fypl

French Yearbook *of* Public Law

Issue 1, 2023

Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

fypl
french yearbook *of* public law
Issue 1, 2023

Steering Committee

Editorial Board and Secretariat

International Scientific Council

fypl french yearbook of public law

Contents

fypl french yearbook *of* public law
Issue 1, 2023

Climate Change Litigation and Legitimacy of Judges towards a 'wicked problem': Empowerment, Discretion and Prudence

Marta Torre-Schaub
Senior Professor Researcher at CNRS (National Center for Scientific Research), at the Institut des Sciences Juridique et Philosophique de la Sorbonne

Abstract:

For the past ten years climate litigation has received growing attention from academics, lawyers and civil society.[1] Although the first climate trials emerged twenty years ago, they have recently increased and nowadays constitute a new trend in international, administrative and civil law.[2] While climate litigation has acquired interest as a rela-

1 United Nations Environment Program, *The Status of Climate Change Litigation: A Global Review,* 2017; Markell, D. & Ruhl, J.B., "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?", *FLA. L. Rev.* 2012, vol. 64, p. 15; Fisher, E., "Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA", *Law & Policy* 2013, vol. 35, issue 3, pp. 236-260; Varvaštian, S., "Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?", Berlin Conference "Transformative Global Climate Governance after Paris", 2016; Fournier, L., *The cost of inaction. The role of Courts in Climate Change Litigation,* LLM Thesis, 2017, University of Edinburgh.

2 Smith, J. & Shearman, D., *Climate Change Litigation,* 2006, Adelaide, Australia, Presidian Legal Publications; Torre-Schaub, M., "Justice et justiciabilité climatique : état de lieux et apports de l'Accord de Paris" in Torre-Schaub, M. (dir.), *Bilan et perspectives de l'Accord de Paris, Regards croisés,* t. 8, 2017, éd. IRJS, coll. Institut André Tunc, pp. 107-124; Torre-Schaub, M. (dir.), *Les dynamiques du contentieux climatique. Usages et mobilisations du droit,* 2021, Paris, mare & martin; Hautereau-Boutonnet, M., "Les procès climatiques par la « doctrine du procès climatique »", in Courril, C. & Varisson, L. (dir.), *Les procès climatiques. Entre le national et l'international,* 2018, Paris, Pedone, p. 46; Kahl, W. & Weller, M.-P. (ed.), *Climate Change litigation. A Handbook,* 2021, Oxford, Hart, München, Beck, Somon, Oxford U.

tively new procedural and judicial phenomenon, the contribution that judges make to the construction and implementation of ecological transition in the context of the climate crisis has become an object of studies in itself. This article belongs to the latter category of studies in that it explores the role of the judge in the context of climate litigation and presents both its possibilities and limits, while also highlighting the progress that has been made in this area.

Keywords:

Climate change litigation, Environmental constitutionalism, Ecological transition, Environmental justice

Introduction

Climate litigation emerged as a new kind of environmental litigation in the early 2000s in the United States and Australia. This type of litigation has however multiplied in a spectacular way, mostly in Europe, since 2015. This trend can be explained mainly by two factors: Firstly, the Paris Agreement was negotiated around that time and constituted an opportunity for civil society to mobilize. Secondly, next to the Paris Agreement several NGOs called for further possibilities to bring the matter of climate change before judges.

Several definitions of climate litigation coexist. The broadest definition includes any action in which its object, in fact or in law, is linked to climate change.[3] For the purpose of this article however, we will limit ourselves to a more restricted definition according to which climate change is either the object of litigation in a direct way or is used as central argument. Climate trials occur above all in the domestic context and can be directed against the State or private actors. The plaintiffs on the other hand are most often NGOs, individuals, cities or foundations. Our study will focus in particular on trials demanding new commitments and more ambitious actions from the public administration and the recognition of more effective climate laws as well.

In public planning and public policy making, a 'wicked problem'[4] is a problem that is difficult or impossible to solve because of incomplete, contradictory, and changing requirements that are often difficult to recognize. It refers to a problem that cannot be fixed, where there is no single solution; and the adjective 'wicked' implies resistance to solutions. Climate change has exemplified for decades this kind of problem, 'whose social complexity means that it has no determinable stopping point'.[5] Moreover, because of

Press; Alogna, I., Bakker, C. & Gucci, J.-P., *Climate Change litigation: Global perspectives*, 2021, London, BICCL.

3 Thail, K. & Lord, R., "What is climate change litigation?", Practice Note. Available at: https://www.lexisnexis.co.uk/legal/guidance/what-is-climate-change-litigation (consulted in April 2022).

4 Lazarus, R. J., Super wicked problems and climate change: Restraining the present to liberate the future, *Cornell L. Rev.* 2009, vol. 94, pp. 1153-1160, in *The Status of Global Climate Change Litigation: a Global Review*, 2017, UN Environment Report, Sabin Center for Climate Change Law, Columbia University, p.7.

5 Ibid, p. 8.

complex interdependencies, the effort to solve one aspect of a 'wicked problem' may reveal or create other problems, for example a cascade effect in litigation.

Because of the complexity and difficulties States and public policies have to face, climate change litigation testifies a trend towards a new polycentric climate governance that is no longer limited to the framework of UN negotiations, which never had found efficient solutions to tackle climate change.[6] Indeed, the fight against climate change is no longer conducted exclusively in the international arena. Domestic and local levels are becoming an increasingly favorable and effective framework for fighting climate change with legal tools. In this evolving context, domestic courts cannot be an exception to the broadening of the venues for climate discussion and governance.

This model of governance involves new alliances between different actors (NGOs, citizens, local authorities) but it shows a 'pathological' side of climate law and of the 'wicked' difficulties public administrations have to address. Climate change litigation is a reflection of either the absence of climate change laws and/or public policies, their inadequacy, or, more in general, their unsuitability for accommodating climate phenomena. In order to fill these gaps or to respond to the growing demands of civil society, a paradigm shift is taking place throughout the courts in order to ensure the right to access to justice in climate matters. Judges are increasingly called upon to fix climate change issues, but their role is still not comfortable nor free from difficulties and limitations. This article aims to show how judges face this challenge which places courts somewhere between empowerment, discretion and prudence. Several questions arise here. The one that immediately comes to mind is the legitimacy of judges to decide or rule on climate issues. Is the court the place to address climate issues? Can – and should – judges do something to "compensate" for the slowness and lack of ambition of climate texts in international law?[7] It should be recalled that climate litigation is mostly brought before national judges and that its primary purpose is to call upon domestic laws. But, in practice, climate lawsuits present elements that refer not only to domestic law, but also to international law.[8] Are domestic judges entitled to undertake such an approach consisting of applying both international and domestic laws? Are they entitled to make such an extensive application of an embryonic and hybrid emerging climate law?[9] By the same token, at least in the European law systems, judges should interpret the law without creating it. Also, in the face of this kind of limitation, it seems appropriate to ask what role can judges play in the fight against

6 Van Asselt, H. & Zelli, F., "International Governance: Polycentric Governing by and beyond the UNFCCC", in Jordan, A., Huitema, D., Asselt, H.V. & Forster, J. (eds.), *Governing Climate Change. Polycentricity in Action?*, 2018, Cambridge, UK, Cambridge University Press, pp. 29-46; Hirschl, R., "The judicialization of politics", in Goodin, R.E. (ed.), *The Oxford Handbook of Political Science*, 2008, Oxford, UK, Oxford University Press, pp. 253–274.

7 Torre-Schaub, M., "Les procès climatiques à l'étranger", in Dossier spécial : *Le juge administratif et le changement climatique, RFDA* July-Aug. 2019; Torre-Schaub, M. et Lormeteau, B. (dir.), Dossier : *Les recours climatiques en France, Revue Energie, Environnement, Infrastructures* May 2019, n° 5, pp. 12-45.

8 Sabin Center for Climate Change Law, Columbia University. Available at: https://climate.law.columbia.edu/; and Grantham Institute –Law and Environment, Imperial College of London. Available at: https://www.imperial.ac.uk/grantham/. See also Voigt, C., "Climate Change as challenge for Global governance", in Kahl, W. & Wellers, M. (eds.), *Climate Change litigation –Liability and Damages from a comparative perspective*, 2021, München, CH. Beck / Oxford, Hart, pp. 1-19, p. 15, §72.

9 Torre-Schaub, M., "Decision Making Process at the Courts Level: The example of Climate Change Litigation", *Revista de la Universidad de Granada, Special Issue Derecho y Cambio Climático* 2008, n° 12, pp. 57-72.

global warming. What can they do? What should they do? With what kind of means? What limits and obstacles do they face? At the end of the day, what is then their contribution?

First of all, this article aims to analyze the role of judges in climate change litigation and the enforcement of climate law (I). Secondly, this article will study the contribution of judges to tackle climate change. In doing so, it traces what limits and difficulties judges face, but also which opportunities are open to them (II). My aim is to present, through the analysis of several decisions, what is the actual contribution of administrative jurisdictions in the implementation of climate laws. From this perspective, this article has the ambition to shed some light on the role played by judges in pursuing the ultimate target of the Paris Agreement and of European legislation on climate change, i.e. to reach carbon neutrality by 2050.

I. Shall judges play a role in Climate Change?

Portalis wrote that 'the law does not have all the power and cannot say everything'.[10] The primary function of law 'is to fix, through essential lines, the general principles of law, to establish fruitful principles and not to descend to the details of questions that may arise in different matters. And, it is the judge, inspired by the general essence of the laws, who must direct the application'. The judge, who refuses to address a case, alleging insufficiency or non-existence of the law, would be denying justice to those who deserve or need it. However, the judge is not allowed to create law by recurring to existing regulation or general provisions, while drafting his decision. Jurisprudence is recognized by the law but not as a *source* that creates it, at least in the Romano-Germanic legal system.[11] Likewise, in the Kelsenian pyramidal model, the jurisdictional act appears at the bottom of the pyramid. The judge applies the law and, according to Kelsen, it is an act subordinate to legal norms with general effect.[12]

Increasingly, however, judges are producing general provisions in certain cases, under the guise of an interpretative act of the law in force. The supreme courts of several countries of civil law go even further and the French *Cour de cassation*, for example, enjoys great freedom in this respect, as it is able, on occasion, to lay down certain general and abstract rules. To this must be added the aforementioned rule prohibiting the denial of justice on the basis of silence, obscurity or insufficiency of the law. This provision obviously allows the judge to create law. The law thus created must be standardized (become the standard of application). This operation allows the judge to rule again in the same sense as he did in the first place.

In common law systems, case law can be regarded as a genuine source of law. However, the British legal culture refers to case law as the *judge creating law* rather than only *deciding the case* Whatever the appropriate term, common law systems are based on the principle of stare decisis, according to which the answer to a question of law and the answer given in a particular case should also be given in similar cases raising the same legal question. Moreover, this principle also implies that lower courts are always bound by the

10 Portalis, Preliminary Address - Civil Code, "La loi ne peut tout pouvoir et ne peut tout dire".

11 Also called "Civil Law". Available at: https://www.britannica.com/topic/civil-law-Romano-Germanic (consulted in March 2022).

12 Ost, F. & Van de Kerchove, M., *De la pyramide au réseau ? Pour une théorie dialectique du droit*, 2002, Brussels, Univ. Saint-Louis.

legal interpretation given by a higher court. Even the judge who ruled in the first place has to comply with his decision, according to the stare decisis principle. The future legal force given to the decision entails – when judging identical or similar questions – a work of casuistry[13] that often requires a high dose of creativity.[14] Thus, both in the Romano-Germanic legal system (civil law) – in order to not deny justice when statutory law is silent – or in the common law system – because judges have more creative freedom – judicial decisions can effectively produce law. The question that this article raises in the first place is, therefore, whether the opposition between law and jurisprudence as sources of law is really still a current issue or whether we should not revise the existing position on the matter and apply some flexibility to the traditional assertion (A). This question must however be asked with regards to environmental law and, more specifically, to climate change (B).

A. The legitimacy of the judge to enforce the law

It is often the case that in new branches of law, such as environmental law, new problems and issues arise to which the law does not provide a direct answer (yet). It also happens, as in the case of climate change, that positive law does not yet have all the solutions or answers, given its novelty and the scientific uncertainties surrounding its subject. In these cases, the judge can play a determining and creative role.[15] Thus, it must emphasized that the judge can be a producer of law in relatively new legal scenarios that have not yet been regulated by the law, such as those opened by climate change. The issue to be examined here is to what extent the judge participates in the *governance* of climate change law.

The answer to the question: "what precise role the judge can play in climate change issues"? requires some preliminary remarks. Using the dichotomy that divides law into its procedural and substantive aspects, the question of the judge's involvement in tackling climate change falls somewhat between the two. The procedural aspect is essential, as it determines who is entitled to go to court to settle a dispute concerning climate change. But substantive law is also relevant, because without its analysis, it would not be possible to answer the question of what could be claimed. In short: what is the core of a climate change lawsuit? The two questions will therefore be analysed together, as they seem to be inseparable in this particular context.

Likewise, environmental law is made up of new elements, but also makes use of more traditional legal concepts. Thus, legal principles such as the principle of participation or the right to (environmental) information are new legal concepts. The parties and the judge will have to use them in a trial involving an environmental issue. The precautionary principle also seems to be particularly well suited to questions relating to climate change, mostly because it is a matter of great scientific uncertainty.[16]

13 Casuistry, the moral theology devoted to resolving problematic cases, offered general rules to swearing lawfully. Available at: https://dictionary.cambridge.org/fr/dictionnaire/anglais/casuistry (consulted in June 2022).

14 Foyer, J., "Allocution d'ouverture", in *La création du droit par le juge, Archives de Philosophie du droit*, t. 50, p. 5.

15 467 U.S. 837, 1984, *Chevron U.S.A., Inc. v. NRDC*, in *Les grands arrêts de la Cour Suprême*, p. 1017.

16 Bodanski, O. & Haigh, N., *Interpreting the precautionary principle*, in O'Riodan, T. & Cameron, J., Earthcan, 1994, London, 220 p.; Martin, G., "Principe de précaution, mesures provisoires et protection de l'environnement, Aménagement-Environnement", 1994, nº 4, Kluwer Éditions Juridiques Bélgique, p. 215; Laudon, A., "Le droit face à l"incertitude scientifique : risques, responsabilité et principe de précaution", *Colloque international, Quel*

Environmental law also makes use of existing legal tools from fields such as contract law, liability law or property law. Thus, the second question addressed by this article is the extent to which new mechanisms and principles of law are used to solve issues related to climate change, or to what extent the judge can interpret already existing instruments to solve legal issues related to this global crisis.[17]

The judge plays a central role in environmental law, as litigation in this area has increased dramatically since the end of the 1970s.[18] Jurisdictions at international, regional (European Union, Inter-American Commission on Human Rights, Merco-Sud) and national level have seen numerous trials that opened up new paths in the development of environmental law.[19] Several international conventions encourage and follow this trend, such as the Lugano Convention of 1993, the Aarhus Convention, or the Strasbourg Convention of 1998 on criminal law. This seems to create what we could call a 'community of judges' who collaborate at international, regional and national level, each using principles and concepts that emerge in other jurisdictions at their own level of competence.[20] Thus, principles such as precaution, sustainable development, or prevention appear in decisions in the international, regional and national arenas. As some authors have claimed, we are moving towards a 'common law' on the environment.[21] The question that emerges here is whether going to court to settle issues not clearly regulated by the law gives judges the ability to offer solution to this legal vacuum.

If this question was indeed often asked in the early 2000s, when climate change litigation timidly started in the US and Australia, it seems that it is no longer pertinent today. As the European Union's impulse is felt greatly in domestic climate legislation, and the Paris Agreement has had a similar effect, the question to be asked now should be whether the judges (civil and administrative) can assist the implementation of existing laws by interpreting them in such a way that their 'normative' content (or lack thereof) is no longer an excuse for the government's inaction in climate change policies.[22]

B. Judges' role in climate change litigation

This section will firstly examine the actual contribution of judges to the improvement of

environnement pour le XXI siècle ?, 1996; Rémond-Gouilloud, M., "Le risque de l'incertain : la responsabilité face aux avancées de la science", *La vie des sciences, CR.* série Générale 1993, vol. 4, t. 10, p. 341; Boy, L., "La nature juridique du principe de précaution", *Nature, Sciences et Société* 1999, vol. 7, nº 3, pp. 5-11.

17 Torre-Schaub, M., "Le droit des changements climatiques : vieux instruments pour nouveaux problèmes", in Torre-Schaub, M. (dir.), *Dossier Droit et climat, Cahiers de Droit Science et Technologies* 2009, nº spécial; Torre-Schaub, M., "Le rôle des incertitudes dans la prise de décision aux Etats-Unis. Le réchauffement climatique au prétoire", *Revue internationale de droit comparé* 2007, nº 3, pp. 685-713.

18 Maljean-Dubois, S. (dir.), *Le rôle du juge dans le développement du droit de l'environnement*, 2008, Bruylant.

19 Canivet, G., "Les influences croisées entre juridictions nationales et internationales : éloge de la bénévolence des juges", in *Les influences croisées entre juridictions nationales et internationales.* Available at: http://www.ahjucaf.org.

20 Maljean-Dubois, S. (dir.), Le rôle du juge dans le développement du droit de l'environnement (2008), op. cit., p. 195.

21 Delmas-Marty, M., *Vers un droit commun de l'humanité*, Interview with Petit, P., coll. textuel, 2004, Paris.

22 SCOTUS, 05-1120, 549 U.S, 4 Feb. 2007, *Massachusetts v. EPA & al., Connecticut v. Electric Power co.*; SDNY, NO 04-CV-05669, 21 July 2004; Torre-Schaub, M. (2007), Le rôle des incertitudes dans la prise de décision aux Etats-Unis, op. cit., pp. 685-713.

climate law (1). In a second step, this section analyses the incipient stage of climate change litigation (2).

1. The contribution of judges to the improvement of Climate Law

Calling on the judge to solve a question not previously regulated by the law occurs frequently, especially in common law countries, as discussed above.[23] It is not, however, a general rule, nor is it as obvious as it may appear at first glance. We will take the United States as an example here, as some cases have shed light on this issue since the early '00s.[24] A debate has been raging in the United States for more than twenty years. This debate has been settled to some extent in favor of the judiciary, empowering it to make decisions on issues on which the law is somewhat silent.

We know that the separation between the executive, legislative and judiciary powers is the basis of the rule of law. It is equally evident that, even in the United States, the judge does not have the power to substitute himself to the Congress (in legislative matters) or to a Governmental Agency (in regulatory matters). There is, however, also an obligation for Governmental Agencies to act in a *reasonable* manner.[25] It is often in the interpretation of this 'reasonableness' that judges have been able to slip their ability to make decisions in the face of regulatory 'inaction' from an Agency. In other words, faced with a specific, unregulated problem, the executive branch, through its regulatory capacity, and the legislative branch, are required 'to do something about it', so that the situation is sorted

23 In the *Massachusetts v. EPA* climate case quoted above, the Supreme Court found that 'With respect to the injury element of standing ... Massachusetts adequately demonstrated that rising global sea levels have already swallowed some of the state's coastal land and that if sea levels continue to rise as predicted, the state's injury will become more severe over time. As an owner of significant coastal property'. The Court found that Massachusetts' injury was 'actual' and 'imminent.'. See too, Michaut, F., "Le rôle créateur du juge selon l'école de la « sociologie américaine ». Le juge et la règle de droit", *RIDC* 1987, vol. 39, nº 2, pp. 343-371.

24 According to the analysis of the evolution of scientific evidence in Environmental Law cases in the US for the last decades, the American Bar Association explained that: 'in the 1990s, the Supreme Court more fully elaborated Article III standing requirements as applied to an environmental case'. In *Lujan v. Defenders of Wildlife* (1992), environmental plaintiffs challenged a new rule by the U.S. Department of Interior, which interpreted a section of the Endangered Species Act as not applicable to actions in foreign nations. Plaintiffs included individuals who had visited Egypt in order to view the Nile crocodile and Sri Lanka to view the Asian elephant and Asian leopard. Plaintiffs alleged that the Department of Interior's rule would negatively affect their future ability to view these species in their natural habitat. The *Lujan* Court delineated three elements that must be met to demonstrate the constitutional minimum of standing to sue. First, a plaintiff must show an 'injury-in-fact.' The 'injury-in-fact' must be 'concrete and particularized' and 'actual or imminent',' not conjectural or hypothetical. The Court has noted that 'particularized' means that the injury must affect the plaintiff in a personal and individual way. Second, the plaintiff must demonstrate a 'causal connection between the injury and the conduct complained of.' The injury must be 'fairly traceable' to the defendant's challenged actions. Third, the plaintiff's injury must be one that is likely to be redressed by a favourable decision in the case. Available at: https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

25 The Court found in *Massachusetts v. EPA*, op. cit., that 'EPA held the authority to regulate greenhouse gases from new motor vehicles under Section 202(a)(1) of the Clean Air Act'. The Court found that 'the EPA provided no reasoned explanation for its refusal to determine whether greenhouse gases contributed to global warming and remanded the case for further proceedings'. Available at: https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf.

out. This is the recent interpretation of the 'reasonableness' obligation. It is thus an obligation to do.

On the other hand, in the very first climate decision ruled by the US Supreme Court – *Massachusetts v. EPA*[26] – the judges enabled their participation in decision making because:

> *'Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930–52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether green-house gases contribute to global warming, EPA must say so'.*[27]

In this context, the next question to ask is how the issue of climate change was solved by the judges in the very first landmark climate change case.[28]

2. The incipient stage of the development of climate change litigation

In 2006, numerous scientists have concluded that the increase in GHG emissions from fossil fuels such as C02 was a major contributor to global warming. The legal instruments regarding climate change were at the time already a complex patchwork of legal and scientific issues. The legal issues surrounding this problem were only partly solved by international law- especially by the Kyoto Protocol (1997). As far as Europe was concerned, the

26 According to the American Bar Association, 'EPA found that six greenhouse gases "in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare."' The EPA also introduced regulations of certain greenhouse gases as a result. In February 2010, the states of Alabama, Texas, and Virginia and several other parties sought judicial review of the EPA's determination in the U.S. Court of Appeals, District of Columbia Circuit. On June 26, 2012, the court issued an opinion, which dismissed the states' and other parties' challenges to the EPA's endangerment finding and the related regulations. The three-judge panel unanimously upheld the EPA's central finding that greenhouse gases, such as carbon dioxide, endanger public health and were likely responsible for the global warming experienced over the past half century. The U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA* had an impact on subsequent climate change lawsuits as well as on environmental standing and standing in general. The Court's finding that carbon dioxide is considered a 'pollutant' under the Clean Air Act has been used to support separate litigation challenging the EPA's failure to regulate greenhouse gases from stationary sources and other sources covered by the Clean Air Act. Also, the Court's recognition of the injuries caused by global warming, the causation between increased greenhouse gases and global warming, and the EPA's ability to mitigate harmful impacts of climate change will likely be used to demonstrate standing in other global warming-related cases'. Available at: https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

27 *Massachusetts v. EPA*, op. cit., p. 31. Available at: https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf (consulted in July 2022).

28 *Massachusetts v. EPA*, op. cit. See also the previous decisions about this topic: SDNY, 21 July 2004, NO 04-CV-05669, *Connecticut v. Electric Power co.* Available at: http://www.ag.ca.gov; For a deep analysis of this decision see: Torre-Schaub, M. (2007), Le rôle des incertitudes dans la prise de décision aux Etats-Unis, op. cit., pp. 685-713.

2004 GHG Emissions Trading Directive triggered the creation of GHG regulations and legislation at the domestic level.[29] But no special climate laws were really enacted at that time in the member states, nor any universal treaty concerning climate change.

The climate change crisis, as described by the scientists of the Intergovernmental Panel on Climate Change (IPCC), was originally fraught with uncertainty. This uncertainty led to a great deal of institutional inertia on the part of many industrialized countries who, driven by the lack of specific and irrefutable data, exploited these deficiencies to avoid any legal initiative on global warming. Countries such as the United States had no specific legal instruments, neither at federal nor at state level, to regulate or limit greenhouse gas emissions at that time. They were not yet under any international obligation to legislate. In countries without specific emission regulations, what legal instruments could citizens wield in courts? Would citizens be entitled to be parties in lawsuits concerning the damage caused by GHG emissions? The main question emerging from the very first cases on the matter was the qualification of "climate harm" as a specific damage, thus ascribable to a specific behavior and, ultimately, to global climate change phenomena.[30]

Global warming and its consequence on the climate were treated by judges as a phenomenon that went beyond isolated scientific predictions. It became therefore a 'danger' or 'risk' that affected different populations, cultures, communities and countries. For this reason, climate has been considered a 'global good' in more than one occasion, since climate damages have global dimensions. Global damage harms the general public. Furthermore, this kind of damage was and still is considered to be a problem of general interest. Lastly, the damage caused by global warming affects at the same time individuals, collectivities and, above all, common goods such as the atmosphere. Climate change has been considered global damage since the first declarations of the United Nations on the environment (especially after the Rio Declaration of 1992). But with that being said, the question that arose before the courts was how could a 'global damage' be assessed. Is it repairable? Or is it insubstantial, undermined by the lack of sufficient specificity and individualization of the victims? Given the aforementioned practical difficulties, is it considered as a damage caused 'to no one in particular but to everyone in general'? In short, how did the judge position himself with regards to this kind of damage and how did he qualify both the damaged good (the atmosphere) and the victims of the damage (the population as a whole)?

This raised the problem of the definition, qualification and evaluation of the damage caused by climate change. Although the judge had the last word on these three questions, at the end of the day it was the scientific experts who informed the judges in their decision. (a) It is therefore necessary to consider the importance of the assistance of scientific experts in such cases as the *Massachusetts v. EPA*. Close collaboration between judges and experts revealed to be crucial for the decision.[31]

Another point discussed in these first cases was related to the nature of the damage caused by climate change. Such an inquiry leads to the establishment of different respon-

29 Dir. (EU) nº2003/87/EC, 13 Oct. 2003, of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0087:20041113:EN:PDF.

30 Smith, J. & Shearman, D. (2006), *Climate Change Litigation*, op. cit., *pp.* 14 f.

31 Jasanoff, S., "Making order: law and science in action", in Hacket, E. J., Amsterdamska, O., Lynch, M. & J. Wajcman, J. (eds.), *The handbook of sciences and technology studies*, 2008, Cambridge, MIT Press, p. 779.

sibilities, which were not individual, but considered as collective, shared and multiple.[32] Proof as a procedural, but also substantial, element was therefore essential in these cases. (b) This issue raised the problem of state action or inaction related to climate change policies and legislation. (c) At the same time, the first climate change decisions referred to broader legal principles that allowed the recognition of the damage caused by GHG emissions, whatever its degree of certainty.

a) Scientific expertise and the judge: the co-construction of the decision

The question related to the qualification of global environmental damage in the United States dates back to the 1990s. In 1990, the *City of Los Angeles Florida Audubon* case raised the issue of whether certain kinds of damage to agriculture, natural resources and coastal populations was caused by global warming as a global phenomenon, thus causing a harm 'to all'.[33] In this case, the judges stated that in order to establish this type of damage it was necessary to demonstrate that certain conditions be fulfilled, such as the fact that the damage was 'specific' and not 'merely general'. To carry out this demonstration, the judges required a sufficient and necessary causal connection relating specific damage (agriculture, coastal population, etc.) to a global phenomenon (climate change). The establishment of this causal link and its evidence could not be proved without resorting to scientific experts. Although the parties in court produced the requested scientific reports, the judges decided that evidence of global damage due to climate change was not sufficiently clear and did not accept the claim for global damage to a common good.

While this case proved to be a great disappointment to environmental groups and to a large part of the American public in general, it should not be dismissed as such. On the contrary, it is important to point out that this decision marked a hopeful beginning in the history of American litigation on climate change. Although the judges did not admit the existence of 'harm to all', they laid the foundations of a specific reasoning and a specific vocabulary for environmental matters. It is also important to point out that this decision imposed the requirement of a causal link for the first time, which remains today an important condition to establish the existence of damage, its extent and especially its qualification (global or individual). It is therefore necessary, in order to establish the existence of a global damage caused 'to all', to be able to provide the necessary evidence and link it to the causes and consequences of the damage.[34] This is the only way to find satisfactory legal solutions for the eventual victims of climate change. Therefore, the study of these claims leads us to examine the legal instruments employed in the first cases related to climate change.

b) The first steps to build causality

Since the victims of climate change cannot always be precisely identified, the damage caused by climate change can be minimized or overlooked. The authorities of many industrialized countries have always exhibited a certain inertia towards climate litigation,

32 Smith, J. & Shearman, D. (2006), *Climate change litigation*, op. cit.

33 D.C. Cir., 1990, 912 F.2d 478; D.C. Cir., 1996, 94 F. 3d 658.

34 Mank, B.C., "Standing and Global warming: is injury to all, injury to none?", *Lewis & Clark Law School Environmental Law Review* 2005, p. 35.

so that the damage to an imprecise community could not be easily repaired. Examples of this kind of environmental damage are those caused over time by accidents such as oil spills, acid rain or nuclear incidents or by substances such as asbestos. Climate change is also an imprecise ecological phenomenon, both in space and time, making it difficult to identify the victims. However, environmental law has drastically improved these gaps, so that litigation on these issues has become increasingly successful over time and victims can be compensated in some way.

Bringing our attention back to the first cases about climate change, the main issue raised in the *Massachusetts* decision was the federal administration's responsibility, since it did not fulfill its role as a regulator of environmental risks such as climate change. This claim had to be proven before the court, since the link between GHG emissions and the damage caused did not constitute an easily provable damage and the connection to global warming was not easy to prove as well. Thus, the fact that a state refused to regulate GHG emissions did not automatically imply that the plaintiff could prove the state's fault and that the excess emissions were directly associated with global warming. The issue was far from being obvious.

Both points of view converged. The elements required to establish the state's inadequacy and lack of regulation and the elements required to establish the responsibilities of the GHG emitters had to be provided as evidence. These elements were necessary to establish the aforementioned causal link and to determine the connection between the specific damage to individuals or a community, the GHG emissions and the global damage or climate change.

Whereas the burden of proof lies usually with environmental associations or other entitled plaintiffs, in environmental law, the burden of proof can be reversed and it is the damaging party (e.g. a polluting industry) who has to prove that it has done everything necessary to avoid the harm. Since climate change would still not rank among 'major environmental risks', there was no presumption of negligence on the part of industry. Therefore, the burden of proof was not reversed: it was up to the plaintiff to prove the existence of the causal link. In the US, evidence is governed by specific rules that give the parties considerable latitude to call upon experts. This flexibility often results in a race between who will be able to pay more expensive and better renowned experts, so that their scientific reports have more weight in the process. Notwithstanding this danger, it is clear that the judge has sufficient power to set certain limits to this competition between the parties. The Federal Rules of Evidence (FRE) have put order in this game. Rule 702 states that 'if scientific or technical knowledge will assist the judge in better understanding the evidence or issues presented, a witness, as an expert qualified by knowledge, experience, education, or training, may testify by giving his opinion or making his knowledge available to the judge, provided that the knowledge is the result of reliable methods and that the expert has applied such methods to acquire his knowledge.'

Rule 706 allows the expert to be appointed by the parties, by the judge or by both. In climate change litigation in the US, it has been common for the parties to choose their own expert witnesses. Although the criteria of method and standardized knowledge recognized by the scientific community are respected, the parties appoint the experts whose reports best demonstrate the arguments invoked by each party, leading to a better chance of winning the case.[35] Expert reports have served several purposes in climate

35 See 509 U.S 579, 1993, *Daubert y Frye, Daubert c/ Dow Chemical.*

change litigation. They have for instance established the causal link between CO2 emissions and the caused damage. They also highlighted the consequences of climate change and global warming. It was therefore essential that the reports of scientific experts could be based on sufficiently reliable methods so that the judge could clearly establish the damage and its connection to an excessive number of GHG emissions. Supported by this knowledge, the judge in the Massachusetts climate case pronounced a very interesting and pioneering decision.

Nevertheless, the establishment of direct and individual causal connections between CO2 emissions and climate change remains today one of the biggest obstacles for the judge. Very few climate change decisions have clearly recognized a direct causal relation between a public or private actor and climate change.[36] Exceptions to this general trend appeared very recently only in France and the Netherlands.[37]

c) The judge and the uncertainties of climate change litigation: a flexible application of state responsibility

Few scientists today would deny the fact that the science of global warming is subject to numerous uncertainties. This argument has long been the basis for authorities of some industrialized countries not to regulate this problem and not to set legal limits on GHG emissions. However, judges, relying on the theory of public nuisance, have been able to find a satisfactory solution to this problem. This theory has developed strongly in the United States to such an extent that it allowed the Supreme Court, in *Massachusetts v. EPA* (3 April 2007), to find a causal link between GHG emissions from electricity industries and certain damages due to climate warming. In general terms, this theory was based on the fact that 'GHG emissions from human activities are more likely than not to produce an excess of carbon associated with climate warming impacts'.[38]

Plaintiffs in global warming lawsuits clearly face the question of the extent to which scientific evidence and expert testimony can establish causation with the flexibility required for this specific matter. We are faced here with an objective question regarding the content of the reports and their scientific reliability but also with a subjective one as it is the judge and the judge alone, at the end of the day, who must demonstrate a certain interpretative flexibility. Everything will depend on his willingness to 'believe' in certainties, but also to give appropriate space and importance to uncertainties. The causes of damage are examined differently in different cases. In some cases, there might be clear evidence of a root cause of the damage.[39] With regards to the damages caused by climate change, evidence might be lacking. The judge will mostly assume causes that are – as some authors have stated – 'weak but highly significant'.[40] This means that while it is

36 564 U.S. at 415, *Connecticut*; 696 F.3d at 856, *Kivalina*; High Court of New Zealand, 12 Oct. 2006, CIV 2006-404-004617, [2007] NZRMA 87, *Greenpeace New Zealand v. Northland Regional Council*; No. 14-2-25295-1 SEA, *Zoe and Stella Foster et al v. Washington Department of Ecology*.

37 TA Paris, 3 Feb. 2021 & 14 Oct. 2021, *Oxfam, Greenpeace & others v. Ministère de l'Ecologie & others*; Rechtbank Den Haag, 26 May 2021, C/09/571932 / HA ZA 19-379, *Millieudefensie & al. v. Royal Dutch Shell Plc.*

38 *Amicus brief, Brief petitioners Friends of the earth amicus, Scientific NAS amicus, Scientific association amicus*, in *Massachusetts v. EPA*, op. cit.

39 Leclerc, O., *Le juge et l'expert*, 2005, Paris, LGDJ.

40 Penalver, E., "Acts of God or toxic torts? Applying tort law principles to the problem of climate change", *Natural*

difficult to say with certainty that GHG emissions are the defining cause of global warming, it is nevertheless true that GHG emissions have a decisive effect on global warming.

The applicability of the precautionary principle was an issue that arose in the first climate change decisions. This principle allows taking into account the existence of uncertainties, without these being an obstacle to the discovery of proof of damage. Also, the rules of evidence become more flexible, making it easier for victims of damage caused by climate change to prove that there is a "causality link" between emissions and global warming. While the burden of proof is not reversed, it is nonetheless clear that proof is greatly facilitated, so that the damaged party in the trial can more easily provide evidence. The precautionary principle also had the effect of changing the mentality of judges. Indeed, they no longer reason in the same way while employing the precautionary principle. Since the adoption of the aforementioned principle, judges must take into account a 'margin of uncertainty' that should be treated as such, i.e. as a possibility of damage, such as that caused by climate change. Once uncertainty is accepted as a 'driving' element and not as a generator of legal inertia, the judge can overcome the traditional relationship between evidence and the causal nexus, thus inducing a progressive relaxation of this rule. This new attitude of the judge started with the *Massachusetts* case, entailing changes towards a new vision of climate change responsibility and the role played by the judges in it.

In the *Massachusetts* case, scientific reports indicated that uncertainty was decreasing and that certainty was increasing correspondingly.[41] Scientific information, in turn, encouraged the evolution of administrative responsibility on climate change, shifting the balance in favor of its victims rather than in favor of those who 'create the risk' by emitting GHGs without precaution. In this particular case, judges interpreted the precautionary principle as if its respect was an obligation in 'decision making' to be fulfilled by executive and environmental administrations. In other words, despite the separation of legislative, judicial and executive powers,[42] in cases of major environmental danger or threat, judges should not hesitate to put the administration in front of its own responsibilities, so that it can regulate GHG emissions with regards to the precautionary principle.

This requires, of course, taking certain 'precautions' with the judges' power of decision.[43] It is not a question of justifying the creative powers of the judge, who is subject to the law, so that the democratic process can be respected. It is, however, a matter of emphasizing that the judge has an important role to play in the interpretation of climate change law. This role was little explored in legal scholarship until the *Urgenda climate case* in 2015, which completely changed climate change litigation and which can be considered the very first successful climate law case in Europe and in the world.[44] This case represents a starting point in both civil and administrative climate change litigation. It intro-

resources journal 1998, vol. 38, p. 563.

41 See IPCC Report 2008. Available at: http://www.ipcc.ch/.

42 504 U.S. 555, 1992, *Defenders*, pp. 476-77.

43 Scalia, A., "The Doctrine of Standing as an essential element of the Separation of Powers", 17 *Suffolk UL Rev.* 1983; See also Torre-Schaub, M., "Les contentieux climatiques à l'étranger", *RDFA* 2019, pp. 24-43.

44 Rechtbank Den Haag, 24 June 2015, Zaaknummer C/09/456689 / HA ZA 13-1396, *Urgenda v. Netherlands*, Rechtsgebieden Civiel recht Bijzondere kenmerken Bodemzaak. English translation available at: https://www.urgenda.nl/wp-content/uploads/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf.

duced several new climate change litigation 'standards', allowing judges to follow similar pathways and to explore some others. However, the question of the real power of judges to address climate change is still a subject of legal conversation today, also in the US. The question, even if some progress has been made in this area, remains an open question to this date.[45]

II. New pathways and perspectives in climate change litigation

The 'first wave' of climate litigation – led by the *Massachusetts* case – allowed for a better understanding of the advances in environmental law and the role played by judges in climate change litigation. At the same time, this 'first wave' highlighted the difficulties these lawsuits were facing. Some progress has been made since.

The 'second wave' of climate litigation marked a considerable progress with the *Urgenda case* in the Netherlands (2015), in which the Dutch State was condemned for lack of 'climate diligence' and on the basis of a 'new State's responsibility on climate'.[46] However, while the outcome of this decision triggered an unprecedented euphoria and some obstacles – in particular in terms of proof and causality – appear to have been overcome, very few decisions since then have achieved a comparable success (A). As of recently, however, two cases in France, stemming from two suits filed before an administrative judge, have greatly contributed, in different but complementary aspects, to the global dynamic of climate change litigation. The first suit was filed by the *commune* of Grande-Synthe in January 2019 before the *Conseil d'Etat* to ask the annulment of the Government's decisions that refused to adapt and mitigate greenhouse gases' emissions. Later in the same year, four NGOs filed another suit asking for compensation of the damages caused by climate change before the Administrative Court of Paris (the *Affaire du siècle*). Both of them are original and unique decisions. Even though they can be considered as a continuity of the judicial dynamic created by the *Urgenda* case, these French cases open new paths for administrative jurisdictions that deserve to be presented separately. This can be considered a 'third wave of climate change litigation', opening to a new kind of 'interstate conversation' between judges (B).

45 No. 6:15-CV-01517-TC, 2016 WL 6661146, *Juliana v. United States*; Also in Belgium, Cour de Cassation, 20 April 2018 and 2021, *ABSL Klimaatzaak c. Royame de Belgique*.

46 Lin, J., "The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. the State of the Netherlands*", *Climate Law* 2015, vol. 5, pp. 65-81; De Graaf, J. K. & Jans, J. H., "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change", *J. Environmental Law* 2015, vol. 27, issue 3, pp. 517-527; Van Zeben, J., "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?", *Transnational Environmental Law* 2015, vol. 4, pp. 339-357; Cox, R., "A Climate Change Litigation Precedent: *Urgenda Foundation v. the State of the Netherlands*", *Journal of Energy and Natural Resources Law* 2016, vol. 34, pp. 143-163; Torre-Schaub, M., "L'affirmation d'une justice climatique au prétoire (quelques propos sur le jugement de la cour du district de La Haye du 24 juin 2015)", *Revue québécoise de droit international* 2016, vol. 29, pp. 161-183.

A. The second wave of climate change litigation: the beginning of a 'conversation' about climate change between judges

The first *Urgenda* decision ruled by the District Court of The Hague on June 24th 2015 is considered the beginning of the 'second wave' of climate change litigation.[47] Although some other interesting cases followed, the *Urgenda* decision is still considered the more innovative one. In their ruling, the judges accepted most of the claims raised by the plaintiffs. The court provided an effective judicial framework for climate change. To this end, the decision constituted a major contribution to the justiciability of several legal concepts before a domestic court, such as the application of the duty of care standard to climate change, the precaution principle, – enshrined in environmental administrative Dutch law – and the United Nations Framework Convention on Climate Change of 1992. The *Urgenda* decision of 2015 is considered the very first climate change judicial decision in Europe.

The Commercial Chamber of the District Court of The Hague – which has a mixed function on both civil and administrative law – handed down a groundbreaking judgment by virtue of which the Dutch government was forced to change and adopt more restrictive regulations on climate change. Thanks to this judgment, the Netherlands had to ensure that its greenhouse gas emissions were at least 25% lower than in 1990. Urgenda, an association whose aim is to promote the transition to a sustainable society, and nine hundred other plaintiffs, had emerged victorious from a lawsuit in which they asked the Dutch government to take stronger measures in the fight against global warming.

This ruling is pioneering on the issue of the duty of care standard as applied to climate change. This standard of care, included in the Dutch civil code, had never been applied to global warming before in any other European country. This decision can be thus considered innovative and enriching for several reasons. Firstly, it overcame difficulties that had previously discouraged other judges in similar climate cases. We are referring here to the aforementioned questions of the temporality of climate change as well as to its global nature and the uncertainties that they entail. The judges overcame these obstacles by employing concepts and legal texts that have existed for a long time but that had not been used successfully until then. Secondly, the Court renewed the notion of the duty of care, before then only used in the context of international law by giving it very precise features, and inscribing it in climate change law as an obligation of the state towards its citizens. The redefinition of this concept, which is increasingly used in cases concerning health and the environment, confirms public responsibility and, above all, the state's obligation to act in the face of a documented but uncertain threat. The intensity of this definition can be seen here, since it moves from an obligation of an international nature to an obligation of national law – in this case Dutch civil law – in order to apply it to a new, threatening global problem.

The Hague District Court's reasoning can be summarized in two stages: first, it overcame a series of difficulties that could have prevented it from administering climate justice effectively (1), and then it ruled on the legal obligation of the state and the exact content of the duty of care (2).

47 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands*, op. cit.; See also, Lahore High Court, 4 Sept. 2015 & 14 Sept. 2015, W P No. 25501, *Leghari v. Federation of Pakistan*; Supreme Court, App n° 205/19, 31 July 2020, *Friends of the Irish Environment CLG v. Government of Ireland*.

1. Overtaking difficulties with progressive decisions

Although the *Urgenda* case presented a series of obstacles for decision-making, the judges overcame those. This is why it is considered a unique decision and has since then been used as a benchmark for other judgments all over the world, especially in Europe. Those difficulties can be classified into three categories: (a) space-time difficulties, (b) the 'global' damage obstacle and (c) the 'common good' vision obstacle (d).

a) Space-time difficulties

While the question of Urgenda's legitimacy to act in the name of present generations did not raise any particular concern before the judges, the Dutch state contested its capacity to act on behalf of future generations. The Court based its reasoning on two texts: section 303a, book 3 of the Dutch Civil Code – which allows an NGO to undertake legal action to protect the environment – and the statute of the NGO Urgenda, which enshrines its commitment to a more sustainable society. The judges considered that the term 'sustainable society' a priority that was not limited to the present generations, nor to the Dutch territory, but went beyond geographical and temporal borders.

The notion of intergenerational justice was thus at the heart of the problem, and the judges were right to raise the issue. They also had the courage to face this conceptual challenge, relying on the notion of sustainability, by employing the term 'sustainable society' on several occasions. In this respect, the judges recalled the vast literature on sustainability, establishing the term 'sustainable society' in this case by invoking the Bruntland Report[48] and the United Nations Framework Convention on Climate Change. These references – in point 4.8 of the judgment – enabled the affirmation of Urgenda's legitimacy to act on behalf of future generations.

The Court indeed recognized that the NGO had the necessary legitimacy to represent future generations and their rights. These rights are stated in texts of international law which contain an obligation for the present generations not to compromise the possibilities of future generations. In other words, sustainability is the actual basis of the rights of future generations. It was, therefore, the principle of sustainable development, rarely used by national jurisdictions, which served as a theoretical and legal support for the Hague judges.

The Court used the term 'sustainable society' on several occasions, which implied an intergenerational dimension, as clearly formulated in the Brundtland Report.[49] Thus, 'by defending the right…of future generations to have access to natural resources and to live in a healthy environment, Urgenda worked for the interests of a sustainable society'.[50] The concept of sustainable society was also formulated in the legal instruments invoked by the NGO against the activities that, from its point of view, were not sustainable and seriously endangered ecosystems and human societies as a whole.

48 Brundtland, G.-H., "Our Common Future", World Environmental and Development Commission of the UN "Brundtland Report", 1987. Available at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

49 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands*, op. cit., point 4.7, p. 27.

50 Ibid, point 4.8, p. 27.

Thus, the judges did not hesitate to rely on Article 2 of the United Nations Framework Convention on Climate Change, which states that

> *'The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner '.*[51]

b) The 'global' problem and the response of judges

While not going into the details of Dutch emissions and their contribution to the global phenomenon of climate change, the judges concluded that the Netherlands had collectively contributed to the damage. They emphasized that the Netherlands' greenhouse gas emissions had contributed to global climate change and will continue to do so, which justified a reduction in emissions insofar as this concerned the collective responsibility as well as the individual responsibility of the parties to the Convention, in the name of equity.[52]

The judges explained that using the formula that: 'it is a well-established fact that climate change is a global problem that requires global accounting'.[53] Thus, there is a considerable difference between the desired level of emissions and the actual level of emissions, which, if not reduced, would have dangerously increased by 2030. Thus, the Court concluded, the reduction must be made jointly and at the international level by obliging all states, including the Netherlands, to reduce their emission levels. In the Court's view, the Netherlands must pledge to do its best to fulfill its duty of care to reduce emissions. Therefore, just because the Netherlands' level of emissions was not very high, this did not exclude it from being responsible for the increasing rate of global emissions.

c) The praetorian 'bypassing' of causality

The judges therefore found that 'it follows from the considerations set out that there is a sufficient causal link to connect Dutch GHG emissions to global climate change and its effects (present and future) under the present climate of the Netherlands'.[54] The fact, according to the judges, 'that current Dutch GHG emissions are limited on a global scale, does not alter the fact that these emissions contribute to global climate change'.[55] In the

51 Ibid, point 4.9.

52 Ibid, point 3.1.

53 Ibid, points 3 and 4.

54 Ibid, point 4.90; See also abouat State responsibility the interesting observations of Voigt, C., "State Responsibility for Climate Change Damages", *Nordic journal of International Law* 2008, vol. 77, n° 1-2, p. 10.

55 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., point 4.90.

end, the judges justified the existence of a causal link by placing the Netherlands on the ground of its collective and individual responsibility as a developed country. By going even further in their reasoning, they went so far as to affirm that in order to achieve a 'fair distribution' of global emissions, the Netherlands, as well as the other states of Annex I of the Framework Convention, shall take the lead in reducing emissions.

The causal link, as we can see, was actually 'bypassed' through the acceptance of the global nature of climate change and the affirmation of the climate as a common good of humanity.[56]

d) Can the Climate Earth system be considered a 'common good'?

With regards to the atmosphere as a 'common good', it is useful to recall that the atmosphere is a space between the surface of the Earth and outer space, divided vertically into four spheres based on different temperature levels. Greenhouse gases are naturally present in the atmosphere. However, if the amount of gas emitted due to human activities increases, their accumulation in the atmosphere significantly raises temperatures, causing climate change related problems. Compared to traditional pollution, the effects of climate change are more diffuse and difficult to identify. It is also difficult to attribute them to a specific state. The nuisances associated with the increase of greenhouse gases in the atmosphere are the result of a complex and synergistic accumulation involving different polluters and pollutants.

Things also become more complicated when one confronts the traditional notion of nuisance with that caused by climate change. However, the notion of territory under the jurisdiction of a state commonly used in transboundary nuisance issues can be interpreted quite broadly to include not only the high seas, but also 'areas' – to use UNCAC terms - that include outer space, the atmosphere and the Arctic and Antarctic. It was also advised that the harm caused by climate change should be interpreted as harm to the global commons in areas beyond national jurisdictions. The status of the atmosphere (as a common good, to be inherited by future generations) has not, to date, been fully determined from a legal perspective.[57] The atmosphere is not a defined space but rather a fluid that can not be divided into units of air across well-established national boundaries. It is rather a matter of different layers of gasses through which different currents circulate, dispersing the substances that constitute them. The perception of climate damage seems to include negative impacts across different nations and not necessarily adjacent countries.[58] This is the inter-

56 Ibid, point 4.90, "*From the above considerations, it follows that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch climate change. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that the emission contribute to global climate change*".

57 Bakker, C., "Protecting the Atmosphere as a 'Global Common Good': Challenges and Constraints in Contemporary International Law", in Iovane, M. (ed.) et al., *The protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, 2021, Oxford, Oxford University Press, p. 163.

58 *"It's not disputed between the Parties that dangerous climate change has severe consequences on a global and local level…The Netherlands will also feel the consequences of climate change elsewhere in the world. Some import products will become more expensive…",* Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., points 4.16 and 4.17; Also, points 4.11 to 4.30 and point 4.37 "*The realisation that climate change is an extra-territorial, global problem and fighting it requires a worldwide approach has prompted heads of state and government leaders to contribute to the development of legal instruments for combating climate change by means of mitigation*

pretation that the Court has adopted in the *Urgenda* decision in 2015.[59]

This argument is indeed surprising, considering its difference from the rules of evidence used in liability law. While it is certainly effective in overcoming the obstacle of proving emissions related to climate change, it does not take into account the intellectual rigor of the theory of liability. Nevertheless, the somewhat circular reasoning of the judges shows the influence of classical theories of causality, or at least of those that are currently emerging in the field of uncertain risks. One cannot help but make a comparison with certain pioneer European Union decisions in the area of risk,[60] which, based on the impossibility of 'guaranteeing an absence of risk', nevertheless oblige the state to 'take sufficient measures to reduce the risk', which in this case would mean affirming the existence of an obligation on the part of the state to honor its duty of care by taking precautionary measures. Thus, the judges in the *Urgenda* case did not hesitate to apply the precautionary principle, in order to affirm the state's obligation to reduce the level of emissions, as required by international commitments. While they did not answer the question of tangible proof of the connection between emissions and the rise in global temperatures, they asserted that it was 'precisely' because this risk 'might' exist, even if it is still uncertain, that the Dutch state had an obligation to take precautionary measures. The court presupposed the existence of an uncertain risk, relying on scientific reports, and did not hesitate to sweep aside any doubts about the existence of a causal connection. The judgment was innovative in this regard since it went beyond the requirement of evidence of a 'harmful risk' and limited itself to the existence of a 'hypothetical and uncertain risk', capable of establishing a liability with an anticipatory function on the part of the State.

2. The original and innovative interpretation of a climate obligation: the duty of care 'standard'

In order to affirm the effective existence of a state obligation, the court based its decision on international and national texts as well as (a) the no-harm principle, a principle that could become one day a standard of conduct (b). To hold the state accountable for that duty, the judges developed a very interesting vision of the precautionary principle (c).

a) The interpretation of the no-harm rule as a 'new climatic duty'

Article 21 of the Dutch Constitution states that the state shall be concerned with keeping the country habitable and protecting and improving the environment. In the *Urgenda* case, this article was translated into an obligation to mitigate greenhouse gas emissions. On the basis of this obligation, Urgenda accused the state of not acting enough to mitigate emission levels, even though it was imposed by multiple international agreements

greenhouse gas emissions as well as by making their countries « climate-proof » by means of taking mitigation measures...".

59 *"It is an established fact that climate change is a global problem and there for requires global accountability... emission reduction therefor concerns both a joint and individual responsibility of the signatories to the UN Climate Change Convention...",* Ibid, point 4.79.

60 CJEU, 5 May 1998, C-180/96, *United Kingdom and North Irish v. European Commission*. Available at: https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:61996CJ0180&from=FR.

signed by the Netherlands. In doing so, the Court explained that the state was acting against the interests it should protect.

According to the court, the legal obligation of the state should be defined in both a spatial and geographical context, insofar as the Netherlands had a dense population living in a geographical area sensitive to sea level variations, which the state had to take into account in order to manage the well-being of this population. This duty of care was not actually defined by law, and the manner in which it has to be applied is within the discretion of the state in the exercise of its government.[61]

b) The no-harm rule: a legal standard of behavior in light of climate change

The application of the no-harm principle to climate change is, still today, a matter of debate.[62] However, the District Court of The Hague in its *Urgenda* decision of 2015 affirmed that it was an actual "standard" of behavior.

Since 2011, after a statement before the United Nations General Assembly by the President of Palau in which he asked to 'urgently seek an informed opinion from the International Court of Justice on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not cause damage to other countries', the principle of non-nuisance has been nurtured by doctrinal analyses and progressively integrated into the international legal corpus on climate change.[63] However, its application has always been delicate because the pollution caused by gas-emitting human activities poses the problem of the immediate and direct link between the cause and its effects. This question was solved by the Dutch court. The no-harm rule was linked to the concept of 'due diligence', a direct descendant of the principle of preventive action, as a 'standard' imposing a duty of care on governments. In the case in which, despite knowledge of the events, a state does not take appropriate measures, the question has been raised whether it could be considered negligent

61 The meaning of the duty of care is not fully stabilized. It generally refers to the care with which a person is obliged to carry out his mission in order to respect the provisions of the law. It may also refer to the efficiency that one is entitled to expect from a prudent person in the performance of a particular task or function. While it generally refers to not being negligent, the duty is often associated with prudence. In this case it is associated with the "duty of care" of the state and thus with its obligation to take care of its citizens in the face of a threat. See our developments on the evolution of the concept Torre-Schaub, M., "La justice climatique. A propos du jugement Urgenda de la Cour de District de La Haye du 25 Juin 2015", *RIDC* July-Sept. 2016, n° 3.

62 Robert-Cuendet, S., "L'invocabilité du droit international devant le juge administratif français", in Torre-Schaub, M. (dir.), *Les dynamiques du contentieux climatique*, 2020, Paris, Mare & Martin, pp. 147-167; Cassella, S., "L'effet indirect du droit international : l'arrêt commune de Grande-Synthe", *AJDA* 2021, p. 226.

63 This is a principle of political and moral philosophy enunciated by John Stuart Mill in his book "On Liberty" (1859) and taken up by John Feinberg in 1973. According to this principle, the only valid reason to compel an individual to do or not to do something is the harm caused to others by his or her behaviour; *Renforcer l'efficacité du droit international de l'environnement*, Rapport de la Commission environnement du Club de juristes, October 2015, pp. 58 & f.; *Renforcer l'efficacité du droit international de l'environnement*, Rapport de la Commission environnement du Club de juristes, October 2015; International Law Association, Legal principles related to climate change, Draft Committee report, June 2012. Available at: http://www.ilahq.org/en/committees/index.cfm/cid/1029; Murase, S., Protection of the Atmosphere, Annexe B, Rapport de la Commission de Droit International, 63 session, 2011, NU AG Resolution 66/10.

and potentially responsible for the harm resulting from its inaction.[64]

This point, which has never been fully clarified,[65] has been answered in this groundbreaking decision.[66] This very innovative interpretation opened interesting perspectives for the legal treatment of climate change. The judges, in this case, adopted the conclusions of contemporary international law, which advocates a broad interpretation of the rule of no-harm, by referring to its twin brother, the principle of prevention. Through these principles, the duty of the state to adopt a responsible behavior was enshrined by a domestic court in the Netherlands. The behavior of the Dutch state did not meet the standards of responsibility required by the duty of care approach, since by its inaction (or by its ineffective climate policy) it was harming or damaging other countries. What was also remarkable in this case is that the judges did not only hold the Dutch state responsible, but also considered that it acted illegally, insofar as it did not fulfill its duty of care towards its citizens.

In this case, the duties of the state were grouped under a single term: the duty of care.[67] This duty, the judges explained, had to be reasonable insofar as it involved dealing with a serious, but uncertain, threat. A first question that arose was whether the duty of care could be defined an obligation of means or an obligation of result. In order to better understand its meaning, it is interesting to split the notion: on the one hand, when the risk is known and identified, it is an obligation of vigilance and, on the other hand, in the face of scientific uncertainty, it is an obligation of prudence, or even of precaution. In this case, we think that the judges have indeed favoured this second interpretation.

c) A new turn in the interpretation and application of the precautionary principle

In order to make the state's duty of care effective, the Court explained that the state should apply the precautionary principle. The Court based its reasoning on the application of this principle, taking into account the danger of the phenomenon.[68] This characteristic resided in two essential elements: the proportionality of the precautionary measures and the cost-effectiveness of these measures. In essence, the judges held that there is less cost in taking precautionary measures now than at a later date, when the phenom-

64 Murase, S. (2011), Protection of the Atmosphere, op. cit.

65 Birnie, P., Boyle, A. & Redgwell, C., *International law and the Environnement,* 2009, Oxford, pp. 143-152.

66 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., points 3.3 and 4.74.

67 Ibid, points 4.64, "*...This factors lead the court to the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent...the state should take precautionary measures for its citizens...* "; See for developments of a general duty of care: Pontier, J.-M., "La puissance publique et la prévention des risques", *AJDA* 2003, p. 1752; Deguergue, M., "Responsabilités et exposition aux risques de cancer", *RDSS* 2014, p. 137.

68 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., points 4.67 & 4.75 "to what extent the State has the obligation to take precautionary measures, it is also relevant to find out whether taking precautionary measures is onerous...it is important to know whether the measures to be taken are costly...If the current greenhouse gas emissions continue in the same manner, global warming will take such a form that the cost of adaptation will become disproportionately high"; See for some developments on this principle: Martin, G. J., "La mise en œuvre du principe de précaution et la renaissance de la responsabilité pour faute", *JCP* éd. E. 1999, n° 1 supl., p. 4; Rouyère, A., "L'exigence de précaution saisie par le juge", *RFDA* 2000, p. 266.

enon of climate change will worsen.

The decision describes the relevance of the precautionary principle based on its effectiveness and feasibility, taking into account existing technical possibilities.[69] The judges did not hesitate to raise the question of the usefulness of greenhouse gas mitigation measures based on the precautionary principle in terms of cost-effectiveness. This was indeed one of the main points of the Dutch government in relation to the reduction of emissions. The government had argued that the costs would be disproportionate if it were to reduce emissions to the extent requested by Urgenda. According to the Court, however, reducing the level of emission is not only perfectly proportionate, but it is also the right thing to do from a purely macro-economic perspective. Mitigation was considered by the judges the cheapest and most appropriate response. To this end, the Court set out the concrete measures to be adopted, all based on precaution, such as the tradable greenhouse gas emission permits, taxes on CO2 or the further introduction of renewable energies. The state, explained the Court, 'cannot delay taking precautionary measures on the sole grounds that there is not enough certainty...' and must therefore, on the basis of a cost-benefit analysis, take immediate action, because "prevention is always better than cure".

It therefore needs to be concluded that the trend that began with the *Massachusetts* case – taking the principles of precaution and prevention seriously – is still evolving in 'third wave of climate litigation'.

The *Urgenda* decision – the most emblematic case of the 'second wave' of climate change litigation – stated in its conclusions that, despite the 'principle of separation of powers', in a democratic society it is up to the judges to make the law effective and not a dead letter.[70] It is not a matter of encroaching on the competences of the executive or the legislative, but of defending the citizens and reorganizing the three powers so that each one does its job. Thus, the Court said, it is the judge's job to render effective the legislation enacted to protect the citizens from the government, which is the primary purpose of the law. In this decision, the judges gave meaning to the notion of 'sustainable society',[71] opening paths for a 'green transition'.

B. The role of judges in the 'green transition pathway': the 'third wave' of climate litigation

The role of judges is becoming increasingly prominent in the latest climate disputes.[72]

69 Principles of Oslo on Global Climate Change, 1 March 2015. Available at: http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf; See also: Sands, P., "International Law in the field of Sustainable Development: emerging legal principles", in Lang, W. (ed.) *Sustainable Development and International Law*, 1995, Graham & Trotman, Martinus Grijhof, London, Boston, pp. 55.

70 Torre-Schaub, M. et al., *Les contentieux climatiques. Usages et mobilisations du droit pour la cause climatique.* Mission de Recherche Droit et Justice, 2019. Available at: http://www.gip-recherche-justice.fr/publication/les-dynamiques-du-contentieux-climatique-usages-et-mobilisation-du-droit-face-a-la-cause-climatique-2/.

71 *"The term 'sustainable society also has an intergenerational dimension', which is expressed in the definition of 'sustainability' in the Brundtland Report referred to under 2.3: Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own need"* Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., point 4.8, p. 27.

72 Fort, F.-X., "La « climatisation » du procès administrative", *JCP A* 2021, comm. 2206; Torre-Schaub, M., *Grande-*

Indeed, judges are taking an active role in the low-carbon transition, either to better accompany the administration on this path, or to compensate its inaction, reminding states to 'get on the right track' of decarbonization. It seems that especially in the French judicial system, the judge takes such an active role, as will be shown in the following.[73]

Climatic phenomena belong both to the past and to the future. French administrative judges place themselves between what has already happened and the future.[74] Following two different paths, on the one hand the legality control – '*recours pour excès de pouvoir*[75]' – and on the other hand the indemnity action for failure to act –'*recours en responsabilité*[76]' – , the judges of the *Conseil d'Etat* and those of the Administrative Court

Synthe I, EEI 2020, ét. 17; Huglo, C., *EEI* 2021, dossier 12; Radiguet, R., *JCP A* 2020, comm. 2337; Parance, B. & Rochfeld, J., *JCP G* 2020, p. 1334; Rotoullié, J.-C., *Dr. adm* 2021, n°3, comm. 14; Delzangles, H., *AJDA* 2021, p. 217; Cassella, S., *AJDA* 2021, p. 226. On the *Grande Synthe II* decision: Delzangles, H., "Le « contrôle de la trajectoire » et la carence de l'Etat français à lutter contre les changements climatiques. Retour sur les décisions *Grande-Synthe* en passant par *l'Affaire du siècle", AJDA* 2021, p. 2115; Van Lang, A., Perrin, A. & Deffairi, M., "Le contentieux climatique devant le juge administrative", *RFDA* 2021, p. 747; TA Paris, 3 Feb. 2021, l'*Affaire du siècle I, Ass. Oxfam France et a.* See Torre-Schaub, M., *EEI* 2021, n°3, étude 3; Torre-Schaub, M. & Bozo, P., "L'affaire du siècle, un jugement en clair-obscur", *JCP A* 19 March 2021, n° 12, comm. 2088, pp. 29-33; Torre-Schaub, M., *JCP G* 2021, n°10, act. 247; Mazeaud, D., *JCP G* 2021, n°6, comm. 139; Cournil, C. & Fleury, M., *La revue des droits de l'homme* 7 Feb. 2021; Pastor, J.-M., *D.* 2021, p. 239; Hautereau-Boutonnet, M., *D* 2021, p. 281; Gali, H., *D.*, 2021, p. 709; Brunie, J., *EEI* 2021, n°4; Deffairi, M., *Dr. adm.* 2021, n°6, comm. 28; Baldon, C. & Capdebos, C., "L'affaire du siècle, présentation, ambition, enjeux", *EEI* Oct. 2021, art. 26. On the jugment *ADS II*: Bétaille, J., "Le préjudice écologique à l'épreuve de l'affaire du siècle. Un succès théorique mais des difficultés pratiques", *AJDA* 8 Nov. 2021, p. 2228; Quick overview: Hautereau-Boutonnet, M., "Jugement de l'affaire du siècle. Une logique comptable et correctrice", *JCP éd G.* 15 Nov. 2021, p. 1195. Before the decisions, for an overview of the background: Cournil, C., Le Dylio, A. & Mougeolle, P., "L'affaire du siècle : entre continuité et innovations juridiques", *AJDA* 2019, pp. 1864.

73 CE, 19 Nov. 2020, n°427301, *Commune de Grande-Synthe*, Jurisdata : 2020-018732; CE, 1 July 2021, n°427301, *Commune de Grande-Synthe*; TA Paris, 3 Feb. 2021, n°1904967, 1904968, 1904972, 1904976/4-1, *Association Oxfam France et a.,* JurisData : 2021-000979; TA Paris, 14 Oct. 2021, n°1904967, 1904968, 1904972, 1904976/4-, *Association Oxfam France et a.,* 1 JurisData: 2021-016096 (Affaire du siècle).

74 Lasserre B., presentation at the w*ebinar organized by Yale* University and the Conseil d'Etat *Grande-Synthe,* 24 Feb. 2021. Available at: https://www.conseil-etat.fr/actualites/mercredi-24-fevrier-webinar-avec-l-universite-de-yale-autour-de-la-decision-grande-synthe.

75 A contentious appeal for annulment made before an administrative court by means of a request and directed against a unilateral administrative act (not a contract except for the hiring of a contractual public agent and except for a prefectural deferment); based on means of external legality and means of internal legality whose only purpose is to obtain the partial or total annulment of the decision challenged. It is often said that it is a lawsuit against an act as opposed to the full litigation appeal which is a lawsuit against a public person in order to obtain compensation based on its responsibility for fault or risk. The recourse for excess of power is defined as "the recourse which is open even without text against any administrative act and which has for effect to ensure, in accordance with the general principles of the law, the respect of the legality" (CE Ass., 17 Feb. 1950, *Dame Lamotte*) Maurin, A., *Droit administratif*, Collection Aide-mémoire - Ed. Sirey.

76 The administration is subject to the principle of responsibility, which obliges it to repair the damage caused by its act. This principle can take several forms. Contractual liability concerns the relations between the administration and the persons who have signed a contract with it (co-contractors). If the administration, or its co-contractor, does not execute the obligations provided for in the contract, the other party can refer to the judge in order to obtain compensation for these contractual failures. In other cases, the liability is said to be "extra-contractual", because it

of Paris come to the same conclusion: the lack of time before us to achieve the goal set by the Paris Agreement. This objective is to keep the global temperature increase below 2°C and, if possible, below 1.5°C. It is, therefore, an affirmation of the urgency of climate change that unites the judges in both cases.

In the first law case, *Grande Synthe affaire*,[77] the *Conseil d'Etat* was asked to rule on the legality of an administrative act. In Grande Synthe the applicants argued that the administration had exceeded its powers by not giving answer to the request made previously by the applicants, requiring the administration to react to the insufficiency of the existing regulation concerning the mitigation of climate change. They therefore raised an appeal for '*excès de pouvoir*'. The Mayor of the city of Grande Synthe, in his own name and on behalf of his municipality, presented before the Council of State a request for 'excess of power' requiring the said high jurisdiction to examine the 'legality' of the acts of the administration for not having responded to the requests of the applicant demanding a response concerning the measures taken by the administration to mitigate and reduce GHG emissions causing global warming.

In the second case discussed here – the *affaire du siècle*[78] – the administrative judge, this time of the administrative court of Paris, in first instance, had to hear an appeal for compensation, brought by several NGOs demanding to declare the faulty responsibility of the administration for having caused an ecological damage to the atmosphere, due to the failures and insufficiencies in the legislation and regulations concerning the mitigation of GHG emissions at the origin of the climate change. The judges had to assess whether the state was responsible for the damage caused to the atmosphere by the excessive GHG emissions.

The administrative judge relied on two central theories in the light of the dispute. He noted that the commitments made by France entailed real binding obligations. The judge had also affirmed that the principle of prevention is an essential tool in the fight against climate change. However, the judge was not able to go beyond his powers, both because he can only interpret existing legislation and because of the limited content of this legislation. The judge stressed that there is an obligation to act which is currently not lived up to. The confirmation of new and binding climatic commitments arises from these two cases, as does their scope. These commitments show the 'path' to the ultimate goal of carbon neutrality (1). On the one hand, the judges initiate this transition through the reaffirmation of the objectives to be achieved and by employing preventive measures. On the other hand, they indirectly identify what could become a new standard of behavior (2).

1. How the judges interpret the transition to a decarbonized society

Both the reinforcement of climate 'obligations' by the administrative judge (a) and the reaffirmed necessity for 'action' (b) can be observed in the latest French decisions.

is not based on a contract. The liability can then be: a liability for fault: the victim must then demonstrate a fault of the administration; a liability without fault: it is only necessary to prove that the damage is linked to an activity of the administration, which has not committed a fault. Available at: https://www.vie-publique.fr/fiches/20274-quelles-sont-les-formes-de-responsabilite-de-ladministration (consulted in July 2022).

77 CE, 19 Nov. 2020, n°427301, *Commune de Grande-Synthe*, op. cit.; CE, 1 July 2021, n°427301, *Commune de Grande-Synthe*, op. cit.

78 TA Paris, 3 Feb. 2021, *Ass. Oxfam France et a.*, op. cit.; TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit.

a) The reinforcement of climate 'obligations' by the administrative judge

The *Grande Synthe* (here GS) *commune* decision responds to an appeal against the excess of power of the President of the Republic, the Prime Minister and the Minister of Ecological Transition by omitting to take all measures necessary to respect international commitments for the reduction of greenhouse gas emissions on French territory. The court had considered the *commune*'s appeal and the interventions of other cities and associations admissible - by adopting an extensive conception of the legal interest in bringing proceeding. It had also recognized the normative scope of the objectives of reducing greenhouse gas emissions.

The two GS rulings deal with the question of inadequacy of public climate policies. To answer this question, the judges relied on three central arguments. First, they emphasize that the international legal texts binding France to contrast climate change (the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement) must be taken into account as genuine commitments. Secondly, the November 2020 decision – confirmed by the July 1, 2021 decision – notes the binding character of the programmatic documents on carbon targets and trajectories, carbon budgets and the different periods to be respected (*Stratégie Nationale Bas Carbone* SNBC I and II). This aspect is one of the strong points of the two decisions because it puts an end to any ambiguity on the mandatory nature of France's climate commitments. Third, as a logical consequence, the decision underlines the lack of compliance with the reduction trajectories for the period 2015-2018, based on the binding nature of the documents.

In its decision of July 1st, 2021, the *Conseil d'Etat* confirmed the annulment of the implicit decision of rejection taken by the administration. It thus forced the government to 'take all necessary measures' to respect the GHG emission trajectories it set for itself. The *Conseil d'Etat* once again recognized the normative value of the commitments, and of the objective to be reached under Article 104 of the Energy Code. This was also the meaning of the conclusions of the public rapporteur. Still, the July 2021 SG decision, stated that the administration should present its measures to reduce emissions according to the national plan established (the Stratégie Nationale Bas Carbone SNBC) before March 31th 2022. This deadline has already passed and no specific measure has been taken, which will probably lead to a new decision anytime soon. The upcoming judgment could further legitimize judges to oblige the administration to adopt climate change mitigation measures. In doing so, the judges will not be 'trespassing' their role, but will be exercising their legitimate power to force the administration to act according to existing climate law.

b) The necessity of 'action' reaffirmed by the judge

In another case, entitled *Affaire du siècle*, the judge recalled the need to act as an obligation for the state. This was interpreted in the decision as the need to 'take all useful measures'. This was already clear in the conclusions of October 14, 2021, which were particularly enlightening on this subject: '*nous vous demandons, compte tenu de l'impossibilité d'identifier précisément, et donc de réparer, les effets de ces émissions sur l'atmosphère, de la compenser en ordonnant à l'État de déduire des futurs budgets carbone le surplus d'émissions produit*

sur la période 2015-2018'.[79] Despite the arguments of the defendants, the conclusions eventually affirmed that the compensatory nature of the SNBC was not the solution. The insufficient action on the part of the state was thus well established for the past and even for the current year, which led the judges to follow up with their decision of October 14, 2021 and to force the state to 'take all useful sectoral measures likely to repair the damage up to the uncompensated share of GHG emissions under the first carbon budget... it is necessary to order the measures within a sufficiently short period of time in order to prevent the worsening of the damage'.[80]

2. Towards the jurisprudential creation of a new 'prudential climate standard of behavior'?

By examining recent French climate change decisions, the administrative judge reveals two main trends: on the one hand, administrative justice designs the future of the carbon transition by controlling emission pathways, even if it takes a cautious stance (a). [81] This control of administrative activities could drive the judge, on the long run, to set a new standard of behavior for the state regarding climate change (b).

a) Designing the future: the control of low carbon trajectories

'The decision of *Grande Synthe* is a decision that puts the judge in the forefront.'[82] So he had to control what will happen in the future.[83] This jurisprudence will likely have a historical significance because it is 'turned towards the future.'[84] Because when it refers to the past, it also provides a 'roadmap' for the future.[85] The point is to consider that, if the state continues to follow the same trajectory of reduction that was followed until the year 2020, all the efforts to reach carbon neutrality by 2050 and to achieve a reasonable reduction by 2030 will be very difficult to achieve, even 'impossible'.[86]

Both French decisions expressed doubts about the reduction capacities, which seemed unrealistic given current climate policies. The conclusions of the first GS decision al-

79 "*they ask you, in view of the impossibility of identifying precisely, and therefore of repairing, the effects of these emissions on the atmosphere, to compensate for it by ordering the State to deduct from future carbon budgets the surplus of emissions produced over the period 2015-2018*" (Unofficial translation).

80 TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit.

81 Torre-Schaub, M., "Les contentieux climatiques, quelle efficacité en France ? Analyse des leviers et difficultés", in *REEI* May 2019, Dossier spé. cit., p. 30; Monnier, L., "Quel rôle pour la justice administrative dans la lutte contre les projets « climaticides » ? Le cas de Guyane Maritime", in *REEI* May 2019, Dossier spéc. cit., pp. 32-37; Torre-Schaub, M., « Les contentieux climatiques : du passé vers le futur », *RFDA* Jan.-Feb. 2022, n°1.

82 B. Lasserre presentation at the w*ebinar organized by Yale* University and the Conseil d'Etat *Grande-Synthe,* 24 Feb. 2021, op. cit.

83 Delzangles, H., Le « contrôle de la trajectoire » et la carence de l'Etat français à lutter contre les changements climatiques. (2021), op. cit., p. 2115; Torre-Schaub, M., Les contentieux climatiques : du passé vers le futur (2022), op. cit.

84 Torre-Schaub, M., Les contentieux climatiques : du passé vers le futur (2022), op. cit.

85 Delzangles, H., Le « contrôle de la trajectoire » et la carence de l'Etat français à lutter contre les changements climatiques. (2021), op. cit., p. 2115; Ibid.

86 Conclusions CE, 1 July 2021, *Commune de Grande Synthe*, op. cit., pp. 4 & f. and 12; TA Paris, *Ass. Oxfam France et a.*, 14 Oct. 2021, op. cit., pp. 8-10.

ready expressed this concern: 'it is a question here of taking a position on an essential trajectory for the future.'[87] The conclusions of the second decision also echo this. It is a matter of excessive future efforts on the citizens' part that would force them to radically change their way of life in a short time.

b. The ' prudential behavior ' as a new jurisprudential standard?

The latest *Affaire du siècle* decision clarified the way judges interpreted the standard of prudence, which could become a new standard of behavior for the public administration regarding some climate change-related activities. In this sense, the last decision of the *Affaire du siècle* pronounced a rather innovative decision on the way in which the compensation of the established damage caused to the atmosphere had to be carried out. In order to do so, and having ruled out monetary compensation in the first judgment of February 3, 2021, the judges opted for compensation in kind. This takes the form of compensation with the objective of 'preventing' and not 'aggravating' the damage. 'Under the terms of article 1252 of the Civil Code: Independently of the compensation of the ecological damage, the judge, seized of a request in this sense by a person mentioned in article 1248, can prescribe the reasonable measures suitable to prevent or make cease the damage'.[88]

With regards to the measures specifically designed to allow this compensation through the application of prevention principle, the court considered that:

> *'If the Minister...specifies that...the various measures appearing in the law of July 20, 2021 as well as the regulatory texts that will soon be taken for its application, are of a nature to allow for the reparation of the prejudice noted...she does not establish, as of the date of the present judgment, that it would have been fully compensated... In the circumstances of the case, it is appropriate to order the Prime Minister ...to take all appropriate sectorial measures to compensate for the uncompensated part of the loss ...and subject to adjustment ...it is appropriate to order the enactment of such measures within a sufficiently short period of time to prevent further damage'.*[89]

Once this path is mapped out and guided by prevention, judges will be able judges to set the ultimate goal of carbon neutrality in future decisions. The means to that end may well become the beginning of a standard of diligent preventive behavior. The assessment of this 'responsible' behavior is based on the definition of a prevention standard. This standard is manifested by various signals: first, by the effective obligation to 'take all measures' to achieve reparation of the ecological damage. Secondly, by the obligation for the state to 'submit itself to the control of the judge' in the months to come. Finally, the judges expressed this preventive new standard of behavior for the administration with the threat of a 'new injunction', possibly accompanied by a fine.[90] It is indeed through

87 Conclusions CE, 1 July 2021, *Commune de Grande Synthe*, op. cit., pp. 4 & 12.

88 Conclusions TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit., p. 5.

89 Ibid, p. 6.

90 TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit., point 7, p. 29.
Ibid, points 8, 9, 10 & 13.

'drawing a precise roadmap for carrying out low carbon transition' that the judges have sketched out the beginning of a climate prudential diligence standard.

This would mean that administrative authorizations granted to private actors, that might have a negative impact on the fight against climate change or that are not in line with the final objective of carbon neutrality by 2050, would be subject to an increased 'duty of vigilance' on activities carried out under the administration's responsibility. As a result, administrative authorizations granted to private operators that are not in line with the final objective of carbon neutrality would fall under the scope of possible liability actions. If this 'climate duty of care' '*à la française*' was finally accepted, 'it would commit the State beyond its own activity'. This could have unintended consequences.

However, this trend is not unique to France. Other countries witness a similar trend. In Australia, the *Sharma* case has recently illustrated the emergence of a new kind of 'climate duty of care' from the state.[91] In the Netherlands as well, in a surprising judgment concerning the fossil private company Shell.[92] If this new path is to be followed by other domestic judges, this could open new doors to the empowerment of climate change litigation.

***

This article showed the way judges played a role in tackling climate change during the last twenty years. The role played by courts in contributing to the fight against climate change is, of course, partial and not homogenous, depending on many factors such as the legal system in which the decisions are made, the existence of climate change laws at domestic level, and the role played by international law in domestic courts. Despite these differences and the many difficulties mentioned (difficulties to interpret uncertainties, difficulties to establish a clear causality link, lack of ambition of many climate change laws and the principle of the separation of powers), the role of judges became timidly but surely more and more important. Through the different 'waves of climate litigation', a 'duty to ensure' that the low carbon transition trajectories are respected by the administration has emerged in French jurisprudence. This particular role of administrative judges in 'controlling' the action (or lack thereof) of the administration will be verified and renewed as climate change cases appear here and there. In France, more particularly this will arrive soon: first, at the end of March 2022, then at the end of December 2022, in order that the GHG reduction targets set for 2030 and 2050 could be achieved.

We are aware that today we are still at the stage of small-steps jurisprudence because the judge, by virtue of historical prudence and proximity to the administration limits himself. He limits himself too because of the respect for the principle of the separation of powers. And, last but not least, because of the margin of appreciation that must be left to the administration.

Nevertheless, a new path has been opened up by the administrative judges that might

91 Sister Marie Brigid Arthur v. Minister for the Environment *Sharma,* Federal Court of Australia, 27 May 2021; See also commenting a previous decision New South Wales Court of Appeal, 8 Feb. 2019, *Gloucester Resources Limited* (GRL) *v. Minister for Planning,* Thuilier, T., "Dialogues franco-australiens sur la justice climatique", *Revue Energie, Environnement, Infrastructures*, March-April 2019.

92 Court of District of The Hague, 26 May 2021, *Milieudefensie et al. v. Royal Dutch Shell plc,* NL:RBDHA:2021:5339. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339.

lead in the near future to the establishment of a new 'standard' of diligent behavior for the administration. For the time being, this is still in a preliminary and even prospective stage. We can support such a hypothesis thanks to an unprecedented development of the 'duty of prevention' by the different decisions that we have covered so far.