

ARTICLE

# Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France

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## Abstract

This study examines how the climate litigation approach builds pathways to face climate emergency. In light of recent jurisdictional developments, this article underlines the links between legislation, litigation, and public policies to trace ways, progress and obstacles to face it. Those emergent dynamics contribute to build a lasting and sustainable climate change legal regime. Intertwining the different climate disputes in the world and the progress made through the elaboration of different climate laws allow to have a panoramic visibility on this new mode of climate governance which appears in filigree today all over the world and especially in France.

**Keywords:** Climate Change Litigation; climate emergency; climate justice; Climate change Law; Climate Governance; Sustainability; Green Transition; Law Carbon; Net zero carbon; Climate Liability; Ecological prejudice

Numerous climate trials have emerged in the world since the 2000s and have multiplied, including in Europe since 2015. They bear witness to a trend towards polycentric climate governance which is no longer limited to the framework of UN negotiations.<sup>1</sup> In this evolving context, the courts cannot be an exception to this expansion of forums for discussion and climate governance. This form of approaching the fight against climate change, which is more collaborative—because it involves new alliances between actors (NGOs, citizens, local communities)—nevertheless shows a “pathological” aspect of climate law: Either its absence, its inadequacy, or, in general, its

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<sup>1</sup>Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 THE AMERICAN ECONOMIC REVIEW 641 (2010) (proposing to find “cooperation” and “consensus” in the management of common resources); Stefan Aykut, Jean Foyer & Eduard Morena, *‘Incantatory’ Governance: Global Climate Politics’ Performative Turn and Its Wider Significance for Global Politics*, 58 INT’L POL. 519–40 (2020) (analyzing the issue of climate governance in terms of a failure in UN negotiations due to the lack of effective presence of interest representatives from minorities or civil society). See also Harro Van Asselt & Fariborz Zelli, *International Governance: Polycentric Governing by and Beyond the UNFCCC*, in GOVERNING CLIMATE CHANGE: POLYCENTRICITY IN ACTION? 29, 29 (Andrew Jordan et al. eds., 2018); Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE, 253, 253 (Robert E. Goodin ed., 2008); Stefan C. Aykut & Lucile Maertens, *The Climatization of Global Politics: Introduction to the Special Issue*, 58 INT’L POL. 501, 501 (2021); STEFAN AYKUT & AMY DAHAN, GOUVERNER LE CLIMAT? VINGT ANS DE NÉGOCIATIONS INTERNATIONALES 129–66 (2015).

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maladjustment to the climate emergency.<sup>2</sup> In order to fill these voids or to respond to growing demands from civil society, a paradigm shift is occurring through the courts in an attempt to crystallize a right of access to climate justice.<sup>3</sup>

Several possible definitions of climate disputes coexist. The broadest is that which includes any remedy in which its object, *de facto* or *de jure*, is linked to climate change. Here we will retain a more restricted definition whereby climate change is the subject of direct appeal or is used as a central argument.<sup>4</sup> While climate litigation is multi-faceted and remedies can be sought against the climate policies of States or against companies, the present study will focus in particular on claims relating to the demand for climate responsibilities from the public administration and the recognition of more effective climate change laws and climate policies. This article seeks to show the role of courts and climate litigation in advancing and promoting the definition of a legal climate regime. By looking at recent developments of climate litigation in France, we will explore them through both specific French Law and a comparative analysis with other climate justice developments around the world.<sup>5</sup>

The recent legislative and policy developments in France are a very good example of the inter-relationship between the evolution of case law and the progress made in climate change legal regime. Our main purpose in studying French case law is to show that the recent developments are a good example for shedding light on emergent dynamics between law, policy making, and legal actions brought by civil society. Analyzing French case law enables us to underline the background of a number of important legislative courses of action towards the progressive recognition of a climate emergency. The two main cases examined in this article reflect this interplay and the potential positive synergy between case law and legislation. This new scenario in France could be the beginning of a polycentric approach to climate governance.

It is useful to situate these case law developments in a global context. In recent months, “climate emergency” declarations have been multiplying in different States<sup>6</sup> and cities<sup>7</sup> as well at the European Union<sup>8</sup>. France is no exception and the French National Assembly has voted to declare a state of climate and ecological<sup>9</sup> emergency following a motion for a resolution. Likewise, a

<sup>2</sup>Marta Torre-Schaub, *Changement climatique, quand la société civile multiplie les actions en justice* [Climate Change, When Civil Society Steps Up Legal Action], THE CONVERSATION, March 22, 2017, <https://theconversation.com/changement-climatique-quand-la-societe-civile-multiplie-les-actions-en-justice-74191>; LUCA D'AMBROSIO & BLANCHE LORMETEAU, LES DYNAMIQUES DU CONTENTIEUX CLIMATIQUE. USAGES ET MOBILISATIONS DU DROIT POUR LA CAUSE CLIMATIQUE (Marta Torre-Schaub ed., 2019), <http://www.gip-recherche-justice.fr/wp-content/uploads/2020/01/17.05-RF-contentieux-climatiques.pdf>; MARTA TORRE-SCHAUB, JUSTICE CLIMATIQUE: PROCES ET ACTIONS (CNRS ed. 2020); MARTA TORRE-SCHAUB, LES DYNAMIQUES DU CONTENTIEUX CLIMATIQUE. USAGES ET MOBILISATIONS DU DROIT (Mare & Martin eds., 2021).

<sup>3</sup>JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION (2015); Mary Robinson Foundation for Climate Justice, *Principles of Climate Justice*, <https://www.mrfcj.org/wp-content/uploads/2015/09/Principles-of-Climate-Justice.pdf>; MARTA TORRE-SCHAUB, JUSTICE CLIMATIQUE: PROCES ET ACTIONS (CNRS ed. 2020); Marta Torre-Schaub, *Justice climatique, nouvelles tendances, nouvelles opportunités*, IDDRI (June 30, 2021), <https://www.iddri.org/fr/publications-et-evenements/billet-de-blog/justice-climatique-nouvelles-tendances-nouvelles>.

<sup>4</sup>United Nations Environment Program, *The Status of Climate Change Litigation: A Global Review* (2017); David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15 (2012); Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 L. & POL'Y 236 (2013); IVANO ALOGNA, CHRISTINE BAKKER & JEAN-PIERRE GAUCI, CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 1, 1–30 (Ivano Alogna, Christine Bakker & Jean-Pierre Gauci eds., 2021).

<sup>5</sup>Marta Torre-Schaub, *Climate Change Litigation in France*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 124 (Ivano Alogna ed., 2021).

<sup>6</sup>For an evolving overview of the statements identified, see *Climate Emergency Declarations*, CEDAMIA, <https://www.cedamia.org/global/>.

<sup>7</sup>Anne-Françoise Hivert, *A Copenhagen, les maires de 94 villes déclarent l'urgence climatique*, LE MONDE (Oct. 10, 2019). See also Lafayette, Colo., CODE OF ORDINANCES ch. 43, art. IV (2017); Exeter, Del., *Right to a Healthy Climate Ordinance*, (2019).

<sup>8</sup>EUR. PARL. DOC. (COP 25) (2019).

<sup>9</sup>Proposition de Résolution déclarant l'état d'urgence climatique et écologique [Motion for a resolution declaring a climate and ecological state of emergency] Assemblée Nationale [National Assembly], 1943, May 14, 2019 (Fr.); Marta Torre-Schaub & B. Lormeteau, *Les contentieux climatiques en France* [Climate disputes in France] (Dossier special) ENVIRONNEMENT,

climate resilience bill has just been published on August 22 to deal with the climate emergency. At the same time, the opportunity to include the “climate priority” in the French Constitution was missed. The fact remains, however, that several new climatic remedies are sketching out interesting avenues. The purpose of this article is thus to show different pathways, methods, and conceptual solutions taken in France and Europe to underline the importance of fighting against climate change in the courts.<sup>10</sup>

The year 2021 marked a milestone for climate justice around the world. With nearly twenty cases resolved during the year and more than 150 recent appeals, the phenomenon—which was still in the minority until 2015—saw its numbers explode. What about in France? The latest legislative developments show that the climate issue has taken on an unexpected but deserved scale. After the Citizen’s Convention for the Climate and its 149 proposals, the announcement made by President Macron of an “unfiltered” resumption of these proposals in a law was followed by two bills—one on climate and resilience, the other on constitutional reform. If, for a large part of environmentalist doctrine and for many environmental activists, these bills were far from sufficient and did not take up in their entirety, or in their literality the proposals of the Convention, it must be recognized that the question of the climate emergency has been taken seriously by government and lawmakers, to say the least. The litigation activity, meanwhile, does not have to be ashamed either, with two major climate cases in progress<sup>11</sup>. These developments, both legislative and judicial, clearly show the great dynamism that is being deployed in France around the climate issue<sup>12</sup>. However, can we conclude that these two dynamics have contributed to improving the fight against global warming and facing the climate emergency? If so, in what way?

Some recent legal developments illustrate as well a tendency and progress in this direction. On one hand, “climate emergency” has nourished, even indirectly, new judicial developments in climate litigation. We think here at the *Affaire de Grande Synthe* before the Administrative High Court (Conseil d’Etat) that we will analyze and develop further in these pages<sup>13</sup>. On the other hand, some legal concepts, already present in the French legal system, but initially thought for other matters—as, for example, ecological prejudice and civil liability—have recently been

ENERGIE, INFRASTRUCTURES (2019); Marta Torre-Schaub, *Les procès climatiques gagnent la France : quatre initiatives à suivre de près* [Climate Trials are Winning Over France: Four Initiatives to Follow Closely], THE CONVERSATION, Jan. 10, 2019, <https://theconversation.com/les-proces-climatiques-gagnent-la-france-quatre-initiatives-a-suivre-de-pres-109543>; R. Radiguet, *Objectif de réduction des émissions de gaz ... à effet normatif?* [Objective of Reducing Gas Emissions ... with a Normative Effect?], LA SEMAINE JURIDIQUE ADMINISTRATIONS ET COLLECTIVITÉS TERRITORIALES, Dec. 21, 2020, at 28–33.

<sup>10</sup>See Marta Torre-Schaub & B. Lormeteau, *Aspects juridiques du changement climatique: de la gouvernance du climat à la justice climatique* [Legal Aspects of Climate Change: From Climate Governance to Climate Justice], 39 LA SEMAINE JURIDIQUE 1674, pt. 1–2 (2019).

<sup>11</sup>Conseil d’État [CE], 6e-5e ch., Jan. 7, 2021, 427301 [hereinafter *Grande-Synthe*]; Tribunaux administratifs [TA] Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1 (Fr.).

<sup>12</sup>Marta Torre-Schaub, *Les contentieux climatiques. Du passé vers l’avenir* [Climate disputes. From the Past Towards the Future] REVUE FRANÇAISE DE DROIT ADMINISTRATIF (2021), forthcoming.

<sup>13</sup>CE, 6e-5e ch., Jan. 7, 2021, 427301; C. Huglo & T. Bégel, *Le recours de la commune de Grande-Synthe et de son maire contre l’insuffisance des actions mises en oeuvre par l’Etat pour lutter contre le changement climatique* [The Appeal of the Municipality of Grande-Synthe and Its Mayor Against The Insufficiency of The Actions Implemented By The State To Fight Against Climate Change], 5 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 38 (Apr. 2019); R. Radiguet, *supra* note 9; B. Parente & J. Rochfeld, *Tsunami juridique au Conseil d’Etat: Une première décision « climatique » historique* [Legal Tsunami At The Council of State: A First Historic “Climatic” Decision], 49 LA SEMAINE DU DROIT—ÉDITION GÉNÉRALE 2138 (2020); Marta Torre-Schaub, *Plainte de Grande-Synthe pour inaction climatique: pourquoi la décision du Conseil d’Etat fera date* [Grande-Synthe Complaint For Climate Inaction: Why The Decision Of The Council Of State Will Be Milestone], THE CONVERSATION, Nov. 23, 2020, <https://theconversation.com/plainte-de-grande-synthe-pour-inaction-climatique-pourquoi-la-decision-du-conseil-detat-fera-date-150654>; Marta Torre-Schaub, *L’affaire de Grande Synthe, une première décision emblématique dans le contentieux climatique français* [The Grande Synthe Case, An Emblematic First Decision In French Climate Litigation], 12 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 13–15 (Dec. 2020); Hubert Delzangles, *Le premier « recours climatique » en France: une affaire à suivre!* [The First “Climate Remedy” in France: A Case To Follow!], 4 L’ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 217 (2021).

successfully used to fight climate emergency before the courts. In this group, the *Affaire du Siècle*<sup>14</sup> is the most advanced example of this trend. This case law will also be presented and further analyzed in this article.

It is useful also to briefly recall some French contextual elements related to climate change recent developments.<sup>15</sup> After the publication of the annual report issued by the High Council for the Climate in June 2019—which critically underlined the fact that France was falling far short of its ambitions in terms of greenhouse gas (GHG) reduction—it became apparent that the goal of carbon neutrality, although announced by the government since 2018, was far from becoming a political achievement, and even less so from being reflected in a legally binding text. Yet the Act on Climate and Energy—after nearly nine months of tough negotiations—was published on November 9, 2019.<sup>16</sup> Whilst it was initially designed as a “small law,” with only five Articles, over the months it became a law with 69 Articles. Beyond the fact that it sets out a certain number of energy objectives for France, including a final objective of “carbon neutrality” by 2050, the law sets in stone the issue of climate emergency by determining, in Article L100-1 A of the Energy Code, that “a law will determine the targets and establishes the priorities for action of the national energy policy to meet the ecological and climate emergency”<sup>17</sup>.

In spite of these advances, NGOs on the one hand, and the youth mobilized for the climate on the other, as well as a large part of the academic community, are wondering how these legislative objectives will be enforced and how they will be linked to the wave of climate litigation that now seems unavoidable given that it is already well under way.<sup>18</sup> This two-fold dynamic draws our attention by being both international—in the form of the Paris Agreement negotiations<sup>19</sup>—an established dialogue between different domestic courts concerning climate justice, and cross-border—in the form of a dialogue between litigants. This is our main point and this article will focus on the analysis and discussion around these different dynamics.

In order to better show these different evolutions and dynamics, and understand the links between them and the progress made, this article is organized around the following steps. First, this article will discuss—by outlining new legal boundaries—the question of the development of a judicial component of the Climate Justice focused on the notion of “climate obligation,” in order to see how climate emergency—through its litigation dimension—enables a legal climate regime to move forward. Second, we will present a view to consider, subsequently, how the question of the “urgency to act” also exerts an influence on the law. Third, we will present the emergency of “climate vulnerabilities” at stake as well as new judicial developments. Fourth, as part of judicial innovations, it is also interesting to observe how we moved from “climate emergency to climate priority,” through the example of the *Grande Synthe* Case. Fifth and finally, it is important to underscore how using more classical legal concepts for “new climate” purposes is a fruitful path to respond to climate emergency. This can be observed within the example of the concept of “ecological prejudice” in the *Affaire du siècle* case.<sup>20</sup>

<sup>14</sup>TA Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1 (Fr.).

<sup>15</sup>Marta Torre-Schaub, *Les contentieux climatiques, quelle efficacité en France? Analyse des leviers et difficultés* [Climate Disputes, How Effective in France? Analysis of Levers and Difficulties], 5 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 28 (Apr. 2019); A. Epstein & E. Deckert, *Climate Change Litigation in France*, in CLIMATE CHANGE LITIGATION: A HANDBOOK 336–62 (Wolfgang Kahl & Marc-Philippe Weller eds., 2021).

<sup>16</sup>LOI 2019-1147 du 8 novembre 2019 relative à l'énergie et au climat [Law 2019-1147 of November 8, 2019 relating to Energy and Climate], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 9, 2019, 0261.

<sup>17</sup>Torre-Schaub & Lormeteau, *supra* note 10.

<sup>18</sup>*Id.* at pt. 1.

<sup>19</sup>See C. Voigt, *Climate Change Litigation and International Governance*, in CLIMATE CHANGE LITIGATION: A HANDBOOK 2–19 (Wolfgang Kahl & Marc-Philippe Weller eds., 2021).

<sup>20</sup>TA Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1 (Fr.).

### A. Towards a Concept of “Climate Obligation in Times of Emergency”

Whilst the Paris Agreement<sup>21</sup> on Climate Change does not contain any legal obligations as such, it does, however, introduce a virtuous dynamic whereby States develop national contributions that can be reviewed every five years, setting out their reduction targets and their GHG accounting method. Thus, while their legal nature is still not very precise, these obligations go beyond mere statements of “soft law.” However, this process of establishing climate obligations should be regarded as a dynamic in itself, linking international and national law, case law on the subject, and some texts that could be described as “soft” law but are in the process of becoming “hard” law. Against this background, many States have embarked on a legislative process in order to get their act together with the final objective of the Agreement—to remain well below 2°C of global temperature compared to 1990 levels, and preferably within +1.5°C. This is an internationally binding target, as it is part of the Agreement ratified by more than 196 countries. Furthermore, the issue with keeping within this threshold, and if possible within +1.5°C, has been recalled by the international experts at the Intergovernmental Panel on Climate Change (IPCC) on a number of occasions this year.<sup>22</sup> The 2019 French Act on Climate and Energy contains several objectives that are in line with the Agreement. Nonetheless, the whole question that arises at present is that of determining the legal nature of these objectives. Are they legally binding? Do they involve absolute obligations or obligations of conduct? A number of court cases clearly show how difficult it is to enshrine a climate obligation that includes both precise results and a range of means to achieve them. Consequently, the process of developing this new concept is complex and incomplete.

There is currently a long path towards the establishment of a climate obligation in the form of positive legal obligations. While this may even constitute a new general principle of law in some countries, in others, such obligations stem from rights of a diverse nature.

Therefore, as a kind of “model,” the *Urgenda*<sup>23</sup> appeal decision of October 2018 affirmed the existence of two types of general climate obligations: one relating to the duty of care, under national law (in this case the Civil Code and the Constitution), and the other to international human rights law, as contained in Articles 2 and 8 of the European Convention on Human Rights (ECHR).<sup>24</sup> The latter argument paves the way for future legal actions that can be brought on these fundamental rights. Such is the case in Ireland, where the High Court<sup>25</sup> ruled that a right to an environment consistent with human dignity and the well-being of citizens is an essential condition for the fulfilment of all human rights. The decision stated that this right was not so much “utopian” and that it would become enforceable once it had been realized through the

<sup>21</sup>Conference Report: Framework Convention on Climate Change, <https://unfccc.int/sites/default/files/resource/docs/2015/cop21/eng/10a01.pdf>.

<sup>22</sup>Special Report: Global Warming of 1.5 °C, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), <http://www.ipcc.ch/report/sr15/> (last visited Oct. 29, 2021).

<sup>23</sup>Rechtbank’s-Gravenhage, 9 oktober 2018, 200.178.245/01; Rechtbank Den Haag, 24 juni 2015 (Urgenda Foundation/l’État des Pays-Bas, ECLI:NL:RBDHA:2015:7196 (Neth.); Jolene Lin, *The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. the State of the Netherlands*, 5 CLIMATE L. 65-81 (2015); J. K. De Graaf & J. H. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, 27(3) J. OF ENV’T L. 517-527 (2015); J. Van Zeven, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*, 4 TRANSNAT’L ENV’T L. 339-357 (2015); R. Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v. the State of the Netherlands*, 34 J. ENERGY & NAT. RES. L. 143-163 (2016); Conference Report: Samvel Varvaštian, *Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?*, BERLIN CONFERENCE: TRANSFORMATIVE GLOBAL CLIMATE GOVERNANCE APRÈS PARIS (2016); Marta Torre-Schaub, *La justice climatique. À propos du jugement de la Cour de district de la Haye du 24 juin 2015* [Climate Justice. Regarding the Judgment of the District Court of The Hague of June 24, 2015], 68(3) REVUE INTERNATIONALE DE DROIT COMPARÉ 672-693 (2016).

<sup>24</sup>European Convention on Human Rights (ECHR) art. 2, 8 (Sept. 3, 1953).

<sup>25</sup>*Friends of the Irish Environment v. Gov. of Ireland* [2019] IEHC 747 (H. Ct.) (Ir.).

definition and delineation of specific rights and obligations. The Court dismissed the appeal but held that Article 15 of the Constitution creates a climate obligation.<sup>26</sup> In the same vein, but targeting a private actor, an application was filed in the Netherlands in May 2019 by the environmental group Milieudefensie suing Shell. The claim alleges that Shell's contribution to climate change violates its human rights obligations and duty of care under Dutch law.<sup>27</sup> The Plaintiffs asked the court in The Hague to compel Shell to reduce its CO2 emissions by forty-five percent by 2030, and to reduce them to zero by 2050, in accordance with the Paris Agreement. In this action, the Plaintiffs broadened their duty of care argument to include private companies, claiming that, in light of the Paris Agreement objectives and scientific evidence, Shell has a duty to take measures aimed at reducing its greenhouse gas emissions. The May 26 decision agrees with the NGO and accepts the responsibility of the company for non-compliance with its duty of care towards consumers concerning the reduction obligations of greenhouse emissions in their scopes 1, 2 and even 3.<sup>28</sup>

In France, the legal action before the Administrative Court of Paris instituted by the *Affaire du siècle* in March 2019 aims to affirm the existence of a general climate obligation on the part of public authorities. This obligation, which does not yet exist, would be the basis for the failure to act which is thus reproached to the State. The court is asked to rule on a general principle of law which would operate as the legal basis for this obligation. To that end, the action underlines the rights and duties included in the Charter of the Environment—in particular, Articles 1 and 2 concerning the right to live in a healthy environment and the duty to conserve the environment. If the French courts are faced with a completely new task because of this ambitious appeal, other case law relating to positive obligations in the field of air pollution can be brought forward. The Council of State has already held that the State had an obligation to observe and enforce air quality levels in accordance with the 2008 Directive on ambient air quality and cleaner air for Europe.<sup>29</sup> The CJEU then ruled in October 2019 that France had breached its absolute obligations under the Directive.<sup>30</sup> At the same time, the Court has had to rule on the issue in several actions brought by private individuals against the Administration on the grounds of State responsibility for inaction and wrongful failure to comply with air quality thresholds.<sup>31</sup> In the February 3, 2021 *Affaire du siècle* decision, the Tribunal Administratif of Paris ruled, in a preliminary ruling judgment, partially in favor of the requesting NGOs.<sup>32</sup> The court accepted the responsibility of the State for faulty deficiency due to its inaction, and for having caused ecological damage due to the alteration of the atmosphere, but only for the period between 2015 and 2018.<sup>33</sup> We will develop in detail

<sup>26</sup>CONSTITUTION OF IRELAND 1937 art. 15, <https://www.irishstatutebook.ie/eli/cons/en/html> (Un organisme compétent doit, dans l'exercice de ses fonctions, prendre en considération: la poursuite de l'objectif national de transition et l'objectif de réduction des émissions de gaz à effet de serre et d'adaptation aux effets du changement climatique) [“A competent body shall, in performing its duties, take into consideration: the pursuit of the national transition objective and the target of reducing greenhouse gas emissions and adapting to the effects of climate change.”] (Unofficial translation).

<sup>27</sup>*Milieudefensie et al c/ Royal Dutch Shell* 9, Rechtbank's-Gravenhage, 5 Apr. 2019.

<sup>28</sup>*Milieudefensie et al. v Royal Dutch Shell*, Rechtbank's-Gravenhage, 26 mei 2021, NL:RBDHA:2021:5339, at para. 4.2.3, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>.

<sup>29</sup>CE, July 12, 2017, 394254; 2008 O.J. (L 152) 1; Agathe Van Lang, *Protection de la qualité de l'air: de la transformation d'un droit gazeux en droit solide* [Protection of Air Quality: From The Transformation Of A Gaseous Right Into A Solid Right], 12 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1135 (2017).

<sup>30</sup>ECJ, Case C-636/18, European Comm'n v. French Republic, ECLI:EU:C:2019:900 (Oct. 24, 2019), <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-636/18>.

<sup>31</sup>See TA Montreuil, June 25, 2019, 1802202 (Fr.). See also TA Paris, July 4, 2019, 1709333, 1810251, 1814405 (Fr.).

<sup>32</sup>TA Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1 (Fr.).

<sup>33</sup>TA Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1 (fr.); LEXIS KIOSQUE, *L'affaire du siècle, une révolution pour la justice climatique? A propos de la décision du TA du 3 février 2021 (n° 1904967, 1904968, 1904972, 1904976/4-1)* [The Case of the Century, A Revolution for Climate Justice? About the Decision of the TA of February 3, 2021], 10 LA SEMAINE JURIDIQUE GÉNÉRALE, Mar. 8, 2021, at 247; Marta Torre-Schaub, *L'affaire du siècle, une affaire à suivre* [The Case Of The Century, A Case To Follow], 3 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 10–12 (Mar. 2021); Denis Mazeaud, *L'affaire du siècle un petit pas vers le solidarisme climatique* [The Case of The Century A Small Step Towards Climate

the decision on the question of extending the concept of ecological damage to the climate in the following points of this article.

Before going further with the French cases, it is important to compare what happened in France with other countries. In this respect, it is useful to recall that, in the United Kingdom, attempts have been made to assert climate obligations on the part of the State and private actors, but without success.<sup>34</sup> One such example is the *Plan B Earth* complaint, which brought a legal action against the Secretary of State for Business, Energy and Industry Strategy on the grounds that the UK Government had breached the Climate Change Act of 2008 by failing to review a target for carbon reduction by 2050 in light of new international law and scientific developments. The application was dismissed on appeal as well,<sup>35</sup> which led to the inference that the courts considered the obligations under the Paris Accord to be “non-binding.”

Nonetheless, not all hope is lost with regards to the recognition of climate obligations. In February 2020, a group of German youth filed a legal challenge to Germany’s Federal Climate Protection Act (“Bundesklimaschutzgesetz” or “KSG”), arguing that the KSG’s target of reducing GHGs fifty-five percent by 2030 from 1990 levels was insufficient. The complainants alleged that the KSG therefore violated their human rights as protected by the Basic Law, Germany’s constitution. On April 29, 2021, the Federal Constitutional Court struck down the parts of the KSG as incompatible with fundamental rights for failing to set sufficient provisions for emissions cuts beyond 2030. The Court found that Article 20a of the Basic Law obliges the legislature to protect the climate and aim towards achieving climate neutrality. The judges accepted the arguments that the Climate law must follow a carbon budget approach to limit warming to well below 2°C and, if possible, to 1.5°C. The Court found that that Law had not proportionally distributed the budget between current and future generations. The Court ordered the legislature to set clear provisions for reduction targets from 2031 onward by the end of 2022.<sup>36</sup>

As a result of those different decisions, we can observe that a climate obligation is emerging from a plethora of case law, based on various foundations. On one hand, these foundations draw on a specific legislative mandate, along the lines of the Paris Agreement. On the other, they draw on fundamental rights, as well as already existing climate laws, considered insufficiently ambitious. We can then see how a general climate obligation emerges, slowly.

Further climate obligations may also result from even more specific and sectoral requirements as for instance those used in the Environmental Impact Assessments<sup>37</sup>.

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Solidarity], 6 LA SEMAINE JURIDIQUE GÉNÉRALE, Feb. 8, 2021, at 139; Marta Torre-Schaub, *Décryptage juridique de l'affaire du siècle* [Legal Decryption Of The Case Of The Century], THE CONVERSATION, Feb. 10, 2021, <https://theconversation.com/décryptage-juridique-de-l-affaire-du-siècle-155053>; M. Torre-Schaub & P. Bozo, *L'affaire du siècle, un jugement en clair-obscur ?* [The Case of The Century, A Chiaroscuro Judgment?], LA SEMAINE JURIDIQUE ADMINISTRATIONS ET COLLECTIVITÉS TERRITORIALES, Mar. 8, 2021, at 31; Mathilde Hautereau-Boutonnet, *L'affaire du siècle, de l'audace, encore de l'audace, toujours de l'audace !* [The Business of The Century, Daring, Still Daring, Always Daring!], 6 RECUEIL DALLOZ 281 (2021); M. Deffairi, *L'affaire du siècle : le préjudice écologique saisi par les juridictions administratives*, *Dr. adm.*, juin 2021, comm. 28.

<sup>34</sup>Plan B Earth v. Sec’y of State for Bus., Energy & Indus. Strategy [2018] EWHC 1892.

<sup>35</sup>Court of Appeal, Civil Division, *Re: The Queen on the application of Plan B. Earth and Ors v. Sec’y of State for Bus., Energy & Indus. Strategy and Anr*, C1/2018/1750, (Jan. 25, 2019), <https://planb.earth/wp-content/uploads/2019/01/Court-of-Appeal-decision.pdf>.

<sup>36</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18 (Mar. 24, 2021), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324\\_1bvr265618en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html).

<sup>37</sup>Torre-Schaub & Lormeteau, *supra* note 10. See also D’AMBROSIO & LORMETEAU, *supra* note 2; TORRE-SCHAUB, *supra* note 2.

## B. Moving Towards the “Emergency to Act”: Judiciary Developments on Climate Impacts Assessment Cases in France

Four alarmist scientific reports on the present and future effects of climate change on the ecosystem and our societies were published recently.<sup>38</sup> All four reports stress the underestimated nature of the impacts of human activities on the climate, biodiversity and the ecosystem, and similarly stress the impacts of climate change on our social systems. The reports also acknowledge the urgency for humanity to both reduce GHG emissions and adapt to future climate change. Moreover, 2021 is the year of the new IPCC report, which urges action in the face of the irreversible progress of global warming.<sup>39</sup>

Yet, and despite those declarations and reports about the necessity of “urgent action,” climate governance experiences difficulties fitting this emergency in the political agendas, at least in a binding fashion. In the latest example to date, the European Parliament adopted a resolution on November 28, 2019 that acknowledges the strong link between scientific expertise and the diplomatic and legal response that should follow, recalling that the current citizen commitment calls for “greater collective ambition and swift action in order to meet the goals of the Paris Agreement.”<sup>40</sup> Climate emergency has indeed become the basis of a judicial activism that calls also for “short-term” action by challenging the so-called “climaticide” projects (those having negative effects on the atmosphere and the normal functioning of the climate system) within an extensive use of Environmental Impacts Assessment.<sup>41</sup>

Aiming to take more rapid action on the causes of climate change—for example, GHG emissions linked to projects—judicial activism is also emerging and growing in France.<sup>42</sup> In other countries, the cases are numerous, and courts do not deal with them in the same manner, particularly with regards to the question of the causal link between global warming and local emissions from projects.

In France, the challenge of those projects also relies on the inadequacy of the Environmental Impact Assessment regarding the foreseeable environmental<sup>43</sup> and climate effects.<sup>44</sup> The new field of climate action was foreseeable, as the scope of the facilities likely to directly or indirectly

<sup>38</sup>IPCC, SPECIAL REPORT CLIMATE CHANGE AND LAND (P.R. Shukla et al. eds., 2019); IPCC, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (H.-O. Pörtner et al. eds., 2019); INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES (IPBES), GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES (E. S. Brondizio et al. eds., 2019); *Health and Climate Change Survey Report*, WORLD HEALTH ORGANIZATION [WHO] (2019).

<sup>39</sup>IPCC, *supra* note 22.

<sup>40</sup>Special Report, IPCC, *Global Warming of 1.5 °C*, <https://www.ipcc.ch/sr15/>.

<sup>41</sup>See TORRE-SCHAUB, *supra* note 2. See also D’AMBROSIO & LORMETEAU, *supra* note 2; Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Feb. 2, 2017, W109 2000179-1/291; *Earthlife Africa Johannesburg v. Ministry of Environmental Affairs* 2017 (2) SA 519 (GP); *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (Austl.); T. Thuilier, *Dialogues franco-australiens sur la justice climatique* [Franco-Australian Dialogues on Climate Justice], 3 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 46 (Mar. 2019); *Austl. Conservation Found. v Minister for Plan.* [2004] VCAT 2029; *Wildlife Pres. Soc’y of Queensl. v Min. for Env’t & Heritage* (2006) FCA 736; In France, see M. Lucas, *Les études d’impact, nouvel outil contentieux pour le climat* [Impact Studies, A New Litigation Tool for The Climate], in LES DYNAMIQUES DU CONTENTIEUX CLIMATIQUE. USAGES ET MOBILISATIONS DU DROIT 399–416 (Mare & Martin eds., 2021); CHRISTIAN HUGLO, MÉTHODOLOGIE DE L’ÉTUDE D’IMPACT CLIMATIQUE [Climate Impact Study Methodology] (2020).

<sup>42</sup>*Groundwork Trust v. Minister of Environmental Affairs* 2017 High Court of South Africa, Gouteng Division Pretoria, no. 54087/17; *Earthlife Africa Johannesburg v. Ministry of Environmental Affairs* 2017 (2) SA 519 (GP); *Client Earth c/ Polska Grupa Energetyczna*, appeal lodged in 2019 (decision pending); *Plan B Heathrow aeroport*, [2020] EWCA Civ 214. See Marta Torre-Schaub, *Les procès climatiques à l’étranger* [Climate Trials Abroad], 4 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 665 (2019). See also C. Cournil, “L’affaire du siècle” in Actes du colloque Justice climatique. Université de Lausanne, June 2021.

<sup>43</sup>See S. Hébrard, *Les études d’impact sur l’environnement devant le juge administratif* [Environmental Impact Studies Before The Administrative Judge], 2 REVUE JURIDIQUE DE L’ENVIRONNEMENT 129, 131 (Feb. 1981).

<sup>44</sup>See M. Lucas, *Les études d’impact, nouvel outil pour le climat?* [Impact Studies, A New Tool for The Climate], in LES CONTENTIEUX CLIMATIQUES. DYNAMIQUES EN FRANCE ET DANS LE MONDE (Marta Torre-Schaub et al. eds., 2021). See also D’AMBROSIO & LORMETEAU, *supra* note 2.

generate GHGs subject to an impact study prior to their administrative authorizations is relatively broad.<sup>45</sup> Nevertheless, it is only at the beginning. The climate emerged for the first time in the content of the impact study at the end of 2011,<sup>46</sup> being identified as one of the “factors likely to be significantly affected by the project,”<sup>47</sup> with the impact study having to consider “the significant impacts of the project on the climate and the project’s vulnerability to climate change.”<sup>48</sup> It is worth noting that the climate will only be studied if impacts—either direct or indirect—are significant. This inclusion in the legislation is crucial. In the context of some big projects for the construction or modification of major infrastructures, especially transportation—as, for example, in France the *Notre-Dame-des-Landes airport project*.<sup>49</sup> In this case, the claimants pointed out, among other things, the shortcomings of the impact document accompanying the application for authorization of the road construction program “on the consideration of climate change.” Yet, in light of the legislation in force, the court simply dismissed this argument.<sup>50</sup>

At present, two decisions are of interest. In February 2019, the Administrative Court of Cergy dismissed an application for summary proceedings brought by the municipality of Sinnamary, requiring the court to cancel the authorization for drilling permits in French Guiana that had previously been awarded to Total by the Prefect of French Guiana.<sup>51</sup> The municipality alleged, in particular, that the impact study on the effects of drilling on the climate was inadequate—an issue that was not discussed by the court hearing the application for summary proceedings.<sup>52</sup> In another context, it must also be underlined the case concerning the extension of the Charles de Gaulle International Airport in Paris and the construction of a Mold and a Train Station in the same neighborhood. This case concerned the authorization given by the administrative authorities for the creation of the ZAC (a joint development zone) of the Triangle de Gonesse, the natural and agricultural area next to the current Charles de Gaulle Paris International airport.<sup>53</sup> Here, although the court did not directly address the issue of climate change, it nevertheless found several

<sup>45</sup>Code de l’environnement [Environmental Code] art. L. 121-1 II (Fr.).

<sup>46</sup>Decree No. 2011-2019 of 29 December 2011 reforming the impact studies of works, structures or development projects (Fr.), JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 30, 2011, 0302.

<sup>47</sup>Code de l’environnement [Environmental Code] art. R. 122-5 (Fr.).

<sup>48</sup>Code de l’environnement [Environmental Code] art. L. 122-1 III et R. 122-5 (Fr.).

<sup>49</sup>The Grand Ouest or Nantes-Notre-Dame-des-Landes airport project is an operation, launched in 1963 and abandoned in 2018, intended to ensure service to the Brittany and Pays de la Loire regions by responding to the foreseeable saturation of the Nantes-Atlantique international airport by transferring its commercial activities to a new airport northwest of Nantes, France. The opposition to the airport project has been organized since 1972 and has given rise to lively local and national controversies between its supporters and opponents. On June 1, 2017, the government set up a mediation mission to compare the two options (construction of Notre-Dame-des-Landes or modernization of the current airport). It submitted its report in December 2017. On January 17, 2018, the Prime Minister announced the definitive abandonment of the Notre-Dame-des-Landes project. Along social and cultural reasons, the opponents commissioned several environmental impact studies to show the unviability of the project and its negative impacts on the environment. See Marta Torre-Schaub, *La prise en compte des enjeux climatiques dans le bilan des grands projets. Contribution à l’étude critique du projet d’aéroport Notre-Dame-des-Landes* [Taking Climate Issues into Account in The Assessment of Major Projects. Contribution to The Critical Study of The Notre-Dame-des-Landes Airport Project], in *L’ABANDON DU PROJET NOTRE-DAME-DES-LANDES: QUELS ENSEIGNEMENTS?* 137–169 (B. Lormeteau & A. Van Lang eds., 2021).

<sup>50</sup>Cour administrative d’appel [CAA] Nantes, Nov. 14, 2016, 15NT02883, 15NT02884, 15NT02864. See also CAA, 5<sup>e</sup> ch., Apr. 9, 2013, 10BX00624.

<sup>51</sup>Following an authorization given by the Prefect of French Guiana for the company Total to drill and exploit oil in the sea of French Guiana, the case was protested by Greenpeace before the Administrative Court of Nanterre in order to have the authorization cancelled. The basis of this request was the fact that the environmental impact study was incomplete and inaccurate because it did not take into account the impacts of the project on CO<sub>2</sub> emissions. See TA Cergy-Pontoise, Feb. 1, 2019, 1900066. See also the applications filed by the NGOs, L. Monier, *Quel rôle pour la justice administrative dans la lutte contre les projets “climaticides”?* [What Role for Administrative Justice in The Fight Against “Climaticide” Projects?], 5 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 34 (Apr. 2019).

<sup>52</sup>See, e.g., Jean C. Rotoullié, *Le contentieux de la légalité* [Legality Litigation], 4 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 644 (2019).

<sup>53</sup>TA Cergy-Pontoise, Mar. 6, 2018, 1610910, 1702621 (Fr.).

shortcomings in the impact study directly related to climate change factors. All those cases enlighten the emerging and urgent question of the need to include the study of the effects and consequences on the climate and the atmosphere as a legal obligation in the Environmental Impact Assessments before any industrial, energetic, commercial or transportation field activity.

At present, climate impacts are therefore not yet identified by French courts as quantitative data to be linked to national climate commitments.<sup>54</sup> Rather, they are linked to the information that the authorities need to make their decision, without the court being able to interfere with the administrative authorities' discretionary power.<sup>55</sup> Nonetheless, one might hope that the increase in scientific knowledge regarding the links between macro and microclimate and the administrative authorities' climate commitments will lead to the development of this type of argument, thus underlining the urgency of acting against certain projects. Furthermore, climate is being introduced into the administrative culture—even if only timidly. For instance, in the case of the expansion of the Charles de Gaulle Paris International Airport (Gonesse affaire cit.), the French National Commission for Public Debate pointed out that “the State did not justify the discrepancy identified by the participants concerning the increase in air traffic and France’s climate commitments.”<sup>56</sup> It seems then that there is still a long way to go before it becomes mandatory to include climate change in the Environmental Assessments and to induce substantial changes in this aspect of climate change regime law.

### C. The Emergency of New Climate Vulnerabilities at Stake

At the same time, in the litigation brought and the various pre-litigation procedures, there is a demand for anticipatory and preventive State action, which is growing in response to the urgent need to adapt to the consequences of climate change.<sup>57</sup>

It was also the urgency to provide for adaptation measures given their special vulnerability that partly underpinned the petition lodged by sixteen children against Argentina, Brazil, France, Germany, and Turkey for violating the UN Convention on the Rights of the Child. They argued that there is a “duty to cooperate at the international level to address the global climate emergency” as a means of protecting the human and children’s rights enshrined in the Convention,<sup>58</sup> as well as the duty of States to “ensure intergenerational equity for children and the future.”<sup>59</sup> The petitioners called on the Committee to urge States to step up their efforts to mitigate and adapt to climate change, to take coordinated international action to put in place binding and enforceable climate measures, and to guarantee the right of children to be heard in all efforts to mitigate or adapt to the climate crisis.

It was also from the perspective of urgency for action that the Human Rights Committee received the petition from the Torres Strait Islanders (Australia) alleging violations resulting from State inaction on climate change, based on a violation of the International Covenant on Civil and Political Rights.<sup>60</sup> Australia had been the subject of a previous recommendation by the UN Committee on Economic, Social and Cultural Rights stating that a State that fails to adopt adequate measures to effectively address climate change is in breach of the Covenant.

<sup>54</sup>See Lucas, *supra* note 43. See also Torre-Schaub, *supra* note 48.

<sup>55</sup>CAA Nancy, Nov. 4, 1993, 92NC00611 (Fr.); CE, Oct. 14, 2011, 323257 (Fr.); CE Ass., Dec. 23, 2011, 335033 (Fr.).

<sup>56</sup>Floran Augagneur, *Bilan des garants. Projet d'aménagement du terminal 4 et développement de l'aéroport Paris-Charles-de-Gaulle à l'horizon 2035-2050 [Review of guarantors. Terminal 4 layout project and development of Paris-Charles-de-Gaulle Airport to be completed by 2035-2050]*, COMMISSION NATIONALE DU DEBAT PUBLIC (2019).

<sup>57</sup>Torre-Schaub & Lormeteau, *supra* note 10.

<sup>58</sup>J. Knox, Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/37/58§57, at 52 (2016).

<sup>59</sup>*Id.* at 54.

<sup>60</sup>Human Rights Committee, *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change* (May 2019).

The Committee had already recommended that Australia should take immediate measures to tackle the increase in domestic GHG emissions.<sup>61</sup> The petitioners allege that Australia's inadequate action on climate change has infringed their human rights. This complaint alleges that these violations are linked to inadequate funding for defense, resilience, and adaptation measures.

In France, the *Grande-Synthe* case exemplifies the slow but certain progress that climate change litigation is doing in that field. This case shows the importance of taking seriously climate risks assessment in public policies and the law. The *Grande Synthe* case was brought before the Council of State by the city of Grande Synthe (in the north of France by the sea) and its mayor in 2019. It was an appeal questioning the legality of measures taken by the administration in climatic matters. In particular, the State was accused of not having respected the carbon budgets established in the National Low Carbon Strategy (a legal text that plans the number of emissions in France by year and by groups of 4 years). The applicants considered that the climate policies carried out by the State were not consistent, on the basis of this text, with the climate emergency. The Council of State issued a first decision on November 19, 2019, in which the applicants were partially vindicated and in which the text at issue was identified as having a mandatory scope. The decision was confirmed on July 1, 2021.

This case constitutes indeed a new and important step in French climate change litigation concerning climate vulnerabilities and climate risks. Those risks and vulnerabilities were never brought before in court and were not taken seriously by a court until this case was brought up.

The *Grande Synthe* case, was launched with the filing of expedited expert report proceedings in March 2019 before the High Administrative Court (*Conseil d'Etat*) with a view to appointing an expert whose mandate would be to anticipate climate risks by identifying them. The purpose of this mandate would be to “protect the territory of the municipality from changes in the climate situation,” with the report having to “assess the risks of damage associated with climate change on its territory as well as the structures, works and measures that may be undertaken in order to prevent or mitigate the occurrence of such damage.”<sup>62</sup> Despite a very promising first ruling on November 20, 2020 accepting some “climate obligations” for attenuation and later confirmed in July 2021, the adaptation part of the petition was dismissed by the court. However, the adaptation claims and the “climate vulnerabilities” cases will probably multiply in France and the rest of Europe for years to come.

#### D. From “Climate Emergency to Climate Priority”: The Example of the *Grande Synthe* Case

The *Grande Synthe* final decision of July 1, 2021 is quite remarkable because it does not only consider that the municipality, by its exposure to climate risks and its vulnerabilities, is legitimate to act and therefore has an interest in acting, but it also positions itself as a pioneer on three main points.<sup>63</sup> First, it stresses that the texts of international law committing France to the climate plan (framework convention and Paris Agreement) must be considered. Second, the decision notes the normative nature of the programming documents on carbon targets and trajectories, carbon budgets, and the various periods to be observed. Finally, the decision settles on the non-respect of the reduction trajectories for the period 2015–2018, based on the binding nature of the documents determining intermediate periods. If the issue of “climate priority”—the subject of one of the main demands of the appeal—was not dealt with directly, the judges nevertheless recognize that there is an “urgent need to act.” On one hand, despite the pandemic and the cessation of activities during the year 2020, the GHG reduction trajectory will probably not be up to the

<sup>61</sup>U.N., Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, U.N. Doc. E/C.12/AUS/CO/5 (July 11, 2017).

<sup>62</sup>Torre-Schaub, *supra* note 15.

<sup>63</sup>CE, 6e-5e ch., Jan. 7, 2021, 427301 (Fr.).

quantities required for 2030 and to achieve carbon neutrality by 2050. On the other hand, given the current state of climate policies and legislation, carbon reduction budgets do not correspond coherently with the European objectives set for 2030. According to the courts, these two aspects highlight a delay observed by France and a certain difficulty to update, in terms of the efforts to be provided by 2030. Therefore, even indirectly, the judges recognize that there is a “climate emergency” and that it would be a priority to act quickly.<sup>64</sup>

### E. Using Classical Legal Concepts for “New Climate” Purpose: The Example of the “Ecological Prejudice” in the *Affaire du siècle* Case

The *affaire du siècle* is a case brought before the tribunal administratif de Paris (TA) in February 2019 claiming that the State is responsible for causing ecological damage on the atmosphere.<sup>65</sup> Previously, an online petition filed by the four NGOs that wished to bring the appeal had been signed by almost one million people. Consequently, the case garnered very large media coverage. The failure of the State is due to the ecological damage it would have committed by altering the atmosphere with an excess of emissions. The fault of the State and thus the damage produced to the atmosphere come from the fact the State did not take the necessary steps to avoid the excess of CO<sub>2</sub> emissions. This excess would lead France on a trajectory far from the one marked in both the European Union commitments and the Paris Agreement. This argument—central in this case—pushes new boundaries on climate justice in general and even more specifically in Europe and France.

Both decisions, in *l’affaire du siècle* opened up a new avenue by recognizing ecological damage due to the “alteration produced in the atmosphere” due to the excess of cumulative GHG emissions.<sup>66</sup> This issue of ecological damage and prejudice, largely unexplored for the time being on the climate issue, will undoubtedly become a strong trend for future litigation.

As a reminder, four NGOs (the Oxfam France association, Greenpeace France, the Fondation pour la Nature et l’Homme and NAAT) had lodged a request before the administrative court in March 2019 asking for the State to be ordered to pay them the sum of one euro in compensation for the moral damage suffered, to order the State to pay them the symbolic sum of one euro for ecological damage. Further, they sought to order the Prime Minister and the competent ministers to put an end to the whole State failure to meet its obligations—general and specific—in the fight against climate change or to mitigate its effects and put an end to ecological damage. The four NGOs also requested to take measures to achieve France’s objectives in terms of reducing greenhouse gas emissions, developing renewable energies, and increasing energy efficiency, and to reach targets set by various laws, regulations, and decrees, as well as in relation to European Union law. They also demanded that the necessary measures be taken to adapt the national territory to the effects of climate change as well as those necessary to ensure the protection of the life and health of citizens against the risks associated with climate change.

<sup>64</sup>Marta Torre-Schaub, *Bilan et perspectives pour la justice climatique. Dynamiques et tendances* [Assessment and Perspectives for Climate Justice. Dynamics and Trends], 10 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 6 (Oct. 2021).

<sup>65</sup>TA Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1 (Fr.).

<sup>66</sup>LEXIS KIOSQUE, *L’affaire du siècle, une révolution pour la justice climatique ? A propos de la décision du TA du 3 février 2021 (n° 1904967, 1904968, 1904972, 1904976/4-1)* [The Case of The Century, A Revolution For Climate Justice? About the TA Decision of February 3, 2021], 10 LA SEMAINE JURIDIQUE GÉNÉRALE, Mar. 8, 2021, at 247; Marta Torre-Schaub, *l’Affaire du siècle, une affaire à suivre* [The Case of the Century, A Case to Follow], 3 ENVIRONNEMENT, ENERGIE, INFRASTRUCTURES 10–12 (Mar. 2021); Mazeaud, *supra* note 33; Marta Torre-Schaub, *Décryptage juridique de l’affaire du siècle* [Legal Decryption of The Case of The Century], THE CONVERSATION, Feb. 10, 2021, <https://theconversation.com/dcryptage-juridique-de-l-affaire-du-siecle-155053>; Torre-Schaub & Bozo, *supra* note 33; Hautereau-Bouttonnet, *supra* note 33; Deffairi, *supra* note 33; Jean M. Pastor, *L’affaire du siècle, un constat et toujours pas de réponses* [The Case of The Century, An Observation and Still No Answers], DALLOZ ACTUALITÉS (Oct. 18, 2021), <https://www.dalloz-actualite.fr/flash/affaire-du-siecle-un-constat-et-toujours-pas-de-reponse#.YXyoGmLMKUK>.

The tribunal administratif de Paris ruled partially in favor of the applicants in both a first decision on February 3, 2021, and a second decision on October 14, 2021, reaffirming the first. In its decision on February 3, 2021, the court ruled on three points. It first ruled on the admissibility of the action for ecological damage. It then ruled on the existence of ecological damage and moral damage. Finally, the judges expressed their opinion on the failure and responsibility of the State as well as the “causal link” between the cited prejudices and the absence or insufficiency of State action.

The Tribunal has established the existence of an ecological damage derived from the deficiencies of the State.<sup>67</sup> As a result, the failings committed by the state because of its deficiency have been established as being the source of environmental damage characterized by the worsening of climate change. This damage would cause a change in the atmosphere and impair its ecological functions.<sup>68</sup>

Regarding the establishment of the damage, the decision goes quite far, asserting that the damage is not only “established” but that it is also “aggravated” (§ 31). Relying on various works by the IPCC, those of the National Observatory on the effects of global warming, and those of CITEPA, the TA considered that the constant increase in the average global temperature of the Earth is responsible for a “modification of the atmosphere and its ecological functions” which has already accelerated the melting of continental ice and permafrost and the warming of the oceans, resulting in turn in rising sea levels combined with the increase, in frequency and severity, of extreme climatic phenomena, and damage to ecosystems, with serious and irreversible consequences on human activities. It also follows from these reports that global warming will reach 1.5 °C between 2030 and 2052 if anthropogenic greenhouse gas emissions continue to increase at their current rates, and that it will persist for several centuries even if emissions decrease, due to the persistence of greenhouse gases in the atmosphere. The report concluded that a warming of 2 °C rather than 1.5 °C would seriously increase these phenomena and their consequences.

For the judges, it also results from these studies that each additional half-degree of global warming very significantly reinforces the associated risks, for the most vulnerable ecosystems and populations, and that limiting this warming requires reducing, by 2030, greenhouse gas emissions by forty-five percent compared to 2010 and achieving carbon neutrality by 2050 at the latest. Finally, in France, the increase in average temperature, which rose 1.14 °C during the decade 2000–2009 compared to the period between 1960–1990, caused the acceleration of the loss of mass of the glaciers. In particular, since 2003, the worsening of coastal erosion, which affects a quarter of the French coasts, and the risk of submersion, poses serious threats to the biodiversity of glaciers and the coast, and leads to an increase in extreme climatic phenomena—risks that affect sixty-two percent of the population. On this point, the court concluded that “in view of all of these elements, the ecological damage invoked by the applicant associations must be regarded as established.”<sup>69</sup>

The situation is different with reparations. This became an issue as the TA believes that elements are still missing to substantiate the impossibility of his compensation in kind. Reparations will therefore be more of a “symbolic” recognition than operational, which nonetheless constitutes significant progress for the law of climate responsibility.<sup>70</sup> The court considers, in fact, that compensation for ecological damage is carried out as a priority in kind and that it is only in the event of the impossibility or insufficiency of the compensation measures that the judge condemns the

<sup>67</sup>See G. J. Martin, *THE ECOLOGICAL DAMAGE IN THE CIVIL CODE: REFLECTIONS AROUND THE NEW REGIME OF COMPENSATION FOR ECOLOGICAL DAMAGE INTRODUCED BY THE BIODIVERSITY LAW 415–21* (Mélanges F. Collart-Dutilleul ed., DALLOZ 2017).

<sup>68</sup>TA Paris, Feb. 3, 2021, 1904967, at § 16 (Fr.).

<sup>69</sup>*Id.*

<sup>70</sup>Marta Torre-Schaub, *Le préjudice écologique au secours du climat, ombres et lumières* [The Ecological Damage to The Relief of The Climate, Shadows and Lights], 11 LA SEMAINE DU DROIT–ÉDITION GENERALE, Mar. 15, 2021, at 520; B. Parance, *Décision majeure sur la réparation du préjudice écologique* [Major Decision on Compensation for Ecological Damage], 27 LA SEMAINE DU DROIT–ÉDITION GENERALE, JULY 6, 2020.

person responsible to pay damages and interests to the plaintiff, these being allocated to the reparation of the environment.<sup>71</sup> However, according to the TA, the associations in this case did not demonstrate that the state would be unable to provide compensation in kind. With regards to the amount of the sum requested in respect of his pecuniary compensation, the judges consider that the request for payment of a symbolic euro is unrelated to the importance of what the payment symbolises. It will be on this reasoning that the TA rejects this point of the application.<sup>72</sup>

The last decision of the *affaire du siècle* in October 2021 confirms the solution of the first ruling but clarifies the question of the reparation.

The October 14 ruling establishes that the administration should repair the ecological prejudice caused to the atmosphere by compensating the excess of emissions emitted in the past period, from 2015–2018.<sup>73</sup> The judges considered that even though greenhouse emissions were reduced during the confinement period due to the Covid pandemic (all activities were down during that period of time), that alone was not satisfactory enough and the global amount of emissions in France has not met levels necessary to achieve carbon neutrality by 2050. Considering this fact, the court sentenced the State to “take all necessary actions” in order to reduce emissions from now until December 31, 2022, in order to attain the trajectory of emissions according to the Paris Agreement mandatory limit of 2°C.

Undoubtedly, the *affaire du siècle* last decision will mark the public climate disputes in France. However, this case has to be understood with the *Grande Synthe* case. They both are complementary and coherent with the present and dynamic evolution that French climate change litigation is experimenting.

Indeed, the Conseil d’Etat in the *Grande Synthe* affair, with the ruling of July 1, 2020, developed its reasoning that the State must pay respect to its “climate obligation.” The *affaire du siècle* decision follows this open path, considering that the State has a climate obligation both in relation to its past activities (for the period 2015–2018) and to the means of implementing the reduction of the emissions trajectory (for the period between now and December 31, 2022).

This article wanted to show how climate justice, which is currently taking place in the world and particularly in France, is changing the content of the State’s obligations in the climate change area. This article also shows that new “climate obligations” are emerging everywhere in the world. In France, these obligations and legal commitments are both. On the one hand, those that the Law and Climate National Planification (Low Carbon Strategy) must show. On the other hand, those that must also be imposed by the Environmental Assessment Impact studies. This article also shows that the issue of considering territorial, geographical, and physical vulnerabilities is important to properly assess climate risks in public policies. Finally, this article wanted to present how the new dynamics of climate change—both legislative, jurisprudential and public policy—are built from small steps, sometimes slow but lasting at the end. Climate Justice is assuredly a promising path to make the change happen in the climate change fight. French climate change justice litigation is a “to be continued” story with a very promising future before it.<sup>74</sup>

<sup>71</sup>Reparation of ecological damage in practice, Report edited by L. Neyret, Association of professionals in economic and financial litigation, 2016.

<sup>72</sup>TA Paris, Feb. 3, 2021, 19049679, at §§ 36, 37 and 39 (Fr.).

<sup>73</sup>CE, Oct. 14, 2011, 323257 (Fr.).

<sup>74</sup>Marta Torre-Schaub, *Les dynamiques juridiques et judiciaires de la gouvernance climatique. Libres propos autour de la construction d’un droit du changement climatique* [The Legal and Judicial Dynamics of Climate Governance. Free Talk Around the Construction of a Climate Change Law], 22 *REVUE DE DROIT D’ASSAS* (2021) 35-49.