted to groups – usually associations – if the statutes of the group in question stipulate safeguarding its members interests as a statutory objective, if the interests at stake (potentially) affect the majority or at least a large number of its members, and if the members themselves would be entitled to lodge an appeal on their behalf[146]. It was the latter constellation of possible group actions that the association *KlimaSeniorinnen* based their request and appeals on, arguing in particular that most of

143. ECtHR, *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, 27 April 2004, para. 38.
144. ECtHR, *Magyar Helsinki Bizottság v Hungary*, App. No. 18030/11, 8 November 2016, para.164 ff.
145. For more detail see e.g. L. Kneubühl - J. Hänni, *op. cit.*, 490 ff.
146. Instead of many: BGE 136 II 539, para. 1.1.

their members are affected by the challenged omissions[147]. However, the question of whether the courts followed their line of argumentation and more generally of whether the association *KlimaSeniorinnen* had a legal standing on their own was left open in the national proceedings. Since the national instances have denied the *KlimaSeniorinnen* as individual women have a sufficient interest in their claims, it is very likely though that they would have held that the conditions for access to court have not been met by the association either. In light of what has been stated before, this would be criticizable. Rather, it can be argued with good reasons that the requirements to grant standing to the association *KlimaSeniorinnen* have been fulfilled, particularly since these requirements should not be interpreted too restrictively. Going one step further, one could also argue that it would be beneficial to establish a specific (statutory) right to access to court for NGOs in the context of climate change. This has already been put forward by scholars and it will be interesting to see whether Switzerland will pick up on this proposal[148].

4.3.2 Actiones Populares *and Other Forms of Public Interest Litigation*

In light of the difficulties associated with establishing – and proving – an individual interest with which applicants are confronted in climate change cases, one could go one step further and question whether the general exclusion of *actiones populares* – or other forms of public interest litigation – should not be reconsidered, at least in certain areas where a potentially large number of people is affected and where proving an individual interest is difficult[149]. In fact, (some form of) public interest litigation is provided and has been used in climate change cases in other countries, particularly in the Global South[150], but also in the

147. See more detailed line of argumentation for this reasoning above in the answer to question 1 with regards to the appellants.

148. See *nota bene* L. Kneubühler - J. Hänni, *op. cit.*, 496 ff.

149. Concerning Switzerland: In favour of the introduction of the *actio popularis* in cases where a large number of people is potentially affected, see e.g. C. Errass, *op. cit.*, 1351 ff.; For a discussion of different earlier proponents of an introduction of the *actio popularis* in Switzerland, see M. Rehmann, *op. cit.*, 233 ff.; Highlighting the advantages of public interest litigation and the shortcomings of current more restrictive standing requirements but ultimately concluding the unsuitability of public interest litigation for European human rights courts see C. Schall, *op. cit.* On the problem of standing rules and the need to adapt them in situations in which a large number of people is affected, specifically in the context of the US, see J.R. Siegel, *op. cit*., 135 ff.

150. See e.g. M. Murcott - M.A. Tigre - N. Zimmermann, *op. cit*., 3, referring to section 38 of the South African Constitution and section 24 of the National Environmental

Dutch *Urgenda* case[151], and it is interesting to consider whether and if so, how, Switzerland and other European countries excluding *actiones populares per se* could draw a lesson from such examples.

Indeed, the inadmissibility of *actiones populares* is always proclaimed as a given, but – regrettably – seldom justified and substantiated[152]. If it is, it is mainly argued that general interests should be addressed in the political discourse and with political means, thus guaranteeing the highest democratic legitimisation[153], and drawing on the "classical" division between objective and subjective rights. Furthermore, it is argued that opening up access to court to *actiones populares* would create a floodgate, overwhelming courts with cases they do not have the means to deal with[154]. As to the first argument, we have already established that from a separation of powers and rule of law perspective, it is indeed normatively desirable to have control mechanisms ensuring that all state actors – the political as well – fulfil their legal duties[155]. This holds true even if these legal duties concern general interests as is often the case. Furthermore, not only has to be highlighted that courts – if they are not as directly democratically legitimised as parliament – do not lack democratic legitimisation[156], but also – as has been convincingly argued[157] – courts can be an enabling factor for liberal democracy. Not least, it has to be emphasised that democratic legitimacy is not the only form of legitimacy, but that there are other forms of legitimacy which are pertinent as

Management Act providing standing to act in the public interest and different climate change cases in the form of public interest litigation that have been conducted; see also the respective chapters of this publication.

151. *Urgenda*, para. 3.2.2.

152. For Switzerland see e.g. M. Rehmann, *op. cit.*, 56 f. with further references, who also holds that it would indeed be desirable if not necessary to address and debate the reasons for the exclusion of *actiones populares*.

153. See e.g. FC, *KlimaSeniorinnen*, para. 4.1 with further references; furthermore: M. Rehmann, *op. cit.*, n. 72 ff. with further references.

154. See e.g. M. Rehmann, *op. cit.*, 71 ff. with further references; earlier and with references already P. Mercer, *op. cit.*, 91; with regards to public interest litigation see C. Schall, *op. cit.*, 445.

155. See para. 3.1.1.

156. In many cases, judges are elected or appointed by democratically elected delegates (members of parliament, the president). In Switzerland, judges on a cantonal level are often even elected directly by the people.

157. A. Durbach - I. Reinecke - L. Dargan, *Enabling Democracy: The Role of Public Interest Litigation in Sustaining and Preserving the Separation of Powers*, in *Australian Journal of Human Rights*, 26 (2), 2020, 1-14.

well – *nota bene* forms of out-put legitimacy based on considerations of justice. This is all the more relevant as scientific research highlights the problems – or rather shortcomings – the (short-term oriented) political process[158] and actors are confronted with when having to deal with long-term challenges such as climate change[159], making it reasonable to argue that political means are actually not best suited to tackle these challenges. In contrast, *actiones populares* – especially in the form of public interest litigation – present certain advantages. For example, the functioning of courts based on objectivity, impartiality and rational arguments and facts might be better suited than the interest-driven political process to decide on certain matters with regards to climate change[160]. Also, it can be an advantage that courts, once a case is brought to them and provided that the admissibility criteria are fulfilled, generally have the duty to take a decision and render a judgment, as opposed to the political process, where it can be difficult – if not impossible – to make the political actors take a decision and act if, for whatever – even legitimate – reason, they are not inclined or capable to do so[161]. Not least, courts might be the only forum for people excluded from the political process – *nota bene* because they are under age or foreigners – to participate.

As to the "floodgate argument", it would remain to be seen whether such a scenario would materialise in practice. There are reasons to believe that it would not[162], one of them being that when wanting to access

158. This phenomenon has even been named as a problem of «short-termism in democratic politics», see e.g. A.M. Jacobs, *Policy Making for the Long Term in Advanced Democracies*, in *Annual Review of Political Science*, 19, 2016, 433-454, 438 with further references.

159. *Ivi*, 438 ff.; D.F. Sprinz, *Long-Term Environmental Policy: Definition, Knowledge, Future Research*, in *Global Environmental Policis*, 9 (3), 2009, 1-8; J. Hov - D.F. Sprinz - A. Underdal, *Implementing Long-Term Climate Policy: Time Inconsistency, Domestic Politics, International Anarchy*, in *Global Environmental Policis*, 9 (3), 2009, 20-39; R.W. Stone, *Risk in International Politics*, in *Global Environmental Policis*, 9 (3), 2009, 40-60; on the shortcomings of a system based on individual rights protection in environmental matters, *nota bene* with regards to enforcement, see also L. Kneubühler - J. Hänni, *op. cit.*, 489 f., 493.

160. E.g. J.R. Preston, *op. cit.*, 16 f.; C. Schall, *op. cit.*, 445.

161. E.g. J.R. Preston, *op. cit.*, 12 with reference to Sax.

162. See e.g. C. Schall, *op. cit.*, 445, who refers to a study of European national legal systems suggesting that «the broadening of standing requirements did not lead to a significant rise in applications». However, the author questions whether these findings would be applicable to the context of the ECtHR as well; Furthermore M. Rehmann, *op. cit.*, 297 ff., referring to the Canadian system of public interest litigation whose introduction had not let to applicants flooding the court.

a court, one is confronted with many other difficulties and hurdles, *nota bene* factual and in particular financial reasons[163]. Furthermore, it could be argued, on the contrary, that *actiones populares*, if designed in a way so that sufficiently similar interests can be pooled, would render legal proceedings more efficient and effective[164], thus disburdening courts. Indeed, even with the current admissibility requirement of having to be affected in one's rights, there is a potential for a large number of applications – be they admissible or not, and in particular in cases in which large-scale emissions (potentially) affecting a large group of people[165]. However, even if allowing *actiones populares* could lead to an increase in applications, this danger of flooding courts could be prevented with other mechanisms, for example the use of the Pilot Judgement Procedure in the context of the ECtHR[166], or other procedural instruments, such as treating one or a few main cases speedily, adjourning other, similar ones until a decision has been taken in these main cases, which is how the ECtHR is currently proceeding with regards to the climate change cases before it.

5. *Assessment of Facts and their Implications for Access to Courts*

Facts and their assessment by courts are pivotal in the judicial decision-making process. Indeed, the factual situation and its evaluation by the court is essential for the outcome of a case. This is perhaps particularly true in the context of climate change litigation, as the status of scientific data is not only relevant when applying the law to a specific case, thus evaluating whether a legal duty has been breached, but also in the process of interpreting the law in order to determine which specific legal obligation(s) can indeed be derived from a certain legal provision. However, questions regarding the assessment of facts might also be particularly challenging in the climate change context due to its global character and

163. See further references in chap. 4.2.1.

164. See chap. 4.1.1 f., *nota bene* with reference to *Urgenda*, para. 5.9.2. with further references.

165. Along these lines see M. Rehmann, *op. cit.*, 585 ff.

166. Art. 61 of the Rules of the Court; for a detailed discussion of the pilot judgment procedure see e.g. J. Gerards, *The Pilot Judgment Procedure Before the European Court of Human Rights as Instrument for Dialogue*, in M. Claes - M. de Visser - P. Popelier - C. Van de Heyning (eds.), *Constitutional Conversations in Europe*, Cambridge/Antwerp/Portland, 2012, 371-395. Proposing the introduction of a similar procedure on a national level, see C. Errass, *op. cit.*, 1371.

scientific and societal complexity leading to further difficult questions regarding causality and the attribution of responsibility.

Indeed, the assessment of scientific data has in fact been essential in the *KlimaSeniorinnen* case – and will continue to be so in the context of climate change litigation more generally, which is why, as a final – and more technical – aspect, we will now discuss questions regarding the assessment of facts, focusing on their implications for access to courts.

5.1 *Assessment of Evidence by Courts*

In light of the critical importance of the assessment of facts in the judicial decision-making process, it might seem surprising that there are relatively few rules, sometimes no rules at all, as to how courts should perform the task of assessing evidence – and the facts they (allegedly) contain. Indeed, many – at least national – jurisdictions do provide rules as to who has to establish facts[167], who bears the burden of proof[168], or which pieces of evidence are admissible[169]. The court, however, can assess the pieces of evidence and the facts behind them freely[170].

Although not principally an issue, this can prove to be problematic where a court only insufficiently takes into account the relevant scientific data it is presented with in the proceedings. This problem can be exacerbated in that the possibilities to challenge the assessment of facts before a higher instance are oftentimes limited. For example, the evaluation of facts can only be challenged before the FC if it is manifestly incorrect or based on an infringement of the law[171]. Similarly, the ECtHR holds that

167. Exemplary: In administrative procedures based on public law in Switzerland, it is in principle the public authority that has to establish the facts of the case *ex officio* in (art. 12 APA). The parties are, however, obliged to cooperate in establishing the facts of the case (art. 13 APA). The FC, in turn, bases its judgment on the facts of the case as established by the previous instance (art. 105 para. 1 AFC).

168. Chap. 5.2.

169. Exemplary: article 12 APA listing the different means of evidence; Sometimes, the law even provides a privileged treatment of certain pieces/means of evidence, e.g. public registers and public deeds in civil proceedings (see article 9 Swiss Civil Code).

170. For Switzerland: Article 40 Federal Act on the Federal Civil Proceedings (referred to in article 19 APA); for more detail, see: R. Kiener - B. Rütsche - M. Kuhn, Öffentliches *Verfahrensrecht*, Zurich/St. Gallen, 2015, n. 722; concerning the ECtHR, see C. Bicknell, *Uncertain Certainty: Making Sense of the European Court of Human Rights' Standard of Proof*, in *International Human Rights Law Review*, 8 (2), 155-187, 187; furthermore W.A. Schabas, *op. cit.*, article 38, 810

171. Article 97 Federal Act on the Federal Court.

«it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention»[172].

It is thus important to highlight that – like with any other exercise of discretion by public powers – the court has to assess the evidence according to its best judgment, and that its assessment has to be objectively comprehensible[173]. This particularly relates to the required standard of review and level of proof[174], but also to the court's duty to take a "reasoned decision" deriving from procedural guarantees, *nota bene* article 6 ECHR. This duty comprises indicating «with sufficient clarity the grounds» on which a decision is based as well as basing the «reasoning on objective arguments»[175].

The assessment of facts and scientific evidence is indeed a particularly important – and in my opinion criticizable – aspect of the decisions of the national instances in the *KlimaSeniorinnen* case. Even though IPCC reports were used as proper science and to establish facts, the examination and consideration of the scientific findings – or at least the reasoning given by the court to that effect – were very basic and not in line with the requirements of a «reasoned decision».

Indeed – and especially when compared to other climate litigation judgments –, the references to scientific facts and findings were extremely brief and superficial. The first instance referred to the IPCC only twice and each time in one phrase only – once saying that the Federal Council had based Switzerland's targets on the scientific recommendations of the IPCC without, however, going into more detail, and once highlighting that the IPCC's Fifth Assessment Report had shown that there is a direct correlation between the development of emissions and the rise in temperature[176]. The second national instance was even briefer with regards to references to scientific facts, mentioning the IPCC once in the context of a «brief overview of possible impacts of climate change», not directly referring to one of the IPCC reports but rather on an overview provided by the FOEN based on the IPCC Assessment[177]. The FC referred to one

172. ECtHR, *Perez v France*, App. No. 47287/99, 12 February 2004, para. 82.
173. R. Kiener - B. Rütsche - M. Kuhn, *op. cit.*, n. 725.
174. Chap. 5.2.
175. ECtHR, *Taxquet v. Belgium*, App. No. 925/05, 16 November 2010, para. 91; in the context of Switzerland, see FC, *KlimaSeniorinnen*, para. 3 (unpublished).
176. Ruling, 11.
177. FAC, *KlimaSeniorinnen*, para. 7.4, in particular 7.4.2.

of the IPCC reports in somewhat more detail[178]. Still, the reference to the IPCC report's content was very basic. This can be illustrated in quantitative terms on the one hand. Whereas the FC's reference to the IPCC report did not exceed one page, the appellants first request counted 15 pages on scientific facts and findings[179]; the German Constitutional Court in its Climate Order elaborated on the factual bases of climate change and climate action on 21 pages[180]; the Decision of the Dutch Supreme Court in the *Urgenda* case contained 5 pages dedicated to the "Facts"[181]. Furthermore, the FC referred solely to one IPCC report whereas the appellants as well as the German and Dutch courts all referred to multiple IPCC reports and included references to other scientific studies as well. Even if the quantitative mention alone is not decisive, it is nevertheless a significant indication.

On the other hand, the FC's dealing with facts can also be criticised in terms of content. Indeed, the FC used the IPCC report to deduce from it that the temperature rise limit of "well below" 2°C in terms of the Paris Agreement is not expected to be exceeded in the near future, that there is still some time available to prevent global warming exceeding this limit and that global warming can be slowed down through suitable measures, facts from which it then concludes that the appellants are not affected in their rights with sufficient intensity[182]. This could be qualified – as I argue – as a rather one-sided and partial approach to facts rather than a detailed assessment.

Indeed, the *KlimaSeniorinnen* have unsuccessfully challenged the reasonings of the respective lower court(s) before the FAC and the FC. This provides the perfect opportunity for the ECtHR to revisit the application of courts' duty to take a «reasoned decision» as described above. Indeed, even though the duty to give reasons «may vary according to the nature of the decision and must be determined in the light of the circumstances of the case» and even if the court is not required to «give a detailed answer to every argument»[183], this does not encompass the court outright failing

178. FC, *KlimaSeniorinnen*, para. 5.3.
179. Request, chap. 4 para. 22 ff.
180. *Klimabeschluss*, para. 16 ff.
181. *Urgenda*, para. 2.1.
182. FC, *KlimaSeniorinnen*, para. 5.3 f.; That the applicants are affected in their rights is procedurally required for them to be able to act against the criticised omissions by the state. See also answer to questions 1 and 2.
183. Instead of many: ECtHR, *Lăcătuș and Others v. Romania*, App. No. 12694/04, 13 November 2012, para. 97; with regards to Switzerland, see FC, *KlimaSeniorinnen*, para. 3.2.

to address the applicants' main line of argumentation[184] – without giving reason of why it would not be pertinent –, particularly concerning the four individual applicants, whose health problems and the evidence provided to prove the latter's existence as well as the link to climate change the FC has not mentioned once. Rather it is under a duty to properly examine the submissions, arguments and evidence provided by the parties[185]. In this context, it is particularly important that «reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part»[186].

5.2 *Standard(s) of Review, Level of Proof and Burden of Proof*

The concepts of standard(s) of review, level of proof and burden of proof are very complex and context dependent. Most basically, standard of review refers to the level of scrutiny of a court in assessing a case; level of proof – although differently understood depending on the jurisdiction at hand[187] – pertains to the «threshold of probabilistic likelihood [of a fact] given the evidence»[188] or to the «degree of satisfaction» to which the judges «have to be persuaded of that proof»[189]; and burden of proof determines who has to bear the consequences of lack of evidence[190]. While these concepts are clearly distinguishable in theory, they (and particularly the first two) are often intertwined in practice. We will thus discuss them – or rather their implications for access to court in climate change cases – together.

In the *KlimaSeniorinnen* case, standard of review and level of proof have been a particularly important element in the context of the assessment of the requirement of having to be particularly affected, in which context the interplay between the two is indeed pronounced. As to the applicable standard of review, having to show that one is affected in a right does not mean that one has to prove the violation of that right, not even that one's

184. Namely that they, as elderly women, were (already now and particularly) affected in their right to life and private and family life.
185. ECtHR, *Perez v France*, App. No. 47287/99, 12 February 2004, para. 80.
186. ECtHR, *Taxquet v. Belgium*, App. No. 925/05, 16 November 2010, para. 91.
187. For a more detailed discussion, see e.g. K.M. Clermont, *Standards of Proof Revisited*, in *Vermont Law Review*, 33 (3), 2009, 469-488.
188. G. Gardiner, *The Reasonable and the Relevant: Legal Standards of Proof*, in *Philosophy and Public Affairs*, 47 (3), 2019, 288-318, 288.
189. C. Bicknell, *op. cit.*, 158.
190. *Ibidem*.

right has been restricted *stricto sensu*[191]. Rather, the required intensity of the impairment of the right is lower. The question is whether an act or omission potentially affects the scope of the alleged right[192]. This signifies that – at least on procedural grounds – the applicants did (and do) not have to show that their rights have been violated, but rather – and "only" – that the alleged omissions by the criticised state actors are potentially fit to reach the degree of a restriction and subsequent violation of their rights[193].

Regarding the level of proof, it is rightly held – at least in the scope of application of article 25a APA – that it is limited to having to establish *prima facie* evidence (that one is affected in one's right)[194]. It is thus not necessary to bring the full proof, which would require the court to not have serious doubts but to be convinced of the correctness of a factual assertion based on objective grounds[195]. Rather, a fact is established *prima facie* if certain elements speak in favour of its existence, even if the court still deems possible that the fact in question might in fact not have materialised[196]. Limiting the level of proof to *prima facie* evidence and holding that – on procedural grounds – the applicants do not yet have to substantiate a violation of their right, but only that they are affected in their right is all the more justified, as I argue here, by reference to the right to access to court guaranteed in article 6 ECHR. According to this provision – and if the other stipulated requirements are met –, access to court has to be granted not only if the existence of a claim is fully proven, but already if the applicants can substantiate an arguable claim that such a right exists according to national law[197]. The question whether the right and claim do indeed exist is not a question to be solved on procedural grounds, but on the merits of the case.

This must also be similar with regards to the victim status according to the ECHR. Indeed, if it is required at the admissibility stage that an

191. The FC itself states this in its *KlimaSeniorinnen* decision, see FC, *KlimaSeniorinnen*, E. 4.4, with further references to BGE 144 II 233 (concerning a national health prevention campaign against HIV and alleged negative effects of this campaign for children and youths) E. 7.3.1 and BGE 140 II 315 (concerning accident prevention measures for the nuclear powerplant "*Mühleberg*") E. 4.3 and 4.5, each with further references.

192. BGE 144 II 233 E. 7.3.2 with further references; but also FC, *KlimaSeniorinnen*, E. 4.4; see also I. Häner, *op. cit.*, article 26 APA n. 28.

193. See BGE 144 II 233 E. 7.3.2.

194. S. Müller, *op. cit.*, 354; affirmative: I. Häner, *op. cit.,* article 25a APA n. 28.

195. BGE 130 III 321, para. 3.2.

196. BGE 132 III 715, para. 3.1; also: BGE 140 III 610, para. 4.1.

197. E.g. ECtHR, *Mennitto v Italy*, App. No. 33804/96, 5 October 2000, para. 23.

applicant has to "claim" that they are a victim of a violation, this is not equivalent to having to prove the existence of a violation. This is particularly evident in the case of a potential victim, in which context the ECtHR has explicitly held that the potential victim is «required to provide reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur»[198].

In the *KlimaSeniorinnen* case, this means that – from a procedural perspective – the applicants did (and do) not have to fully convince the court of their being affected in their rights. Rather, merely establishing that certain elements speak in favour of their being affected and providing reasonable evidence would have been sufficient. The reasoning of the Swiss FC, however, according to which the applicants – like the rest of the Swiss population – are not affected with sufficient intensity by the omissions as required by art. 25a APA because the temperature rise limit of "well below" 2°C in terms of the Paris Agreement is not expected to be exceeded in the near future and because global warming can be slowed down by suitable measures, thus concluding that there is still some time available to prevent global warming exceeding this limit[199], can be argued to amount to requiring the proof of the existence of a violation of a right, the FC hence having misconceived the appropriate standard of review and level of proof.

A similar line of argumentation regarding the standard of review and level of proof can be defended concerning the question of shared causality and responsibility as well as the assessment of probabilities and risk. As to the first, it can be highlighted that shared causality and responsibility is not equivalent to no causality and responsibility. Rather, jurisprudential examples, namely the *Urgenda* case, show that it is possible to establish causality and responsibility, even if many actors might collectively contribute[200]. Furthermore, models for the attribution of responsibility and addressing shared causality do exist – *nota bene* in criminal law or tort law – and could serve as an inspiration.

As to the second, it is indeed disputable whether the FC's conclusion from the (only) IPCC-report it has cited reflects the appropriate standard of review and level of proof, particularly in light of the principle of precaution as well as seeing that the IPCC's basis for calculation is not a "no-risk-approach" but rather on a basis of 66% probability. The FC has

198. ECtHR, *Senator Lines GmbH v Austria et al.*, App. No. 56672/00, 10 March 2004.
199. See FC, *KlimaSeniorinnen*, para. 4.1 and 5.3 ff.
200. Regarding responsibility: *Urgenda*, para. 5.7.1 ff.; Referring to the reasoning in the *Urgenda* case, see also H. Keller - A.D. Pershing, *op. cit.*, 30.

indeed only taken into account that the temperature rise limit of "well below 2°C" is not expected to be exceeded in the near future, that global warming can be slowed down by suitable measures, and that there is still some time available to prevent global warming exceeding this limit. It has not, however, considered that the effects of the failure to reduce GHG emissions – even though already caused – will only materialise in the future, or the costs shifting the burden to reduce GHG emissions into the future will have, or an assessment of the measures taken, or other relevant aspects.

Not least, the question of the burden of proof has to be (re)considered. In the *KlimaSeniorinnen* case, it was indeed the appellants that hold the burden of proof. For in the Swiss system, the burden of proof lies with the party that derives rights from the fact to be proven[201]. In the context of the ECtHR as well, the burden of proof lies with the party making the claim, a rule that has been qualified by some as general principle of international law[202].

However, this rule can be questioned. This is particularly apparent in the Swiss context, where the burden of proof rule stems from private law and has been applied in administrative law *per analogiam*[203]. Indeed, in the archetypical private law proceedings concerning two individuals, it is generally assumed that they have – at least approximately – the same "power", whereas in the archetypical public law proceedings, an individual faces the state, thus constituting a situation in which a certain power imbalance is inherent. Since holding the burden of proof can be disadvantageous, one can argue that it would indeed not be appropriate to attribute it to an already "weaker" adversary. Such dynamics of "weaker" vs "stronger" adversaries existing more generally, the criticism of the burden of proof rule applies not only in contexts where the latter explicitly stems from private law.

One could therefore consider to draw inspiration from examples in other areas of law where facilitated standards of proof or even the reversal of the burden of proof exist. The most "extreme" example is criminal law, where the state has to proof the criminal liability of the defendant, as opposed to the defendant having to prove their innocence[204]. But less

201. See art. 8 of the Swiss Civil Code; Indeed, this civil law rule on the burden of proof is applicable in public law proceedings as well as a general principle of law.
202. W.A. Schabas, *op. cit.*, article 38, 810.
203. R. Kiener - B. Rütsche - M. Kuhn, *op. cit.*, 186.
204. E.g. W.A. Schabas, *op. cit.*, article 6, 298.

far-reaching examples do exist, *nota bene* in civil law proceedings in constellations where a typically "stronger" party faces a "weaker" party in terms of power relations, as in tenancy law of labour law, to give two examples[205].

Before this background and in light of the power relations in public law proceedings as well as with view to the immense difficulties for applicants to prove certain elements – *nota bene* causality –, facilitating standards of proof or reversing the burden of proof could – or should I say "should" – be considered in climate change cases.

In this context, it is important to notice that the ECHR and the ECtHR do not exclude the possibility for reversal of the burden of proof. Rather, the ECtHR has already implemented a reversal of the burden of proof in some cases[206]. In this context as well, it has indeed been held that «reversing the BoP actually operates as something of a leveller, bringing greater parity between parties in the dispute»[207].

6. *Conclusion*

This paper has highlighted that and in what way climate change cases challenge the traditional understanding of admissibility and access to courts, at least in a European setting. Focusing on the *KlimaSeniorinnen* case currently pending before the ECtHR, but looking at admissibility issues more generally, we have argued that and how access to court and admissibility do not pose an insurmountable hurdle to climate change litigation. In this regard, we have discussed approaches and means to deal with admissibility issues – *de constitutione* and *lege lata* or *ferenda*.

In terms of a conclusion, I would like to propose a few final recommendations regarding access to court and admissibility. The first would be an *in dubio pro* admissibility rule, proposing to – when in doubt – assess

205. In Switzerland, for example, tenancy and labour law are two areas in which so-called simplified civil proceedings ("*vereinfachtes Verfahren*") are stipulated (article 243 ff. of the Swiss Civil Procedure Code). The policy considerations behind this is to make it easier for the (socially) weaker litigant to assert their claims or to defend against opposing demands and to enable them to conduct the case without legal representation, see e.g. S. Mazan, *Commentary on Article 247*, in K. Spühler - L. Tenchio - D. Infanger (eds.), *Schweizerische Zivilprozessordnung, Basler Kommentar*, Basel, 2017, n. 4.
206. First case: ECtHR, *Kurt v Turkey*, App. No. 15/1997/799/1002, 25 May 1998.
207. C. Bicknell, *op. cit.*, 159.

the critical questions on the merits rather than from a procedural perspective. Indeed, not only do admissibility issues sometimes pose complex questions, but also they are often very closely linked to questions on the merits. This is *nota bene* the case with victimhood status or the question of «being affected in one's right», but also regarding questions of causality and responsibility. The court would do good and be better equipped to answer these questions on the merits[208].

Secondly, it is recommendable, sometimes even normatively required in light of superordinate legal obligations such as procedural human rights guarantees as well as the Aarhus Convention, to interpret existing admissibility criteria extensively where they allow so. This is *nota bene* possible regarding the requirement of «being affected in one's right» or the recognition of victimhood and standing to NGOs and other groups.

Thirdly, and particularly where existing admissibility requirements do not lend themselves to an extensive interpretation, alternatives should be seriously considered. Amongst such alternatives are more extensive rights of access to court for groups or even allowing public interest litigation. Instead of offhandedly rejecting them, possible disadvantages and advantages should carefully be weighed up.

Lastly, these questions of access to court should be guided by functional criteria, taking into account current circumstances and new developments.

In the meantime, it will be interesting to wait and see the ECtHR's approach to admissibility questions and access to court. This contribution should at least have pointed out that issues in that regard are not insurmountable hurdles, but that there rather is a way forward for climate change litigation – before the ECtHR as well as before national courts.

208. See along these lines e.g. ECtHR, *Siliadin v France*, App. No. 73316/01, 26 July 2005, para. 63; furthermore: ECtHR, *Hirsi Jamaa and others v Italy*, App. No. 27765/09, 23 February 2012, para. 111 f., where the ECtHR has expressly held: «The Court notes that the issue raised by this preliminary objection is closely bound up with those it will have to consider when examining the complaints under Article 3 of the Convention. That provision requires that the Court establish whether or not there are substantial grounds for believing that the parties concerned ran a real risk of being subjected to torture or inhuman or degrading treatment after having been pushed back. This issue should therefore be joined to examination on the merits. The Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination on the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

Although the assessment of these climate change cases on the merits, in turn, is yet another question, the approaches discussed here with regards to procedural grounds may provide some insights concerning the merits as well.

Section 2
Climate Change Litigation Across the World

Saajidah Patel

Climate Under Fire: Challenging Authority and Forging Accountability in Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others

1. *Introduction*

The purpose of this paper is to discuss the case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*[1] (hereinafter "*Earthlife Africa*") and the impact such case has on climate litigation, specifically in South Africa. In the *Earthlife Africa* case, the High Court Gauteng Division of Pretoria in South Africa was asked to rule on whether the proposals for a new 1200 MW coal-fired Thabametsi Power Project which would continue until 2061, were subject to "relevant" environmental evaluation under the National Environmental Management Act 107 of 1998 (hereinafter "NEMA")[2]. The considerations included the project's effects on the global climate as well as the project's effects on a changing climate[3]. The court held that such concerns are pertinent and its exclusion from the environmental review of the project made the approval unlawful, despite the statute not expressly considering climate change[4]. EarthLife Africa stated that the project's environmental review was invalid as it overlooked climate change, and this was submitted as an appeal to the Minister of Environmental Affairs[5]. The second appeal was submitted to the High Court in Pretoria to contest the Minister's decision that the environmental review was legally valid[6]. This was challenged as the environmental review still needed to be supplemented as certain issues regarding climate mitigation had not been «comprehensively

1. (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017).
2. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017).
3. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16), cit.
4. *Ibidem.*
5. *Ibidem.*
6. *Ibidem.*

assessed and/or considered»[7]. The court ruled in favour of Earthlife Africa and held the assessment review to be legally invalid[8].

2. *The High Court's Decision and Reasoning*

2.1 *Background of the Case*

The main issue of this case revolves around the environmental impact of a future coal-fired power station in Limpopo in South Africa. In order to create a coal-fired power station, one needs to receive an approval by the Department of Environmental Affairs (hereinafter DEA)[9]. Additionally, section 24 of NEMA stipulates that before the construction of a coal-fired power station, there has to be authorization of the project by the Chief Director of the DEA[10]. In this case, the Chief Director, which is also the third respondent, authorised the coal-fired power station on 25 February 2015[11]. Earthlife Africa, who is the applicant in this case, appealed this decision to the Minister of Environmental Affairs – the first respondent[12]. The Minister upheld the authorization which led to the current case – Earthlife Africa – a non-profit organisation – wanted the court to review firstly, the authorization and secondly, the Minister's decision[13].

2.2 *The High Court's Decision with Reasoning*

The High Court is a judicial public court in South Africa, which ruled in favour of Earthlife Africa[14]. The High Court further set aside the authorization granted by the Chief Director regarding the coal-fired power station and, it instructed the Minister to reconsider the project by taking into account the following:

7. *Ibidem.*
8. *Ibidem.*
9. *Ivi*, para. 2.
10. As above.
11. As above.
12. As above.
13. As above.
14. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16), cit., para. 126.

a climate change impact assessment report; a paleontological impact assessment report; comment on these reports from interested and affected parties; any additional information that the first respondent may require in order to reach a decision on the applicant's fourth ground of appeal[15].

The Court held that the Minister must evaluate the impact of climate change as set out in the precautionary principle in Article 3(3) of the UN Framework[16]. The principles of sustainable development should also be considered by the Minister when reconsidering the project[17].

The Court held that the DEA must first take into account the effect that projects have on the climate before authorising such projects[18]. Additionally, the Minister has to ensure that a sufficient assessment of the impact of the project on the climate was conduct before such authorization, as provided for by NEMA[19]. Although the Court did not specifically address the issue of greenhouse gas emissions, it did state that the main source of greenhouse gas emissions in South Africa is coal-fired plants[20]. The Court in its decision instructing the Minister (and competent authorities in general) to evaluate the project's impact on the climate based on new information, held that factors such as «pollution, environmental impacts or environmental degradation» should be considered before authorization of a project in accordance with section 240(1) of NEMA[21]. It further held that a climate change impact report was vital[22]. Therefore, since State authorities were compelled to assess the impacts of the project in climate change and greenhouse gas emissions, it can be concluded that the Court did acknowledge State responsibility, albeit indirectly. Furthermore, the Court held that the first decision was based on insufficient data and information and thus ordered a climate change impact assessment, giving the impression that the Court wanted to ensure that an in-depth scientific investigation was conducted prior to any authorisation.

When reaching its decision, the Court used UNFCCC (United Nations Framework Convention on Climate Change), the Paris agreement

15. As above.
16. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16), cit., para. 83.
17. *Ivi*, para. 80.
18. *Ivi*, para. 45.
19. *Ivi*, para. 63.
20. *Ivi*, para. 25.
21. *Ivi*, para. 5.
22. *Ivi*, para. 126.

(although the court stated that it was not yet enacted domestically) and international law to interpret domestic legislation. It is noteworthy that the court stated that interpretation that is in line with international law is favoured over an interpretation that is inconsistent with international law[23]. Thus, international law was used as a tool for interpretation and not as a direct source of law. The Court looked at South Africa's obligations under the UN Framework Convention which obliged States to consider all environmental impacts and mitigation measures. This was read in conjunction with section 240(1) of NEMA as well the 2010 Environmental Impact Assessment Regulations[24]. This was interpreted in light of section 24 of the Constitution of the Republic of South Africa, 1994 which states: «Everyone has the right to: an environment which is not harmful to their health or well-being»[25]. Using all of this, the Court reached its conclusion that there was an insufficient assessment of the project's implications on the climate and thus the authorisation as well as the decision of the Minister should be set aside.

3. *Opinion of the Case*

International agreements for mitigating the negative impacts on the climate can only be fully effective as long as the governments articulate these climate change commitments, and their executive branches approve regulatory legislation to effectively combat climate change and put into place corresponding adaptation measures to attain climate conformance[26]. Therefore, this decision reinforced South Africa's obligations and commitments under the Paris agreement and it acknowledged the State's obligation to combat climate change and the negative effects on the environment.

Additionally, the case had a significant impact on climate litigation in South Africa. It emphasised the importance and obligations of governmental authorities to sufficiently assess the impact on the climate by

23. *Ivi*, para. 85.
24. *Ivi*, para. 87.
25. *Ivi*, para. 12.
26. M. Van Der Bank - J. Karsten, *Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices*, in *Air, Soil and Water Research*, 13, 2020, 7 f.

a project before the authorization of such project. The court strengthened its stance on the vitality of a sufficient and comprehensive climate change impact assessment by governmental authorities by setting aside both the authorization and the decision of the Minister as it lacked such assessment.

Moreover, this case is imperative as it signalled that climate change considerations cannot be dismissed or underestimated. This was emphasised by the court establishing the requirement for a climate change impact assessment as a crucial component of the authorization of projects[27]. This decision will hopefully ignite the movement of environmentalists and the public to hold governmental authorities accountable when dealing with future projects that might have adverse effects on the environment.

Although this is a step in the right direction and a pat on the back for the judiciary, it generally needs comprehensive legislation to make a greater impact[28]. In order to ensure sustainable development, which is needed to address climate change, South Africa needs an efficient legislative framework which will govern the ongoing climate change and the way the country responds to it[29]. The government is obligated to enhance environmental sustainability in order to strengthen the country's capacity to endure the impacts of climate change, in its capacity «as the custodian of public property»[30]. By failing to create legislation that specifically targets and addresses climate change, it can be argued that such failure amounts to the state failing to protect the rights of the people as enshrined in section 24 of the Constitution[31]. Even though there is a policy document, a Bill and the recent Carbon Tax Act, there is still a gap in the legislative framework for the complete focus on climate change[32].

27. T. Humbly, *A landmark case on climate change in SA*, available at www.wits.ac.za (accessed 28 August 2023).
28. M. Van Der Bank - J. Karsten, *op. cit.*, 7 f.
29. H. Papacostantis, *South Africa's Journey to Climate Change Regulation: Earthlife Africa Johannesburg v Minister of Environmental Affairs 2017 2 All SA 519 (GP)*, in *Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad*, 24 (1), 2021, 18 f.; R.L. Ottinger - M. Jayne, *Global Climate Change Kyoto Protocol Implementation: Legal Frameworks for Implementing Clean Energy Solutions*, in *Pace Envtl. L. Rev.*, 18, 2000.
30. H. Papacostantis, *op. cit.*, 18 f.
31. *Ibidem*.
32. *Ibidem*.

4. *Concluding Remarks*

Climate change denial is often excused as freedom of speech. On the contrary, it is a play by industrialists to stifle the voice of science. Its objective is to discourage any form of objection against climate change in order for the perpetrators to profit while endangering the planet and all of mankind. This scheme has unfortunately proved to be tremendously successful.

The unparalleled effects of climate change is felt across the world and is especially burdening the poorer developing countries of the Global South. These vulnerable countries are exposed to devastating climate events such as droughts, floods, tsunamis and cyclones. It is a known fact that climate change occurs as a result of an increased concentration of greenhouse gases, greatly because of human activities.

Our planet is experiencing a climate dilemma. International law now contains provisions to prevent the environment from destruction and for the safeguarding of essential human rights in order to stimulate transformative climate action by all states of the world.

Therefore, all governments, as well as, if not especially the judiciaries, need to take a firm stance in protecting and upholding basic human rights by ensuring all governmental authorities act in strict accordance and with the best interests of the environment in mind.

Monika Feigerlová

Contribution of a National Human Rights Body to Uncovering Climate-Related Corporate Responsibility: Extraterritoriality and Human Rights Due Diligence*

1. *Introduction*

Climate change knows no borders and there is no global authority to tackle it. Climate actions against companies necessarily face cross-border legal challenges in terms of jurisdiction of the relevant body to adjudicate on harms caused by businesses operating elsewhere and in finding an appropriate accountability regime. It comes as no surprise, therefore, that an array of innovative legal approaches and arguments seeking to hold greenhouse gas (GHG) emitters accountable for the impacts of climate change has surfaced in recent years[1]. The instance of a non-judicial investigation into transboundary human rights violations linked to corporations and climate crisis is exemplified by the petition submitted to the Commission on Human Rights of the Philippines (Commission)[2].

The Commission is a national body established under the Philippine Constitution[3] and the petition was brought by Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement (Greenpeace) together with other civil society organisations and several Philippine citizens, in-

* The research for this article has been supported/subsidised within the *Lumina quaeruntur* award of the Czech Academy of Sciences for the project "Climate law" conducted at the Institute of State and Law.

1. M. Burger - M.A. Tigre, *Global Climate Litigation Report: 2023 Status Review*, United Nations Environment Programme, 2023, available at wedocs.unep.org (accessed 31 July 2023).

2. In re Greenpeace Southeast Asia and Others (Greenpeace), Case No. CHR-NI-2016-0001, Commission on Human Rights of the Philippines, National Inquiry. The submissions relating to the case are available at: www.greenpeace.org (accessed 31 July 2023).

3. 1987 Philippine Constitution, Article XIII, Sections 17 and 18, available at www.officialgazette.gov.ph (accessed 31 July 2023).

cluding the survivors of Typhoon Haiyan[4]. The petition was filed in 2015, a few months before the Paris Agreement on climate change was signed[5]. The case is also known as the *Carbon Majors Inquiry* because of the companies against which the petition was directed.

The petition asked for an investigation into the role of the world's largest private emitters of GHG in driving climate change, which are in certain studies referred to as Carbon Majors[6] and whose proportionate contribution to aggregate global GHG emissions has been quantified. Specifically, the petition inquired in human rights violations of the Philippine people and ocean acidification resulting from the impacts of climate change to which the Carbon Majors had allegedly contributed. The petitioners asserted that climate change was detrimentally affecting human rights, with the leading oil producers contributing knowingly to this phenomenon. As the major corporate contributors of GHG emissions, these entities have not taken effective steps to mitigate their emissions, despite their awareness of the resulting harm, their capability to act, and their potential involvement in activities that might undermine climate action[7].

The petition is an early example of the use of due diligence concept over the negative impacts of climate change and illustrates the growing attention to the human rights responsibility of companies as set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs)[8]. In the academic context, the issue of the application of human rights law to the climate crisis has fuelled a growing body of research and publication in recent years. Savaresi and Setzer mapped the role of human

4. The petitioners included 12 organisations, 20 individuals, and 1,288 Filipinos who expressed support for the petition through a dedicated webpage www.greenpeace.org.ph.

5. UN. Framework Convention on Climate Change-Conference of the Parties: Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/ L.9/Rev.1, New York, 2015, available at: www.unfccc.int (accessed 31 July 2023).

6. 47 respondents that were investor-owned companies producing crude oil, natural gas, coal and cement and belonged to the companies determined by Richard Heed. See R. Heede, *Carbon Majors: Accounting for Carbon and Methane Emissions 1854-2010, Methods and Results Report*, available at www.climateaccountability.org (accessed 31 July 2023).

7. Greenpeace, *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, 22 September 2015, available at www.greenpeace.org (accessed 31 July 2023).

8. United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UNGPs), UN Doc. A/HRC/17/31, New York, 2011, available at www.ohchr.org (accessed on 31 July 2023).

rights in climate litigation in general[9], and Yoshida and Setzer focused on several high-profile climate change human rights cases directed against States[10]. The content of the due diligence obligation of States to secure human rights from the threats of climate change impacts was analysed by Voigt concluding that States must take all adequate and appropriate measures at the level of their possible ambition to meet the Paris Agreement temperature goals[11]. Climate action against multinational companies was examined in the business and human rights field[12], with Macchi highlighting the concept of «climate due diligence»[13] and Dehm pointing out its limitations and narrow focus[14], which Colombo overcomes with the more encompassing concept of «sustainability due diligence»[15].

Building on prior analyses of the Carbon Major inquiry[16], the present contribution elucidates the legal reasoning embraced by the Commission to address human rights infringements in relation to two key issues: (i) the jurisdiction of the Commission to investigate the contribution of Carbon Majors, having no presence in the Philippines, to the violations of human rights of the Philippine citizens, and (ii) the nature and substantive content of the human rights duties pertinent to fossil fuel corporations with regard to the climate crisis. The contribution considers the implications of the Commission's main findings in relation to the emerging mandatory

9. A. Savaresi - J. Setzer, *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, available at SSRN 3787963 (2021) and literature referred therein.

10. K. Yoshida - J. Setzer, *The trends and challenges of climate change litigation and human rights*, in *European Human Rights Law Review*, 2, 2020, 140 f.

11. C. Voigt, *The climate change dimension of human rights: due diligence and states' positive obligations*, in *Journal of Human Rights and the Environment*, 13, 2022, 152 f.

12. C. Bright - K. Buhmann, *Risk-based due diligence, climate change, human rights and the just transition*, in *Sustainability*, 13 (18), 2021 [10454].

13. C. Macchi, *The climate change dimension of business and human rights: the gradual consolidation of a concept of 'climate due diligence'*, in *Business and Human Rights Journal*, 6 (1), 2021, 93 f.

14. J. Dehm, *Beyond Climate Due Diligence: Fossil Fuels, 'Red Lines' and Reparations*, in *Business and Human Rights Journal*, 8 (2), 2023, 151 ff.

15. E. Colombo, *Unpacking Corporate Due Diligence in Transnational - Climate Litigation: A Planetary Perspective*, in *ex/ante*, 2023, Special issue, 35 ff.

16. See e.g. A. Savaresi - J. Hartmann, *Using human rights law to address the impacts of climate change: early reflections on the carbon majors inquiry*, available at SSRN 3277568 (2018); K. Boom - I. Prihandono - N. Hosen, *A mandate to investigate the carbon majors and the climate crisis: The Philippines commission on human rights investigation*, in *Australian Journal of Asian Law*, 23, 2023, 57 f.

due diligence laws, as well as the potential of non-judicial bodies to help develop guiding principles outlying climate accountability of companies.

While the Commission lacked adjudicative or enforcement authority, the outcome of its extensive seven-year investigation in a 2022 report[17] bears significant relevance for analysing the concept of human rights due diligence of companies in the context of climate change[18]. Firstly, the findings offer a valuable guidance for other national human rights institutions. Throughout the investigation, the Commission sought to stimulate a global debate on the role of corporations in climate change, drawing on input from *amici curiae* briefs, research studies, and position papers provided by science and legal experts, professional organisations, academics, advocates, and duty-bearers from across the globe. Secondly, the emerging dimensions of corporate climate accountability can be juxtaposed with the Commission's experiences. Notably, the question of corporate responsibility for environmental violations and climate-related harm across the value chain, specifically concerning scope 3 GHG emissions, has gained substantial relevance in light of the EU's proposed directive on sustainability due diligence obligations of companies. In sum, the Commission's non-adjudicative contribution holds crucial insights for the landscape of human rights due diligence of companies, particularly within the framework of climate change.

Like other bodies seised with climate-related grievances, the Commission grappled with two principal questions. Firstly, it had to evaluate its authority to address claims against corporations linked to climate change. Secondly, it needed to determine the applicable legal regime and the source of obligations for the respondent companies. This contribution will analyse the two key points of the Commission's findings: overcoming extraterritoriality objections to the Commission's mandate and operationalising the human rights due diligence as outlined in the UNGPs for climate-related impacts.

17. Commission On The Human Rights Of The Philippines (CHR), *National Inquiry on Climate Change Report*, 2022, available at www.chr.gov.ph (accessed 31 July 2023).

18. For the details on the investigation process and the petition see M. Feigerlová, *Human Rights Responsibilities of Corporations and Climate Change: Carbon Majors Inquiry*, in P. Šturma - A. Tymofeyeva (eds.), *70th anniversary of the European Convention on Human Rights*, Praha, 2021, 86 f.

2. *Jurisdiction, State's Duties and Corporate Responsibilities to Respect Human Rights*

2.1 *Jurisdiction of the Commission*

The issue of extraterritorial jurisdiction[19] or extraterritorial scope of obligation is especially important in cases of transnational harm, including those brought against multinational corporations. It is often the case that the harm is largely caused by activities of corporations operating and seated in industrialised countries while the impacts are felt in the world's poorest countries or islands that are already vulnerable to natural disasters. This was also the situation of the Philippines where the petition was filed following extreme typhoons causing loss of life and damage to property. One of the issues that arises in transboundary disputes is whether an applicant in one jurisdiction where the harm is felt can sue a foreign company conducing the allegedly harmful activities in another State and hold such company accountable.

The Carbon Majors petition, as further amended, requested the Commission to conduct an investigation and issue a finding on the responsibility of the Carbon Majors named in the petition. Their responsibility was to be evaluated for their role in human rights threats and/or violations in the Philippines arising from climate change and ocean acidification. The petition further sought the companies' provision of plans detailing how they intend to rectify and prevent such violations or threats in the future[20]. The petitioners also asked the Commission to recommend measures to

19. The term "extraterritorial jurisdiction" is a concept employed in scholarly works with diverse meanings and interpretations. For the purpose of this contribution, the notion of extraterritorial jurisdiction is understood as the exercise of the authority by a State outside of its territory, involving the consideration of the jurisdiction, extraterritoriality, and applicable law. See UN International Law Commission, *Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, UN A/CN.4/SER.A/2006/Add.l (Part 2), 2006, 229 f. For the discussion on the issue within the context of human rights law see e.g. C. Methven O'brien, *The home state duty to regulate the human rights impacts of TNCs abroad: a rebuttal*, in *Business and Human Rights Journal*, 3 (1), 2018, 47 ff.; S. Besson, *The extraterritoriality of the European Convention on Human Rights: why human rights depend on jurisdiction and what jurisdiction amounts to*, in *Leiden Journal of International Law*, 25 (40), 2012, 857 ff.

20. Greenpeace, *Amended Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, 21 April 2016, available at www.greenpeace.org (accessed 31 July 2023).

be implemented by the Philippine government and the governments of countries where respondent companies are headquartered. These steps are aimed at safeguarding human rights affected by climate change, which include adopting objective standards for climate corporate reporting and accountability mechanisms ensuring access for victims[21].

None of the companies named in the Carbon Majors inquiry was headquartered in the Philippines; some of them had operations or a presence in, or a substantial connection to the Philippines; others claimed to have no link to the Philippines and therefore no ground for being subject to the jurisdiction of the Philippine Commission and generally the jurisdiction of the Philippines[22].

Most companies assessed in the inquiry chose not to participate or limited themselves to the rejection of the Commission's jurisdiction to investigate the claims on technical and procedural grounds. For example, some of the companies claimed the lack of personal jurisdiction of the Commission over foreign entities and argued that «the exercise of jurisdiction of a State is limited only to the confines of the Philippine territory»[23] and that

> the attempt by the [Commission] to apply the Philippine human rights norms extraterritorially to actions of foreign corporations on the territory of another State without legal basis will amount to an incursion of the sovereignty and independence of that other State[24].

While pointing to the legislative history of the rules on the Commission's creation and its mandate, the objections additionally alleged that the Commission's mandate is limited to violations of "civil and political rights" which do not cover climate change upon which the petitioners relied. Additionally, the petitioners cannot rely on the UNGPs because they are non-binding.

21. *Ibidem.*
22. Greenpeace, *Petition*, cit., Annex C; CHR, *National Inquiry Report*, cit., 4.
23. See Entry of special appearance with motion to dismiss filed by CEMEX Mexico, 12, available at www.greenpeace.org (accessed 31 July 2023).
24. See Motion to dismiss *ex abundanti ad cautelam* filed by Shell, 10, available at www.greenpeace.org (accessed 31 July 2023).

2.1.1 *Extraterritoriality and the Mandate to Investigate*

Given that the body to which the Carbon Majors petition was brought is a national human rights body with non-adjudicatory functions, the question arose on whether the Commission can exercise jurisdiction over the case. In its press release announcing the acceptance of the petition, the Commission carefully used the term "mandate" to uphold the human rights of Philippine peoples[25]. Nevertheless, the final report confirmed the Commission's "jurisdiction" to hear the matter and the admissibility of the petition.

The Commission ascribed a broad meaning to the term jurisdiction that is commonly reserved to the power to issue binding decisions and the adjudicatory function. The Commission considered the term appropriate in the context of having the authority to exercise non-judicial constitutional mandates, such as investigatory, recommendatory or monitoring powers[26]. According to this interpretation, for a human rights complaint-handling body to proceed with a complaint, it must possess the relevant power or legal competence over the parties and the matters brought before it.

The law applicable to matters concerning the jurisdiction of the Commission and admissibility of the petition is Philippine law. The Commission was established as an independent body under the 1987 Philippine Constitution based on Executive Order No. 163 dated 5 May 1987. The Philippine Constitution vested the Commission with the power to investigate allegations of human rights violations against the Philippine people[27]. Specifically, its mandate includes

> investigat[ions] [of] all forms of human rights violations involving civil and political rights, […] monitor[ing] [of] the Philippine government's compliance with international treaty obligations on human rights […] and adopt[ion] [of] its operational guidelines and rules of procedure[28].

25. CHR, *Press Release,* 12 December 2017, available at www.greenpeace.org (accessed 31 July 2023).
26. CHR, *National Inquiry Report*, cit., 10.
27. *Ivi*, 9.
28. 1987 Philippine Constitution, Article XIII, Sections 17 and 18, available www.officialgazette.gov.ph (accessed 31 July 2023). In the Commission's Rules of Procedure it is further clarified that the Commission can investigate «all forms of human rights violations involving civil and political rights […] to monitor the Philippine Government's compliance with international human rights treaties and instruments to which the Philippines is a State party, […] to investigate and monitor all economic, social and cultural rights violations

In its final report, referring to the scope of its constitutional mandate, the Commission established that it may inquiry into allegations involving violations of human rights of the Philippine citizens, even when occurring outside the Philippine territory[29]. While the Commission's acceptance of the mandate to proceed with the investigation was regarded as a significant breakthrough[30], particularly in light of the Inter-American Commission on Human Rights' dismissal of the predecessor Inuit petition on procedural grounds by the Inter-American Commission on Human Rights[31] and the relatively slower progression of domestic practices regarding extraterritoriality compared to international human rights ones[32], the Report allocated limited attention to the matter of purported extraterritorial application. The below text will summarise the main building blocks of the Commission's reasoning.

2.1.2 *Paris Principles*

Firstly, the Commission being a national human rights institution (NHRI) pointed to the compliance of its establishment with the UN Principles Relating to the Status of National Institutions[33] (so called Paris Principles)[34]. The Paris Principles set out general recommendations on the establishment, powers and functioning of national institutions for the protection and promotion of human rights in an effective and independent manner. The Paris Principles confirm that the mandate of a national institution should be as broad as possible, including producing «reports

and abuses, as well as threats of violations thereof, especially with respect to the conditions of those who are marginalised, disadvantaged, and vulnerable». Rule 2 of the Omnibus Rules of Procedure, available at www.chr.gov.ph (accessed 31 July 2023).

29. In the Preface to the Report, the Commission's Chairman was unequivocal on this issue: «Stripped of legal niceties, the contention was that our Commission, or, indeed, the Philippine State, in general may only inquire into the conduct of corporate entities operating within Philippine territory, even if the corporations'operations outside our territory were negatively impacting the rights and lives of our people. We cannot accept such a proposition». CHR, *National Inquiry Report*, cit., 4.

30. K. Boom - I. Prihandono - N. Hosen, *op. cit.*, 57 f.

31. Inter-American Commission On Human Rights, *Sheila Watt-Cloutier et al. v United States*, 7 December 2005. The Inter-American Commission decided against accepting a petition by Inuit peoples that global warming was violating their human rights.

32. S. Besson, *op. cit.*, 864.

33. Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly Resolution 48/134, UN A/RES/48/134, 1993, available at www.ohchr.org (accessed 31 July 2023).

34. CHR, *National Inquiry Report*, cit., 9-11.

and recommendations on any matters concerning the promotion and protection of human rights […]», including in the area of «any situation of violation of human rights which it decides to take up»[35].

In a similar vein, the UNGPs highlight the role of the NHRIs as important state-based non-judicial grievance mechanisms[36]. Frequently the NHRIs will have the power to hear matters of human rights violations, including investigations of businesses with respect to corporate-related abuses[37].

The Paris Principles shed light on the nature of the Commission as an accredited NHRI and its mandate as a NHRI established by the Philippines but provide limited information on the Commission's jurisdiction to consider the petition at hand. The Commission used the Paris Principles to support its power to inquire into allegations involving violations of human rights of its citizens even when occurring outside the Philippines, in particular investigating and gathering information provided the process is done in a manner respecting domestic laws of foreign territories[38]. Consequently, the Commission reasoned that the performance of its mandate is neither constrained by nor anchored on the principle of territoriality[39].

2.1.3 *Jurisdiction* Ratione Materiae

Secondly, the Commission dismissed the objection that it lacks the authority to address the subject matter of climate change and that civil and political rights encompassed within its constitutional mandate do not cover environmental rights asserted in the petition. Furthermore, the Commission referred to the acknowledgment under customary international law of the «interrelatedness, interdependence, and indivisibility of human rights». This underscores that all human rights are related and must be equally addressed; the violation of one right impacts other rights. «A complete consideration of all the dimensions of human rights issues is required for [the] Commission to effectively exercise its recommendatory, monitoring, advocacy, and other powers»[40]. Moreover, the Commission ultimately concluded that climate change affects the right to life, a funda-

35. The Paris Principles, *op. cit.,* Principles 2 and 3(a).

36. UNGPs, *op. cit.*, Principle 25.

37. See e.g. K. Boom - I. Prihandono - N. Hosen, *op. cit.*, 60. The authors provide examples of national inquiries already conducted with respect to human rights abuses by corporations in several African states.

38. CHR, *National Inquiry Report*, cit., 11.

39. *Ivi*, 4.

40. *Ivi*, 10.

mental civil and political right enshrined in the International Covenant on Civil and Political Rights, to which the Philippines is a signatory. As such, the matter falls squarely within the scope of the Commission's mandate[41].

2.1.4 *Jurisdiction* Ratione Personae

Thirdly, the Commission rejected the objection asserting its lack of personal jurisdiction to hear and decide the case. While acknowledging the conceivable challenges that courts might face in exercising jurisdiction over respondents seated outside their territory, the Commission underlined the fundamental distinction in its authority and mandate to make inquiries into human rights violations[42]. The Commission's mandate to promote and protect human rights compelled it to inquire into the issues raised in the petition.

2.1.5 *Concluding Remarks on Jurisdiction*

The Commission adopted a broad understanding of the term "jurisdiction" and recognised the role that a NHRI can assume in paving the way for the formulation of guiding principles that could eventually attain binding status. Regardless of the terminology used, the Commission took a courageous stance and accepted the mandate to investigate, in one global process, the contribution of Carbon Majors to climate change, including of those entities without a presence in the Philippines, and the corresponding implications for the human rights of the Philippine peoples.

Although the Commission's justification for its mandate or jurisdiction was succinct, its investigation can be considered consistent with recognised principles of jurisdiction under international law. This alignment has also garnered considerable support within the academic literature[43]. It follows from the principle of non-intervention in the domestic affairs of other States that, in determining the competence of their organs, States must not act in such a way as to confer on them the power to proceed in matters which fall within the scope of the domestic affairs of the other State. Accordingly, States normally subject to the jurisdiction of their authorities only those matters which have a clear connecting nexus to their territory, determined, for example, by the residence of a person, the location of an asset, the occurrence of a legally significant event in the territory

41. CHR, *National Inquiry Report*, cit., 10-11.
42. *Ivi*, 11.
43. Eg. A. Savaresi - J. Hartmann, *op. cit.*; K. Boom - I. Prihandono - N. Hosen, *op. cit.*, 60.

of the State (territorial principle) or matters concerning domestic nationals or legal persons irrespective of their residence (personal principle).

The extraterritorial jurisdiction of States can be perceived as an endeavour to regulate, by means of national legislation, adjudication, or enforcement, the conduct of persons or acts beyond a State's border, which affect the State's interest in the absence of regulation under international law[44]. The UN International Law Commission attributed the increasing exercise of extraterritorial jurisdiction by a State over persons, property or acts outside its territory also to the growing number of multinational companies and the economic globalisation[45]. The question then, of course, is where the limits of such jurisdiction lie without violating international law and its fundamental principles of the sovereign equality of States, the territorial integrity of a State, or the non-intervention in the domestic affairs of other States. Accepting the premise that a State shall not rely on the principle of non-intervention to reject interference which aim at protecting fundamental human rights, adoption of regulation requiring private entities to ensure their subsidiaries' adherence to the law of the State in which they operate would be an example of such permissible action[46].

The Commission's investigations into the role of the Carbon Majors in the alleged human rights violations could find support in the principle of territoriality and the "effects doctrine" as recognised in the relevant principles of extraterritorial jurisdiction under international law[47].

Usually, based on the principle of territorial jurisdiction, the duty to protect is borne by the State in which the human rights violations took place and where the State has all regulatory power at its disposal and can exercise control over local companies, subsidiaries or branches of multinational enterprises based on its territory[48]. The Carbon Majors inquiry, however, concerned a slightly different situation where the Philippines had no control over some of the Carbon Majors and their subsidiaries. In this context, the territorial principle also allows States to exercise adjudicative jurisdiction in their own territory concerning persons, property or acts outside its territory when a constitutive element of the conduct occurred

44. UN International Law Commission, *op. cit*., 229 f.

45. *Ibidem*.

46. M. Krajewski, *The state duty to protect against human rights violations through transnational business activities*, in *Deakin Law Review*, 23, 2018, 29 f.

47. The exercise of extraterritorial jurisdiction was confirmed in the *Lotus* case. Permanent Court of International Justice, France v. Turkey (1927) P.C.I.J., Ser. A, No. 10.

48. M. Krajewski, *The State Duty*, cit., 19 f.

in their territory, for example, the conduct was there initiated or completed[49]. The petition aptly claimed that the Carbon Majors' activities cause or contribute to human rights abuses in the Philippines although many of the corporations were headquartered outside the Philippines.

Alternatively and closely related to the territorial principle, the "effects doctrine" provides that jurisdiction may be asserted regarding the conduct of a foreigner occurring outside the territory of a State which has a substantial effect within that territory[50]. The doctrine requires no element of the conduct to take place within the territory of the State asserting jurisdiction.

The Commission could also find additional support in the protective principle (Savaresi and Hartmann), which authorises States to protect themselves by regulating and adjudicating over conduct carried out abroad that may damage their fundamental national interests, or ultimately in the *forum of necessity* concept (Boom at al), where no feasible alternative human rights forum is available. In its Report, the Commission also briefly mentioned the universality principle, which acknowledges that actions that are uniformly harmful to States and their subjects necessitate the recognition of authority of all States to punish such acts wherever they occur and suggested that this concept is being increasingly accepted regarding abuses against human rights[51].

As follows from the above, the Commission had sufficient legal and doctrinal grounds to conduct the investigations against the fossil fuel companies that did not conduct business in the Philippines while the effects of their activities occurred in the territory or might have been regarded as a threat to essential interests of the Philippines. It's important to highlight that the Commission's actions did not involve adjudicative or enforcement jurisdiction; instead, it fulfilled its duty to promote and protect human rights, which mandated an examination of the matters presented in the petition. To facilitate this, the Commission established an Inquiry Panel that engaged in a fact-finding process through multidisciplinary consultations and public hearings, effectively encompassing multiple corporate entities within a single procedure. The option that the petitioners would otherwise have, i.e., to apply to national human rights bodies in several jurisdictions and initiate an identical process, is evidently impractical. Especially since the allegations of human rights violations are directed

49. UN International Law Commission, *op. cit*., 231 f.
50. *Ibidem.*
51. CHR, *National Inquiry Report*, cit., 70.

at the territory of one State. The Commission's findings, coupled with its bold approach to its investigative mandate, offer invaluable guidance to other national institutions in investigating corporate behaviour and related transboundary human rights violations linked to climate change.

2.2 *Extraterritorial Responsibility*

The petition alleged that the Carbon Majors breached their responsibility to respect the rights of the Philippine people by extracting, producing, and selling fossil fuels and thereby contributing for impairing, infringing, abusing or violating human rights[52]. The inquiry by the Commission concerned events and acts committed outside the Philippines. The petitioners built their complaint on the UNGPs, which recognise that corporations have a responsibility to respect human rights arising from a «global standard of expected conduct applicable to all businesses in all situations»[53]. Other standards that the petitioners invoked were the OECD Guidelines for Multinational Enterprises (OECD Guidelines), which are aligned with the UNGPs[54].

There was no disagreement between the petitioners and the Commission about the applicable sources of "law" and legal principles as regards the issue of corporate responsibility. The Commission analysed the implications arising from the UNGPs for enterprises in the context of climate change. In addition, the Commission applied the Philippine law and concluded that the acts of obfuscation, deception and misinformation about climate science by the Carbon Majors contravene the standard of honesty and good faith expected of a person in the exercise of his right (Articles 19 and 21 of the Civil Code of the Philippines)[55].

In evaluating the petition, the Commission further took "administrative notice" of the reports of the Intergovernmental Panel on Climate Change (IPCC) and the UN Environment Programme (UNEP)[56]. Within the Commission's conclusions, the IPCC reports offer unequivocal eviden-

52. CHR, *National Inquiry Report*, cit., 9-10.

53. UN Human Rights Office Of The High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, UN Doc. HR/PUB/12/02, 2012, 13 f., available at www.ohchr.org (accessed 31 July 2023).

54. Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (version of 2000), available at www.oecd.org (accessed 31 July 2023).

55. CHR, *National Inquiry Report*, cit., 98.

56. *Ivi*, 12.

ce of global warming, the reality of climate change happening on a global scale, and climate change being primarily caused by human activities. The Commission regarded this as an established, unequivocal truth, substantiated by peer-reviewed science[57]. As per the Commission's perspective, the Philippine courts should take "judicial notice" that climate change is unequivocally anthropogenic, based on incontrovertible data.

Before proceeding to the analysis of corporate responsibility, the Commission first tackled the State's duties to protect human rights in the context of climate change.

2.2.1 *Extraterritorial Human Rights Obligations of States Relating to Climate Change*

Human rights law is based on the obligations of States as primary duty bearers. The obligations originate from human rights treaties and customary international law. The States are required to ensure that companies within their jurisdiction do not violate human rights and provide an adequate remedy to address the harms caused by such non-state actors. The question of exterritorial human rights obligations of the State beyond its territory is subject to cautious State practice and research by academics[58]. Climate change and the activities of multinational corporations are good examples in this regard. Strictly speaking, the use of the term of extraterritorial obligations can be inaccurate if the situation involves the State's application of international or foreign law rather than its own national law and where the State does not exercise its national law based on its national interests[59].

When the Commission concluded that States may have obligations to respect, protect and fulfil human rights abroad[60], it drew upon the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights[61]. These principles, devised by an expert group, elucidate that States may be held accountable for violating

57. CHR, *National Inquiry Report*, cit., 28.

58. M. Feria-Tinta, *The future of environmental cases in the European Court of Human Rights: extraterritoriality, victim status, treaty interpretation, attribution, imminence and 'due diligence' in climate change cases*, in *Journal of Human Rights and the Environment*, 13, 2022, 172 f.

59. UN International Law Commission, *op. cit*., 231 f. For a slightly different approach based on the scope of the State's duty to protect see M. Krajewski, *The State Duty*, cit., 26 f.

60. CHR, *National Inquiry Report*, cit., 66-70 f.

61. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011, available at www.icj.org (accessed 31 July 2023).

human rights of people outside of their own territories. The Commission addressed the realm of the (home) State's duty to protect human rights concerning the extraterritorial activities of transnational corporations, either incorporated within their jurisdiction or with their parent companies headquartered there, which is a topic of on-going scholarly research[62]. For the present analysis, Commission's findings are emphasised to the extent that they are pertinent to the identification of fossil fuel corporations' accountability for the climate crisis, based on the foundation of human rights.

Notably, the Commission made the following key points. The duty of the States to prevent human rights abuses may extend beyond its territory[63]. The State's duty to protect human rights necessarily encompasses the duty to regulate business activities and to provide effective judicial and non-judicial remedies for the victims[64]. Furthermore, the State's duty to protect human rights encompasses the impacts of climate change[65]. This duty is neither directly related nor proportional to the State's contribution to climate change. States may not claim that they have not "caused" climate change to escape the obligation to address global warming[66]. Instead, States have obligation to mitigate climate change in order to fully protect human rights. A government's refusal to engage in meaningful action to mitigate climate change may be categorised as a human rights violation[67].

States must reduce the carbon footprint of not only State activities but also of non-State actors[68]. This involves drastic reductions in the use of fossil fuels and the transition to renewable energy sources by 2030[69]. The obligation of States to address climate change includes the enactment of laws to regulate business and their enforcement[70]. These laws should hold enterprises within their jurisdictions legally liable for acts harming the environment and the climate system. In general, States must establish a

62. E.g. M. Krajewski, *The State Duty*, cit., 13-39 f.; C. Methven O'brien, *op. cit.*, 47-73 f. The latter contesting the proposition that States have a duty to regulate corporations that they have the capacity to influence, wherever such corporations operate.
63. CHR, *National Inquiry Report*, cit., 66-69.
64. *Ivi*, 70-71.
65. *Ivi*, 79 f.
66. *Ivi*, 74.
67. *Ivi*, 78 f.
68. *Ibidem.*
69. *Ibidem.*
70. *Ivi*, 79.

regulatory or policy environment that would incentivise the discovery, development, and use of clean energy.

The Commission concluded that even if it is not possible to connect a particular emission of GHG to a specific infringement of human rights, States are obliged to protect against the harm caused by climate change[71].

In consideration of this context and recognising the extensive body of climate-focused laws already enacted in the Philippines[72], the Commission put forth several specific recommendations addressed to the Philippine government, legislature and judiciary. These recommendations are primarily oriented towards enhancing the enforcement of existing law. They also encompassed proposals such as the adoption of a national action plan under the UNGPs and the revision of nationally determined contributions under the Paris Agreement[73].

A noteworthy aspect of the Commission's recommendations targeted the judiciary. These recommendations pertained to the development and implementation of rules of evidence for attributing climate change impacts and assessing associated damages[74]. The Commission noted a distinction between the science of event attribution and the establishment of legal causation. It highlighted that the assessment of the "fraction of attributable risk" is often misunderstood and misapplied in the context of legal causation where a clear unbroken chain of events leading up to the injury or damage is crucial for establishing liability. The disregard of the insights offered by climate and attribution sciences perpetuates climate injustice. Consequently, the Commission recommended that the judiciary acknowledge advancements in attribution science while considering legal causality in the assessment of climate change impacts and damages.

Regarding corporate accountability and responsibility, the Commission proposed that the government make a clear commitment to the UNGPs and their implementation. Furthermore, the Philippines should enact laws imposing legal liabilities for corporate and business-related human rights abuses. These laws should also establish mechanisms to provide compensation to victims affected by the climate change impacts. This compensation could be funded through revenues directly obtained

71. *Ibidem.*

72. It is noteworthy that the Philippines passed a separate Climate Change Act and established a Climate Change Commission as early as 2009. CHR, *National Inquiry Report*, cit., 134-140 f.

73. *Ivi*, 142 f.

74. *Ivi*, 147.

from those entities contributing to pollution[75]. As per the Commission's perspective, domestic laws should clearly provide for jurisdiction over transboundary harm and for legally demandable reparations to the victims regardless of juridical personality or local presence of the responsible corporation in the Philippines[76].

2.2.2 *(Extraterritorial) Responsibility of Corporations Relating to Climate Change*

The more pertinent question that arises in this case concerns the companies'liability and whether the relevant source of law can be applied extraterritorially. As explored in the previous text, the essence of the petition did not rest on law but was primarily rooted in the application of the UNGPs. These principles outline the concept of "corporate responsibility" to respect human rights. The UNGPs, unanimously endorsed by the Human Rights Council, stipulate a set of principles directed at both States and businesses to prevent, address and remedy human rights abuses committed in business operations. The UNGPs are structured around three fundamental pillars: the State's duty to protect human rights, the corporations' duty to respect human rights and, the responsibility of both States and corporations to ensure victim's access to remedies.

Although the UNGPs and their associated interpretative guide do not explicitly reference climate change, all three pillars are relevant within the climate change context. For the purposes of this contribution, Pillar II gains specific significance concerning the companies' responsibilities to respect human rights and to address any human rights violations in which they are implicated. The concept of human rights due diligence, which will be examined in the subsequent subchapter, plays a pivotal role in fulfilling the duty to respect human rights.

The Carbon Majors petition highlighted a novel assertion that private business enterprises (not just States) have the obligation to respect and uphold human rights in the climate change context. The petitioners argued that corporate actors have a positive duty to support, rather than oppose, climate policies and a negative duty to refrain from activities causing harm. In this sense, enterprises must comply, cooperate and not hinder State regulations involving climate change and human rights in line with the responsibility laid out in the UNGPs. Hence, enterprises must comply with the Nationally Determined Contributions of States who are parties to

75. *Ivi*, 110.
76. *Ivi*, 145 f.

the Paris Agreement and in general comply with the targets set by science such as those provided by the IPCC[77].

The Commission concluded that the Carbon Majors within Philippine jurisdiction as well as all entities within the value chain have the corporate responsibility to undertake human rights due diligence and provide remediation. This is in line with the UNGPs which articulate that a company's responsibility to respect human rights extends to its business relationships with suppliers, customers, and governments in operating countries. This understanding reflects a divergence from the approach taken predominately previously[78].

The UNGPs are, however, a soft law instrument and as such cannot create binding obligations for companies and produce legal consequences in case of their violation. The Commission pointed to the non-binding character of the instrument, however, noted that under Philippine law the UNGPs might be resorted to. Article II, Section 2 of the Philippine Constitution states that «the Philippines […] adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations». Philippine jurisprudence provides for a wide latitude of what constitutes generally accepted principles of international law that are automatically incorporated into statutory law, including non-binding international instruments, such as the Universal Declaration of Human Rights (before it achieved the status of customary international law)[79].

Consequently, the Carbon Majors within the Philippine jurisdiction may be compelled to undertake human rights due diligence and to provide remediation[80]. If an enterprise that is found to have caused adverse human rights impacts fails to cooperate in the remediation of such impacts, as per the Commission's assessment, it can be held accountable in the Philippines[81]. At the same time, the Commission pointed to lack of Philippines laws and jurisprudence on the intersectionality between business and human rights on the one hand, and climate change on the other[82].

77. *Ivi*, 88 f.
78. C. Bright *et al.*, *Toward a corporate duty for lead companies to respect human rights in their global value chains?*, in *Business and Politics*, 22 (4), 2020, 672 f.
79. CHR, *National Inquiry Report*, cit., 100.
80. *Ibidem.*
81. *Ivi*, 102.
82. *Ivi*, 140.

The Commission further emphasised that the Carbon Majors have known since 1965 that their products result in various harms to the climate system. The Commission found that the Carbon Majors,

directly by themselves or indirectly through others, singly and/or through concerted action, engaged in wilful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system[83].

A meaningful environmental and climate action was thus delayed. The acts of obfuscation and obstruction may form bases for liability under Philippine law[84].

Despite the UNGPs' non-binding character, international and national courts are increasingly relying on them to establish that businesses must respect human rights and be accountable for the adverse impacts of their business activities on human rights. This marks a discernible trend towards the judicialization of corporate responsibility[85] and the hardening of soft law at the domestic level, where national jurisdictions are implementing the UNGPs' human rights due diligence expectations[86]. This trend extends to emerging climate-related cases in which the UNGPs have proven relevant to the case outcome. The landmark *Shell* judgment, for instance, was grounded on human rights responsibilities (including corporate due diligence), tort-based duties, and an unwritten standard of care based on the goals of the Paris Agreement and the UNGPs[87].

Bearing in mind the soft law nature of the UNGPs, the Commission's recommendations for the Philippine authorities encompass the enactment of laws that establish legal liabilities for corporate and business-related human rights abuses. These laws should mandate business compliance with the UNGPs and other human rights treaties and instruments[88].

83. *Ivi*, 98.
84. *Ivi*, 97-98.
85. C. Bright *et al.*, *op. cit.*, 667-697 f.
86. C. Macchi - C. Bright, *Hardening soft law: the implementation of human rights due diligence requirements in domestic legislation*, in *Legal Sources in Business and Human Rights*, Brill Nijhoff, 2020, 218 ff.
87. See e.g. *Milieudefensie et al.v. Royal Dutch Shell (Milieudefensie)*, The Hague District Court C/09/571932/HA ZA 19-379 26, Judgment May 2021 (Shell judgment).
88. CHR, *National Inquiry Report*, cit., 145.

The Commission's approach did not depart in any way from the foundational structure of the UNGPs duties in Pillar I and responsibilities in Pillar II, maintaining the boundary between the States' duty to protect and fulfil human rights (i.e. ensuring that others do not infringe on human rights and establishing institutions and infrastructure necessary to fully enjoy human rights) and the companies' responsibility to respect human rights (avoiding actions which infringe on human rights) under international law.

3. *Human Rights Due Diligence for Climate-Related Harms*

One of the key Commission's findings concerned the operational principles of corporate responsibility, which mirror the obligation of enterprises to act with due diligence to avoid infringing on the rights of others. To this end, enterprises, including Carbon Majors, must conduct human rights due diligence and provide remediation.

The term "due diligence" means the care that a reasonable person exercises to avoid harm to other persons or their property[89]. As explored above, the notion of due diligence in the human rights context has been developed within the UN Framework and the UNGPs. It resides at the heart of Pillar II, which pertains to corporate responsibility to respect human rights and is considered to rest on voluntarism[90].

The human rights due diligence is an on-going process to identify, prevent, mitigate, and account for how a company addresses the most severe risks of its activities to people[91]. The due diligence entails four core steps: identifying any actual and potential human rights impacts that may be «caused by a business» or «to which it may contribute» or «be directly linked through its business relationships»; dealing with the findings and taking appropriate action; tracking the effectiveness of those actions; and publicly communicating the company's human rights policies, practices, and outcomes[92]. The appropriate action that a business is required to ta-

89. Dictionary, Merriam-Webster. Merriam-webster, 2002, available at www.mw.com (accessed 31 July 2023).

90. M. Krajewski, *Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?*, in *Nordic Journal of Human Rights*, 2023, 1 ff.

91. Principle 17 of the UNGPs.

92. *Ibidem*.

ke differs and depends on whether the human rights impact is one the business "caused", "contributed to" or is «linked to through business relationships». The concept of due diligence helps the company to live up to its human rights responsibilities. In the words of the Commission, companies «need to know and be able to show» that they respect human rights[93].

While the UNGPs do not explicitly address climate change, efforts have been made to articulate the responsibility of enterprises to prevent and remedy the human rights impacts of climate change. An illustrative instance is the formulation of the Oslo Principles on Global Climate Change Obligations, initially centred on States, which were subsequently supplemented by the Principles on Corporate Responsibility for Climate Change in 2018[94]. These principles acknowledge the absence of a definitive global consensus regarding the precise climate-related duties of corporations. The Commission alludes to these principles, which were prepared by a group of legal experts drawing from diverse legal sources (human rights, environmental, corporate, and liability law, codes of governance and conduct, case law, authoritative reports and other sources of soft law). The underlying aim was to contribute to clarifying the contours of corporate responsibilities concerning climate change.

There is still a knowledge gap with regards to the precise implications of human rights due diligence in relation to climate change[95]. Macchi advocates for a holistic approach to corporate due diligence, one that seamlessly integrates and reinforces principles of climate law, environmental law and human rights law[96]. The Commission has proposed a number of key components that should constitute a «climate corporate due diligence» when applying the UNGPs[97]. First, companies should explicitly recognise the effect of climate duties on the enjoyment of human rights within their policy statement (Principle 16), while also incorporating climate change considerations into their due diligence processes (Principle 17). This involves the identification, assessment, and disclosure of the specific human rights impacts of climate change arising

93. CHR, *National Inquiry Report*, cit., 101.

94. Principles on Climate Obligations of Enterprises (2nd edition, 2018), available at www.climateprinciplesforenterprises.org (accessed 31 July 2023). The principles were prepared by a group of legal experts based on a variety of legal sources (human rights, environmental, corporate, and liability law, codes of governance and conduct, case law, authoritative reports and other sources of soft law).

95. C. Bright - K. Buhmann, *op. cit.*

96. C. Macchi, *op. cit.*, 93 f.

97. CHR, *National Inquiry Report*, cit., 84-85.

from their operations and products. In instances of harm being discovered, a remediation mechanism that is accessible, predictable, transparent, and legitimate, must be made available. Of paramount importance, companies should mitigate GHG emissions from their operations and products (Principle 19), which encompasses setting appropriate emission reduction targets and diversification of energy sources. The Commission's findings affirm that the general due diligence obligation covers the reduction of GHG emissions in line with the Paris Agreement's temperature targets, as well as the transparent and well-documented reporting of their total GHG emissions throughout their products' life cycles (Principles 20-21).

The Commission has taken a broad view of the responsibility to undertake human rights due diligence. The duty extends not only to the «whole group of companies of each Carbon Major» but also encompasses other business enterprises in their respective value chain[98]. This even encompasses the financial sector, which finances fossil fuel projects, thus assuming, according to the Commission, a level of responsibility equivalent to that of the Carbon Majors. Consistent with the UNGPs, a company's responsibility to respect human rights extends to its business relationships with suppliers, customers, and governments in operating countries. This responsibility necessitates that companies avoid causing or contributing to adverse human rights impacts through their own activities, and that they address such impacts when they occur. It also requires companies to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships through the concept of leverage.

The report makes clear that the Commission's interpretation of human rights due diligence covers climate impacts. Notably, one of the recommendations addressed to the Philippine legislative department expressly mentioned the concept of «carbon footprint due diligence» and reporting requirements for private enterprises[99].

There is a noticeable upward trajectory towards making human rights due diligence legally binding. This trend is evident in case law of international bodies[100], courts within some jurisdictions[101] and more

98. *Ivi*, 101 f.

99. *Ivi*, 146.

100. See e.g. Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, Series C, No. 309. Merits, Reparations and Costs, 25 November 2015.

101. See e.g. *Shell Judgment*, cit.

importantly in legislative initiatives on mandatory corporate due diligence. The emerging legal regulations require corporations by law to conduct human rights due diligence across their operations and supply chains to assess human rights risks, investigate human rights abuses, adopt prevention plans and report on due diligence matters. These domestic legal frameworks establish companies' legally enforceable human rights obligations, signifying a clear shift form the soft-law foundation of Pillar II in the UNGPs towards a hard-law approach, which had been previously confined to Pillar I[102].

The proposed EU sustainability due diligence directive represents the most advanced regulatory framework on companies' duties to prevent and address adverse human rights impacts in their own activities and global value chains, including environmental ones. Several documents are under consideration in ongoing trialogue discussions between the European Parliament, EU Council and European Commission[103]. These documents represent varying levels of ambition concerning climate change, namely the EU Commission's Proposal of 23 February[104], the EU Council's General Approach of its negotiation position of 30 November 2022[105], and the EU Parliament's Amendments to the draft directive of 1 June 2023[106]. Uncertainty exists regarding whether the broader concept of «sustainability due diligence» includes climate aspects. Notably, the EU Commission's Proposal lacks reference to the Paris Agreement and the UN Framework Convention on Climate Change. The text from the EU Parliament's legal

102. M. Krajewski, *Mandatory Human Rights*, cit., 1 ff.

103. The so-called trialogue is a step in the EU legislative process, where the legislators – the European Council (represented by the country holding the presidency) and the European Parliament (represented by the rapporteur of the proposal and a group of shadow rapporteurs from the other groups) – agree on a final text. The European Commission helps finding a compromise, usually providing explanations, assessing whether the proposed compromise text conflicts with existing legislation.

104. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (CSDDD), COM(2022) 71 final, 23 February 2022.

105. Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, 2022/0051(COD), 30 November 2022.

106. Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [COM(2022)0071 - C9-0050/2022 - 2022/0051(COD)].

affairs committee[107] comes closest to integrating climate concerns. The ongoing debate should ideally confirm that climate aspects are part of human rights and environmental due diligence, aligning with the Philippine Commission's final report. Additionally, introducing liability provisions for compensation claims together with provisions on jurisdiction of courts is crucial due to the spatially and temporally dispersed nature of climate-related human rights impacts, which pose some operational limits on conducting climate due diligence[108].

4. *Concluding Remarks*

The Carbon Majors Inquiry is an early example of the assertion of human rights jurisdiction with respect to foreign companies in the context of climate change. It stands as an early precedent that involved complex climate-related human rights violations and pioneering efforts to apply human rights due diligence obligations in relation to climate crisis, acknowledging that addressing climate change's adverse effects necessitates the business community's involvement.

The decision of the Philippine Commission on Human Rights to accept the petition and conduct the investigation marks a significant advancement in the climate litigation agenda. Compared to the dismissal of the earlier *Inuit* petition on procedural grounds by the Inter-American Commission on Human Rights in 2005, the Commission exhibited its readiness and competence to address human rights complaints associated with the impacts of climate change. Although the Report was brief on the issue of extraterritorially in the human rights and business context, it creates a legal precedent and offers a navigational guide for other national human rights institutions. It clarifies how national bodies can probe responsibilities of corporations, including of those located outside their territories, and, thus, fill the climate accountability gap until sufficient systems of redress are in place[109].

The Commission's conclusions underscore businesses' responsibility to respect human rights in the context of climate change. The Commission

107. Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 April 2023.

108. J. Dehm, *op. cit.*, 151 ff.

109. A. Savaresi, *Human Rights Responsibility for the Impacts of Climate Change: Revisiting the Assumptions*, in *Oñati Socio-Legal Series*, 2019.

attempted to clarify what businesses must do concerning climate change. Drawing from these conclusions, the Carbon Majors within the Philippine jurisdiction may be compelled to undertake human rights due diligence and to provide remediation.

The Commission has proposed a number of key components that should constitute a «climate corporate due diligence» when applying the UNGPs. This includes the reduction of GHG emissions and transparent and well-documented reporting of company's total GHG emissions throughout its products' life cycles. The conceptualisation of climate corporate due diligence can foster its consistent and contextual implementation across sectors and uniformity of rules in emerging mandatory due diligence legislation. The Commission extended this responsibility not only to the Carbon Majors themselves but also to the business enterprises within their value chains. This includes the financial sector, whose investments in fossil fuels give them accountability similar to that of the Carbon Majors themselves.

Furthermore, the Commission clarified that beyond the negative duty to refrain from harmful activities, companies shall also hold a positive duty to support (rather than oppose) climate policies and their enforcement. The Commission acknowledged that the Carbon Majors had early awareness of their products' adverse impacts on the environment and climate system. The acts of obfuscation and obstruction delaying any meaningful environmental and climate action may serve as grounds for liability. In this aspect, the Commission referred to Philippine domestic laws.

The Commission's report contributes to discussions on what constitutes adequate human rights protection from climate harms. The case also exposes the current legal framework's limitations in forcing multinational corporations to reduce GHG emissions and holding them accountable for transboundary climate-related human rights violations. The Commission refrained from redefining the boundaries between States duties and companies' responsibilities and from extending direct human rights obligations to certain non-state actors; instead, it provided recommendations for Philippine legislature, executive and judiciary. This is consistent with the UNGPs that urge States to prevent adverse human rights impacts through domestic regulation and adjudication, while urging companies to comply with national laws while honouring the principles of internationally recognised human rights. The Commission's recommendations can be seen as indicators of gaps in national regulatory frameworks that do not sufficiently prevent corporations from interfering with the enjoyment of human rights within and beyond their territories. Suggested measures

aimed at establishing legal liabilities for corporate or business-related human rights abuses include, in particular, the enactment of a «carbon due diligence» law, halting new oil field explorations, keeping fossil fuels in the ground, clean energy transition, and contributing to a Green Climate Fund for mitigation and adaptation measures.

While the 2022 final report lacks legally binding power due to the Commission's non-punitive mandate, the inquiry showcases how non-judicial mechanisms can cultivate corporations' responsibilities to respect and uphold human rights in line with the UNGPs. This process can catalyse the transformation of soft laws into hard ones, such as mandatory human rights due diligence. Emerging questions about the jurisdictional complexities of transnational corporations and access to remedies for victims, as raised during the inquiry, underline the Carbon Majors Inquiry's relevance for other proceedings and law reforms. Its potential for cross-regime interpretation and inter-systemic fertilisation remains to be monitored. The UN Special Rapporteurs have cited the Commission's findings regarding States' duties to undertake sufficient measures in addressing climate change in their submissions before the International Tribunal for the Law of the Sea concerning climate change and international law[110]. Furthermore, the UN Special Rapporteur on the Promotion and Protection of Human Rights in the context of climate change, who has elevated corporate accountability concerning human rights and climate change as a priority within his mandate[111], expressed appreciation for the Commission's report[112].

110. An Amicus Curiae brief by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd) dated 30 May 2023, available at www.ohchr.org (accessed 31 July 2023).

111. I. Fry, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, A/HRC/50/39, 2022, available at www.un.org (accessed on 31 July 2023).

112. Climate Home News, *Philippines inquiry finds polluters liable for rights violations, urging litigation*, 2022, available at www.climatechangenews.com (accessed on 31 July 2023).

Part II
Essays on Climate Change Litigation

Elena D'Alessandro

Potential Long-Term Impact of Vertical Climate actions

1. *Introduction: Approaches to Climate Change. Top-Down and Bottom-Up Strategies*

Tackling climate change is one of the greatest societal challenges of our time, following decades of warnings from scientists about its potential human impacts. While legislation at all levels (international, European, and national) can play a crucial "top-down" role in sustainable development and the reduction of climate-damaging greenhouse gas emissions[1], "bottom-up" strategies are increasingly gaining popularity, particularly in countries of the Global North[2]. These strategies aim to persuade governments and politicians to address climate change for the benefit of both present and future generations, i.e., to adopt mitigation and/or adaptation measures.

At the EU level, EU Regulation No. 1999 of 2018, which implements the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, seeks to combine the aforementioned "top-down" and "bottom-up" strategies in the realm of environmental law. The aim is to address climate change by formalising public participation (referred to as the "collectivisation of decision-making processes") as a legally mandated procedure at both national and local tiers.

The EU has also strongly encouraged citizen and other energy stakeholder involvement at the local level – within the national sphere – through

1. C. Voigt, *Climate Change as a Challenge for Global Governance, Courts and Human Rights*, in W. Kahl - M.P. Weller (eds.), *Climate Change Litigation*, Beck, Hart, Nomos, 2021, 3 ff.; A. Pisanò, *Il diritto al clima, Il ruolo dei diritti nei contenziosi climatici europei,* Esi, 2022, 7 ff.

2. However, the amount of climate change litigation in the global south continues to grow, although these types of disputes have limited prospects in countries with weaker judiciaries or more authoritarian governments.

the Sustainable Energy and Climate Action Plan. This theoretical foundation of the EU draws upon climate and environmental studies that reveal the effectiveness of bottom-up public participation and the active engagement of NGOs in reducing emission levels. These efforts serve to counterbalance the considerable influence held by private interest groups and lobbies (such as the industry), which typically attempt to exert pressure on public administrations to lower gas emission standards and secure profits.

However, in contrast to traditional local environmental cases[3], the issue of climate change caused by gas emissions – referring to alterations in average weather conditions or temporal weather variation within longer-term averages due to persistent and emerging pollutants (as substantiated by scientific evidence) – gives rise to distinct bottom-up challenges with unique characteristics.

Firstly, (1) the effects of climate change often have a long latent period. As the harm remains latent and is frequently imperceptible at the local level, citizens must be motivated to engage in bottom-up initiatives.

Secondly, (2) information about pollutants and their climate change implications is frequently highly technical. In other words, assessing the extent of gas emission reduction can be complex. This complexity makes it challenging for citizens to identify instances of rent-seeking.

Despite these challenges, climate change has gained considerable media attention in recent years, particularly since teenage activists like Greta Thunberg commenced their efforts in 2018. Teenage activism is spurred by the realisation that younger generations are likely to experience the most pronounced effects of climate change. A multitude of hazardous climate shifts will inevitably transpire over the next decades unless adequate mitigation and adaptation measures are implemented. Specifically, since 2018, youth-led student activist groups worldwide have undertaken numerous actions, including pursuing legal cases[4].

3. Whereby pollutants introduced into the natural environment by an entity (usually a corporation) cause adverse effects, namely environmental damages.

4. For instance: "Fridays for Future" stands as a global climate strike movement, organised and led by the youth. Its inception traces back to August 2018 when 15-year-old Greta Thunberg initiated a school strike for the climate. In the three weeks leading up to the Swedish election, she positioned herself outside the Swedish Parliament each school day, demanding immediate action to address the climate crisis. Greta and her fellow students chose to sustain their strike until Swedish policies charted a secure path well below the 2°C threshold, aligning with the Paris Agreement objectives. Their movement adopted the hashtag #FridaysForFuture and extended an invitation to young individuals worldwide to join their cause, sparking the inception of the global school strike for climate. "Fridays

2. *The Strategic Role of National Civil Courts in Vertical Climate Actions: Objective of this Essay*

Among the bottom-up strategies to combat climate change, the most significant are the various initiatives established by NGOs and by national activists who, as citizens, have taken their Governments to court in many national civil (or administrative) courts around the world, including the European Union[5]. In the EU, 60 actions were reported in 2022.

This type of litigation aims to put pressure on States to be more ambitious and effective in the fight against climate change by reducing emissions and/or filling the gaps left in the legislation (so-called "vertical climate action"[6]: press States for regulation and assess regulation through

for Future" has now evolved into an international organisation committed to maintaining global temperature increase below 1.5°C and upholding the principles of the Paris Agreement.

5. Proceedings before international, European (ECtHR) – such as the cases *Duarte and others v. Portugal and others, KlimaSeniorinnen v Switzerland* and *Carême* (former mayor of the city of Grande-Synthe) *v. France* – or domestic constitutional courts (*Recurso de amparo / Verfassungsbeschwerde*) – such as the decision rendered by the German Constitutional Court on 24 May 2021, - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 (*Neubar*) – will not covered by this essay, as it only focuses on civil lawsuits.

6. For a definition of the terms "climate litigation" and "vertical climate actions" see M.P. Weller - M.L. Tran, *Climate Litigation against Companies*, in *Clim Action*, 1, 14, 2022. Examples of successful (or still pending) vertical climate actions within the European Union are:

i) the *Urgenda* case (www.urgenda.nl), which, after the first instance (*Urgenda 1*) and the appellate decision (*Urgenda 2*), ended with the judgment of the Hoge Raad of 20 December 2019 - Case 19/00135 (*Urgenda* 3) ordering the Dutch government to reduce the country's greenhouse gas emissions by 25%, compared to its 1990 emissions, by the end of 2020;

ii) the French *Affaire du Siècle*, decided by the administrative Tribunal of Paris with two decisions (the first rendered on 3 February 2021 and the second enacted on 14 October 2021), in which the French State was ordered to remove the consequences of its unlawful inactivity against climate change by 31 December 2022. However, the French Government has not complied with the decisions.

iii) the Belgian "*Klimaatzaak*" case, brought by an organisation of concerned citizens and 58,000 co-plaintiff citizens, arguing that Belgian law requires the Belgian Government's approach to reducing greenhouse gas emissions to be more aggressive. With a decision rendered on 17 June 2021, the Brussels Court of First Instance held that the Belgian Government had breached its duty of care by failing to take the necessary measures to prevent the harmful effects of climate change, but declined to set specific reduction targets on the grounds of separation of powers.

injunctive reliefs[7]). The plaintiffs, usually crowdfunded, seek remedies that go beyond the situation of individual litigants and beyond the courts, thus contributing to the intended policy and regulatory impacts.

Vertical climate litigation can therefore also be defined as "strategic climate litigation", which aims to pursue its goals beyond the individual case through its media impact and public debate[8]. A closer look at the pending cases reveals that the plaintiffs are complaining of the actual and/or potential impact of energy malpractice on climate change. It is no coincidence that most strategic climate lawsuits have a website, which usually contains the English versions of all court documents[9].

iv) the Spanish "*Juicio por el clima*". On 15 September 2020, Greenpeace Spain, Oxfam Intermón, and Ecologistas en Acción filed a motion notifying the Supreme Court of their intention to sue the Spanish Government, alleging failure to take adequate action on climate change. The plaintiffs seek an order compelling greater climate action.

v) the Italian "*Giudizio Universale*", still pending before the Tribunal of Rome. On 5 June 2021, an environmental NGO together with more than 200 Italian citizens filed a lawsuit alleging that the Italian Government, by failing to take the necessary actions to meet the temperature targets established by the Paris Agreement, is violating fundamental rights, including the right to a stable and safe climate. The plaintiffs seek a declaration that the Government's inaction is contributing to the climate emergency and a court order ordering it to take the necessary steps to reduce its emissions by 2030 by 92% from 1990 levels.

For further details, see R. Luporini, *The 'Last Judgment': Early reflections on upcoming climate litigation in Italy*, in *QIL, Zoom-in*, 77, 2021, 27-49.

7. A. Rocha, *Suing States: The Role of Courts in Promoting States' Responsibility for Climate Change*, in G.M Da Gloria Garcia - A. Cortes (eds.), *Blue Planet Law*, Springer, 2023, 99, 102; B. Mayer, *Prompting Climate Change Mitigation through Litigation*, in *ICLQ*, 2023, 233, where, at 234, the author draws a distinction between holistic and atomistic decisions. In Mayer's perspective, holistic decisions pertain to cases where the court establishes the conditions necessary and sufficient for an entity to implement a comprehensive mitigation obligation at a specific point in time. On the other hand, atomistic cases involve the determination of necessary but insufficient conditions for an entity's general mitigation obligations. Mayer argues that climate mitigation outcomes are more likely to arise from atomistic cases, given their higher likelihood of success in court and their potential to influence States and other entities beyond the immediate case.

8. J. Peel - R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, in *German Law Journal*, 2021, 1484; M. Rodi - M. Kalis, *Klimaklagen als Instrument des Klimaschutzes*, in *KlimR*, 2022, 5; W. Hau, *Informationsverantwortung im Zivilprozess*, in *ZfPW*, 2022, 154, 172; B. Hess, *Strategic Litigation: A New Phenomenon in Dispute Resolution*, in *MPILux Research Paper*, 3, 2022, 1. In the preceding century, Piero Calamandrei had already formulated and expanded upon the notion of "strategic litigation" in his masterpiece "*Il processo come giuoco*": P. Calamandrei, *Il processo come giuoco*, Morano, 1965. *Opere giuridiche*, I, 537, 548.

9. *Supra*, footnote number 6.

In Europe, this scenario creates tension between the right of citizens to public participation in energy and climate issues, as outlined by the EU legislator[10], and the extent to which such issues are challenged in the Member States.

It is a conflictive process, between the "to be" and the "must be" of public opposition to "citizen litigation" against Governments for causing irreversible climate consequences. Citizens tend to see vertical litigation having climate change as a central issue as a regulatory tool to react proactively to the lack of sufficient/efficient State regulatory initiatives on climate change, such as the failure to enforce legislation establishing adaptation and mitigation measures.

Thanks to "vertical climate actions", the judiciary assumes a pivotal role in addressing the root causes of climate change for the betterment of future generations, all while operating within the confines of the separation of powers («courts as agents of change and legal development»).

Courts must exercise caution to avoid disrupting the delicate equilibrium between the judicial and political spheres. The responsibility of making political determinations necessary for decisions regarding the reduction of greenhouse gas emissions lies with the Government and Parliament, not the judiciary. Nevertheless, it falls within the purview of the courts to ascertain whether the Government and Parliament have abided by the bounds of international, European, and national laws to which they are beholden, or if their actions have disadvantaged citizens by failing to do so[11].

For instance, in the Urgenda 3 case[12], the Dutch Hoge Raad determined that these constraints were derived, among other sources, from the European Convention on Human Rights, of which the Netherlands is a signatory. Notably, Articles 2 and 8 of the European Convention on Human Rights mandate that States Parties take appropriate measures

10. *Supra*, para. 1.

11. The demarcation between the judiciary and political authority is delineated by the fact that the court's role is confined to the resolution of legal matters. To be more precise, as emphasised by the High Court of Justice, Queen's Bench Division, in its judgment dated 17 February 2022, *FINCH* v. *Surrey County Council* [2022] EWCA Civ 187, «such matters must not venture into the sphere of political assessment, which falls within the jurisdiction of the executive branch, rather than the courts, or delve into the realm of policy formulation or the substantive merits of the contested decision. This guiding principle is equally applicable to cases addressing greenhouse gas emissions and climate change as it is to other contexts».

12. *Supra,* footnote number 6.

to safeguard their residents, including those in the Netherlands, from perilous climate changes[13]. In ruling on this vertical climate action, the Dutch courts merely applied the provisions of the Convention and did not overstep the mark by entering into the realm of politics[14].

Should the State be unsuccessful in the litigation, it is compelled to adhere to the court's decision. If the State does not voluntarily comply with the judgment, the prevailing party can, if permitted by the applicable civil procedure, seek the imposition of a fine (*astreinte*) as a means to encourage governmental compliance with the court's ruling.

This essay will focus on the realm of vertical climate actions to investigate whether:

– Vertical climate litigation is only a temporary legal, social, and political phenomenon designed to propel states towards a more advanced form of democracy with social cohesion;
– Vertical climate litigation can serve as a long-term supranational or EU private enforcement tool to monitor the correct implementation of supranational, EU, or national climate change strategies.

3. *The Durability of Vertical Climate Actions: A Transient or Long-Lasting Private Enforcement Mechanism?*

In the foreseeable future, it is conceivable that the promotion of horizontal climate lawsuits against emitting companies will persist, with the aim of recovering potential damages and thereby influencing the conduct of major emitting entities[15]. In contrast, as already noted at the end of the

13. The subject matter is thus interconnected with the realms of Judicial Safeguarding of Human Rights on both national and international scales, a topic that formed the central focus of the International IAPL (International Association of Procedural Law) conference convened in Bologna in 1988.

14. For an in-depth exploration of this pivotal matter, a comprehensive analysis can be found in M. Payandeh, *The role of courts in climate protection and the separation of powers*, in W. Kahl - M.P. Weller (eds.), *Climate Change Litigation*, cit., 62 ff., 76 ff. It appears that the reluctance of the Dutch courts to transgress the boundary between the judiciary and politics led them to decline the plaintiff's request for an "information order". This proposed order would have mandated the State to monitor and report on the progress made in achieving emission reduction objectives, and no directive for a reporting-back mechanism was issued. K. Roach, *Judicial Remedies for Climate Change*, in *Journal of Law&Equality*, 17 (1), 2021, 105, 110 expressed criticism concerning this particular aspect.

15. For an overview on the EU and national applicable rules on jurisdiction to these kinds of actions, see E.M. Kieninger, *Conflict of jurisdiction and the applicable law in domestic*

preceding paragraph, one of the most intricate and thought-provoking aspects within climate change litigation revolves around determining:

– whether vertical climate actions are just a temporary legal, social (and political) phenomenon that will cease, at least within the European Union, in 2050, when the EU becomes climate neutral, as occurred in Italy for the assault praetors of the 1970s, or
– whether they can be transformed into long-term, coordinated and non-fragmented private (supranational or EU) enforcement instruments aimed at monitoring the correct governmental approach, i.e. the implementation of supranational or EU strategies in the field of climate protection, and thus the commitment of the present generation to the future generation [such as the American IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change (IBA Model Statute)].

As is widely recognised, the concept of private enforcement instrument pertains to the practice of enabling private plaintiffs to seek compensation in instances where the State neglects to enforce climate change laws or regulations. This mechanism serves as a means to influence their conduct, compelling States to adhere to the legislative provisions enacted to address climate change.

Thus, it shall be investigated whether the existing vertical approach to climate change litigation can evolve into a sustainable private enforcement instrument over time. This could potentially encompass actions like civil penalties or damages claims brought before civil courts, with the objective of scrutinising and challenging the efforts of States and public authorities in combating climate change.

In this context, vertical climate change litigation has the potential to complement international, European, and potentially national climate change legislation by offering a flexible and timely compensatory recourse in the face of potential governmental inaction and inefficacy. An added benefit of private enforcement lies in its reliance on the judicial system, which is less susceptible to lobbying influences than the political arena.

In this pursuit, an initial question to explore is the feasibility of devising a novel private enforcement mechanism for climate change litigation, potentially drawing inspiration from the Antitrust Damages Directive No. 2014/104. This Directive introduced provisions for private enforcement

courts' proceedings, in W. Kahl - M.P. Weller (eds.), *Climate Change Litigation*, cit., 119, 125 ff.

of EU competition law and might serve as a model for guiding the development of a similar framework within the context of climate change litigation.

In an era where alternative dispute resolution mechanisms are increasingly favoured for dispute resolution, the vertical climate "litigation" instrument appears to be positioned upstream. This is because the goals of private enforcement, including reputational repercussions, are more effectively pursued within the realm of the judiciary rather than through an alternative dispute resolution (ADR) avenue[16].

A second pivotal query that demands attention pertains to addressing the challenge arising from the collective nature of the interests involved, such as the reduction of gas emissions. This question delves into whether a comprehensive framework of European (or potentially national) regulations needs to be devised, establishing a representative private enforcement mechanism tailored for these types of disputes. Drawing inspiration from EU Directive 2020/1828, this mechanism would aim to secure a court order against a Government to provide compensation for non-compliance with EU climate change policies.

As is commonly understood, the fundamental issue concerning "collective interests" lies in the circumstance where numerous citizens are impacted by the same risk resulting from climate change («the common interest rationale»). In such a scenario, either no individual possesses the right to seek redress for the violation of the collective interest (due to the State's negligence in mitigating climate change effects), or the individual stake in rectifying the infringement is too trivial to motivate the pursuit of enforcement for damages stemming from the State's inaction[17].

In essence, the central query revolves around whether the inherent nature of collective interests involved and the specific sought-after measures necessitate a departure from an individualistic litigation approach, steering towards the adoption of a representative framework for judicial safeguarding. This constitutes yet another timeless theme warranting exploration – a topic eloquently delved into by Mauro Cappelletti during the VII IAPL World Congress held in Würzburg in 1983[18].

16. Regarding this enhanced contribution of litigation, refer to H. Prütting, *Der Zivilprozess im Jahre 2030: Ein Prozess ohne Zukunft?*, in *AnwBl 6*, 2013, 401, 405.

17. M. Cappelletti, *Access to Justice: Comparative General Report*, in *RabelsZ*, 1976, 669, 680 ff.

18. See M. Cappelletti - B.G. Garth, *The Protection of Diffused, Fragmented and Collective Interest in Civil Litigation*, in *Effectiveness of Judicial Protection and Constitutional*

Moreover, concerted efforts must be undertaken to address the following issues, with the overarching goal of providing an effective EU private enforcement tool within the domain of climate change:

a) Defendant's standing: Vertical climate actions involve the State (or other public entity) as the defendant. However, owing to the principles of state immunity, a State can solely face a lawsuit in its domestic courts for its alleged failure to enact sufficient measures against climate change. At present, no avenue exists to initiate a strategic climate change action targeting multiple States within a national jurisdiction. To make vertical climate change litigation a private enforcement tool at the EU level, this problem must be addressed;
b) Social Media and NGOs: Social media and digitalization play a pivotal role in empowering young citizen activists to initiate legal actions against States. These e mechanisms appear to serve as catalysts for increasing the volume of ongoing cases in the short to medium term, aiming to make vertical climate change litigation an effective enforcement tool at the EU level;
c) Litigation Costs: consideration should be given as to whether public funding mechanisms should be instituted, as we are dealing with a private enforcement instrument against States, or whether private funding instruments are preferable, as we are dealing with a compensatory instrument. Another aspect requiring scrutiny pertains to the potential need for tempering the "loser pays" principle, as exemplified in Article 12 (paragraphs 2 and 3) of the EU Directive 2020/1828. This provision stipulates that «Individual consumers concerned by a representative action for redress measures shall not pay the costs of the proceedings», with the *caveat* that «in exceptional circumstances, an individual consumer concerned by a representative action for redress measures may be ordered to pay the costs of proceedings that were incurred as a result of the individual consumer's intentional or negligent conduct».
d) Length of proceedings: Given the objective of mitigating climate harm, prompt resolution is essential in climate change litigation. Consequently, this type of legal action is notably more susceptible to undue delays compared to other litigation forms. How might this issue be effectively managed with the aim of transforming vertical climate change litigation into stable instruments of private enforcement?

Order, Gieseking, 1983, 117; F. Carnelutti, *Lezioni di diritto processuale civile*, Cedam, 1930, 3 ff.; Id., *Sistema di diritto processuale civile*, Cedam, 1936, I, 7 ff.

e) Transnational network and cross-fertilisation: Transnational networks have been crucial to the success of climate litigation, as plaintiffs have often benefited from the expertise of a wide range of lawyers and other experts both within the forum and abroad. In particular, within the EU Member States, plaintiffs and courts can refer to each other, as all EU Member States are not only bound by EU law, but are also parties to the European Convention on Human Rights. As a matter of fact, lawyers involved in pending climate change cases across Europe are in contact with each other and a part of a single network. How might this fruitful cross-fertilisation be enhanced?

4. *Concluding Remarks*

In spite of the distinct challenges and obstacles faced across various historical periods, procedural law, guided by the judiciary, has consistently evolved to meet the needs of both present and future generations. Functioning as a vital force, it has played a pivotal role in creating new mechanisms to enforce rights. Procedural law is a timeless and resilient framework that continually renews itself. This phenomenon seems evident in the realm of vertical climate change litigation, as we have sought to illustrate. Such litigation highlights its potential as an enduring supranational or EU private enforcement tool, crucial for overseeing the proper implementation of supranational, EU, or national climate change strategies. With this brief essay, we hope to have provided insightful feedback to those interested in demonstrating that vertical climate change litigation can be transformed into a long-lasting private enforcement mechanism.

Davide Castagno

Claimants' Standing in Climate Disputes: Rules of Proceedings and "Political" Decisions

1. *Introduction*

A study conducted in France has highlighted that climate activists encounter at least four procedural considerations when they choose to initiate legal action in any court: legal standing, forum choice, burden of proof, and separation of power theory, that is to say the limits of a Court order with regard to the legislative and executive powers[1]. In this study, we will focus particularly on the first of these aspects, namely the claimants' legal standing in climate change litigation and its legal basis. Indeed, if procedural rules are sometimes of help, providing *ad hoc* standing for this kind of litigation, the fact remains that judges are still often required to manage such claims without a specific rule. In said instances, judges are compelled to modify conventional standing regulations to align them with the unique characteristics of climate change litigation. Otherwise, the absence of legal standing is frequently the primary argument used to dismiss the lawsuit, providing judges with a strategic response to a strategic claim[2].

Therefore, bearing in mind that in this study we are only considering strategic human rights-based domestic litigations in which the defendant is a State[3], we are going to examine four key "standing-orientated" climate

1. Cf. M. Hautereau-Boutonnet - È. Truilhé, *Le procès environnemental: du procès sur l'environnement au procès pour l'environnement*, in *www.gip-recherche-justice.fr*, 2019 Final Report.

2. On the difference between strategic cases and routine cases in climate change litigation, cf. C.V. Giabardo, *Climate Change Litigation and Tort Law. Regulation Through Litigation?*, in *Diritto&Processo* (University of Perugia Law School Yearbook), 2020 (2019), 361, 362 f.

3. Consequently, we do not refer to litigations against multinational companies, which represent another branch of climate change litigation, in which different mechanisms apply. From this perspective, let's consider that in accordance with the 2022 Report of

cases, that is to say cases in which the court's decision largely hinged on whether or not the claimants possessed the requisite legal authority to sue the State. In particular, we will refer to the Dutch case of *Urgenda* (para. 2.1) and to the Canadian case of *ENvironnement JEUnesse* (para. 2.2), on the one hand, and to the Belgian case of *Klimaatzaak* (para. 3.1) and to the Swiss case of *KlimaSeniorinnen* (para. 3.2), on the other. The reason for this choice is that in the first group of cases, collective actions for the protection of general interests are provided for. However, in the second group, such actions do not exist, or at least did not exist at the time the cases were brought. Furthermore, it is worth noting that all of these cases were adjudicated by civil law courts[4].

Finally, in our concluding remarks, we will address an Italian precedent, not concerning climate change litigation at all, in order to emphasise how the "strategic" use of procedural rules can always enable a court decision, even when under those rules this would seem impossible.

2. *Climate Change Litigation Under Specific Regulations that Permit Collective Actions*

2.1 *The* Urgenda *Case in The Netherlands*

To assess the significance of standing rules in climate change litigation, we can observe that in the *Urgenda* case, from which the climate litigation network originated, the claimant's right to standing was the primary point of contention in the adjudication of the claim.

In this case, the claimant was an association, namely Urgenda Foundation, that expressly acted on behalf of itself as well as legal representative of 886 individuals who had authorised Urgenda to also conduct the proceedings on their behalf[5]. The proceedings had been instituted in

The London School of Economics, in the European context around 75% of cases have been filed against a wide variety of government actors (cf. J. Setzer - H. Narulla - C. Higham - E. Bradeen, *Climate litigation in Europe. A summary report for the European Union Forum of Judges for the Environment*, in www.lse.ac.uk, accessed on 10 September 2023).

4. Even if Canada is a common law country, in the region of Quebec civil law applies. Quebec is indeed the only Canadian province with a civil code, which is based on the French Napoleonic Code.

5. Urgenda – a contraction of the words "Urgent" and "Agenda" – was founded in 2007 as an initiative of the Dutch Research Institute for Transitions (DRIFT), an institute for the

accordance with Article 305a of the Dutch Civil Code (hereafter DCC), which allows collective actions (otherwise called class actions) to obtain a declaratory judgment[6]. A distinctive feature of this process is that there is no specific conflict between the defendant and the organisation that typically files the claim. This is because the organisation does not pursue litigation based on its own interests but rather advocates for the interests of an unspecified group of "others"[7].

Since Urgenda was not acting as the legal representative of all other claimants, it was evident that its lawsuit sought to safeguard a matter of public concern central to its constitutional mission: safeguarding the interests of both present and future generations from the hazards of climate change.

On its own, the State did not dispute Urgenda's capacity to represent the present generations of Dutch citizens, but it argued that Urgenda had no basis when it sought to protect the interests of current and future generations in other countries[8]. As for the interests of future Dutch generations, the State deferred to the court's opinion.

Considering that Urgenda had made sufficient efforts to attain its claim by entering into consultations with the State, according with Article 3:305a(2) DCC, the Hague District Court concluded that Urgenda's claim,

transition to a sustainable society, at the Erasmus University in Rotterdam. Urgenda is a non-governmental organisation that has gained Dutch NGO status (*algemeen nut beogende instelling*). The official purpose of Urgenda, as stated in its articles of incorporation, is «to stimulate and accelerate the transition to sustainable society, starting in the Netherlands».

6. Under this provision, a legal entity, such as a foundation or association, can submit a complaint if it seeks to protect a common interest or the collective interests of others, provided that such an interest aligns with one of the constitutional objectives of that legal entity. Since the Urgenda claim was initiated in 2013, we refer to the regulation as existing before the amendments which from January 2020 were made to the procedure as a result of the enactment of the Act on collective damages in class actions (Act of 20 March 2019, Stb. 2019, 130).

7. As for these interests, they may relate to a specific group interest or to a more ideological public interest, to the extent that they are of a similar nature: cf. V.B. de Vaate, *Collective redress and workers' rights in the Netherlands*, in *European Labour Law Journal*, 12 (4), 2021, 455, 464. Article 3:305a DCC represents in any case an exception to the general provision of Article 3:303 DCC, which determines that a (legal) person can file a complaint before civil courts only when that person has sufficient individual and personal interest in that claim.

8. Since climate change and sustainability were transboundary in their nature and thus have strong international dimensions, the interests that Urgenda represented were in fact not limited to the Netherlands.

in so far as it acted on its own behalf, was allowable to the fullest extent[9]. Nevertheless, the Court considered that Urgenda itself could not rely on Articles 2 and 8 of the European Convention on Human Rights (hereafter ECHR), since Urgenda itself could not be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR. The fact remains, however, that these treaty obligations have contributed to detailing the standard of care under Article 6:162 DCC invoked by Urgenda towards the State[10].

Urgenda's standing has been reviewed by the Hague Court of Appeal, whose decision expressly relied on "regulations of a predominately procedural nature", namely Article 34 ECHR and Article 3:305a DDC, respectively[11]. The Court of Appeal observed that the District Court had failed to acknowledge that Article 34 ECHR could not serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 ECHR in those proceedings. While individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda

9. Cf. The Hague District Court, 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.9, in www.rechtspraak.nl, accessed on 10 September 2023 (English unofficial translation). For some comments, cf. *inter alia* K. De Graaf - J. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, in *Journal of Environmental Law*, 27 (3), 2015, 517; J. Lin, *The First Successful Climate Negligence Case: A Comment on Urgenda Foundation c. the State of the Netherlands*, in *Climate Law*, 5, 2015, 65; J. Van Zeben, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*, in *Transnational Environmental Law*, 4 (2), 2015, 339; R. Cox, *A Climate Change Litigation Precedent: Urgenda Foundation c. the State of the Netherlands*, in *Journal of Energy & Natural Resources Law*, 34 (2), 2016, 143.

10. Cf. The Hague District Court, cit., para. 4.45. As for the action instituted on behalf of the individuals, the Court observed that Urgenda was defending the right of not just the current, but also the future generations' right to access of natural resources and to live in a safe and healthy environment. In any case, in this situation, the Court found out that the individual claimants did not have sufficient personal interest besides the Urgenda's interest (cf. The Hague District Court, cit., para. 4.109).

11. Cf. The Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2610, para. 34, in www.rechtspraak.nl, accessed on 10 September 2023 (English unofficial translation). For some comments, cf. *inter alia* B. Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)*, in *Transnational Environmental Law*, 8 (1), 2019, 167; P. Minnerop, *Integrating the "duty of care" under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case*, in *Journal of Energy & Natural Resources Law*, 27 (2), 2019, 149; I. Leijten, *Human rights v. Insufficient climate action: The Urgenda case*, in *Netherlands Quarterly of Human Rights*, 37 (2), 2019, 112.

may also do so on their behalf under Article 3:305a DCC[12]. On the other hand, with respect to Urgenda's inability to represent the future generations of Dutch citizens or the current and future generations of individuals from other countries, the Court noted that the claim remained permissible as long as Urgenda acted on behalf of the current generation of Dutch citizens and individuals. After all, it was without a doubt plausible that the current generation of Dutch nationals – in particular but not limited to the younger individuals in that group – would have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases were not adequately reduced[13].

Regarding the State's argument that this type of legal action might also encompass individuals who may not even desire representation, this argument was refuted by the Court, considering the legislative history of Article 3:305a DCC. After all, in the Parliamentary papers, the legislator specifically acknowledged that:

> nancial interests, but also more idealistic interests, and in this case, it is irrelevant whether each member of society attaches the same value to these interests. It is even possible that the interests that are sought to be protected in the proceedings conflict with the ideas and opinions of other groups in society. This alone shall not stand in the way of a class action. […] It does not have to concern the interests of a clearly defined group of others. It may also concern the interests of an indeterminable, very large group of individuals[14].

The decision was finally confirmed by the Dutch Supreme Court, which argued that Urgenda, on the basis of Article 3:305a DCC, was representing the interests of the residents of the Netherlands, with respect to whom the obligation under Articles 2 and 8 ECHR applied. After all, the interests of those residents were sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. The mere fact that Urgenda did not have a right to complain to the European Court of Human Rights on the basis of

12. Cf. The Hague Court of Appeal, cit., para. 36.
13. Cf. *ivi*, para. 37.
14. Parliamentary Papers II, 1991/92, 22 486, No. 3, 22. Moreover, it was set out in the Explanatory Memorandum that an environmental organisation's claim in order to protect the environment, without an identifiable group of persons needing protection, would be allowable under that scheme. On this point, see also M.F. Cavalcanti - M.J. Terstegge, *The Urgenda case: the Dutch path towards a new climate constitutionalism*, in *DPCE online*, 2020/2, 1371, 1383 f.

Article 34 ECHR, because it was not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, did not detract from Urgenda the right to institute a claim before Dutch civil courts, in accordance with Article 3:305a DCC on behalf of residents who were in fact victims[15].

2.2 *The Canadian Case of* ENvironnement JEUnesse *(*Enjeu*)*

A somewhat analogous case was unfolding in the Canadian province of Quebec, albeit with a completely different outcome. We are referring to the class action brought by *ENvironnement JEUnesse* (*Enjeu*) against the Canadian Government.

Enjeu is an association that was founded in 1979 with the constitutional purpose of educating young people on environmental issues. In this case, *Enjeu* specifically acted on behalf of all Quebec resident aged 35 and under on November 26, 2018 (i.e., the date of the filed action), aiming at a declaratory judgment establishing that the Canadian Government's behaviour in the fight against climate change had infringed on the rights of the youth, as well as an order to pay punitive damages[16]. According to Article 571 of the Quebec Code of Civil Procedure (hereinafter QCCP),

> a class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class. In addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with juridical personality may be members of the class.

15. Cf. The Netherlands Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2007, para. 5.9.2 and 5.9.3, in www.rechtspraak.nl, accessed on 10 September 2023 (English unofficial translation).

16. According to the *Enjeu*'s claims, the Canadian Government's behaviour had infringed on a number of rights protected by the Canadian Charter of Rights and Freedoms and Quebec's Charter of Human Rights and Freedoms, namely: the right to life, integrity and security of the person protected by section 7 of the Canadian Charter of Rights and Freedoms and section 1 of the Quebec's Charter of Human Rights and Freedoms; the right to live in a healthful environment in which biodiversity is preserved, protected by section 46.1 of the Quebec's Charter of Human Rights and Freedoms; the right to equality protected by section 15 of the Canadian Charter of Rights and Freedoms and section 10 of the Quebec's Charter of Human Rights and Freedoms (cf. Trudel Johnson & Lespèrance, Completed class actions, ENvironnement JEUnesse v. Attorney General of Canada, in www.tjl.quebec, accessed on 10 September 2023). For further details, see also C. Feasby - D. Devlieger - M. Huys, *Climate Change and the Right to a Healthy Environment in the Canadian Constitution*, in *Alberta Law Review*, 58 (2), 2020, 213.

In any case, according to Article 574 QCCP, in order to institute a class action, a prior authorization of the court is required. Thus, in its motion for authorization, *Enjeu* argued that the claim complied with all the requirements mentioned in Article 575 QCCP[17], relying in particular on the fact that the class composition made it difficult or not viable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings[18]. Nevertheless, in its reply, the Government challenged *Enjeu*'s decision to use a collective action under Article 571 QCCP as a procedural vehicle for its claims, arguing that the association had failed to fulfil different requirements established in Article 575 QCCP.

In July 2019, the Superior Court of Quebec refused the authorisation, focusing on the claimant's standing right. According to the Court's opinion, it was accurate to assert that the class action could guarantee the adherence to regulations pertaining to environmental matters. However, this did not mean that a class action could be authorised automatically every time an environmental issue was a stake[19]. In particular, after having rejected the Government objections based on the separation of powers theory and after having *prima facie* acknowledged the rights alleged by the petitioner, the Court argued that *Enjeu*'s choice to cap the age of the group members at 35 was not reasonable. Indeed, according to Article 591 QCCP, the judgment on a class action describes the class to which it applies and is binding on all class members who have not opted out. But,

17. In accordance with Article 575 QCPC, «The court authorises the class action and appoints the class member it designates as representative plaintiffs if it is of the opinion that: (1) the claims of the members of the class raise identical, similar or related issues of law or fact; (2) the facts alleged appear to justify the conclusions sought; (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and (4) the class member appointed as representative plaintiff is in a position to properly represent the class members».

18. Cf. Motion for authorisation to institute a class action and obtain the status of representative, para. 3, in www.enjeu.qc.ca, accessed on 10 September 2023 (in French). In particular, *Enjeu* affirmed that: «[…] the actions of the Canadian government affect millions of members. 3.2. According to Statistics Canada, in 2017, the population aged 35 and under in Quebec was 3,471,903, including residents and citizens. 3.3. Moreover, it is clear that class members cannot individually bear the costs of such a lawsuit. A class action is undoubtedly the only way for class members to go to court and obtain the cessation of the interference with their rights protected by the Charters».

19. Cf. Quebec Superior Court, 11 July 2019, 2019 QCCS 2885, para. 43 s., in www.enjeu.qc.ca, accessed on 10 September 2023 (English unofficial translation).

even if the judge has the power to modify the group definition, this power should not be accomplished by the arbitrary exclusion of persons having the same interest in the common issues[20]. In this instance, this translated to the elimination of the 35-year-age limit, resulting in the formation of a group of over 7 million inhabitants of Quebec aged over 18.

Conversely, when considering minors who were included in the group due to being under 18, the very right to take legal action was subject to scrutiny. In particular, *Enjeu* should not be recognised as having the power to impose on millions of parents the obligation to act to exclude their children from class action nor was it a statutory entity created by the legislator to protect the rights of minors or to act on their behalf[21]. So, in conclusion, the Court observed that the mission and objectives of *Enjeu* – even if admirable in socio-political terms – were too subjective and limiting, by nature, to constitute the ground for an appropriate group bringing a class action on the basis of Article 571 QCCP.

The authorisation refusal was challenged by *Enjeu* before the Quebec Court of Appeal, but the Court dismissed the appeal. Granting the interlocutory appeal, the Court first of all assumed that the claimant's assertions were not justiciable, because of their vagueness and their politically-oriented nature. Besides this aspect, which falls outside the scope of this study, the Court revisited the claimant's standing right, confirming the Superior Court's decision regarding the group definition. Global warming was indeed a common issue for all Canadian residents and the fact that the younger people may be more exposed is merely a matter of time[22].

20. Cf. Canadian Supreme Court, 18 October 2001, 2001 CSC 68, para. 21, in www.scc-csc.ca, accessed on 10 September 2023. On the risk of failing on a class definition issue, cf. C. Cameron - R. Weyman, *Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices*, in *Journal of Environmental Law*, 34 (1), 2022, 195, 203 ff. On the topic, see also J. Kalajdzic, *Climate Change Class Actions in Canada*, in *Supreme Court Law Review*, 2d, 100, 2021, 29.

21. Cf. Quebec Superior Court, cit., para. 132.

22. Cf. Quebec Court of Appeal, 13 December 2021, 2021 QCCA 1871, in www.enjeu.qc.ca, accessed on 10 September 2023 (English unofficial translation). The application for leave to appeal from the judgment of the Court of Appeal of Quebec has been dismissed by the Supreme Court of Canada (cf. Canadian Supreme Court, 28 July 2022, 2022 CSC 40042, in www.scc-csc.ca, accessed on 10 September 2023).

3. *Climate Change Litigation Within Traditional Standing Rules*

3.1 *The Case of Senior Women in Switzerland (*KlimaSeniorinnen Schweiz*)*

In the preceding section, we contrasted two similar lawsuits that yielded entirely disparate results, both founded on the shared procedural mechanism of collective actions, which facilitate the safeguarding of public interests. In the following two paragraphs we will compare two different cases that have been decided without this procedural vehicle, thus in accordance with general standing rules which normally require the direct and personal interest of the claimant.

The first one is the Swiss case of the Association of Swiss Senior Women for Climate Protection (*KlimaSeniorinnen Schweiz*), an association founded in August 2016 with the specific aim to fight for climate protection before Swiss courts (therefore, an *ad hoc* association). The concept of forming an association aimed to prevent legal proceedings from relying on individual individuals, whereas the restriction to elderly females stemmed from the vulnerability of older women to severe and frequent heatwaves experienced in Switzerland. In essence, the petitioners sought to align the broader public interest with an individual and particular standpoint, with the goal of addressing the issue of the claimant's legal standing[23].

The claim was introduced in November 2016 on the ground of Article 25a(1)(a) of the Administrative Procedure Act (hereinafter APA), according to which

> any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and

23. As pointed out on the association's website, petitioners were obviously aware that older men, people with diseases, and small children also suffer from heat waves and other climate effects. Nevertheless, by focusing on the proven susceptibility of older women, they were simply enhancing the lawsuit's chances of success which was ultimately good for everyone (cf. www.en.klimaseniorinnen.ch, accessed on 10 September 2023). On the topic, cf. C.C. Bähr - U. Brunner - K. Casper - S.H. Lustig, *KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation*, in *Journal of Human Rights and the Environment*, 9 (2), 2018, 194, 214. With particular regard to the strategic action of *KlimaSeniorinnen*, see also S. Keller - B. Bornemann, *New Climate Activism between Politics and Law: Analysing the Strategy of the KlimaSeniorinnen Schweiz*, in *Politics and Governance*, 9 (2), 2021, 124.

which affect rights or obligations that it refrains from, discontinues or revokes unlawful acts[24].

The legal request was submitted to the Federal Council, the Federal Department of Environment, Transport, Energy and Communication (DETEC), the Federal Office of Environment (FOEN) and the Federal Office of Energy (SFOE).

In April 2017, DETEC responded to the request on behalf of the other three respondents and denied the applicants' standing according to Article 5(1)(c) APA, since the applicants' rights had not been affected as required by Article 25a APA. Specifically, the authority contended that Article 25a of the Administrative Procedure Act (APA) should be interpreted in conjunction with the constitutional guarantee of access to the courts outlined in Article 29. This constitutional provision ensures the right to have legal disputes adjudicated by a court when an individual legal position is deemed worthy of protection. However, in this instance, the primary objective of the applicants' petition was not solely the reduction of atmospheric CO2 levels in their immediate vicinity but rather on a global scale. This is because the applicants were urging the administrative authorities to formulate draft legislative measures aimed at further reducing CO2 emissions or to assume responsibility for preparing such legislative proposals. Consequently, the authority of first instance did not enter into the case, stopping the process at a procedural stage on the ground of the petitioner's lack of standing according to Article 25a APA, since no individual legal positions were affected[25].

In May 2017, the senior women appealed to the Federal Administrative Court. In the appellants' opinion, women over 75 would have indeed been affected to a particular degree in terms of mortality and health impairments. Therefore, the applicants' request could not be termed an inadmissible *actio popularis*, as made by the authority's ruling. On the contrary, the appellants had an interest worthy of protection in the issuance of a ruling concerning the contested omissions.

24. Article 25a of the Administrative Procedure Act (APA) is labelled "Ruling on real acts" and is designed to bring under judicial scrutiny cases where the government's actions, while not primarily focused on regulating rights and obligations, still impact such rights and obligations (so-called "real acts").

25. Federal Department of the Environment, Transport, Energy and Communications, Order of 25 April 2017, in www.klimaseniorinnen.ch, accessed on 10 September 2023 (in German).

Considering that the appeal was introduced by the association and by four more individuals, who certainly had an interest worthy of protection in the revocation of the contested ruling, the Federal Court did not expressly decide whether, within the scope of an appeal brought by an association in its own name but in the interests of its members (*egoistische Verbandsbeschwerde*), the association was entitled to file a request with the authority of first instance and to file an appeal before the Court itself[26]. Considering this, the Court noted that the pivotal issue in this case revolved around the determination of whether there was a requirement for individual legal protection. This determination was crucial to narrowing the scope of application and excluding the possibility of an *actio popularis* under Article 25a of the Administrative Procedure Act (APA).

Therefore, concerning the interest in legal protection, it implies that a tangible advantage must be sought, and this interest must also be presently relevant. In terms of interests deserving of protection, which is a matter-specific criterion, it is essential that the appellant is affected in a manner that distinguishes them from the general population according to Article 48(1)(b) of the Administrative Procedure Act (APA)[27].

From this perspective, considering all possible impacts of climate change in Switzerland, the Court concluded that the group of women older than 75 years of age was not particularly affected by climate change. Although different groups were affected in different ways, ranging from economic interests to adverse health effects affecting the general public, it cannot be said that the proximity of the appellants to the matter in dispute was particular, compared with the general public. Consequently, since the appellants had no sufficient interest worthy of protection, the Court held that the authority of first instance had rightly refused to issue a material ruling on the basis of Article 25a APA[28].

26. Cf. Swiss Federal Administrative Court, 27 November 2018, A-2992/2017, para. 1.2, in www.klimaseniorinnen.ch, accessed on 10 September 2023 (English unofficial translation).
27. Cf. Swiss Federal Administrative Court, cit., para. 6.3.2. In accordance with Article 48(1)b APA, which refers to appellant locus standi, «A right of appeal shall be accorded to anyone who: […] has been specifically affected by the contested ruling».
28. Cf. Swiss Federal Administrative Court, cit., para. 7.4.3. According to the Court's opinion, further claims to the issuance of a material ruling do not result from the European Convention of Human Rights: since a reduction of the general risk of danger cannot be achieved directly through the actions demanded, the authority of first instance was not obliged on the basis of Art. 6(1) ECHR to enter into the matter of the appellants. After the judgment, the association decided to file a complaint before the European Court of Human Rights, alleging the violation of Articles 2 (Right to life), 6 (Right to a fair trial), 8

3.2 *The Belgian Case of* Klimaatzaak

The last case we will consider is the Belgian case of *Klimaatzaak*. *Klimaatzaak*, i.e., Climate Case, is a non-profit organisation established in 2014 by 11 concerned citizens who wanted to take action against Belgium's ailing climate policy, following the model of the Urgenda's legal action.

In December 2014 *Klimaatzaak* formally declared the four responsible Governments (the three regions and the Federal State) to be in breach of their climate obligations. Having failed to reach a consensus at a round table, in June 2015 the legal proceedings began. The claimants were the association itself, 58.586 individuals and a mountain alder with 81 other trees. Leaving aside the *locus standi* of the trees, which are not entitled to bring a claim in the Belgian legal system, let us concentrate on the standing of the association and the individuals[29].

On the basis of Article 17(1) of the Belgian Judicial Code (hereinafter BJC), in order to bring a claim, the claimant needs legal standing and interest[30]. Regarding the interest, it must be present and current as per Article 18 BJC. From this perspective, in the summons, individual claimants affirmed that due to climate change they were exposed to

(Right to respect for private and family life) and 13 (Right to an effective remedy) ECHR. The claim is pending before the Grand Chamber (cf. ECtHR, Verein Klimaseniorinnen Schweiz and Others v. Switzerland, application No. 53600/20, in www.coe.int, accessed on 10 September 2023).

29. However, the idea that natural objects, such as trees, can also have a legal standing is not new: cf. C. Stone, *Should trees have standing? Toward Legal Rights for Natural Objects*, in *Southern California Law Review*, 45, 1972, 450 ff. After all, natural objects such as the Amazonian forest in Colombia or the Ganges and Yamuna rivers in India, as well as all their tributaries, have been recognised by courts as entity subject of rights entitled to legal protection: cf. respectively, Colombian Supreme Court, 5 April 2018, STC4360-2018, in www.cortesuprema.gov.co, accessed on 10 September 2023 (in Spanish) and High Court of Uttarakhand, 20 March 2017, Salim v. State of Uttarakhand, Writ Petition PIL No.126 of 2014, in www.elaw.org, accessed on 10 September 2023.

30. In this study we do not consider Article 17 BJC as implemented by the 2018 Justice system reform, which did not apply in that case. In any case, starting from 10 January 2019, on the basis of Article 17(2) BJC, the action of a legal person, aimed at protecting human rights or fundamental freedoms recognised in the Belgian Constitution and in the international instruments which bind Belgium, is admissible under the following conditions: 1st - the purpose of the legal person is of a particular nature, distinct from the pursuit of the general interest; 2nd - the legal person pursues this object in a sustainable and effective manner; 3rd - the legal person takes legal action within the framework of its object, with a view to ensuring the defence of an interest related to this object; 4th - only a collective interest is pursued by the legal person through its action.

material damage (such as damage resulting from storms or floods) and damage to their health and well-being (such as spread of new tropical diseases, heat waves, psychological and emotional stress, and so on). Consequently, the government's inaction against climate change violated their subjective rights, allowing them to act on the basis of Article 1382 of the Belgian Civil Code (hereinafter BCC), which provides for compensation in case of (future) damage caused by negligence. While for *Klimaatzaak*'s standing, the action was based on a Supreme Court's judgment which had permitted an environmental association to carry out a legal action aimed at contesting negligence of public authorities, which would be contrary to the provisions of environmental law, on the basis of the Aarhus Convention[31].

So, starting from the individuals' standing, the Brussels Court of First Instance argued that Belgium was of course concerned by climate change effects as demonstrated by national and European scientific reports. By attributing part of the climate change responsibility to the Belgian Government, individual claimants were therefore giving sufficient reasons for their standing, as they were pursuing a personal and real interest according to Article 18 BJC. Although it was a possibility that other Belgian individuals could be impacted by the same alleged harm as the claimants, this was not a compelling reason to categorise the filed action as an inadmissible *actio popularis*, nor was the fact that individuals were acting to prevent damage a hurdle, since Article 18 BJC also admits action to prevent the violation of a seriously threatened right, even on a declaratory basis[32].

As for *Klimaatzaak*'s legal standing, the Court contended that initially, a legal entity may initiate a lawsuit primarily to safeguard its legal existence, as well as its assets and moral rights, such as honour and reputation. Conversely, the existence of a constitutional purpose for a legal entity does not automatically grant it the authority to act on behalf of that purpose. Nevertheless, environmental associations benefit from a preferential status since Article 9(3) of the Aarhus Convention has to

31. Cf. Belgian Supreme Court of Cassation, 11 June 2013, ECLI:BE:CASS:2013:ARR.20130611.12, in www.juportal.be, accessed on 10 September 2023 (in French).

32. Cf. Brussels Court of First Instance, 17 June 2021, 2015/4585/A, para. 1.1, in www.klimaatzaak.eu, accessed on 10 September 2023 (in French). For a comment on the case, see C. Renglet - S. Smis, *The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?*, in *American Society of International Law*, 25 (21), 2021.

be intended as conferring legal standing to this kind of association with regard to environmental claims[33]. In particular, according to the European Court of Justice's case law, even if Article 9 of the Aarhus Convention contains any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals, it is up to the national court to give an interpretation of national procedural law which is consistent with the objectives laid down in that Article. From this perspective, therefore, the Court considered that *Klimaatzaak*'s claim was consistent with the association's constitutional purpose of preventing climate change. Thus, the association's claim under Article 1382 BCC met the criteria laid down in Article 18 BJC, since the claimant could be considered as having a personal and direct interest, which was actually different from the general interest[34].

4. *An Italian Precedent as a Conclusion*

We started this paper by pointing out that legal standing can sometimes offer judges a strategic answer to a strategic claim. The four cases we analysed have provided sufficient evidence of this. The Canadian case of *ENvironnement JEUnesse* has demonstrated that collective actions intended to safeguard public interests are insufficient without robust intervention by the courts. On the other hand, the Belgian case of *Klimaatzaak* has demonstrated to what extent court activism can overcome traditional limitations of procedural rules. Moreover, the *Urgenda* case in the Netherlands and the case of Senior Women in Switzerland appear to be two opposite examples of the way in which judges may offer or deny a political answer to the global problem of climate change by using the rules of proceedings[35]. In any case, and this is the key point, rules of procedural law were always at stake.

33. Cf. Compliance Committee, 12th meeting, 16 June 2006, Communication ACCC/C/2005/11, para. 34, in www.unece.org, accessed on 10 September 2023: «When assessing the Belgian criteria for access to justice for environmental organisations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced».

34. Cf. Brussels Court of First Instance, cit., para. 1.2.

35. On this point see also C.V. Giabardo, *Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a "Judicial Governance" of Climate*

An Italian precedent appears highly pertinent in this regard. I am referring to the claim brought in 2009 to the Court of Milan by some citizens who aimed at challenging the electoral regulation of 2005 (Law No. 270/2005 of 21 December 2005). In that instance, ultimately adjudicated by the Italian Supreme Court of Cassation, which subsequently referred the matter to the Constitutional Court, the issue of the claimants' legal standing was under scrutiny. Indeed, the State's defence, *inter alia*, focused on the fact that the claimants did not have any actual interest in the claim according to Article 100 of the Italian Code of Civil Procedure. In the State's opinion, that claim had in fact the sole purpose of obtaining from the court an "entry visa" for access to the constitutional review[36]. From this standpoint, it would have been an impermissible lawsuit, as its subject matter was an ambiguous harm used to resolve purely theoretical legal inquiries, such as the entitlement to voice individual preferences in future elections. Nonetheless, in a landmark ruling, the Court of Cassation allowed the lawsuit, contending that the act of voting constitutes a fundamental right of every citizen. Citizens may be required to exercise this right at any point and should be able to do so in accordance with the Constitution, particularly its Articles 2, 48, 56, and 58. According to the Court's opinion, the state of uncertainty in this regard was therefore a source of concrete prejudice and that was a sufficient reason to justify the applicant's interest in bringing proceedings in the face of State's inaction[37].

In essence, although, in theory, such a lawsuit appeared to be a procedural debacle and, as a result, seemed initially inadmissible based on conventional civil procedure rules, it transpired that the judges opted for an exceptionally assertive political judgment in that instance. This decision, which allowed not only for the Constitutional Court to declare the unconstitutionality of the electoral regulation in question but also for the potential issuance of a declaratory judgment, recognised both the presence of the fundamental right to vote and its infringement by the State regulation in previous elections[38]. This was ultimately made possible by a

Change?, in B. Pozzo - V. Jacometti (eds.), *Environmental Loss and Damage in a Comparative Law Perspective*, Cambridge, Intersentia, 2020, 393.

36. In the Italian legal order, in fact, individuals are not allowed to directly act before the Constitutional Court, since only judges may refer to the Court with a question raised by the parties through an ordinary claim.

37. Cf. Italian Supreme Court of Cassation, 17 May 2013, No. 12060, in www.dejure.it, accessed on 10 September 2023 (in Italian).

38. Cf. Italian Constitutional Court, 13 January 2014, No. 1, in www.cortecostituzionale.it, accessed on 10 September 2023 (in Italian) and Italian Supreme Court of Cassation,

strategic use of rules concerning legal standing in civil proceedings, since in that case the interest of the claimants did not differ in any substantial way from the potential interest of every other citizen.

Thus, although legal standing is a difficult hurdle to overcome in climate change litigation, it seems to me that judges still have the power to take a strong stance in this field, pushing governments to implement their climate policy. And this through a "wise" use of the rules governing civil procedure, such that a political decision can be reached in a political matter.

16 April 2014, No. 8878, in www.dejure.it, accessed on 10 September 2023 (in Italian). For some comments on the procedural aspects, cf. C. Consolo, *L'antefatto della sentenza della Consulta: l'azione di accertamento della "qualità" ed "effettività" del diritto elettorale*, in *Corriere Giuridico*, 31 (1), 2014, 7; Id., *Dopo la Consulta la Cassazione chiude sulla vecchia legge elettorale, ma quanto davvero?*, in *Corriere Giuridico*, 31 (12), 2014, 1553; G. Basilico, *Mero accertamento di diritti fondamentali e giudizio di legittimità costituzionale*, in *Rivista Diritto Processuale*, 76 (1), 2021, 34. For this and other examples of strategic litigation in Italy, see also S. Pitto, *Public interest litigation e contenzioso strategico nell'ordinamento italiano. Profili critici e spunti dal diritto comparato*, in *DPCEonline*, 50 (Spec), 2021, 1061.

Eleonora Ebau

Third-Party Funding: a Cornucopia for Strategic Climate Change Disputes?

1. *Introduction*

Over the last decade, thousands of lawsuits have been brought around the globe in order to hold governments and corporations accountable for their impacts on climate change and environmental disasters. Despite the great influence that strategic litigation might have on environmental regulation and policy, plaintiffs still have to face severe financial barriers to access to justice. Nonetheless, as high-profile environmental cases usually involve large sums of money to recover, they have been under the spotlight of third-party funders lately. In fact, if the claim is successful, the funder not only recovers the initial investment, but it also gets part of the amount awarded to the funded party (either a percentage or a success fee). It goes without saying that the higher the value of the dispute, the greater the revenue for the funder. From this perspective, funding climate change disputes seems a "win-win" scenario: on the one hand, strategic litigators can have access to justice and proceed before courts or tribunals. On the other hand, third-party funders monetise their investments, receiving remuneration if the funded party wins the case. However, the financing of climate change litigation could raise concerns for several reasons. Among other circumstances, one has to consider that the phenomenon of litigation funding is still not widely and generally regulated and several issues might occur in climate change strategic litigation related to: the profitability barrier, the control of the funder over the dispute, the funding of anti-regulatory disputes etc. In particular, funders are mostly profit-oriented entities which have merely lucrative purposes, while the funded party's goals are commonly linked to environmental justice, human rights' assessment, etc. As a consequence, this situation might cause misalignments between the funder and the funded party's interests.

Overall, it is undeniable that litigation funding might have a great impact on the future evolution of strategic climate change litigation. Therefore, this paper aims at figuring out the importance and the barriers of climate change litigation and the potential developments of Third-Party Funding of strategic environmental disputes. More specifically, the author intends to draw some guidelines in order to highlight benefits and avoid risks of litigation funding involved in climate change lawsuits.

2. *Climate Change Litigation: Potential Impact and Barriers*

Anthropogenic climate change has been defined as one of the most urgent problems of this century worldwide[1]. In order to prevent the worst consequences of global warming, several actions at different levels have been carried out. In particular, states committed to reduce their greenhouse gas emissions by signing the United Nations Framework Convention on Climate Change (UNFCCC) (1992), followed by the Kyoto Protocol (1997) and then the Paris Agreement (2015)[2]. Moreover, intergovernmental organisations, such as the World Trade Organisation as well as Non-Governmental Organisations structured specific programs in order to tackle the climate change issue[3]. Alongside these actions, climate change strategic litigation is emerging and increasingly getting consensus, due to its capability to enforce environmental standards faster than other vehicles[4]. Indeed, it is undisputed that strategic litigation can have a great impact on environmental policy and regulatory landscape. To this regard, it has been argued that high-profile cases – even if unsuccessful – can raise awareness on climate change and bring the issue to the attention of governments, serving as a catalyst for executive action[5]. Moreover, a variety of strong arguments – already tested in strategic cases – might inspire and influence plaintiffs in other jurisdictions, thus having a ripple effect on an

1 . M. Saracino-Lowe, *Urgenda, milieudefensie, and the impact of climate change litigation on global trade policy*, in *Minnesota Journal of International Law*, 32 (1), 2023, 301.
2. *Ivi*, 302.
3. More specifically, on WTO actions related to climate change, see supra *ibidem*.
4. *Ibidem*.
5. F. Bisalbutr, *The potential impact of climate change litigation on government policy*, in *Notre Dame Journal of International & Comparative Law*, 11 (2), 2021, 275; J. Peel - R. Markey-Towler, *Recipe for success?: lessons for strategic climate litigation from the sharma, neubauer, and shell cases*, in *German Law Journal*, 22 (8), 2021, 1485; B.J. Preston, *Climate change litigation (part 2)*, in *Carbon & Climate Law Review*, 2, 2011, 263.

international scale[6]. More specifically, Peel and Markey-Towler have identified six common features of environmental claims that tend to generate a systemic impact[7]. These characteristics are the following: (1) carefully selecting plaintiffs to communicate a strategic message[8]; (2) engaging an experienced legal team with a track record of bringing other strategic climate legal interventions; (3) targeting defendants which are widely seen to be lagging in their climate action[9]; (4) trying legal arguments closely to the latest science[10]; (5) adopting innovative legal arguments, including those emphasising duties of protection; and (6) seeking remedies that extend beyond the situation of individual litigants and contribute to shape new policies and regulations[11].

Despite the great impact that strategic climate change litigation can have globally, there are some major procedural barriers that can affect the right to access to justice for whom is willing to bring an environmental claim[12]. First, plaintiffs need to overcome a direct barrier which is standing to sue[13]. Second, capable attorneys and other expert must be able to assist with the case, sometimes on a pro bono basis[14]. Third, there must be a suitable court or tribunal that has jurisdiction to hear the case[15]. Fourth,

6. F. Bisalbutr, *The potential impact*, cit., 275; J. Peel - R. Markey-Towler, *Recipe*, cit., 1485.

7. J. Peel - R. Markey-Towler, *Recipe*, cit., 1485.

8. For instance, in the Sharma case the plaintiffs are a group of eight Australian children under the age of 18, representing their own interests and the interests of children ordinarily living in Australia, to stress the fact that current children and future generations will be the most affected by climate change.

9. For instance, Danone and Shell have been sued as they are among the most polluting companies in the world respectively due to plastic and oil and gas. On the topic, see ClientEarth website: www.clientearth.org (accessed on 22 August 2023)

10. Most strategic climate change litigation refer, among other sources, to the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report "Climate Change 2021: The Physical Science Basis", which addresses the most up-to-date physical understanding of the climate system and climate change, bringing together the latest advances in climate science; text available at the website: www.ipcc.ch (accessed 22 August 2023).

11. J. Peel - R. Markey-Towler, *Recipe*, cit., 1485.

12. J. Peel - H. Osofsky - A. Foerster, *Shaping the 'next generation' of climate change litigation in Australia*, in *Melbourne University Law Review*, 41 (2), 2017, 831.

13. J.E. Bonine, *Removing Barriers to Justice in Environmental Litigation*, in *Rutgers International Law and Human Rights Journal*, 1, 2021, 102; J. Peel - H. Osofsky - A. Foerster, *Shaping*, cit., 831.

14. J. Peel - R. Markey-Towler, *Recipe*, cit., 831.

15. *Ibidem*.

one has to consider whether the merits review (*de novo* review of law and facts) is available to claimants or only a judicial review (review of legal process and validity) is feasible[16]. Last but not least, environmental litigation might imply very high costs, such as high court filing fees, security for costs or similar bond as a condition of obtaining an injunction, strategic lawsuits against public participation (also known as SLAPP suits or intimidation lawsuits), lawyers' fees, in case of appeal too[17]. It goes without saying that all these potential fees and costs may represent an indirect financial barrier for the plaintiffs, even if they have a meritorious environmental claim[18]. To this regard, it is to be said that financial barriers are even more severe when Global South petitioners – which are generally poorer – are willing to bring their cases in the Global North[19]. Moreover, when considering allocation of costs of proceedings, one has to bear in mind that most jurisdictions around the world apply the principle "*costs follow the event*", also called "*English Rule*", providing that the loser party pays all the costs awarded in the final decision[20]. As a result, many meritorious and potentially successful claims do not even make it to a court or tribunal because of the risk of paying also the opposing party's attorney's fees, which may be a government or a corporation, as the case may be[21]. Overall, it is clear that strategic litigation can be one of the effective ways to address climate change and have an impact on the regulatory and policy framework, however, financial barriers can hold back its rise. For the purpose of this paper, the author focuses on the financial barrier of environmental disputes among others procedural obstacles.

16. *Ivi*, 832.
17. J.E. Bonine, *Removing*, cit., 113-114; J. Peel - R. Markey-Towler, *Recipe*, cit., 832.
18. J.E. Bonine, *Removing*, cit., 113-114; J. Peel - R. Markey-Towler, *Recipe*, cit., 832.
19. H.M. Osofsky, *The Geography of Emerging Global South Climate Change Litigation*, in *AJIL Unbound*, 114, 2020, 65.
20. J.Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, in *Michigan Journal of International Law*, 21 (1), 1999, 5.
21. J.E. Bonine, *Removing*, cit., 123.

3. *Potential Developments of Third-Party Funding of Climate Change Disputes*

3.1 *Funding of Climate Change Disputes: A Win-Win Scenario?*

In order to overcome financial barriers, environmental claimants may decide to resort to Third-Party Funding. This phenomenon has been defined as «the professional practice of an entity, which is not a party to the dispute, in funding all or part of the costs of domestic or cross-border proceedings. The funding is provided in exchange for a reimbursement of the "investment" and for remuneration that is (a) wholly or partially dependent on the outcome of the dispute ("percentage approach") or (b) provided through a success fee ("multiple approach")»[22]. The phenomenon has been dramatically gaining popularity in recent decades not only in litigation but also in the context of international arbitration, and it is argued that it can be beneficial for climate change disputes as well[23].

This activity is commonly carried out by private entities and both natural and legal persons can benefit from it. These very features differentiate Third-Party Funding from state legal aid, which is instead a public tool aimed at financing disputes for natural persons with low income only[24]. Moreover, Third-Party Funding differs from other private instruments available in the litigation financing market, such as Legal Expense Insurances (LEIs) – commonly divided into Before The Event (BTE) and After The Event (ATE) insurance agreements – assignment and sale of claims, contingency fees agreements, etc. More specifically, the fact that the funded party is not required to reimburse the sum paid by the funder, in case of failure, represents the reason why this kind of agreements are qualified as non-recourse and not as loans[25]. As a consequence, third-party funding agreements, conceived in a no-win-no-pay scheme, might not be subject to state usury laws and consumer lending laws[26]. Moreover, as Third-Party Funding agreements usually follow a non-recourse scheme,

22. E. D'Alessandro - C. Poncibò *et al.*, *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, in *EPRS Research Paper*, 43, 2020, text available at www.europarl.europa.eu (accessed 22 August 2023).
23. M. Faure, *Environmental liability of companies in Europe*, in *Arizona Journal of International and Comparative Law*, 39 (1), 2022, 127-128.
24. E. D'Alessandro - C. Poncibò *et al.*, *State*, cit., 44-45.
25. T. Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, in *Widener Law Journal*, 23 (1), 2013, 233-234.
26. *Ibidem*.

they differ from LEIs in several ways. First, funders do not merely cover the disputing party's legal costs, but they also try to get a return from the investment, while an insurance keeps a party free from risks associated with a lawsuit[27]. Second, Third-Party Funding agreements do not require a disbursement of money by the client before the dispute, while the insurance – especially the case of BTEs – requires a premium[28]. In other words, the allocation of risk in Third-Party Funding is totally upon the funder, while in an insurance agreement the risk is shared by the insurance company and the insured party who pays the *premium*. Third, LEI contracts may fund either side of the claim, namely both claimants and respondents, while funders – particularly in litigation and investment arbitration – tend to fund only the plaintiff, unless the defendant brings counterclaims[29]. Third-party funding agreements are also different from a transfer of claim, as the funder does not become a party in the case and claim is not purchased by the funder[30]. Moreover, Third-Party Funding differs from the assignment of claim for collection only, as the funder is usually not the assignee of the claim for collection purposes[31]. Lastly, Third-Party Funding differs from contingency fees, conditional fees, success fee, no-win-no-fee, damages-based agreements, where the lawyer or the law firms themselves (and not a third party to the dispute) fund the case[32].

Once the definition of the phenomenon has been briefly outlined, it is appropriate to consider whether Third-Party Funding can be successfully used in environmental litigation. As mentioned before, climate change litigation could be «*a lengthy, costly and risky process*»[33]. Accordingly, given the uncertainty about the length and the outcome of a dispute, the high

27. V. Frignati, *Ethical Implications of Third Party Funding in International Arbitration*, in *Arbitration International*, 32 (3), 2016, 508-509.

28. E. D'Alessandro - C. Poncibò *et al.*, *State*, cit., 69.

29. W.H. van Boom, *Juxtaposing BTE and ATE: the Role of the European Insurance Industry in Funding Civil Litigation*, in *Oxford University Comparative Law Forum*, 1, 2017, text available at www. law.ox.ac.uk (accessed 22 August 2023).

30. V.A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, in *Cardozo Law Review*, 36, 2015, 880; E. D'Alessandro - C. Poncibò *et al.*, *State*, cit., 46.

31. E. D'Alessandro - C. Poncibò *et al.*, *State*, cit., 46.

32. G.M. Solas, *Alternative Litigation Funding and the Italian Perspective*, in *European Review of Private Law*, 24 (2), 2016, 264; E. Bertrand, *The Brave New World of Arbitration: Third-Party Funding*, in *Asa Bulletin*, 29 (3), 2011, 607; V.A. Shannon, *Harmonizing*, cit., 871-872.

33. E. Davies, *Recommendations for effectively resolving climate change disputes against investors*, in *Carbon & Climate Law Review (CCLR)*, 1, 2020, 53.

costs of the lawsuit could jeopardise the right of access to justice of a party who does not have sufficient funds to bring an action or defend against it[34]. In this regard, it has been widely argued that Third-Party Funding promotes access to justice because it relieves from legal fees disadvantaged parties who cannot afford a substantial disbursement for a lawsuit[35]. In other words, it promotes access to justice by allowing claimants with meritorious cases to initiate proceedings that they would otherwise be unable to initiate[36]. This general principle can easily be applied to climate change disputes too. Moreover, from the point of view of funders, environmental litigation is very attractive, as the high value of the lawsuits could ensure them a large profit if the funded party wins the case[37]. Therefore, at first glance, Third-Party Funding of climate change disputes seems to be a "win-win" scenario: on one side, environmental petitioners can have access to justice and proceed before courts or tribunals, while on the other hand, third-party funders would get a percentage of the sum awarded in the judgment or a success fee, if the funded party is successful in the lawsuit. However, some issues may arise on the topic and therefore need to be addressed.

3.2 *The Suitability of the Dispute for Funding*

First of all, it is to be underlined that not all environmental claims are under the spotlight of litigation funders. Indeed, to be eligible for funding, a lawsuit must have a sufficient success rate and potentially provide a return that can offset the initial investment and risk of loss, thus overcoming the "*profitability barrier*"[38]. However, some climate change disputes exclusively aim at defining policies and governance for environmental

34. J. Von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, Alphen aan den Rijn, 2016, 83.

35. C. Dos Santos, *Third-party funding in international commercial arbitration: a wolf in sheep's clothing?*, in *ASA Bulletin*, 35 (4), 2017, 920; C. Veljanovski, *Third-Party Litigation Funding in Europe*, in *Journal of Law, Economics and Policy*, 8 (3), 2012, 437; J. Von Goeler, *Third-Party Funding*, cit., 83.

36. P. Callens - F. Lefèvre *et al.*, *Legality of third-party funding mechanism under Belgian law*, in J.F. Tossens - A. van Hooft (eds.), *b-Arbitral Belgian Review of Arbitration*, 1, 2017, 37, text available at www.kluwerlawonline.com (accessed 22 August 2023).

37. I. Kaminski, *An ocean of opportunities? Climate litigation is doing so well it's now being eyed by investors*, in *The Wave*, 2023 February 1, text available at www.the-wave.net (accessed 22 August 2023).

38. C. Dos Santos, *Third-party funding*, cit., 921; J. Von Goeler, *Third-Party Funding*, cit., 84.

protection[39]. Let's consider for example an inter-states dispute where a State A seeks liability of a State B, for the damage incurred on its territory, by claiming that State B failed to comply with its due diligence obligation on private companies responsible for GHG emissions within its jurisdiction[40]. In other words, State A claims that State B has not taken all the necessary and adequate measures it should have taken to regulate the emissions of private entities under its jurisdiction[41]. It is clear that the purpose of that case is not compensating a material prejudice, but rather «*restoring legality and preventing further harm*»[42]. Despite the great impact that such disputes might have on environmental policies and governance, no funder – with profit purposes – would be interested in investing in those cases. Indeed, there is no condemnation of the counterparty that would represent compensation for damages suffered by the funded party, as well as an economic return for the funder. Accordingly, several climate change disputes would be excluded by default from funders as unprofitable.

That being said, however, an increasing number of strategic litigators seek damages from polluting companies for various reasons, such as greenhouse gas emissions, greenwashing, failure to disclose to investors the potential costs and risks associated with climate regulation, etc.[43]. This category of claims is definitely of interest of funders, which can potentially monetise their investment at the end of the lawsuit. Therefore, it is true that Third-Party Funding can foster access to justice, but it would seem more accurate to say that this phenomenon promotes access to remunerative justice, as only disputes with a financial remedy are chosen by funders.

In addition to that, one must bear in mind that, in assessing whether the dispute is suitable for funding, the profitability of the investment is not the only parameter considered by funders. More specifically, third-party funders draw a due diligence check-list, similar to the one used in the merge & acquisition process, evaluating different factors such as:

39. C. Dos Santos, *Third-party funding*, cit., 921; J. Von Goeler, *Third-Party Funding*, cit., 84.

40. S. Maljean-Dubois, *Climate change litigation*, in *Max Planck Encyclopedia of Procedural Law*, 2019, 31.

41. *Ivi*, 23.

42. *Ivi*, 31.

43. I. Kaminski, *An ocean*, cit.; A. Foerster - K. Sheeman - D. Parris, *Investing for safe climate?*, in *University of New South Wales Law Journal*, 44 (4), 2021, 1411; D. Grossman, *Tort-Based Climate Litigation*, in W.C.G. Burns - H.M. Osofsky (eds.), *Adjudicating Climate Change*, Cambridge, 2009, 193-194.

– the merits of the case;
– the substantive law of the dispute;
– the quality and the quantity of the documentary evidence;
– as to litigation, the jurisdiction where the claim is to be heard;
– as to arbitration, the arbitral institution's practice and reputation;
– the size of the claim and the projected legal costs, that is to say, the value of the claim and the perspective investment to be done;
– the expected duration of the proceedings;
– the likelihood of success;
– portfolio risk management constraints in terms of proportion of investable funds committed to an individual case, and risk profile;
– especially as to international arbitration and transnational litigation, the enforceability of the judicial decision/ award against the counterparty;
– defendant's solvency and ability to pay costs and any decision/ award/ settlement;
– the risks associated with any possible counterclaim;
– potential adverse costs they may face in an unsuccessful claim;
– the expertise and deliverability of the legal team they will be funding;
– claimant's motivation, commitment and "(dis)honesty"[44].

When looking specifically at climate change disputes, among other factors, the jurisdiction where the judgment is to be rendered and where it is to be enforced are key elements that funders take into consideration[45]. In fact, well established jurisdictions, such as the United Kingdom, United States or Australia, can provide higher legal certainty to plaintiffs, as environmental litigation in those countries has a long history and reputation[46]. However,

44. C. Flechet - A. Goldsmith - M. Scherer, *Third party funding in international arbitration in Europe. Part 1: funders'perspectives*, in *International Business Law Journal*, 207, 2012, 212-213; E. De Brabandere - J. Lepeltak, *Third Party Funding in International Investment Arbitration*, in *Grotius Centre Working Paper No. 2012/1*, 2012, 5-6; N. Landi, *Chapter II: the Arbitrator and the Arbitration Procedure: Third-Party Funding in International Commercial Arbitration - an Overview*, in C. Klausegger - P. Klein *et al.* (eds.), *Austrian Yearbook on International Arbitration*, Vienna, 2012, 98; C. Veljanovski, *Third-Party Litigation*, cit., 418-420.

45. P. Mc Donald, *Third party funding of climate change arbitration*, in *Pinsent Masons Out-Law Guide*, 2022, April 5, text available at www.pinsentmasons.com (accessed 22 August 2023).

46. P. Mc Donald, *Third party funding*, cit.; J. Peel - H. Osofsky - A. Foerster, *Shaping*, cit., 795.

such an assessment might foster funding of climate change disputes in the Global North, to the detriment of the Global South.

3.3 *Control of the Funder Over the Dispute*

Alongside the issue of the suitability of the dispute for funding purposes, it is worth considering that Third-Party Funding is generally unregulated especially in domestic litigation. Therefore, several issues might arise such as the control of the funder over the dispute. Indeed, it has been argued that the funder's objectives of minimising costs and maximising the profitability of its investment would invariably result in a substantial degree of control over the process[47]. Primarily, a funder may exert control over the claim while negotiating the funding agreement, by making certain case assessment criteria a precondition for funding[48]. For instance, it may influence the choice of the legal team assisting the funded party, or, as to arbitration, it may have a say in the choice of the arbitrator appointed by the party[49]. This could have a substantial influence in the outcome of the dispute.

Moreover, the funder has usually the power of monitoring the case during proceedings, through several means. First, a funder may exert control over the dispute via contractual rights to influence strategic procedural decisions, such as: settlement, withdrawal, waiver, or other disposal over the claim, as well as changes in the funded party's legal team[50]. In particular, it might happen that at certain point of the proceedings the party and its lawyer are willing to reach a settlement agreement, while the funder considers it more beneficial to go ahead with the dispute[51]. Second, the funder may influence the lawsuit via case budgeting, since money equals to power[52]. Indeed, the funder could force the party to follow the cheapest way of proceedings in order to maximise its return, but this could jeopardise counsel's professional duties[53]. Third, any termination rights of the funder, agreed upon in the funding contract, may amount to

47. K.H. Shahdadpuri, *Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory*, in *Asian International Arbitration Journal*, 12 (2), 2016, 84.
48. J. Von Goeler, *Third-Party Funding*, cit., 41.
49. K.H. Shahdadpuri, *Third-Party Funding*, cit., 84.
50. J. Von Goeler, *Third-Party Funding*, cit., 41.
51. N. Landi, *Chapter II*, cit., 100.
52. J. Von Goeler, *Third-Party Funding*, cit., 42.
53. *Ivi*, 43.

a powerful indirect control over the funded party and its counsel, which could therefore be induced to comply with the funder's strategy[54].

In order to preserve the integrity of the judicial system, some bodies of law have regulated the issue.

For instance, the Code of Conduct for Litigation Funders[55] sets forth several limitations to funder's control over the proceedings[56]:

1) the funder must ensure that the funded party received independent advice on the terms of the Litigation Funding Agreement[57];
2) the funder must not place the litigant's lawyer in a position of conflicts of interest in breach of its professional duties[58];
3) the funder must ensure that it will not seek to influence the litigant's lawyer in order to cede control or conduct of the dispute to the funder[59];
4) the funder is prevented from taking control of settlement negotiations[60];

54. J. Von Goeler, *Third-Party Funding*, cit., 44.

55. In England and Wales, the Association of Litigation Funders (ALF) adopted the Code of Conduct for Litigation Funders which is a voluntary self-regulation measure binding only for the funders, which take part in the Association. Even though the ALF Code does not have the force of the law, it represents a first important attempt of soft-regulation. The funders who decide to take part in the Association would be bound to the Code, regardless of the proceedings they decide to fund.

56. R. Mulheron, *England's unique approach to the self-regulation of third-party funding: a critical analysis of recent developments*, in *Cambridge Law Journal*, 73 (3), 2014, 582.

57. Code of Conduct for Litigation Funders Clause 9.1: «A Funder will take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute».

58. Code of Conduct for Litigation Funders Clause 9.2: «A Funder will not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties».

59. Code of Conduct for Litigation Funders Clause 9.3: «A Funder will not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder».

60. Code of Conduct for Litigation Funders Clause 11.1: «The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may provide input to the Funder Party's decisions in relation to settlements» and Clause 13.2: «If the LFA does give the Funder or Funder's Subsidiary or Associated Entity any of the rights described in clause 11, the LFA shall provide that if there is a dispute between the Funder, Funder's Subsidiary or Associated Entity and the Funded Party about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council».

5) the funder must behave reasonably and may only withdraw from funding in specific circumstances[61].

Another example is the Hong Kong Arbitration Ordinance which states that the degree of control of the funder over arbitration proceedings has to be set out under the funding agreement, as well as its termination rights[62]. Whenever, the funder is not bound by any self-regulation or other legal provisions, it is fundamental to deal with above mentioned issues – relating the control of the funder over the dispute – within the funding agreement. This is even more so in relation to climate change disputes, where plaintiffs' goals are commonly linked to environmental justice, human rights' assessment etc., while funders are profit-oriented entities, which have merely lucrative purposes. Needless to say, this situation might cause misalignments between the funder and the funded party's interests. For this reason, it is essential that the funded party and its legal team keep control over the dispute and decide the litigation strategy in the best interest of environmental issues.

3.4 *Funding of Anti-Regulatory Disputes*

It is well-known that climate change litigation encompasses a wide spectrum of different lawsuits. Alongside cases with a positive impact on the regulatory framework aimed at mitigating climate change, there

61. Code of Conduct for Litigation Funders Clause 11.2: «The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity: 11.2.1 reasonably ceases to be satisfied about the merits of the dispute; 11.2.2 reasonably believes that the dispute is no longer commercially viable; or 11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party».

62. Hong Kong Arbitration Ordinance (Cap. 609) Part 10A, Division 4, 98Q: «Content of code of practice

(1) Without limiting section 98P, the code of practice may, in setting out practices and standards, require third party funders to ensure that - […]

(b) funding agreements set out their key features, risks and terms, including -

(i) the degree of control that third party funders will have in relation to an arbitration;

(ii) whether, and to what extent, third party funders (or persons associated with the third party funders) will be liable to funded parties for adverse costs, insurance premiums, security for costs and other financial liabilities; and

(iii) when, and on what basis, parties to funding agreements may terminate the funding agreements or third party funders may withhold arbitration funding; […]».

have been cases of anti-regulatory or defensive litigation[63]. For instance, in the United States plaintiffs brought actions to contrast regulatory measures set forth by the legislative and the executive, thus ultimately opposing the implementation of environmental policies[64]. Moreover, it has been argued that Investor-State Dispute Settlement (ISDS) may be fertile ground for investors who plan to seek damages for expected losses from the implementation by host states of measures aimed at addressing climate change[65]. As explained further above, due to the profitability barrier, funders only consider claims with a financial remedy; thus, for example, actions for specific performance are not suitable for funding, as they do not involve a financial outcome to be shared[66]. Conversely, Third-Party Funding can be a valuable tool that facilitates access to justice for investors who wish to obtain compensation but are financially unable to initiate investor-state arbitration, often precisely because of foreign governments that have expropriated their investments[67]. Nevertheless, a harsh criticism has been made with particular reference to disputes brought against developing countries by large economic powers, such as multinational companies. In fact, some authors argue that in cases where the funded-investor wins, the awards represent a real transfer of wealth from states and their citizens to speculative finance, due to the fact that the vast majority of all investors come from high-income countries, and developing countries win only half as often as developed countries[68]. With this in mind, it is clear that developing countries are particularly vulnerable[69]. More specifically, when the investor brings an anti-regulatory climate change lawsuit against the host state, it is

63. J. Peel - H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, 2015, 283; N. Singh Ghaleigh, '*Six Honest Serving Men': Climate Change Litigation as Legal Mobilization and the Utility of Typologies*, in *Climate Law*, 1 (1), 2010, 44.

64. J. Peel - H.M. Osofsky, *Climate*, cit., 267.

65. J. Setzer - C. Higham, *Climate change litigation*, in *ECB Legal Working Paper Series No. 21*, 2021, 11, text available at www.ecb.europa.eu (accessed 22 August 2023).

66. C. Veljanovski, *Third-Party Litigation*, cit., 419.

67. T. Santosuosso - R. Scarlett, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, in *Boston College Law Review*, 60 (9), 2019, 10.

68. F. Garcia, *Third Party Funding as Exploitation of the Investment Treaty System*, in *Boston College Law Review*, 59 (1), 2018, 4; Id., *The Case Against Third-Party Funding in Investment Arbitration*, in *Investment Treaty News*, 2018 July 30, text available at www.iisd.org (accessed 22 August 2023).

69. F. Garcia, *Third Party Funding*, cit., 4; F. Garcia, *The Case*, cit.

questionable whether the funding can be still considered meritorious. In fact, in such a case, Third-Party Funding would facilitate an action that opposes climate change measures, which are typically in the interest of society as a whole.

Prohibiting Third-Party Funding in those cases does not seem a viable option. However, the arbitral tribunal can somehow rebalance the playing field when deciding on costs or security for costs. Indeed, several investment arbitration rules require not only the disclosure of the funding agreement, but they also establish that the tribunal, in deciding the costs of arbitration, must consider the funding agreement entered into by the parties[70]. Similarly, the International Centre for Settlement of Investment Disputes (ICSID) in the 2022 Amendment of the ICSID Rules requires the arbitral tribunal to take the funding agreement into consideration when deciding on security for costs[71]. In light of these rules, the arbitral tribunal might decide not to follow the English Rule in the allocation of costs in case the funded-investor wins the anti-regulatory dispute, or it may require the funded-investor to pay a security for costs at the beginning of the dispute. Such decisions might somehow rebalance the economic position of the parties at stake, levelling the playing field. Moreover, this option would not prevent the use of Third-Party Funding in anti-regulatory disputes, but it may at least discourage funders from funding them.

4. *Concluding Remarks*

Despite the great impacts that climate change litigation might have on the regulatory framework, plaintiffs still have to overcome high financial obstacles in order to bring meritorious claims before a court or a tribunal. Due to the high value of the disputes, third party funders might be interested in funding climate change disputes, thus promoting access to justice for strategic petitioners. However, not all climate change disputes are suitable for funding, but only those involving a financial remedy might be attractive to funders. Moreover, most likely funders would choose to fund disputes in jurisdictions that have a history in climate change litiga-

70. Art. 27 CIETAC International Investment Arbitration Rules; Art. 33.1 SIAC Investment Arbitration Rules, Art. 39.2(d) of the BAC/BIAC Rules for International Investment Arbitration.

71. See Rule 14 and 53 of the ICSID Rules as amended and entered into effect on July 1, 2022.

tion and a well-established judicial and political system. In any case, when negotiating a funding agreement, among other conditions, it is highly recommended to get an independent advice from a lawyer, properly regulate the termination rights of the funder etc. in order to prevent the funder from taking control over the dispute. In fact, in funding climate change disputes there is typically a misalignment between the funder's and the funded party's interests. Last but not least, it is appropriate to consider the scenario in which a funder decides to fund an anti-regulatory dispute specifically in investor-state arbitration. In such cases, it is argued that – if provided for in the arbitration rules – the arbitral tribunal might restore the unbalances between the funded-investor and the host state, taking into consideration the funding agreement, when deciding on the allocation of costs or on the request of security for costs.

In conclusion, Third-Party Funding can certainly foster strategic climate change litigation by providing access to justice for plaintiffs; however, the issues mentioned above must be considered when entering into a funding agreement and throughout the proceedings.

Ana Filipa Morais Antunes

The Role of "Contract Design" in Climate Change Litigation

1. *Introduction*

This article will refer to corporate sustainability and responsible contracting.

The four main aims are the following:

- *First*, to clarify the critical ideas on ESG ("Environmental, Social and Governance") and the future EU framework on corporate sustainability, namely, the proposal for a "Directive on Corporate Sustainability Due Diligence" (CSDDD) submitted by the European Commission on 23 February 2022.
- *Second*, to highlight the relationship between these concepts:
  (i) Sustainability
  (ii) Companies
  (iii) Responsibility
  (iv) Rationality.
- *Third,* to anticipate the main challenges for companies in the future.
- *Fourth,* to emphasise the leading role of the contract in enforcing environmental sustainability and climate change (through "responsible contracting" and adequate tailor-made "ethical clauses").

2. *ESG and Sustainability*

In the current context, ESG ("Environmental, Social and Governance") criteria and "corporate due diligence" are the new requirements of the future "law of sustainable and responsible businesses". ESG, corporate sustainability, and responsible business practices are essential for a "green transition"[1].

1. A.F. Morais Antunes, *ESG, racionalidade empresarial, e novos contenciosos* and *ESG, sustentabilidade empresarial e contratação responsável. Em especial, o papel do contrato e*

The ESG trilogy is a set of regulatory parameters for sustainable business, development, and investment:

– "E", for "Environmental", relates to the prevention of climate risk factors and adverse environmental impacts;
– "S", for "Social", relates to the protection of human rights, local communities, workers, consumers, and the most vulnerable persons and group of persons;
– "G", for "Governance", links to sustainable governance measures to ensure rational business decisions[2].

This trilogy is relevant to ethics and law: sustainability parameters will apply to companies as mandatory rules and are the future binding principles of "responsible business" that will force companies to act with "fair dealing"[3].

The ESG parameters and the future EU sustainability framework aim to protect third persons and prevent adverse impacts on human rights and the environment. The future "law of sustainable and responsible businesses" requires practical actions and is not a purely academic problem that companies can solve with "pamphlet" measures. The new sustainability parameters are a relevant challenge for companies.

Companies should, therefore:

– Implement an appropriate ESG transition plan and tailored sustainability business models and strategies.
– Manage the associated (potential and actual) risk of adverse impacts to human rights and the environment.
– Prioritise harm prevention through balanced, reasonable, transparent, and adequate measures.

das "cláusulas éticas*"*, both in *Revista de Direito Comercial*, available at www.revistadedireitocomercial.com (accessed on 31 August 2023).

2. For the definition of ESG as «a set of responsible investment criteria», see. P. Câmara, *The Systemic Interaction Between Corporate Governance and ESG*, in P. Câmara - F. Morais (eds.), *The Palgrave Handbook of ESG and Corporate Governance*, Palgrave Macmillan, Cham, 2022, 3-40 (13).

3. The criteria of "fair dealing" are defined in the "Draft Common Frame of Reference" (DCFR): articles I. – 1:103: "Good faith and fair dealing" (Book I), e III. – 1:103: "Good faith and fair dealing" (Book III), text available at www.trans-lex.org (accessed on 31 August 2023). On the importance of "fair dealing" in private law, see A.F. Morais Antunes, *A força maior e o (des) equilíbrio negocial*, in E. Vaz de Sequeira (Coord.), *Católica Talks: Direito e Pandemia*, UCE, Lisbon, 2022, 9-75 (67-68), and *Equilíbrio negocial e fair dealing*, in *IV Encontros de Direito Civil: Limites à Autonomia*, UCE, Lisbon, 2023, 123-156, both texts available at A.F. Morais Antunes, *Equilíbrio negocial*, UCE, Lisbon, 2024.

A company that is not sustainable will be held accountable and should be liable for damages caused to human rights, third persons, and the environment.

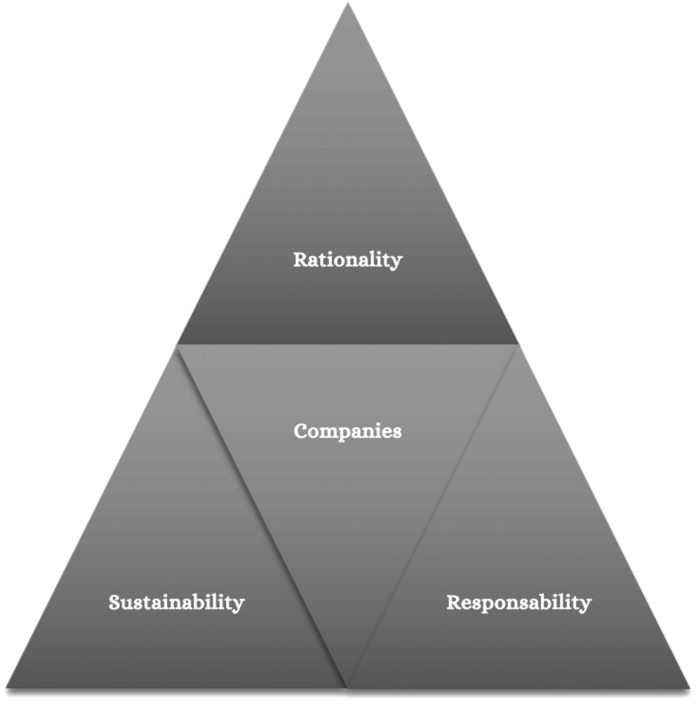
In the future:

- Companies must *update their models and decision frameworks* and *integrate transparent and accurate sustainability strategies*.
- *Non-compliant companies should be liable for damages* caused to human rights, third parties and the environment.

3. *The New "Pyramid Relationship": the Four Fundamental Concepts*

The future "law of sustainable and responsible businesses" involves four fundamental concepts:

- Rationality;
- Companies;
- Sustainability;
- Responsibility.



First, we should define the concept of *corporate sustainability*. With that purpose, it is essential to consider the ESG trilogy and the key ideas of *corporate responsibility* and *responsible business*. In simple terms, a company that is not socially and environmentally sustainable in the short, medium, and long term will be held accountable and should be liable for any damage caused to human rights, third parties and the environment.

Second, the "new" *rationality* demands fair, transparent, reasonable, tailor-made, and balanced *preventive measures* to avoid adverse impacts on human rights, third persons and the environment.

The diagnosis of "renewed corporate rationality" (*e.g.,* more sustainable and aligned with the company's obligations on human rights and the environment) suggests that, in the future, companies will be obliged to an accurate balance of the different interests involved: companies should anticipate their potential adverse impacts on human rights and the environment. This consideration goes beyond the purely economic level and the merely arithmetical implications. The expectation of profit and the potential rewards of a business decision or an investment constitute only one of the criteria to be invoked in the decision-making process whenever there is an alternative (even if immediately less attractive from an economic point of view). Business decisions will be syndicated and evaluated considering the disruptions, and adverse impacts (potential and actual) on local communities, fundamental rights, and the environment[4].

The contract can play an important role: tailored and accurate contractual clauses are essential in the future "law of sustainable and responsible businesses". This new perspective involves a "revolution" of the traditional concept and role of the contract, focused on the binding agreement between two or more parties. Companies should conclude *contracts committed to the respect of human rights, climate requirements and the environment*. Contractual freedom allows the parties to determine the contract's content "subject to any applicable mandatory rules". The scope of limitations on contractual freedom should include, as a mandatory

4. It has a significant adverse impact on the environment, for example: climate change; pollution of air, soil, water, and marine resources; endangerment and damage to protected species; loss of biodiversity; degradation of ecosystems; deforestation; overexploitation of natural resources (water, energy); misuse of mercury products; misuse of carbon resources; increased energy consumption; mismanagement of waste; harm to animal welfare.

rule, the *duty to prevent harmful effects on third parties, the environment and society*.

The upcoming European framework for corporate sustainability leads to a *"new" role of contract as a binding agreement committed to social, climate and environmental requirements*. This "new" idea of the contract includes an "*external function*": contracts harmful to human rights, third parties, or the environment may be considered null and void on the grounds that they are contrary to public policy[5].

Therefore, in the future "law of sustainable and responsible businesses":

a) *Third parties have the right to be protected by the companies' activities and operations*, directly or indirectly.
b) *Companies are obliged to protect human rights*, mainly vulnerable persons and groups of persons, *and the environment*.
c) *Companies are obliged to prevent any adverse impacts caused by their activities or operations on human rights, third persons or the environment*[6].
d) *Companies will be responsible for the adverse impacts* (actual and potential) *and damages caused to human rights, third persons and the environment.*

The future European framework will require companies to adopt *new models of practices*, a *"purpose-driven" not (exclusively) profit-oriented approach*, and an *adequate balance between profit and social, environmental, and climate criteria*: the new paradigm must be "*sustainability over profit*" and "*short, medium and long-term social and environmental sustainability over short-term profit*".

5. For the prohibition of «contracts harmful to third persons and society in general» as a limitation of the fundamental principle of contractual freedom, see *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, in C. von Bar - E. Clive - H. Schulte-Nölke (eds.), *Sellier, European Law Publishers*, Munich, 2009, 64 ff.: «A ground on which a contract may be invalidated, even though it was freely agreed between two equal parties, is that it (or more often the performance of the obligation under it) would have a seriously harmful effect on third persons or society. Thus, contracts which are illegal or contrary to public policy in this sense are invalid».

6. For example, child labour, slavery, labour exploitation, pollution, deforestation, excessive water consumption or damage to ecosystems.

4. *The Future European Mandatory Framework: the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (CSDDD)*

In the European Union, concerns about sustainability, corporate due diligence and responsibility have motivated relevant acts in the last two years, namely:

– The European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate responsibility;
– The proposal for a Directive of the European Parliament and of the Council of 23 February 2022 on Corporate Sustainability Due Diligence (CSDDD)[7];
– The General Orientation of the Council of the European Union of 1 December 2022 on the proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence, amending Directive (EU) 2019/1937, with the revised text of the proposal for a Directive annexed[8].

The CSDDD is a future mandatory framework aligned with the UN Sustainable Development Goals[9] and international conventions, including human rights and environment-related objectives[10]. Compliance with the so-called "duty of diligence" requires companies to adopt appropriate measures and sustainability strategies and procedures by defining and implementing an adequate "sustainability plan". The "duty of diligence" has the nature of an "obligation of means": companies must *identify, prevent, evaluate, mitigate, end, and remedy any adverse impact on human rights and the environment* (see Articles 4.º-11.º of CSDDD).

In short, according to the proposal of CSDDD:

a) Companies should conduct due diligence along their activity (direct operations) and their "value chain" (direct and indirect operations established with business partners), both upstream and downstream

7. Text available at www.eur-lex.europa.eu (accessed on 20 December 2023).
8. Text avaliable at www.data.consilium.europa.eu (accessed on 20 December 2023).
9. Text available at www.sdgs.un.org (accessed on 31 August 2023). The proposal of CSDDD is inspired by: *(i)* the United Nations (UN) Guiding Principles on Business and Human Rights; *(ii)* the OECD Guidelines for Multinational Enterprises (OECD Guidelines – text available at www.mneguidelines.oecd.org (accessed on 31 August 2023).
10. In this matter, see A.F. Morais Antunes, *Responsabilidade empresarial e dever de diligência*, cit.

(including production, supply, transport and storage, distribution or recycling), and consider the (actual or potential) adverse impacts on human rights and the environment, including the climate (see Article 15.º - "Combating climate change");

b) The CSDDD will apply to large companies (according to two criteria: the number of employees and the net worldwide turnover) and to high-risk sectors, namely to «EU companies and parent companies with over 500 employees and a net worldwide turnover higher than 150 million euros»[11] and «to companies with over 250 employees and with a turnover of more than 40 million euros if at least 20 million are generated in one of the following sectors: manufacture and wholesale trade of textiles, clothing and footwear, agriculture including forestry and fisheries, manufacture of food and trade of raw agricultural materials, extraction and wholesale trade of mineral resources or manufacture of related products and construction. It will also apply to non-EU companies and parent companies with equivalent turnover in the EU for non-EU companies»[12];

c) Companies must identify, prevent, evaluate, mitigate, bring to an end, and remedy any adverse impacts on human rights (*e.g.*, child labour, slavery, labour exploitation) or the environment (*e.g.*, pollution, environmental degradation, loss of biodiversity);

d) Companies must define, approve, and implement tailored and climate-aligned "transition plans" that are consistent, *e.g.*, with the Paris Climate Agreement (including Scope 1, 2 and 3 emissions) – see Article 15 of CSDDD;

e) Companies' transition plans to a climate-neutral and green economy will be mandatory, assessed against rigorous criteria, and should include short, medium and long-term targets;

f) Companies will be liable for breaching the duty of due diligence (article 22.º - "Civil liability");

g) Companies will be subject to fines of up to 5% of their annual worldwide net turnover for non-compliance with due diligence obligations.

Compliance with the "duty of care" (set out in Articles 4 to 11 of the proposal of CSDDD) requires companies to update their business models of conduct and to implement the appropriate measures, strategies, and procedures to, on the one hand, *prevent* adverse impacts on

11. See www.europarl.europa.eu (accessed on18 December 2023).
12. *Ibidem*.

human rights and the environment and, on the other hand, to *mitigate and remedy* the adverse impacts caused. Any adverse impact should result in *adequate compensation for the damages* caused by the companies' operations (directly or indirectly) (see Article 22 of the proposal of CSDDD). Therefore, companies must renew their business practices, models, and decision-making frameworks (by adopting the key idea of "*sustainability over pure profit*") and comply with human rights and environmental requirements.

In the matter of "corporate sustainability European timeline", there are three other important milestones to report:

- On 25 April 2023, the Committee on Legal Affairs ("JURI") voted on the proposal of CSDDD[13] and made amendments to the original text, including Article 12 ("Model contractual clauses") (19 votes against 3 and 3 abstentions);
- On 1 June 2023, the European Parliament voted on the proposal of CSDDD, reflecting the amendments proposed by the Council and JURI[14];
- On 14 December 2023, the Council and the European Parliament reached a provisional agreement on the CSDDD[15].

The two most relevant changes included in the provisional agreement on the CSDDD (of 14.12.2023) are the following:

- The omission of the directors' duties of care (see Article 25 of the version of the proposal of CSDDD of 23.02.2022) and to set up and oversee due diligence (see Article 26 of the version of the proposal of CSDDD of 23.02.2022[16]).
- The (temporary) exclusion of the financial sector.

Notwithstanding the amendments made to the text of the proposal of CSDDD during the ongoing legislative process, it remains the case that the paradigm of corporate sustainability will no longer be based solely on "voluntary international standards" but will very soon be defined by legal

13. See www.europarl.europa.eu (accessed on 31 August 2023).
14. Text available at www.europarl.europa.eu (accessed on 31 August 2023).
15. See www.consilium.europa.eu (accessed on 18 December 2023). The draft of the CSDD was voted on 24 January 2024. The final version has not yet been officially published.
16. The omission of the provisions related to the duties of directors (see Articles 25 and 26 of the proposal of CSDDD) does not prejudice the competent national rules of Member States' Law (namely, Article 64 of the Portuguese Companies Code).

mandatory provisions recognised as a priority by the European Union and which, in the event of non-compliance, will form the basis of a claim for damages against the company.

In a word, the *company "of the future*" must comply with CSDDD and "*act responsibly or be held liable*"[17].

5. *Hot Topic: The Enforcement of Future European Mandatory Sustainability Rules*

Preventive measures and adequate strategies for compliance with social and environmental parameters are essential in the future "law of sustainable and responsible businesses".

Responsible companies with responsible businesses should also have *"responsible contracts" with tailored, fair, balanced, and reasonable contractual clauses* effectively committed to respect human rights, the climate, and the environment[18].

Contracts concluded by companies with appropriate "*ethical clauses*" (or "*sustainability clauses*" or "*green clauses*") will reinforce their commitments with sustainability and due diligence obligations to identify, prevent, evaluate, mitigate, end, and remedy adverse impacts on human rights and the environment. On the other hand, clear written contractual clauses will also provide certainty and avoid new forms of corporate litigation[19].

Companies should change their "business as usual" mindset and *implement responsible business models and contracts with "ethical clauses" tailored to the sector and size of companies*. Therefore, companies should conclude contracts (e.g., purchase and sale contracts, supply contracts,

17. See A.F. Morais Antunes, *Responsabilidade empresarial e dever de diligência – Da vinculatividade da futura matriz sobre "ESG" (Environmental, social and governance)*, cit.

18. For the concept of "sustainability contractual clauses" (SCCs), particularly in the context of international business contracts, see C. Poncibò, *The Contractualisation of Environmental Sustainability*, in *European Review of Contract Law*, 12 (4), 2016, 345 ss. The term "ethical clauses" is proposed by L. Miller, *"Ethical Clauses" in Global Value Chain Contracts: Exploring the Limits of Freedom of Contract*, in P.S. Davies - M. Raczynska (eds.), *Contents of Commercial Contracts. Terms Affecting Freedoms, Hart Studies in Private Law*, No. 35, Hart, Oxford-New York, 2020, 163-190 (166-177).

19. There are relevant ongoing projects to develop standard environmental clauses: *e.g.*, "Chancery Lane Project" and "Net Zero Toolkit". For an example of Supplier Model Contract Clauses, see www.responsiblecontracting.org (accessed on 18 December 2023).

service contracts, engineering, procurement, and construction – EPC – contracts, distribution contracts and transport contracts) with clauses describing their obligations to, for example, develop and implement a transition in line with the Paris Agreement (*e.g.*, limiting global warming to 1.5 degrees Celsius) and the objective of achieving climate neutrality.

For example, "ethical clauses" shall stipulate that:

- The company is obliged to avoid activities and operations that are harmful to human rights and environmental objectives and climate requirements.
- The company is obliged to consider, anticipate, and parameterise the potential or actual adverse impact of its activities and operations on sustainability matters, including human rights, climate change, and environmental impacts, in the short, medium, and long term.

"Contract design" entitles "tailored-made solutions" with clear and objective clauses that should also clarify the legal consequences of non-compliance with sustainability requirements and due diligence obligations. In this matter, contracts should also set out the grounds for suspending and terminating business relationships with non-compliant companies[20]. In fact, among the relevant damage prevention strategies, it is important to consider the refusal to institutionalise business relationships and the suspension and termination of partnerships with companies that do not respect the same values in terms of sustainability, respect for human rights and the environment, identified as potential or actual adverse impacts.

"Ethical clauses" may provide the following:

- The refusal of companies to institutionalise business partnerships with companies that do not respect the same value guidelines.
- The suspension or termination of commercial partnerships.
- The exclusion of compensation for early termination of contracts.

The CSDDD includes a relevant insight in Article 12 (under the heading "Model contractual clauses").

20. See recital 41 of the proposal of CSDDD, in the version of the text adopted by the Council on 1 December 2022, cit., 44-45 – which, in any case, states the preference for maintaining business relations and partnerships as an alternative to the radical measure of terminating the business relationship. Recitals 41-A and 41-B limits the right to terminate the business relationship, considering the effects of such decision (see recital 41-A) or the nature and purpose of the undertakings involved (regulated financial undertakings) – (see recital 41-B).

The first version of Article 12 (of 23.02.2022) stated:

To provide support to companies to facilitate their compliance with Article 7(2), point (b), and Article 8(3), point (c), the Commission shall adopt guidance about voluntary model contract clauses.

Following the text of the proposal of CSDDD with the amendments adopted by the European Parliament on 01.06.2023, Article 12 reads as follows:

To provide support to companies to facilitate their compliance with Article 7(2), point (b), and Article 8(3), point (c), the Commission shall, in consultation with the Member States and relevant stakeholders, adopt guidance, tailored to the sector and size of companies, about voluntary model contract clauses by the application date of this Directive. Those model contractual clauses shall stipulate, as a minimum:

(a) the precise allocation of tasks between both contracting parties in ongoing cooperation, and that contractual clauses shall not be such as to result in the transfer of responsibility for carrying out due diligence; and

(b) that without prejudice to Article 7 (5) and Article 8 (6), where contractual clauses are breached, companies shall first take appropriate measures in line with Article 7 (4) and Article 8 (5) and should avoid terminating such clauses.

Article 12 of CSDDD highlights the role of "ethical clauses" and the importance of anticipating and regulating the adverse impacts of a contract or complex business transaction.

ESG and corporate sustainability obligations are projected at the level of (good) governance and in the field of what may be called "contractual design" through the provision of balanced and adequate "ethical" clauses that are substantially committed to the protection of human rights and the environment.

The recent provisional deal on the CSDDD, agreed upon by the Council and the European Parliament on 14 December 2023, emphasises the *role of tailored contractual clauses in enforcing corporate sustainability duties* in "B2B" contracts, as in public contracts and concessions.

6. *Conclusion*

ESG and the future european framework on corporate sustainability-have a relevant practical projection, by imposing responsible investment

and business decisions that do not have an adverse effect (potential or actual) on human rights, society and the environment.

To this end, companies need to adopt "rational" and "responsible" business practices. Rational and responsible business model of conducts will, in turn, minimise business risks and, as a consequence, reduce the chances of litigation based on the non-fulfilment of sustainability parameters and the corporate duty of care.

This is an ongoing evolution, which will require, in the near future, an extensive update of the decision-making process, by prioritising the prevention of adverse impacts on society, local communities and the environment.

In this field, the three key ideas of the future "law of sustainability and responsible businesses" are the following:

- new mandatory European framework on social and environmental sustainability;
- renewed business rationality and balanced management and investment decisions;
- a conflict between private autonomy and ESG criteria (namely, with the new "external dimension" of the contract and the companies' duty to protect "relevant social and environmental interests")[21].

The company of "the future" must comply with the new legal rules on social and environmental sustainability. Therefore, companies should adopt:

- A complex decision-making process;
- A social and environmental committed purpose-driven;
- Responsible business and responsible contracting.

Companies must update their activities, business practices, and strategies and cannot justify their conduct on purely economic arguments to maximise profits and gains.

The company "of the future" will struggle with this dilemma: the need for funds and capital vs. the new legal rules on corporate sustainability.

21. For the prohibition of «contracts harmful to third persons and society in general» as a limitation of the fundamental principle of private freedom, see "DCFR", 64 ff.: «A ground on which a contract may be invalidated, even though it was freely agreed between two equal parties, is that it (or more often the performance of the obligation under it) would have a seriously harmful effect on third persons or society. Thus contracts which are illegal or contrary to public policy in this sense are invalid».

The implementation of responsible business conduct and responsible contracting will be a major turning point in this process: the concept of "ethical clauses" and "responsible contracting" is, indeed, the new trend in sustainability law.

Today, we can rely on an ongoing revolution regarding sustainability. Sustainability is a path that involves States, Regulators, Companies, Academia, and all members of society. In this equation, Contract law and Contract Design shall play a decisive role in enforcing social and environmental sustainability: in a word, responsible contracting will lead to a responsible and sustainable business.

Armando Rocha

Conclusions: Courts as Agents of Change

1. *The Warnings of Cassandra*

In the Greek mythology, Cassandra was a Trojan priestess who received the divine gift of making true prophecies, but who was eventually cursed with the fate of never being believed. In the case of global warming and climate change, scientists and civil society movements are the modern version of Cassandra: despite their repeated warnings about the negative consequences of global warming which results from human enhanced greenhouse effect, State action is still short to meet the basic goals of the UNFCCC[1] or the Paris Agreement[2].

In a nutshell, the causes of the problem are simple to understand but far from simple to deal with: climate change is the downstream result of an excessive concentration of GHG[3] in our planet's atmosphere, which enhances its greenhouse effect, and therefore lead to an overall increase in the global average temperature at the Earth's surface and ultimately to the disruption of our climate system. As there are no natural causes that can explain the increased concentration of GHG in the atmosphere, the human footprint is undeniable. Therefore, to grapple with climate change, States need "only" to reduce their GHG emissions sharply. "Only" suggests the challenge lying ahead of us is apparently simple, but in practice this is the modern version of another tale from the Greek mythology: the Labours of Hercules, which referred to a set of

1. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 *UNTS* 107.
2. Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 *UNTS*. See also Z. Hausfather - G. Peters, *2020: Emissions – The 'Business as Usual' Story is Misleading*, in *Nature*, 777, 2020, 618 ff.
3. I.e., greenhouse gases.

labours that were assigned to Hercules since their performance required his demi-God strength[4].

In fact, as our economies are carbon-driven, every single aspect of our lives is directly or indirectly connected with GHG emissions in general. Accordingly, the reduction of GHG emissions implies sharp changes in how our societies and globalised economy work, as well as in our living standards. In this framework, it is unsurprising that States are non- or underperforming their commitments (and not necessarily obligations) to reduce GHG emissions. Of course that most emissions are not directly attributed to States, in the sense that they are the product of non-State actors activity, namely corporations engaged in carbon-intensive or carbon-driven businesses. However, as States hold the monopoly of the legitimate use of force (including the competence to prescribe and enforce mandatory rules), they have the constitutional and human rights obligation to orchestrate non-State actors' conduct in order to guide our society towards a carbon neutral future[5]. In this sense, excessive emissions of GHG, even if not directly attributed to States, are only possible because of a permissive State regulatory framework that fails to reduce their emissions from its jurisdiction. Accordingly, GHG emissions are at least the product of a failure in the prescription or enforcement of domestic rules.

In this light, civil society and some particularly affected or concerned States have been bringing climate change into the international and domestic judiciary. Cases are manifold and differ from jurisdiction to jurisdiction, but in common they ask courts to step-in and compel States to adopt more ambitious climate mitigation and adaptation policies. In the end, applicants do not necessarily seek for a compensation but rather to force State action; they do not perceive judges as mere «*bouches qui*

4. A. Rocha, Amicus Curiae *before the International Tribunal for the Law of the Sea: The Prospect of an Advisory Opinion on Climate Change and the Law of the Sea*, in *Católica Law Review*, 6, 2022, 87 f.

5. *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity - Interpretation and Scope of Articles 4 (1) and 5 (1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17 (IACtHR 15 November 2017) §§115-122; *Comunidad de La Oroya v Peru* (IACommHR Decision of 19 November 2020) §142; *Hatton and Others v the United Kingdom*, App No 36022/97 (ECtHR, 8 July 2003) §98; *Öneryildiz v Turkey*, App No 48939/99 (ECtHR, 30 November 2004) §§89-90; *Fadeyeva v Russia*, App No 55723/00 (ECtHR, 9 June 2005) §89; *Tătar v. Romania*, App No 67021/01 (ECtHR, 27 January 2009) §§87-88.

pronounce les paroles de la loi», but rather as agents of change that might contribute to the pursuit of climate action. But can courts be agents of change, or will their rulings be "warnings of Cassandra" also?

2. *The Role of Courts in Clarifying States' Obligations in Relation to Climate Change*

Even though the UNFCCC legal complex has a specific dispute settlement system[6], it has never been used and it is unlikely that it will be used in the near future. As a result, climate litigation is rising before domestic courts, hand in hand with an ingenious use of human rights and advisory proceedings at the international level.

The number and diversity of cases is overwhelming[7]. This upsurge in interest and use of contentious (and even advisory) means is unprecedented but is a clear response from civil society to the non- or under-ambitious States' climate action and to the lack of corporations' *ex ante* and/or *ex post facto* responsibility[8]. The background for these cases is the lack of States' (sufficiently ambitious) climate action – but also the lack of any prospect for a successful outcome of the coming meetings of the Conference of the Parties to the UNFCCC and the Paris Agreement, or for States' water-changing domestic policies. In the light of this systemic non-performance in achieving climate goals, civil society and some affected or concerned States (*e.g.*, small island States, or the advisory opinions requesting States) have resorted to international and domestic courts to put pressure on States, requiring them to regulate GHG emissions from their jurisdiction or to check the adequacy of their regulatory framework to curb down GHG emissions and/or to adapt to the consequences of climate change[9].

6. Articles 14 of the UNFCCC, 19 of the Kyoto Protocol, and 24 of the Paris Agreement.

7. See www.climatecasechart.com, run by the Sabin Center for Climate Change Law of Columbia Law School, which runs a repository of domestic and international climate change-related cases.

8. *E.g.*, M. Burger - M.A. Tigre, *Global Climate Litigation Report: 2023 Status Review*, New York, Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme, 2023, available at www.law.columbia.edu (accessed on 5 September 2023).

9. A. Rocha, *Suing States: The Role of Courts in Promoting States' Responsibility for Climate Change*, in M. da Glória Garcia - A. Cortês (eds.), *Blue Planet Law – The Ecology of Our Economic and Technological World*, Cham, Springer, 2023, 100.

At first sight, using courts strategically to pressure States to adopt more stringent climate policies seems to be at odds with the traditional function assigned to courts in a legal system. In the end, applicants are not necessarily asking courts to settle a dispute – but only asking them to declare an infringement of States' constitutional or international obligations; and eventually to pressure States to comply with such obligations. This is not particularly new in the legal system: provided an obligation is sufficiently characterised, the creditor may ask courts to enforce such obligation by pressuring the debtor to comply with it, including through compulsory means. The problem, however, is that constitutional or international obligations in relation to climate change are all but clear or sufficiently characterised. As a result, it is unclear, even for courts, if there is any obligation which has been infringed, and much less how can States comply with it; and if courts even try to provide a little clarity to States and define one specific measure to be adopted, they might end up being entangled in complex trade-offs and value-based choices which are proper of the political and administrative branches of the government. In this sense, the risk is that judicial rulings in relation to climate change might place courts in the sphere of politics and international diplomacy, and perhaps interfere with the current decision-making processes at the domestic or international levels.

Nonetheless, decision-making processes are already stalled. At most, courts can highlight the inability of traditional decision-making processes to deliver the needed outcomes to address climate change and thus to fulfil their societal function. Furthermore, courts societal function is not confined to settle disputes (private, retrospective function), but also includes the contribution to the judicial development of law (public, prospective function)[10]. In this latter case, the ability of courts to contribute to the development of the understanding of States' obligations in relation to climate change derives from their eventual mandatory jurisdiction (as happens with domestic courts and with some human rights bodies), hand in hand with their institutional authority, record, and reputation as adjudicators. Clarifying the expected States' behaviour can mean, for instance, explaining what compensation is owed to individuals affected by climate change-related events, or what is the individual obligation of each State[11]. What this means is that whenever courts settle a dispute

10. V. Lowe, *The Function of Litigation in International Society*, in *ICLQ*, 61, 2012, 209, 212-214.

11. A. Rocha, *Suing States*, cit., 100.

or render an advisory opinion on a climate change-related case, the selection of the laws applicable (especially, in the light of a much needed cross-regime interaction), their interpretation, and their application to specific facts is a "meaningful contribution" to develop a straightforward understanding of what is the expected States' behaviour to comply with their constitutional or international obligations to mitigate and adapt to climate change[12]. Because the devil is in the detail, courts cannot replace domestic decision-makers and micromanage mitigation and adaptation measures – but at least they can establish facts and science, flag a better interpretation of States' obligations, and clarify if the measures so far adopted domestically meet the expected behaviour under constitutional or international law.

As such, courts have a more relevant societal function than the mere reading of black letter law. But applicants do not aim to empower courts and embolden them to be more decisive in their contribution to the clarification of States' obligations in relation to climate change. Because, once again, the devil is in the detail, courts may find themselves unable to provide an extraordinarily relevant contribution to the clarification of climate change law and still contribute decisively to enhance States' climate action. In fact, courts are also «purveyors of legitimacy», namely when they «raise consciousness on a particular matter» and «help us understand what needs to be done, or what is being done inadequately or not at all»[13]. This is possible, because from a sociological angle, courts are a public forum where the applicants (whatever their legal nature) can bring and discuss openly their justiciable rights. In this sense, judicial bodies provide a «forum of protest»[14], i.e., they are «arenas where political and social movements agitate for, and communicate, their legal and political agenda»[15]. In fact, from the applicants' standpoint, «winning in court is not as essential»[16], because the simple fact that a case is brought to the judicial spotlight can be enough to gain attention and disseminate a message, to create pressure regarding the need for State climate action, and eventually to secure a more diffuse, long-term compliance

12. B.J. Preston, *The Contribution of the Courts in Tackling Climate Change*, in *Journal of Environmental Law*, 28, 2016, 11.
13. P. Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, in *Journal of Environmental Law*, 28, 2016, 19, 24.
14. J. Lobel, *Courts as Forums for Protest*, in *UCLA Law Review*, 52, 2004, 477.
15. *Ivi*, 479.
16. *Ivi*, 480.

with States' constitutional and international obligations to mitigate and adapt to climate change[17].

This is particularly visible in the *Urgenda*, the *Neubauer*, or the recently issued the *Held v. Montana* case, whose rulings were reported in most countries and got a global attention from the public. Because courts' rulings are taken seriously by the public in general, the simple fact that a judge declares that States are not adopting sufficiently ambitious climate policies can be enough to pressure State authorities to pursue such mitigation and adaptation policies. In fact, in some cases, public authorities are recalcitrant of adopting economically and socially costly measures that may be criticised by an equally recalcitrant electorate – but using courts as a scapegoat to adopt such measures can be enough to trigger decisive State action[18].

This ability to trigger State action is key in climate litigation: courts cannot demand the planet to stop warming, or ask the climate system not to produce extreme weather events. Perhaps their best, more tangible contribution is actually to raise public awareness and to trigger State mitigation and adaptation policies[19].

At first sight, this seems to be a minor contribution – but Rome was not built in a day. Small-scale, but decisive judicial contributions are helpful if they adjust the sense and speed of direction of State climate action. In fact, there are at least two ways in which courts can contribute to the development and clarification of States' obligations in relation to climate change: on the one hand, courts can "pressure for regulation", namely in cases where regulation is lacking or is under-ambitious, by flagging the insufficiency of States' efforts; on the other hand, courts can "assess the existing regulation", namely by identifying cases of poor or non-implemented regulation, by finding (and filling) regulatory gaps, or by clarifying States' obligations under constitutional and international law.

3. *A Challenge for Courts?*

This upsurge in climate litigation is an exciting opportunity for lawyers and academics in general – but perhaps too much of a challenge for decision-makers and judges alike. In fact, not only climate change poses a

17. *Ivi*, 487; J. Lin, *Climate Change and Courts*, in *Legal Studies*, 2012, 32, 35.
18. A. Rocha, *Suing States*, cit., 101.
19. *Ibidem*.

challenge to the subsistence of life as we know it – it challenges the fabric of the legal system as we know it also. This is visible in the use of concepts and doctrines such as victimhood and *locus standi*, causation link, burden of proof, or separation of powers. The mainstream understanding of these concepts and doctrines was elastic enough to adapt to different challenges, but suddenly they seem to provide odd outcomes in climate change-related cases. Take, for instance, victimhood, where the definition of "direct or indirect impact" of the harm produced requires the demonstration of the indirect, downstream, aggregate, time-delayed, warming and climate disruptive effect of GHG emissions[20]. In this case, a flexible understanding of the causal link considers literally every single human being as a victim of GHG emissions, but an orthodox understanding of the causal link in this regard means no one can claim to be a victim[21].

The task lying ahead of courts, however, is much more complex than the mere adaptation of established concepts and doctrines to the context of climate change. To begin with, the scope of States' obligations is unsettled in international law and is a politically divisive topic domestically and internationally. On the one hand, divisiveness results from the high social and economic costs that are placed upon a political community if they adopt ambitious mitigation and adaptation policies, especially if other States do not adopt the same level of ambitiousness in their domestic policies. On the other hand, divisiveness results from intertwining the assessment of what are States' obligations under constitutional and international law with other topics such as historical reparations for past GHG emissions or the common but differentiated responsibility principle[22]. Furthermore, concepts and doctrines are supposed to be results-oriented, in the sense that they are only meaningful if they are a valuable tool for courts to settle a dispute or render an advisory opinion. In other words, they only add value to the legal system if they allow courts to make a meaningful contribution, *e.g.*, to clarify States' obligations in relation to climate change. But if courts are unable make such contribution, *e.g.*, because they are afraid of step-in the realm of the legislative and administrative branches of government, or because they are only able to pinpoint pro-

20. A. Rocha - R. Sampaio, *Climate Change before the European and the Inter-American Court of Human Rights: Comparing Possible Avenues before Human Rights Bodies*, in *Review of European, Comparative, and International Environmental Law*, 32, 2023, 279, 286.
21. J. Peel, *Issues in Climate Change Litigation*, in *Carbon and Climate Law Review*, 5, 2011, 15, 22.
22. A. Rocha, *Suing States*, cit., 102.

cedural, soft, or even non-binding obligations, then courts' contribution to clarifying States' obligations in relation to climate change is marginal and basically confined to triggering public attention. And in fact, a reader of the UNFCC, the Kyoto Protocol, or the Paris Agreement immediately notices «the crushingly vague nature of the obligations, invariably drafted in such a way as to make it impossible to argue that any particular provision gives rise to a cause of action»[23]. The Paris Agreement, for example, does not explicitly require States to reduce GHG emissions from their jurisdiction – Article 4(2) rather says that States «shall prepare, communicate and maintain successive nationally determined contributions [but not obligations or commitments] that it [freely] intends to achieve», and that States «shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions», but not explicitly with the aim of achieving such contributions or the goals of the UNFCCC and the Paris Agreement. This framework is not particularly heartening. In the light of such vague framework of States obligations, what can be the role of courts in mapping and clarifying such obligations? A challenge for courts, therefore, is to make these concepts and doctrines valuable in order to deliver a meaningful content from a substantive angle also.

At this point, a special attention should be given to domestic courts and to comparative studies on climate litigation – and this is where this book tries to bring forward a meaningful contribution. In fact, domestic courts are the first port of call for the enforcement of international obligations in general, namely by individuals who may rely on an entitlement derived from an international treaty. In this context, domestic courts may be uneased by a particular sensitive topic such as the separation of powers principle, the role of science, or the assessment of *locus standi* and victimhood requirements. Nonetheless, judges are human beings and, as a result, they are also biased. For instance, judges' training in a particular legal context and their life in a particular political and cultural community imply they will likely deal with such sensitive topics according to the legal and conceptual toolbox they were taught as meta-positive and pursuant to the worldview and conception of fairness and order they learned from and in that community. Judges' different cultural imprint, dogmatic affiliation, perspectives of order and fairness, and conceptions of law's and courts' societal function help explaining the differences in the content of the rulings from different jurisdictions. Difference, however, can be an added value, namely if judges from different jurisdictions are more

23. P. Sands, *Climate Change*, cit., 28.

sensitive to, and uneased with, different topics. If that is the case, it means courts can learn from the experience of courts from other jurisdiction and consider settling a dispute or rendering an advisory opinion according to the lessons (and the lenses) from these latter.

For instance, this book's chapters regarding European and African countries show how domestic courts from the Global North and the Global South share different understandings of the separation of powers principle and the role of courts in providing order to a political community – being the first concerned with not stepping outside the traditional function assigned to courts, while the second rather keen on providing creative and socially meaningful rulings; or being the first more concerned with tradition and keeping aligned with a coherent case law lineage, whereas the second feel more free to detach from tradition and to outline what can be future solutions adopted by political decision-makers regarding mitigation and adaptation action. Of course courts' rulings are only binding *inter partes* and authoritative within their domestic jurisdiction – but rulings from other jurisdictions can be a useful lodestar (i.e., an unacknowledged and informal "precedent") in finding creative solutions for the specific challenges posed in climate litigation. Since climate change is a common challenge to the entire world, a coherent and cohesive patchwork of domestic judicial decisions from different jurisdictions could influence national decision-makers and help providing coherence and cohesiveness to States' mitigation and adaptation efforts.

In this sense, finding the commonalities among domestic judicial decisions from different jurisdictions can be a helpful tool to help courts deciding climate change-related cases – but also in boosting their contribution to pressuring States to adopt a proper regulatory framework and to clarifying States' obligations in relation to climate change. This book is an attempt to provide a comparative analysis of domestic and supranational climate litigation, based on that premise that judges are not passive players or mere bystanders. However, taking lessons from other jurisdictions also faces its own challenges: not only some motives and lines of argument are not susceptible of legal transplant, but also – and more importantly – biases are unconscious and powerful barriers to innovation: a judge who was trained in a specific legal tradition and cultural cosmos is unlikely to detach too much from his legal genetic origin.

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