

2 The extent of CDD's enforceability

As established in Part 1, due diligence – as a primary duty⁶⁷¹ – applies to climate change, incidentally establishing the potential jurisdiction of courts in this respect. However, due to the vagueness of the concept, some authors, such as Mayer and Van Asselt, argue that due diligence is hardly enforceable through litigation⁶⁷². In fact, if nobody can determine what due diligence concretely requires, one could argue that it has no binding force, in other words, that it is not enforceable. Conversely, another common criticism of CDD is that it is dangerous as it may lead to creative, misleading and ultimately arbitrary interpretations⁶⁷³.

This part examines this issue in more detail by studying the extent to which litigators can enforce particular interpretations of CDD in jurisdictions other than the Netherlands, especially in the French, German, American, English, and international legal systems.

To do so, this thesis relies on the standing test of the US courts, as it provides the most exhaustive and structured framework to assess the extent to which particular interpretations of *general* due diligence are admissible in court. While it may seem surprising that a non-US lawyer uses the standing criteria of the US jurisdiction to assess the extent of the “enforceability” of CDD for comparative purposes, it is worthwhile noting that these criteria, or their functions, are widely shared among jurisdictions to assess the admissibility, justiciability or enforceability of the claims. Indeed, if other jurisdictions use different labels (see below), and or test causation at the merits stage instead of admissibility, the fact that the US criteria or their

671 Pursuant to the introduction of this thesis, due diligence is a primary duty which constantly apply and require a reasonable conduct to prevent harm to others. Secondary obligations arise in principle when the primary duties are breached. According to some authors, including the members of the ILC, due diligence can also be considered as being part of secondary obligations (see Aust HP and Feihle P, “Due Diligence in the History of the Codification of the Law of State Responsibility” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020)).

672 Mayer B and van Asselt H, “The Rise of International Climate Litigation” (2023) *RECIEL*; see as well Mayer B, “The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar” (2015) 5 *Climate Law*.

673 See the introduction (section 0.4.2).

functions are common to many – if not all legal systems – enables them to be also used for this comparative law assessment.

More precisely, under the US standing criteria, a plaintiff must show three distinct elements, namely “that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury”⁶⁷⁴. Said differently, a claimant must establish:

- an “injury”, which must be “concrete and particularized”;
- causation, as “the injury is fairly traceable to the defendant”;
- and redressability, by showing that “a favorable decision will redress that injury”.

Adequately claiming an injury and causation are common criteria among jurisdictions, at least in the assessed legal systems of this thesis. However, causation largely overlaps with the merits, and is in certain jurisdictions rather assessed at this stage. More generally, the issues pertaining to admissibility and the merits are “closely bound up” in climate cases according to the ECtHR⁶⁷⁵.

As for the “redressability” requirement, it may be an unfamiliar term in other legal systems. While the notion has an equivalent in French, it is only used in fiscal law (redressement judiciaire ou fiscal). Still, the French standing concept “of “*intérêt à agir*”⁶⁷⁶, the ECtHR’s notion of “manifestly

674 Based on Article III of the US Constitution, the Supreme Court of the United States (SCOTUS) recognised in its 1992 *Lujan* case that the standing analysis encompasses issues of causation and redressability (see, notably SCOTUS, *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

675 For example, in *KlimaSeniorinnen*, the ECtHR recognised that the issues relating to admissibility and the merits are “closely bound up”, which justified their examination together in one judgement (see ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 458 of the judgement). This stance illustrates the difficulty of clearly delineating these issues in climate cases.

676 The French notion “*intérêt à agir*” – commonly translated as standing – analyses how the applicant is “affected in his rights and interests by the act whose legality he challenges [...] and the advantage that the plaintiff would obtain from the judge’s recognition of the validity of his claim” (see Guinchard S and Debard T, *Lexique des termes juridiques 2022-2023* (Dalloz, August 2022)). This definition clearly shows that testing “*intérêt à agir*” goes beyond merely focusing on the injury. The latter definition requires the applicant to show that the defendant is the cause of the harm and that the Court can provide an advantage to the claimant. Therefore, the French admissibility stage also encompasses causation and redressability.

ill-founded"⁶⁷⁷ and the UK term of "arguability"⁶⁷⁸ also encompass some form redressability analysis at the admissibility stage. More generally, the concept of "justiciability" of the claims, which is contained in the US redressability analysis, may be more familiar to the European legal systems. In any case, the notion of redressability and its corresponding equivalents in other legal systems significantly overlap with the merits, making this analysis particularly important.

In light of what precedes, the US standing requirements are well-suited to assess the enforceability of various CDD interpretations in comparative case-law. Thus, Part 2 is structured as follows.

The first subpart 2.1 discusses the ability to demonstrate standing in the context of general and special due diligence claims. In the context of *general* liability claims (or *general* due diligence), it is necessary to establish a climate-related injury, requiring the precise demonstration of a concrete and particularised harm as an individual, as an NGO, or as a representative of collective interests, such as local, regional public authorities. This issue is the subject of much debate in all general CDD cases, as the global and cumulative climate context brings entirely new questions to the fore.

The second subpart 2.2 examines the extent to which Courts accept establishing a causal link between GHGs and an injury. It also assesses the acceptance of the concept of partial responsibility, as no State or corporate group can be held entirely and exclusively responsible for climate change, not even the largest individual emitters. Moreover, this subpart encompasses attribution, since the notion of causation requires assessing which conduct or which GHGs of one actor cause or contribute to global warming. As direct emissions from one actor are generally negligible (even for States whose "territorial emissions" are not "direct" emissions), it is

677 Registry of the ECtHR, "Practical Guide on Admissibility Criteria", 30 April 2022 § 285 and 286: "any application will be considered "manifestly ill-founded" if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits (which would normally result in a judgment). The fact that the Court, in order to conclude that an application is manifestly ill-founded, sometimes needs to invite observations from the parties and enter into lengthy and detailed reasoning in its decision does nothing to alter the "manifestly" ill-founded nature of the application (*Mentzen v Latvia* (dec.))."

678 In British administrative law, claimants must show they have an arguable case with a realistic prospect of success on all grounds (see Judiciary For England And Wales, The Administrative Court: Judicial Review Guide 2021, July 2021, § 9.1.3. – 9.2.1).

necessary to seek responsibility for indirect and/or even extraterritorial emissions of public and private actors.

The third subpart 2.3 analyses the redressability of the climate lawsuits. As noted above, this subpart overlaps significantly with the issues dealt with on the merits. It assesses the enforceability of CDD in light of the political nature of the requests and their justiciability, the separation of powers, business freedoms, and the need to rely on consensual elements.

2.1 Injuries and legal interests to act: towards a subtle consolidation, mixing individual and collective components

Whether or not a situation constitutes “harm” or an “injury” is not always clear-cut, as it depends on the context, including how much one’s interest is legally protected or how far the obligations stretch. In the context of CDD claims, the common issues as to claiming an admissible injury are as follows: do plaintiffs need to demonstrate that specific, individual harm has *already* arisen? Also, is the overstepping of the 1.5 threshold necessary to demonstrate specific individual harm? Or can plaintiffs rely on the general danger that climate change represents to claim the enforcement of CDD? Additionally, is it possible to request mitigation in a preventive manner when the actual harm may only materialise at a later stage? If so, how certain must the materialisation of the harm be predicted?

Plaintiffs use various ways in domestic law to claim systemic CDD. Depending on the legal system, its historical development of the right to file a claim and the protected legal interests, some climate plaintiffs are individuals, while others are environmental organisations, or local public authorities (e.g. municipalities, regions, states). This subpart is structured as follows:

Section 2.1.1 discusses the initial opinions in favour of standing, such as those of the US Supreme Court in *Massachusetts* (2007) and the Dutch Courts in *Urgenda* (2015-19). It also assesses the key opposing opinions, such as those expressed by the Court of Justice of the EU in *Carvalho* (2020) and the Swiss courts in *KlimaSeniorinnen* (2019).

Section 2.1.2 considers case laws from different European jurisdictions that unanimously allow standing in cases that rely on the implementation of CDD in specific legislation (*Friends of the Irish Environment v Ireland*, 2020; *Grande-Synthe v France*, 2020; *Client Earth v UK*, 2021).

Section 2.1.3 argues that the demonstration of an injury in the context of a claim based on general due diligence is increasingly accepted when plain-

tiffs assert collective rights, such as environmental harms (*Notre affaire à tous v France*, 2021), or individual rights in conjunction with collective ones (German Constitutional Court case, 2021, ECtHR, *KlimaSeniorinnen*, 2024).

2.1.1 The initial fluctuating case law concerning the recognition of the injury in general CDD cases

Subsection 2.1.1.1 addresses the two pioneering successful model climate cases, *Massachusetts* and *Urgenda*, which blazed a path for many more similar cases. Despite these two cases, two other supreme courts issued different outcomes (see the Court of Justice of the EU in *Carvalho* and the *Klimaseniorinnen* case before the Swiss Supreme Court). Subsection 2.1.1.2 analyses those two opinions.

2.1.1.1 The recognition of standing in the first successful CDD cases

In *Massachusetts*, the legal base of the case, the Clean Air Act, is a *specific legislation*⁶⁷⁹. Consequently, this decision could have been addressed in the next section on cases relying on *specific* legislation. Nevertheless, the reasoning about standing remains relevant in this section on *general* CDD, since the US Supreme Court relied on the standing criteria of Article III of the US Constitution (injury, causation, and redressability), which require demonstrating certain things by going way beyond a typical “judicial review” in *ultra vires* terms (*recours en excès de pouvoir*), where only the State’s wrongful conduct is assessed.

Thus, subdivision 2.1.1.1.1 elaborates on how the US Supreme Court addressed climate-related standing in *Massachusetts*. In turn, subdivision 2.1.1.1.2 analyses how the Dutch courts recognised the claimants’ injury in the *Urgenda* decisions.

679 It gives the EPA the authority to tackle environmental matters and the possibility for third parties to review its conduct if it is acting contrary to the statutory provisions, see 42 U. S. C. §7607(b)(1).

2.1.1.1.1 The pioneering discussion in *Massachusetts v EPA*

In *Massachusetts*, the US Supreme Court applied the traditional standing test under Article III of the US Constitution, which requires a finding of injury. However, the US Congress allowed anyone under the Clean Air Act (CAA) to review the EPA's conduct. Thus, the US Supreme Court slightly accommodated the injury criterion:

“a litigant to whom Congress has “accorded a procedural right to protect his concrete interests,” *id.*, at 572, n. 7— here, the right to challenge agency action unlawfully withheld, §7607(b)(1)—“can assert that right without meeting all the normal standards for redressability and immediacy,” *ibid.* When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”⁶⁸⁰

Given this *specific* procedural right, the conditions in *Massachusetts* depart from those of a general liability case, in which the three conditions under Article III must be met in full (injury, causation, redressability). This distinction is important when assessing other US cases, such as the *Juliana v USA* case (see the corresponding analysis of this case subsection 2.1.3.1 concerning injury, and 2.3.2.2 concerning redressability). However, the US Supreme Court still addressed many important questions of principle in *Massachusetts* that remain relevant today in *general* liability cases, where an injury, a causal link and a justiciable request must be presented.

As a non-US lawyer, it is necessary to keep in mind that the composition of the SCOTUS changed significantly during Trump's first term in office as President⁶⁸¹. Back in 2007, the Supreme Court had a balanced representation of so-called “conservative” and “progressive” judges. However, this changed when Trump nominated three strongly conservative judges during his first term⁶⁸².

680 SCOTUS, *Massachusetts et al v EPA*, 549 U. S. ____ (2007), Opinion of the Court, p 14.

681 Totenberg N, “The Supreme Court is the most conservative in 90 years”, *NPR*, July 2022.

682 The President of the USA, who stems from a specific political party, nominates judges from SCOTUS, and therefore tends to pick judges deciding in favour of their views. This nomination procedure has a well-known impact on how SCOTUS decides, as some judges are rather conservative or progressive. The Court is now

Given this new conservative majority, the US Supreme Court could be inclined to overturn the *Massachusetts* ruling for three main reasons. Firstly, the previous conservative wing of the Court contested the majority's reasoning in *Massachusetts*. Secondly, the current conservative majority overturned the well-known 1973 decision *Roe v Wade* (410 U. S. 113) concerning abortion rights, thereby establishing novel and exceptional criteria for setting aside the doctrine of the precedent (so-called *stare decisis*), which is a pillar of the reliability, authority, and legal certainty of decisions provided by courts, especially apex courts⁶⁸³. Thirdly, the current US Supreme Court restricted EPA's regulatory powers in *West Virginia et al v EPA*⁶⁸⁴ one day after overturning *Roe v Wade*. Therefore, a reversal of *Massachusetts* by the SCOTUS itself cannot be excluded⁶⁸⁵. In this context, the Court's arguments in favour of *Massachusetts*' standing, as well as the dissenting opinions of Chief Justice Robert (who is still Chief Justice) and Justice Scalia, remain relevant and timely.

As in other climate cases, the debate focused on the conditions to assert the injury: are GHGs, which cause global harm, compatible with the concept of standing? Is an injury caused by an *accumulation* of contributions admissible (note that this issue overlaps with causation)? The majority said yes, but the dissenting conservative said no⁶⁸⁶.

Regarding the more specific issues and the ability of *Massachusetts* and other states to bring environmental cases, the former majority observed that US states are not litigants like individuals. A long line of case law shows the legitimate interest of US states as "quasi-sovereigns" in protecting their citizens from transboundary air pollution⁶⁸⁷. Thus, the Supreme Court concluded that US states have a long-standing right to file environmental claims at the federal level.

Given this well-established right, the Supreme Court found that states have "special solicitude" to challenge EPA's decisions. Chief Justice Roberts criticised this finding, arguing that "[i]t is not at all clear how the Court's

composed of 6 conservative judges out of 9 (see Totenberg N, "The Supreme Court is the most conservative in 90 years", *NPR*, July 2022).

683 SCOTUS, *Dobbs et al v Jackson et al*, 597 U. S. ____ (2022).

684 SCOTUS, *West Virginia et al v EPA*, 597 U. S. ____ (2022).

685 Clark L, "Three Climate Rules Threatened by the Supreme Court's EPA Decision", *Scientific American*, 7 July 2022.

686 SCOTUS, *Massachusetts et al v EPA*, 549 U. S. ____ (2007), Opinion of the Court, p 13.

687 SCOTUS, *Georgia v Tennessee Copper Co*, 206 U. S. 230, 237 (1907).

“special solicitude” for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms.” However, this is not entirely accurate, as the Supreme Court did state that Massachusetts’ special solicitude was derived from a combination of its general interest in protecting its citizens, its authority to regulate GHGs (including in the automotive sector), and its procedural right to challenge EPA decisions⁶⁸⁸. Does this special solicitude mean that non-state actors such as individuals or NGOs would have no standing, as CJ Roberts suggests in his conclusion?⁶⁸⁹ This thesis doubts this, since Congress has recognised to anyone a “procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious” in the Clean Air Act⁶⁹⁰.

After having lowered standing requirements for Massachusetts, the Court considered that sea-level rise already occurred in the 20th century⁶⁹¹, including on Massachusetts territory, which remains unchallenged by the EPA. The Court concluded that Massachusetts “alleged a particularized injury in its capacity as a landowner.”⁶⁹²

That being said, the Court argued that Massachusetts was facing “a *risk* of harm”, which was at times considered both “actual” and “real”, and at others “remote” or “imminent”. In any case, the harm involved was considered “catastrophic”. While these descriptions seem contradictory, they illustrate the complexity and the multifaceted character of climate-related harms. The majority further observed that scientific reports indicated a “strong consensus” that global warming would generally worsen over time, without knowing, though, with certainty the extent of the aggravation, especially regarding sea-level rise, potentially rising by 20 to 70 centimetres by the year 2100⁶⁹³. The Court quoted a statement of a state official who “believe[d]” that irreversible losses could occur and that remediation costs could be very high⁶⁹⁴.

Once again, Chief Justice (CJ) Roberts severely criticised these aspects of the decision. He argued that the petitioner’s evidence did not show with certainty that the harm would occur, observing that the “computer

688 *Massachusetts*, Opinion of the Court, p 16 – 17.

689 *Massachusetts*, Dissenting Opinion of CJ Roberts, p 15.

690 *Massachusetts*, Opinion of the Court, p 16.

691 *Ibid*, p 18.

692 *Ibid*, p 19 – 20.

693 *Ibid*, p 18.

694 *Ibid*, p 20.

modeling program has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters.”⁶⁹⁵ Concerning the time horizon of hundred years before the sea level rise might affect Massachusetts coastline, CJ Roberts deemed this distance incompatible with the requirements of imminence and immediacy. He, however, conceded that the concept of “imminence” in standing doctrine is “somewhat elastic”⁶⁹⁶. He further contended that “the very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon “harmful to humanity at large”.⁶⁹⁷ He argued that the particularisation criterion is crucial, and that the judiciary cannot step in if it is not met⁶⁹⁸. It is interesting to note for comparative purposes that the Court of Justice of the EU and the Swiss courts shared this view (see below, the commentary on the *Carvalho* case, and the *Klimaseniorinnen* case).

If CJ Roberts’ interpretation eventually prevails in a possible overturn of Massachusetts, would this mean that nobody could satisfy the injury requirements due to i) the worldwide effects of climate change, and ii) the potential residual scientific uncertainties regarding the extent and occurrence of the harm? Would this mean that even small island States would not have standing, even though they might be entirely wiped out by sea level rise and other climate-related impacts?

Concerning criterion i), the majority of the US Supreme Court’s in *Massachusetts* relied on Justice Kennedy’s concurring opinion in *Lujan* (i.e., the case which defined the current US standing criteria) to emphasise that standing cannot be dismissed simply because the harm affects many persons: “it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.” Justice Kennedy also noted that “many persons [can suffer] mass fraud or mass tort situations”⁶⁹⁹, which does not prevent them from litigating those issues, for example, through a class action. Hence, from that angle, the particularisation requirement does not appear to be an insurmountable obstacle.

Concerning ii), global warming increased and science developed since the *Massachusetts* judgement issued by the US Supreme Court in 2007. According to the most recent IPCC report on “Impacts, Adaptation and Vul-

695 *Massachusetts*, Dissenting Opinion of CJ Roberts, p 8.

696 *Ibid*, p 9.

697 *Ibid*, p 7.

698 *Ibid*, p 7.

699 SCOTUS, Opinion of the Court, *Lujan*, 504 U. S. 555 (1992), p 572.

nerability”, man-made climate change already caused widespread *loss and damage* to people and nature⁷⁰⁰, a finding delivered *with high confidence* (i.e., this degree of confidence is important⁷⁰¹). This scientific recognition should be sufficient to show that climate change has already caused harm in general. At COP27 and COP28, the international community of States even acknowledged that climate change has already led to loss and damage⁷⁰².

Moreover, the IPCC asserts that if global warming exceeds the threshold of 1.5°C, it would “cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans (very high confidence)”. Furthermore, the IPCC recalls that “[n]ear-term actions that limit global warming to close to 1.5°C would substantially reduce projected *losses and damages* related to climate change in human systems and ecosystems, compared to higher warming levels, but cannot eliminate them all (very high confidence).”⁷⁰³

Regarding sea level rise specifically, the IPCC also attributed this slow onset process to man-made climate change *with high confidence*⁷⁰⁴ and asserted it will accelerate in the future⁷⁰⁵. The IPCC stressed that sea level rise exposes a billion people to this issue and poses an *existential threat* to some small islands and low-lying coastal areas⁷⁰⁶. Thus, the IPCC has demonstrated that, by 2021, all human settlements on the coastline will be impacted globally, including those in Massachusetts. Clearly, this constitutes a mass tort. Should US justices deem this global situation incompatible with the particularisation requirement of Article III injury?

700 IPCC, AR6 (2021-23), WG II, SPM, 2022, pp 7 – 8.

701 See IPCC, SRI.5, Section 1.7, p 77: “This report relies on the IPCC’s uncertainty guidance provided in Mastrandrea et al (2011) and sources given therein. Two metrics for qualifying key findings are used: Confidence: Five qualifiers are used to express levels of confidence in key findings, ranging from very low, through low, medium, high, to very high. The assessment of confidence involves at least two dimensions, one being the type, quality, amount or internal consistency of individual lines of evidence, and the second being the level of agreement between different lines of evidence. Very high confidence findings must either be supported by a high level of agreement across multiple lines of mutually independent and individually robust lines of evidence or, if only a single line of evidence is available, by a very high level of understanding underlying that evidence. Findings of low or very low confidence are presented only if they address a topic of major concern.”

702 See, for instance, COP 28 Decision, § 15.

703 IPCC, AR6 (2021-23), WG II, SPM, 2022, § B.3

704 *Ibid*, § B.3

705 *Ibid*, p 13.

706 *Ibid*, p 15.

This hypothesis seems unlikely. In any case, small islands are considerably more exposed than others due to their particular natural location and vulnerabilities, and should retain standing in this respect either way⁷⁰⁷.

In terms of timing, some small islands are already threatened in their existence nowadays or in the midterm due to additional climate-related impacts, such as tropical cyclones, groundwater shortages and food insecurity⁷⁰⁸. As to low-lying coasts, they should face “existential threats” after 2100.⁷⁰⁹

To conclude this subdivision, it is, of course, impossible to know whether Chief Justice Roberts would now consider that some persons could fulfil his standing requirements laid out in *Massachusetts*. Nonetheless, considering the climate-related impacts laid out by the IPCC, shows that there are now many potential injuries that plaintiffs could claim, even under the CJ Roberts criteria. In fact, compared to 2007, scientific observations have progressed considerably today, and the climate-related impacts have become much harsher. These developments seem to render many critiques of CJ Roberts in its *Massachusetts* opinion obsolete. The Supreme Court may soon have the opportunity to redefine climate-related standing, as some pending climate cases against private actors might reach its jurisdiction in the near future⁷¹⁰.

707 As a side note, a suit filed by small Pacific island States should be admissible even as a subject of international law, see the “General exceptions to the jurisdictional immunity of a foreign state” - 28 U.S. Code § 1605.

708 IPCC, AR6 (2021-23), WG II, 2022, chapter 14, p 4 - 5. Note, however, that the IPCC insists on the combination of vulnerabilities of coastlines that are exposed not only to sea level rise, but also to flood and storm-induced damage, including damage due to cyclones, storm surges and sea level rise; tropical cyclones; and groundwater shortages and food insecurity for small islands, etc. These types of damage may result from “cascading impacts and multiple vulnerabilities that are not necessarily directly connected to climate change”, which makes establishing causation more difficult.

709 IPCC, AR6 (2021-23), WG II, 2022, chapter 13, p 4.

710 In the *Juliana* case, the District Court and the Court of Appeals of the Ninth Circuit considered that the individual plaintiffs – young persons exhibiting different exposures to climate-related harms such as familial separation due to water scarcity – satisfied the injury criterion on Article III, but failed with respect to redressability. The US Supreme Court did not, however, examine the case; it only dismissed reviewing it. See United States Court of Appeals For The Ninth Circuit, *Juliana et al v USA*, No. 18-36082 D.C. No. 6:15-cv-01517-AA, 17 January 2020, p 18.

2.1.1.1.2 Urgenda: Availability of the general human rights avenue to claim CDD

The *Urgenda* decision was the first systemic mitigation case to result in the State being found responsible for failing to meet its “duty of care” or CDD. This case triggered a wave of similar cases worldwide⁷¹¹.

The Dutch judges held that the plaintiff Urgenda, a foundation under Dutch law, could represent the collective and individual interests of its members via a class action within the meaning of Article 3:305 of the Dutch Civil Code, in order to claim adequate protection of the right to life and privacy of its members⁷¹².

The Dutch State argued, similarly to the EPA or CJ Roberts in *Massachusetts*, “that the ECHR ‘only guarantees individual rights’ and does not protect ‘society as a whole.’”⁷¹³ It thus questioned the Hague Cassation Court to know whether the ECHR is compatible with a class action claim pursuant to Article 3:305a DCC?⁷¹⁴

The Supreme Court found that Articles 2 and 8 protect the population as a whole⁷¹⁵. To justify the finding that climate change endangers the rights protected by Articles 2 (right to life) and 8 (right to private and family life), the Dutch Supreme Court referred to the ECtHR jurisprudence. It noted first that the ECtHR apply these provisions in the environmental context, including when there is “merely” a violation risk that may only materialise in the longer term⁷¹⁶. The Court, moreover, explained that the ECtHR expanded the meaning of the terms associated with the characterisation of the risk of harm – “real and immediate” and “genuine and direct” – to include risks occurring in the medium to long term⁷¹⁷. Concerning Article 2, the Dutch Court cited *Öneryildiz*, *Budayeva* and *Kolyadenko* to show

711 According to Setzer and Higham, more than 81 cases were built on the foundations of Urgenda in 2023 (see Setzer J and Higham C, *Global Trends in Climate Change Litigation: 2023 Snapshot* (Grantham Research Institute and Centre for Climate Change Economics and Policy, LSE 2023), p 3.

712 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019.

713 Procurator General of The Supreme Court Of The Netherlands, Opinion, *Urgenda*, 19/00135, 13 September 2019, § 3.28

714 See Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, table of contents, and § 5.9.1-5.9.3.

715 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 2.3.2 and § 3.3.

716 *Ibid*, § 5.2.2 and 5.2.3.

717 *Ibid*, § 5.2.2.

that its protection applies from the moment the risks are known, even if the harm does not immediately occur⁷¹⁸. Regarding Article 8, the Court quoted *Taşkin* and *Tătar* to demonstrate that a period of twenty to fifty years may elapse between the knowledge of the risk's existence and its materialisation⁷¹⁹. Therefore, there is no need to establish the existence of a harm that has already occurred. Risks of harm, including those that may occur in the future, are sufficient grounds to claim the enforcement of due diligence.

Next, the Dutch Court acknowledged that man-made climate change is scientifically established by referencing the main results of the IPCC AR 5 report (published in 2014)⁷²⁰. The Court also recalled the applicability of the precautionary principle in the context of Articles 2 and 8 ECHR and specified that the materialisation of harm can remain uncertain to a certain extent⁷²¹. It is also worth noting that the State did not contest Urgenda's standing as far as it represents "the current generation of Dutch nationals against the emission of greenhouse gases in Dutch territory". Per the Hague Court of Appeals, "it is entirely plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced." Indeed, the fact that an entire generation may be harmed by climate change does not affect its justiciability:

"5.3.1. The protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole. [endnote 14 of the judgement: With regard to Article 2 ECHR, see, inter alia, ECtHR 12 January 2012, no. 36146/05 (*Gorovenky and Bugara/Ukraine*⁷²²), para.

718 ECtHR, *Öneryildiz v Turkey*, no. 48939/99, 30 November 2004, paras 98-101, ECtHR, *Budayeva et al v Russia*, 20 March 2008, no. 15339/02, § 147-158; and ECtHR, *Kolyadenko et al v Russia*, no. 17423/05, 28 February 2012, § 165 and 174-180.

719 ECtHR, *Taşkin et al v Turkey*, 10 November 2004, no. 46117/99, paras. 107 and 111-114, and ECtHR, *Tătar v Romania*, no. 67021/01, 27 January 2009, § 89-97.

720 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, Part 2.

721 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 5.2.3.

722 *Gorovenky and Bugara v Ukraine* were about the regulation of police firearms and the ECtHR stated at § 32 that the positive obligation of Article 2 grants "general protection to society [covering] a wide range of sectors [... and which will] arise in the context of any activity".

32, and ECtHR 13 April 2017, no. 26562/07 (*Tagayeva et al v Russia*⁷²³), para. 482. With regard to Article 8 ECHR, see, inter alia, ECtHR 26 July 2011, no. 9718/03 (*Stoicescu/Romania*⁷²⁴), para. 59] The latter is for instance the case with environmental hazards. [endnote 15: See ECtHR 10 January 2012, no. 30765/08 (*Di Sarno et al v Italy*⁷²⁵), para. 110 and ECtHR 24 January 2019, no. 54414/13 (*Cordella et al v Italy*⁷²⁶), para. 172.] In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.⁷²⁷

The above passage, merely relying on the ECtHR case law, is a clear departure from the particularisation and distinctiveness requirements as conceived by CJ Roberts in its dissenting opinion in *Massachusetts* (see subdivision 2.1.1.1.1)⁷²⁸.

Additionally, despite the fact that *Urgenda* was filed in 2013, before the adoption of the Paris Agreement, the Dutch courts still considered it necessary to avoid the overstepping of 2°C. They noted in particular that the EU issued in 1996 a communication saying that warming beyond 2°C would be dangerous. The international community agreed with this stance by 2009 in the COP 13 decision “Copenhagen Accord”. In light of what precedes, the Dutch courts considered the 2°C global warming limit as the threshold to avoid dangerous climate change. They furthermore acknowledged that re-inforced climate action is necessary to still be able to achieve this target⁷²⁹.

723 *Tagayeva et al v Russia* was about terrorist attacks and the ECtHR recalled at § 482 the principle that the “positive obligation may apply [...] also in cases raising the obligation to afford general protection to society”.

724 *Stoicescu v Romania* was about the public health and safety issue caused by stray dogs in Romania.

725 *Di Sarno et al v Italy* was about the collection, treatment, and disposal of waste that the ECtHR considered as “hazardous activities” and concluded that “the State had been under a duty to adopt reasonable and appropriate measures capable of safeguarding the right of those concerned to a healthy and protected environment [requiring a] duty of care”.

726 *Cordella et al v Italy* was about the industrial emissions of a steel plant which endangered “the health of the applicants and, more generally, that of the entire population residing in the areas at risk”.

727 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 5.3.1.

728 See the summary and court documents of *KlimaSeniorinnen* before Swiss courts here: <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>, last accessed 28 October 2025.

729 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 2 and § 4.6.

The Dutch courts also noted that, since 2015, international law and science evolved, leading to the recognition of the rather aspirational 1.5°C target in the PA⁷³⁰. The Supreme Court also noted the scientific findings published by the IPCC “special report on 1.5°C” in 2018, showing the multiple grave risks of breaching this target⁷³¹. The Dutch Supreme Court concluded that the consideration of these elements “necessitates a greater reduction in greenhouse gas emissions than is necessary for a target of no more than 2°C”⁷³². Therefore, despite the absence of direct legal force of the PA’s LTTG, the fact that the injury – or the risk of injury – increases with the overstepping of the 1.5°C and 2°C thresholds enables them to be made enforceable in Dutch domestic law.

2.1.1.2 The explicit dismissal of climate human rights standing by some courts

Subdivision 2.1.1.2.1 deals with the dismissals of the *Carvalho* case by the CJEU, while subdivision 2.1.1.2.2 addresses the rejection of the *Klimasenioren* case by the Swiss courts.

2.1.1.2.1 The particularisation requirement of the Court of Justice of the EU in Carvalho

The *Carvalho* case was a systemic mitigation case, building on the *Urgenda* case in the EU courts. The case sought the upward revision of GHG reduction targets and was brought by 36 individuals from ten different families working in the agricultural and tourism sectors. There was also a Swedish NGO of young indigenous Sami people⁷³³.

730 As already mentioned multiple times, especially in Part I, the Paris Agreement lays out in its Article (2) (a) a somewhat more ambitious objective as presented in the introduction of “well below 2°C” and aspirationally 1.5°C, adding “that this would significantly reduce the risks and impacts of climate change”.

731 The IPCC namely recognised in its SR1.5 SPM that “Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C.” See IPCC, SR1.5, SPM, § B5.

732 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 7.2.8.

733 General Court of the EU, *Carvalho et al v EU*, T-330/18, 8 May 2019, § 1.

Contrary to the class action standing conditions in the Netherlands, applicants – including NGOs⁷³⁴ – must show how they are individually and uniquely affected under the EU judicial system rules⁷³⁵. The General Court emphasised that the alleged rights infringement must necessarily be distinct from the rest of the population, according to Article 263 (4) of the Treaty on the Functioning of the European Union (TFEU)⁷³⁶ and the relevant settled *Plaumann* case law, specifying the standing criteria under this legal avenue⁷³⁷. While the Court recognised that climate change will certainly affect everyone to some extent, it ruled that the claimants had not demonstrated that they would suffer unique harm:

“It is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application. As can be seen from the case law cited in paragraph 48 above, a different approach would have the result of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless and of creating locus standi for all without the criterion of individual concern within the meaning of the case law resulting from the judgment of 15 July 1963, *Plaumann v Commission* (25/62, EU:C:1963:17), being fulfilled.”⁷³⁸

The CJEU subsequently confirmed the General Court's finding⁷³⁹. As the analysis of CJ Roberts' dissent in *Massachusetts* shows, the distinctiveness

⁷³⁴ *Ibid*, § 51.

⁷³⁵ *Ibid*, § 46.

⁷³⁶ Article 263 (4) TFEU: “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of *direct and individual concern* to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

⁷³⁷ CJUE (25/62, EU:C:1963:17): “Persons other than those to whom a decision is addressed may only claim to be *individually concerned* if that decision affects them by reason of certain attributes which are *peculiar* to them or by reason of circumstances in which they are *differentiated from all other persons* and by virtue of these factors *distinguishes them individually* just as in the case of the person addressed.” (I italicised the relevant passage).”

⁷³⁸ General Court of the EU, *Carvalho et al v EU*, T-330/18, 8 May 2019.

⁷³⁹ CJEU, *Carvalho et al v EU*, C-565/19 P, 25 March 2021, § 67 – 80.

or uniqueness requirement seems to constitute an insurmountable hurdle to overcome in climate matters, except perhaps for small islands, as found above (see subdivision 2.1.1.1.1).

The applicants in the *People's Climate case* also challenged this criterion with regard to the right to an effective remedy under Article 47 of the Charter of Fundamental Rights, but the Courts of the EU retorted that this article does not confer an unconditional right to directly lodge a claim before the supranational courts of the EU⁷⁴⁰. The courts added that the Treaty on the Functioning of the EU (TFEU) has set up an exhaustive system of judicial review procedures to ensure the legality of EU acts⁷⁴¹. The General Court elaborated on that point by stating that it is possible to refer questions to the Courts of the EU for a preliminary ruling according to Article 267 TFEU. In other words, the Court suggested that plaintiffs should have used this avenue as they were not in a position to fulfil the standing criteria for a direct claim against the EU institutions before the EU courts⁷⁴². To do that, the applicants should have filed an application with a national court by way of which they could have referred a question about the validity of the acts of the EU to the supranational Courts.

Yet, the claimants contended that “a number of factors make it structurally impossible to obtain an effective remedy through the national courts, having regard, in particular, first, to the inadmissibility of a request for a preliminary ruling concerning the validity of the legislative package regarding greenhouse gas emissions”. The CJEU dismissed this ground of appeal without providing a specific justification⁷⁴³. Nevertheless, seeking a preliminary ruling from the CJEU about the validity of the legislative climate-related targets does not seem impossible. On the contrary, numerous domestic courts declared different climate cases admissible. It could have been, therefore, possible for the applicants in *Urgenda*, *Grande-Synthe*, *Affaire du siècle*, or the *Irish case* to refer a question for a preliminary ruling to the EU Courts. The “public rapporteur” (general advocate) of the French Administrative Supreme Court (*Conseil d'Etat*) even asserted

740 General Court of the EU, *Carvalho et al v EU*, T-330/18, 8 May 2019, § 52; CJEU, *Carvalho et al v EU*, C-565/19 P, 25 March 2021, § 77.

741 General Court of the EU, *Carvalho et al v EU*, T-330/18, 8 May 2019, § 53; CJEU, *Carvalho et al v EU*, C-565/19 P, 25 March 2021, § 68.

742 General Court of the EU, *Carvalho et al v EU*, T-330/18, 8 May 2019, § 53.

743 CJEU, *Carvalho et al v EU*, C-565/19 P, 25 March 2021, § 62 and 80.

that this option had not been pursued by the claimants, despite it being available⁷⁴⁴.

Hence, the CJEU did not identify any violation of the right to an effective remedy, as set out by Article 47 of the Charter of Fundamental Rights.

The *Carvalho* case shows that the highest court of the EU did not adapt the criterion of particularisation in the context of direct liability actions regarding climate change. It found that judicial review of EU acts is possible through preliminary ruling, which could provide a means of contesting the EU's overall target in a systemic manner.

2.1.1.2.2 The dismissal of climate-related human rights claims in Klimaseniorinnen by Swiss courts

While the Swiss courts in *KlimaSeniorinnen* similarly upheld the relevance of the distinction criterion, like the EU courts⁷⁴⁵, their findings are not as easily comparable due to the different personal characteristics of the applicants. In *KlimaSeniorinnen*, applicants were elderly women who requested GHG reduction measures in line with the Paris Agreement.

Although these women might currently be more affected than others due to their age, the Swiss Federal Supreme Court responded, with respect to their basic rights to life and private and family life, that “the appellants – like the rest of the population – are not affected by the alleged omissions with sufficient intensity in the rights invoked in terms of Art. 25a APA.”⁷⁴⁶ This finding related to the time at which the Court issued its judgement: the Court believed that no one could be considered a victim or potential victim under Article 34 of the European Convention on Human Rights (ECHR).⁷⁴⁷

Moreover, the Court believed that overstepping the Paris temperature goal of well below 2°C was timing wise too remote to affect the applicants⁷⁴⁸. Although the Court did not explicitly say so, the applicants would perhaps not be affected by such a level of warming in their lifetime. The particular situation of these elderly women, who are living in a time when it

744 Stéphane Hoyneck (*rapporteur public* of the *Conseil d'Etat*), *Grande-Synthe*, 19 November 2020, p 6 of the document filed by the *Conseil d'Etat*, available on-line on Ariane web.

745 Federal Supreme Court of Switzerland, *KlimaSeniorinnen*, 1C_37/2019, 5 May 2020.

746 *Ibid*, § 5.5.

747 *Ibid*, § 5.4.

748 *Ibid*, § 5.3.

is still possible to adapt to milder levels of warming, including heat waves, may mean that they lack individual standing, in contrast to younger people, who will have to face harsher climate impacts in the future.

Subsequently, the ECtHR Grand Chamber re-examined this case and confirmed that the individual applicants do not have victim status, but that the association or NGO *KlimaSeniorinnen* established *locus standi*. This latter decision departs from Swiss jurisprudence, which does not recognise standing for environmental NGOs in principle. For more analysis of the ECtHR decision, see subdivision below 2.1.3.5⁷⁴⁹.

Addendum clarification: Before the ECtHR issued its decision in *KlimaSeniorinnen* on 9 April 2024, this thesis had argued that the ECtHR *could* reach a different conclusion concerning the standing of the Swiss elderly applicants, given that it was considered likely from a scientific perspective that the global 1.5°C threshold would be overstepped before 2026, albeit temporarily⁷⁵⁰. The IPCC has also established that exceeding the 1.5 threshold is likely in the near term⁷⁵¹. Moreover, given the *Urgenda* decision⁷⁵² and the existence of some ECtHR rulings on the possibility of vindicating human rights even in cases of widespread public harm, this dissertation argued that the ECtHR may declare the particularisation requirement incompatible with the Convention. However, the ECtHR reached a slightly different conclusion: it did not grant victim status to the individual applicants, but instead granted standing to the NGO. This means that the Swiss court will need to adapt its standing requirements with respect to climate mitigation, but not with respect to individuals (subdivision below 2.1.3.5).

2.1.2 The widespread acceptance of claims based on specific climate legislation

Three court cases in three different jurisdictions show the increasing acceptance by courts to provide standing to physical or legal persons in order to oversee compliance with GHG reduction objectives enshrined in *specific* legislation. Those developments were made possible thanks to preexisting judicial review mechanisms, and despite the absence of associated *specific* enforcement mechanisms *per se*, and despite dismissing human-rights-based CDD. The section is structured as follows:

Subsection 2.1.2.1 analyses the admissibility of the applicant NGO in *Friends of the Irish Environment v Ireland*. Subsection 2.1.2.2 deals with the

749 *Ibid.*

750 WMO, “New Climate Predictions Increase Likelihood of Temporarily Reaching 1.5 °C in Next 5 Years”, Press Release No. 27052021, 27 May 2021.

751 IPCC, AR 6, WG III, SPM, 2022, p 7.

752 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 5.3.1.

Grande Synthe case settled by the French Administrative Supreme Court (*Conseil d'Etat*). Subsection 2.1.2.3 discusses the outcomes of some English cases that granted standing in claims based on the *specific implementation of general CDD*.

2.1.2.1 The successful ultra vires case brought by Friends of the Irish Environment

In a climate case decided in 2020, the Supreme Court of Ireland granted the NGO Friends of the Irish Environment's application for a judicial review. The Court ruled that the government had failed to properly implement the Climate Action and Low Carbon Development Act 2015, thereby acting *ultra vires*. Meanwhile, the Court rejected the constitutional and ECHR human rights claims due to a lack of standing in this respect.

Similarly to the UK (see below, subsection 2.1.2.3 on the UK cases), anyone can request judicial review in Ireland of a public body if their individual interests are directly and adversely affected. In addition, NGOs can litigate the inadequate implementation of environmental legislation if they "have been promoting environmental protection for 12 months in respect of relevant matters"⁷⁵³. Accordingly, in *Friends of the Irish Environment v Ireland*, "the standing argument raised by the Government did not apply to the *ultra vires* part of the case for it was accepted that Friends of the Irish Environment had standing to raise those issues."⁷⁵⁴

However, the standing of NGOs is limited. The Chief Justice of the Court, who wrote the opinion on behalf of the Court, concluded that NGOs cannot, in principle, have *locus standi* if they assert human or environmental rights of a constitutional or conventional nature, such as the ECHR, as they are not individual persons:

"FIE [Friends of the Irish Environment], as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights based arguments sought to

753 See the website of the government about procedural information concerning the judicial review: https://www.citizensinformation.ie/en/environment/buildings_and_structures/judicial_review_in_planning_and_environmental_matters.html, last accessed 29 October 2025.

754 Supreme Court of Ireland, *Friends of the Irish Environment v The Government of Ireland*, 31 July 2020, § 5.32.

be put forward whether under the Constitution or under the ECHR. I also conclude that it has not been shown that it is necessary to allow FIE [Friends of the Irish Environment] to have standing under the exception to the general rule, which arises in circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.”⁷⁵⁵

Concerning the exceptions to the general rule that the Court mentioned, it considered that the applicant NGO, which was pleading in favour of future generations and current generations against future threats⁷⁵⁶, could not be assimilated with that of some plaintiffs having previously successfully vindicated the rights of an unborn child⁷⁵⁷. The Supreme Court argued that Friends of the Irish Environment had not provided any satisfying explanation “why these proceedings could not have been brought in the ordinary way by persons who would undoubtedly enjoy the right to life and the right to bodily integrity on which reliance is placed.”⁷⁵⁸

The Court also rejected the argument that the Irish Environment’s position was akin to that of an NGO which had filed a case on behalf of prisoners with psychiatric disorders facing extremely vulnerable living conditions who were adversely affected by systemic treatment deficiencies⁷⁵⁹. The Supreme Court argued that the NGO did not show that persons affected by climate change “were among the most vulnerable and disadvantaged members of society”, in a similar position to that of prisoners. Overall, the Irish Supreme Court argued that the applicant NGO failed to explain why it had “launched these proceedings and why individual plaintiffs have not commenced the proceedings, or sought to be joined.”⁷⁶⁰

Nonetheless, this case shows that NGOs can still litigate a lack of implementation of climate policies by invoking *specific* laws and the *ultra vires* mechanisms. Moreover, the Irish Supreme Court left open the question of whether individuals asserting fundamental rights could have standing. However, due to the ECtHR *KlimaSeniorinnen* judgement, the Irish Supreme Court will now have to accept climate-related claims brought by NGOs.

⁷⁵⁵ *Ibid.*, § 9.4.

⁷⁵⁶ *Ibid.*, § 5.23 and § 13 of the High Court Judgement ([2019] IEHC 747, 19 September 2019).

⁷⁵⁷ *Ibid.*, § 7.13

⁷⁵⁸ *Ibid.*, § 7.22.

⁷⁵⁹ *Ibid.*, § 7.15 – 7.17.

⁷⁶⁰ *Ibid.*, § 7.18

2.1.2.2 The confirmation of the *ultra vires* avenue in the French *Grande-Synthe* case

In the *Grande-Synthe* case, the French Administrative Supreme Court (*Conseil d'Etat*) found that the French State is not on track to meet its own GHG reduction objectives. Applicants launched directly with the Supreme Court. Filing a recourse directly with the Supreme Court is possible under certain conditions in *ultra vires* proceedings⁷⁶¹, called in French “*recours en excès de pouvoir*”, close to the judicial review process in Ireland or the UK⁷⁶².

Regarding standing, the applicants in *Grande-Synthe* did not have to demonstrate a proper injury, but only a direct, certain, and specific interest⁷⁶³. In this case, the Court considered that the municipality of *Grande-Synthe* met these conditions:

“the municipality of *Grande-Synthe* claims, without being seriously challenged on this point, that because of its immediate vicinity to the coast and the physical characteristics of its territory, it is exposed in the medium term to high and increased risks of flooding, an increase in episodes of severe drought, resulting not only in a reduction and deterioration of water resources but also significant damage to built areas, in light of the geological characteristics of the soil’. While the tangible consequences of climate change are not likely to have their full effect on the municipality’s territory until 2030 or 2040, the inevitable nature of such effects, in the absence of effective measures being taken quickly to prevent the causes thereof and in light of the time frame for the implementation of public policies in this area, is sufficient to justify the *necessity of immediate action* to this end. Consequently, the municipality of *Grande-Synthe*, in light of its level of exposure to the risks resulting from the phenomenon of climate change and their *direct and certain impact* on its situation and the interests for which it is responsible, has a *legitimate interest* that entitles it to seek to quash the implied decisions at issue; the argument put forward by the Minister in support of his application to strike out, namely that the effects of climate change are likely to affect the interests

761 See Article R311-1 du Code de justice administrative.

762 Judiciary For England And Wales, The Administrative Court: Judicial Review Guide 2021, July 2021, § 1.7.2.

763 See the opinion of the General Advocate of the *Conseil d'Etat* (S. Hoynck, *rappporteur public*), p 2.

of a significant number of municipalities, is not sufficient to cast doubt on said interest.”⁷⁶⁴

It is noteworthy that the finding of the Supreme Administrative Court regarding the standing of the city bears numerous resemblances to the US Supreme Court finding concerning Massachusetts in the case of the same name (see above). The framing of both cases is also very similar, as Grande-Synthe and Massachusetts, respectively, challenged the inadequate implementation of legislation. On a further comparative note, the general advocate (*rapporteur public*) emphasised that the French jurisprudence has never expected stringent standing requirements such as those of the Court of Justice of the European Union (citing the *Plaumann* ruling) or German Courts, especially concerning the particularisation or distinctiveness of the harm⁷⁶⁵.

The *Conseil d'Etat* also admitted the cities of Paris and Grenoble as interveners in support of the applicants' requests, on similar grounds to Grande-Synthe. The Court observed that “the Paris region and Grenoble urban areas have been identified by the French National Observatory on the effects of climate change as having a very high index for exposure to climate risks”⁷⁶⁶. In addition, it also accepted the intervening environmental associations Notre affaire à tous, Oxfam France, Greenpeace France, and Fondation pour la Nature et l'Homme⁷⁶⁷. NGOs whose statutes seek to protect the environment are traditionally entitled to pursue corresponding lawsuits in France.

The Supreme Administrative Court, however, rejected the claim of the mayor of Grande-Synthe Damien Carême, despite the fact that “his current home is in an area likely to be subject to flooding by 2040”⁷⁶⁸. According to the general advocate, who provided further reasons to dismiss Carême's claim, it is uncertain that he will be affected by global warming since his residence is not his property, and the exposure risk to sea-level rise of his

764 Supreme Administrative Court, *Grande-Synthe*, n° 427301, 19 November 2020, para 3.

765 See the opinion of the General Advocate of the *Conseil d'Etat* (S. Hoyneck, *rapporteur public*), p 3 and 12.

766 Supreme Administrative Court, *Grande-Synthe*, n° 427301, 19 November 2020, para 5.

767 *Ibid*, para 6.

768 *Ibid*, para 4.

house is more remote timing-wise than to the city⁷⁶⁹. The Court further stated that the citizen capacity of the mayor does not provide him with sufficient grounds to ask for judicial review either. Manifestly, the Court attempted to strike a balance between the traditional French standing requirements and the nature of climate change by avoiding the creation of a climate *actio popularis* for individuals. However, since everyone will be affected by global warming in some way or another, and since systemic climate mitigation claims focus on greenhouse gas reductions, which benefit society at large, legal *actio popularis* in the realm of climate mitigation should be allowed. This is also in line with the *erga omnes* finding by the ICJ, meaning that all subjects of international law can pursue litigation to request compliance with *mitigation* rules (only)⁷⁷⁰.

Nevertheless, when reviewing this case in 2024, the Grand Chamber of the ECtHR decided that the Supreme Administrative Court had correctly denied the *locus standi* of the former mayor of the city, Damien Carême⁷⁷¹. While theoretically sticking to its *actio popularis* rule, it still provided an important exception to it by granting environmental associations such as KlimaSeniorinnen *locus standi*.

2.1.2.3 The latest successful specific CDD case in the UK

The UK courts issued three judgements on systemic climate mitigation. They dismissed two systemic climate applications filed by the NGO Plan B Earth and some individuals, but granted the *ultra vires* part of the lawsuit filed by the non-profits Friends of the Earth UK, Client Earth, and Good Law⁷⁷².

As in Ireland and France, anyone in the UK can request a judicial review if they demonstrate “a sufficient interest”⁷⁷³ in the resolution of the case, which requires showing that one is directly and adversely affected by the

769 See the advisory opinion of the General Advocate of the Supreme Administrative Court (S. Hoyneck, *rapporteur public*), p 3.

770 ICJ, *Obligations of States in respect of Climate Change*, Advisory opinion, 23 July 2025, § 441 – 443.

771 ECtHR, *Carême v France*, no. 7189/21, 9 April 2024.

772 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, 18 July 2022, [2022] EWHC 1841 (Admin).

773 Judiciary For England And Wales, *The Administrative Court: Judicial Review Guide* 2021, July 2021, § 6.3.2.1.

public body's conduct⁷⁷⁴. If the claimant is a legal person, such as an NGO or association, then it must act in the public interest, for example, in the realm of the protection of the environment and show expertise in the subject matter of the case⁷⁷⁵. If ECHR rights are relied upon, then the claimant must show victim status as defined by the British Human Rights Act 1998 and the ECtHR case law.

Besides, claimants must show at the standing stage that they have an arguable case with realistic prospects of success. They must also establish that they are seeking reliefs that would provide them with advantages⁷⁷⁶, but these aspects concern more redressability issues (see subpart 2.3 on redressability). In this respect, the first *Plan B* case was precisely dismissed because of the absence of "arguable" arguments.

Regarding the more recent *Plan B Earth* case filed in 2021, the main rejection grounds were the absence of a manifest error of appreciation (see subpart 3.3. on redressability) and victim status. Given that the first claimant – Plan B – is not a natural person, the High Court considered that it cannot rely on individual human rights. As to the other individual claimants, the Court deemed they could not show any immediate risk to their lives or family lives⁷⁷⁷. Some claimants also relied on Articles 8 and 14 ECHR (prohibition of discrimination), arguing they "have family members who live outside the UK in regions of the world that may be affected more profoundly, and/or sooner, by climate change"⁷⁷⁸. The High Court responded that these family members do not fall into the ambit of the ECHR term "family life" of the applicants as they are not "spouses, parents and minor children"⁷⁷⁹. The second claimant also alleged to suffer from "mental health problems [... which] makes her unwilling to have children",⁷⁸⁰ alleging thereby an Article 8 ECHR violation. The High Court did not specifically dismiss this anxiety claim; it only stated that the general risk of harm to the global community cannot be sufficient to establish victim status in relation to Article 2 ECHR⁷⁸¹.

774 *Ibid.*, § 6.3.2.4.

775 *Ibid.*, § 6.3.2.5.

776 *Ibid.*, § 9.1.3. – 9.1.4.

777 High Court of London, *Plan B Earth et al v The Prime Minister et al*, 21 December 2021, [2021] EWHC 3469 (Admin), § 6 and 78.

778 *Ibid.*, § 63.

779 *Ibid.*, § 67.

780 *Ibid.*, § 71.

781 *Ibid.*, § 78.

The claimants eventually lodged an application with the ECtHR⁷⁸². However, the Grand Chamber of the ECtHR dismissed in its first climate judgments similar climate anxiety claims in the *Duarte Agostinho v 32 States* and *Carême v France* case. In the former case, the Court deemed that the applicants could not establish victim status due to a lack of evidence⁷⁸³. In the latter case, the Court argued that allowing climate anxiety claims could breach its long-standing rule on the inadmissibility of *actio popularis*⁷⁸⁴.

In contrast to these non-successful cases, the High Court of London recently granted the judicial review application brought by Friends of the Earth UK, Client Earth, and Good Law⁷⁸⁵, which was similar to the Irish and French cases. However, the High Court of London dismissed the human rights claims of the NGO Good Law and the individual claimant who joined the Good Law application⁷⁸⁶, stating it is preferable to wait for the outcome of the pending climate cases before the ECtHR than elaborate domestic standards departing too heavily from the incremental development of the Strasbourg case law⁷⁸⁷ (see section on redressability for expanded discussion in this regard)⁷⁸⁸.

782 See case summary of *Plan B Earth and others v UK*: <http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/>, last accessed 28 October 2025.

783 ECtHR, *Duarte Agostinho v Portugal and 32 other States*, n° 39371/20, 9 April 2024, § 229.

784 ECtHR, *Carême v France*, no. 7189/21, 9 April 2024, § 84.

785 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022.

786 *Ibid*, § 261 – 265.

787 *Ibid*, § 272 referencing the famous case *Al-Skeini v Secretary of State for Defence* [2008] AC 153 at [106] to justify this stance: “There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg”.

788 This issue concerns redressability. Indeed, lower courts often deem it necessary to wait for the opinion of a higher or a supreme court before settling a dispute. For example, in Germany, the lower court of Berlin exercised some restraint with respect to standing issues by admitting the difficulty of resolving those and allowing applicants to appeal its decision (see below subsection on the German cases). The intervention of the German Constitutional Court eventually settled those. In France, the *Grande-Synthe* decision of the Administrative Supreme Court influenced the outcome of the “*affaire du siècle*” case before the Paris Court of the first instance.

In light of the ECtHR's final judgement in *KlimaSeniorinnen*, the British Courts should now admit climate-related mitigation claims brought by an NGO under Article 8 ECHR and review the State's conduct against the substantive CDD obligations set out by the Grand Chamber (see subsection 2.3.2.5). Note, however, that the British Parliament was, until recently, discussing the draft "Bill of Rights" to replace the Human Rights Act 1998. The Bill aimed to give domestic courts the authority to ignore or set aside Strasbourg case law⁷⁸⁹.

2.1.3 The increasing admissibility of claiming individual injuries in conjunction with collective rights to open up the general CDD avenue

This section discusses the recognition of standing in *general* CDD cases, as recognised under tort law, human rights law, constitutional law, and general international law. In those circumstances, claimants must demonstrate both a breach of due diligence norms and a proper injury. This section focuses on the harm and argues that courts are increasingly adapting the traditionally individual standing criteria to the context of global warming, a collective and global harm. Eased by the worsening of global warming and the progress of science, courts find different ways to establish injuries, drawing from the individual and collective dimensions of the harm. This section is structured more precisely as follows.

Subsection 2.1.3.1 discusses how the injury of the individual plaintiffs was recognised in the *Juliana v USA* case. Subsection 2.1.3.2 deals with the possibility of relying in France on the legal concept of the ecological injury, which is a collective interest. Subsection 2.1.3.3 examines the German Constitutional Court decision, which shows the possibility of claiming an individual injury in conjunction with collective and environmental interests in order to devise a climate claim. Subsection 2.1.3.4 swiftly takes note of the UN-Human Rights Treaty Bodies' opinion. Subsection 2.1.3.5 discusses the considerable jurisprudential evolution of the ECtHR decision in its *KlimaSeniorinnen* decision, which granted standing to the association instead

And in the UK, the British courts preferred to defer to the ECtHR if it requires leaps in the case law development. Within the ECtHR, the Grand Chamber can, in some cases, be directly competent for resolving important questions of principles, like in the pending climate cases or for issuing advisory opinions, according to Protocol 16.

789 For more information on this possibility, see Gentile G, "The Bill of Rights Bill and the Damages of UK's Unilateralism" (2022) *VerfBlog*.

of the individual applicants, as climate change poses massive human rights risks to the entire population, but not the applicants. Subsection 2.1.3.6 briefly discusses developments in the realm of general international law.

2.1.3.1 The recognition of individual climate-related injuries in *Juliana*

In *Juliana et al v USA*, submitted in 2015, the young plaintiffs argued that they had already been personally harmed by global warming. The US courts found standing with respect to injury, but the Court of Appeals of the Ninth Circuit only found injuries and causation, not redressability⁷⁹⁰. Thus, since the demonstration of the injury was – in theory – successful, this case is, to a certain extent, interesting for the purposes of this section, which focuses on the harm.

Notably, the Court of Appeals stated that “some plaintiffs claim concrete and particularized injuries” and that they “have presented evidence that climate change is affecting them now in concrete ways”⁷⁹¹. The Court of Appeals furthermore quoted Massachusetts to recall that ““it does not matter how many persons have been injured” if the plaintiffs’ injuries are “concrete and personal.””⁷⁹² The collective dimension of global warming, or the fact that the “harm is widely shared does not necessarily render it a generalized grievance.”⁷⁹³ Thus, the Court of Appeal found that the collective dimension of global warming does not mean that establishing individual and personal injuries is impossible.

While the Court did not elaborate more on these issues, particularly the scientific evidence, it is worth noting that other courts have agreed that (imminent) injuries were already occurring around 2015, when global warming reached approximately the 1°C threshold. For example, in *Urgenda* (2019), the Supreme Court of the Netherlands recognised that it is “possible that dangerous climate change will occur even with less global warming [than 1.5°C] and a lower concentration of greenhouse gases, for example, because a tipping point is reached or because ice melts at a higher rate”⁷⁹⁴. Additionally, five UN-Human Rights Treaty Bodies stated

790 United States Court of Appeals For The Ninth Circuit, *Juliana et al v USA*, No. 18-36082 D.C. No. 6:15-cv-01517-AA, 17 January 2020, p 18.

791 *Ibid*, p 18 – 19.

792 *Ibid*, p 19.

793 *Ibid*, p 19.

794 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 7.2.10.

in 2019 that “adverse impacts on human rights are already occurring at 1°C of warming and every additional increase in temperatures will further undermine the realization of rights”⁷⁹⁵.

Moreover, the AR6 report of the IPCC, published between 2021-23, reveals that global warming – reaching approximately 1.2°C by 2022 – caused loss and damages, including “some irreversible impacts as natural and human systems are pushed beyond their ability to adapt (high confidence).”⁷⁹⁶ Thus, adaptation becomes critical, in addition to reinforced mitigation.

This state of affairs provides numerous possibilities to find climate-related injuries in law, as the following subsection shows.

2.1.3.2 The possibility of relying on the ecological injury in France to claim general due diligence

In *Notre affaire à tous et al v France*, the Paris Administrative Court of first instance recognised that recent levels of warming have already disrupted the atmosphere’s functions, thereby harming the environment and justifying legal action to protect it:

“With regard to the existence of ecological damage:

16. It follows from the investigation, and in particular from the latest special reports published by the Intergovernmental Panel on Climate Change (IPCC), in which France actively participates and to which it contributes 15% of the funding, and to whose conclusions it subscribes, that the steady increase in the Earth’s average global temperature, which has now reached 1°C above pre-industrial levels, is mainly due to anthropogenic greenhouse gas emissions. This increase, which is responsible for changes in the atmosphere and its ecological functions, has already led to, among other things, the acceleration of the melting of continental ice and permafrost and the warming of the oceans, resulting in sea level rise, which is accelerating. This phenomenon is combined with an increase in the frequency and severity of extreme weather events, ocean acidification and damage to ecosystems, which have serious and irreversible consequences for human activities such as fishing and farming, as well as for water resources, and lead to increasing risks of food insecurity

795 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

796 IPCC, AR6 (2021-23), WG II, SPM B.1.

and degradation of water resources, human health and economic growth [...]. This work also shows that every half degree of additional global warming significantly increases the associated risks, particularly for the most vulnerable ecosystems and populations [...]. In view of all these factors, the ecological damage claimed by the applicant associations must be regarded as established.”⁷⁹⁷

This court decision was made possible by the previous recognition of the pure ecological loss in French law, first through case law (see the *Total Erika* case, 2012⁷⁹⁸), and then through its incorporation into the French Civil Code. Indeed, Articles 1246 and 1247 of the Civil Code provide the right to claim compensation for ecological harm, while Article 1252 grants courts the authority to enforce reasonable measures to prevent or stop the environmental damage. Any person with a legitimate interest may claim such a cause of action.

Furthermore, the Paris Court recognised that global warming also infringes the objectives of environmental NGOs and thereby constitutes a non-pecuniary injury to them (“*préjudice moral*”). NGOs traditionally had the right to seek redress for pure ecological injuries in France by claiming a breach of their statutes⁷⁹⁹.

Both types of injury (ecological and moral) differ greatly from personal injury, as they relate to nature or the NGO's objectives and can affect numerous people simultaneously. In any case, the concept of pure ecological injury logically facilitates the establishment of standing in environmental and climate matters, but it is a legal concept recognised only in some countries⁸⁰⁰. For example, the German jurisdiction and common law jurisdictions do not provide for this possibility.

797 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 16 (own translation).

798 In 2012, French courts, including the Court of Cassation, recognised that the pure ecological loss is recoverable in the famous *Total Erika oil spill* case, caused by a boat of TotalEnergies's subsidiaries, for facts dating back to 1999 (Cour de cassation, crim, *Erika*, n° 10-82-938, 25 septembre 2012). Thus, the case law already provided the legal basis for asking for compensation for ecological harm.

799 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 10 – 15 and § 40 – 45. See, more generally, Torre-Schaub M, *Le préjudice moral*, SERDEAUT, 2008.

800 The recognition of the concept of pure ecological damage is currently limited to certain countries, including France, Italy and Romania, while the moral damage of

2.1.3.3 The admissible German constitutional complaint based on individual and collective rights

In the German *general* CDD cases against the State, the question of individual injury was also very much debated. The Constitutional Court eventually resolved it in favour of the applicants.

In the first German systemic mitigation case, which was decided in 2019, the Berlin Administrative Court left open the question of whether the individual applicants had a legal interest because the GHG reduction target and measures of the State were deemed sufficient to safeguard fundamental rights. In this case, the applicants were eleven individuals from three farming families alongside Greenpeace. They challenged Germany's failure to achieve its 2020 GHG reduction objective. As the 2020 target had not been enshrined in legislation and the instrument was not enforceable, the Berlin court rejected the application. The Court did this at the admissibility stage, indicating that this *manifest lack of fault* overlapped with the merits.

With regard to the recognition of the injury, the Berlin Court stated that the individual claimants, "owners of the three organic farms, are particularly concerned by climate change", noting at the same time that the increase in droughts and heat waves affects the whole population. The president of the Court orally conceded during the hearing that he struggled to resolve this issue, and the judgment granted the applicants the right to appeal, suggesting that it should have been decided by a higher court.

Rather than appealing, the applicants decided to join pending constitutional proceedings against the German Climate Law, adopted in 2019, shortly after the Berlin Court issued its ruling, which introduced GHG reduction targets for 2030 and 2050. Note that in Germany, it is possible to directly challenge legislative provisions before the Constitutional Court according to Article 93 (1) 4a Basic Law if there are allegations of infringements of basic rights. Three separate constitutional complaints had already been brought by various German NGOs and individuals, besides individuals from Bangladesh and Nepal. The applicants in the Berlin proceedings therefore lodged their own complaint directly with the Federal Constitutional Court (BVerfG) in Karlsruhe.

environmental associations is also recognised in Belgium and Italy; see for more information, Vignon-Barrault A, "Les préjudices écologiques – Rapport de synthèse", in Patrice Jourdain (dir), *La responsabilité environnementale : Recueil des travaux du Groupe de Recherche Européen sur la Responsabilité civile et Assurance (LSB. GRERCA)*, Bruylant, 2018, p 163.

The Constitutional Court held in March 2021 that the claims of individuals are admissible⁸⁰¹, but not those of the NGOs who claimed to be “advocates of nature”⁸⁰², since “[t]he Basic Law and constitutional procedural law make no provision for this kind of standing” for NGOs.⁸⁰³ Even Article 20a of the German Basic Law⁸⁰⁴, which imposes on the lawmaker “a special duty of care” in relation to the environment and climate matters according to the Court⁸⁰⁵, does not grant any rights to nature, nor NGOs or individuals. While acknowledging that environmental protection may be more effective if NGOs could take legal cases, the Court noted – in a manner close to the US Supreme Court conservative wing – that “the Constitution has not been amended by the legislator to provide for such a possibility.”⁸⁰⁶ Still, the German Constitutional Court decision opens up a path for addressing environmental harms, by indirectly relying on Article 20a of the Basic Law, provided that individual rights are also violated. This human rights-based approach to environmental protection could advance access to justice in Germany. Although the Constitutional Court specified that this solution merely concerned its constitutional proceedings⁸⁰⁷, German lower courts will likely consider this opinion when dealing with other environmental and climate-related cases in the future.

The admissibility of environmental claims was an important procedural issue, because, unlike in France, civil society – and especially NGOs – were not entitled to request judicial review of the State’s public policies in Germany⁸⁰⁸. Under the terms of Article 1 (1) of the German law on environ-

801 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 96 – 135.

802 *Ibid.*, § 136.

803 *Ibid.*

804 Article 20a of the German Basic Law, entitled “Protection of the natural foundations of life and animals” provides: “Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”

805 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, headnotes 2 (a) and (b), and § 229 and 237.

806 *Ibid.*, § 136

807 *Ibid.*, § 110.

808 France recognises the invocability of “pure ecological injuries”. While a person with a legal interest must invoke it, this can be done by an environmental NGO. Furthermore, the standing of a local authority, such as a municipality, to claim climate-related harm has yet to be tested in Germany, despite this type of interest having been recognised in France (*Grande-Synthe*) and the USA (*Massachusetts*).

mental legal remedies (*Umwelt-Rechtsbehelfsgesetz*), NGOs can only initiate environmental proceedings in certain specific cases. Although the *Protect* case law of the CJEU offers environmental associations an additional remedy, it remains limited to situations in which European law is not observed, as long as it concerns objective European law and not subjective rights. This Constitutional Court's decision might render the access to justice in Germany more compatible with Article 9 (3) of the Aarhus Convention, which obliges State Parties to grant access to justice in environmental matters to any member of the public⁸⁰⁹. However, the persistent refusal to provide NGOs with such a right remains problematic in relation to the Aarhus Convention, and the ECtHR's recent climate jurisprudence in *KlimaSeniorinnen* (see subsection just below).

Regarding the more precise reasons why the Constitutional Court admitted *locus standi* of the individual complainants, the Court noted that its own case law and the ECHR jurisprudence include protection against impairment by environmental pollution by referring, among others, to the following authorities of the ECtHR (citing *Öneryildiz v Turkey*, *Budayeva and Others v Russia*, *Cordella and Others v Italy*). The Court subsequently asserted that this protection extends to climate-related threats⁸¹⁰ and concluded that the applicants' human rights were "presently, individually and directly affected"⁸¹¹. Furthermore, the Court *specified* that the complainants do not need to differentiate themselves from the entire population, in contrast to the legal avenue before the CJEU, citing the *Carvalho* cases⁸¹².

The Court also deemed that "[t]he complainants [...] who live in Bangladesh and in Nepal also have standing."⁸¹³ Even if the Court rejected

More generally, in France and the USA, municipalities and states traditionally play a role in defending their local environment in court.

809 Article 9 (3) of the Aarhus Convention lays out: "3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

810 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 99.

811 *Ibid.*, § 108 – III.

812 *Ibid.*, § 111.

813 *Ibid.*, § 101.

their claims on the merits, this finding is significant for the development of extraterritorial jurisdiction and obligations⁸¹⁴.

More broadly, this decision had and could have additional influence beyond Germany, as the Karlsruhe opinions are highly respected, especially at the European level⁸¹⁵.

The German Constitutional Court further innovated in the context of transnational climate litigation⁸¹⁶ by ruling that the plaintiffs' constitutional freedoms⁸¹⁷ are endangered due to the *likely* insufficient 2030 GHG reduction target⁸¹⁸. In the eyes of the Court, harsher and disproportionate GHG reduction measures may be necessary after 2030 in order to achieve the 2050 legislative climate neutrality target and compensate for the 2030 shortfall (i.e., the 2050 target represents for the Court an admissible concretisation of the mandate contained in Article 20a Basic law)⁸¹⁹. This means that climate change was already jeopardising the constitutional "intertemporal guarantees of freedom" at the time of the proceedings⁸²⁰. The Court also

814 While the ECtHR also considered the German Constitutional Court decision, it did not establish extraterritorial jurisdiction as requested by the applicants in *Duarte Agostinho*; hence, it still did not introduce any significant change to its case-law regarding the territorial character of the application of the Convention (see ECtHR, *Duarte Agostinho v Portugal and 32 other States*, n° 39371/20, 9 April 2024, § 65).

815 It is questionable whether the decision by the German Constitutional Court could induce a jurisprudential change by the CJEU since the standing criteria in Germany are similar to those of the CJEU, according to the French public rapporteur (see the advisory opinion of Hoynck Stéphane, *rapporteur public* at the French Supreme Administrative Court, p 12). Regarding the ECtHR, however, it did not fully agree with the opinion of the German Constitutional Court, as it found that the NGO KlimaSeniorinnen had standing, rather than the individual applicants. In any case, it is worth recalling that the facts of these cases were, of course, different (see subsection 2.1.3.5 regarding this decision).

816 Aust HP, "Climate Protection Act Case, Order of the First Senate" (2022) 116(1) *American Journal of International Law* p 150-157; Krämer-Hoppe R, "The Climate Protection Order of the Constitutional Court of Germany and the North-South Divide" (2022) *German Law Journal*, Cambridge; note moreover that only one constitutional complaint raised the violation claim of individual liberties, see Constitutional Court of Germany, Climate Protection Law, 1 BvR 2656/18, 24 March 2021, § 116 – 135.

817 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 116 – 135.

818 *Ibid.*, § 117.

819 *Ibid.*

820 *Ibid.*, § 130.

stated that the complainants' liberties were individually affected, except those living in Nepal and Bangladesh⁸²¹.

Last but not least, the Court believed that the objective of the German climate law, which was aiming for a limitation of global warming to well below 2°C, in line with the PA's LTTG, did not endanger any constitutionally protected human rights, "at least not at present"⁸²². However, by the time this dissertation was completed in 2025, this position had become somewhat isolated, as the ECtHR, the ITLOS and the ICJ had found that best efforts must be made to achieve the 1.5°C objective.

2.1.3.4 The findings of UN Human Rights Treaty Bodies (UN-HRTB)

As already noted above, in a joint statement in 2019, five UN-Human Rights Treaty Bodies (UN-HRTB) found that global warming endangers human rights. More precisely, they stated that "adverse impacts on human rights are already occurring at 1°C of warming and every additional increase in temperatures will further undermine the realization of rights"⁸²³.

Then, in a specific case, the Committee on the Rights of the Child found in 2021 in *Sacchi et al v Argentina*, that the applicant children, including Greta Thunberg and many others from other regions of the world, had established victim status on a *prima facie* basis:

"In the specific circumstances of the present case, the Committee notes the authors' claims that their rights under the Convention have been violated by the respondent States parties' acts and omissions in contributing to climate change and their claims that said harm will worsen as the world continues to warm. It notes the authors' claims to have been personally affected by: smoke from wildfires and heat-related pollution has caused some of the authors' asthma to worsen, requiring hospitalizations; that the spread and intensification of vector-borne diseases has also impacted the authors, resulting in some of the authors contracting malaria multiple times a year or contracting dengue fever and chikungunya; that the authors have been exposed to extreme heat waves causing serious threat to the health of many of the authors; that drought is

821 *Ibid*, § 132.

822 *Ibid*, § 211.

823 Five UN human rights treaty bodies, Joint Statement on "Human Rights and Climate Change", *op cit*, 16 September 2019.

threatening the water security for some of the authors; that some of the authors have been exposed to extreme storms and flooding; that the subsistence level of life is at risk for the indigenous authors; that due to the rising sea level the Marshall Islands and Palau are at risk of becoming uninhabitable within decades; and that climate change has affected the mental health of the authors, some of whom claim to suffer from climate anxiety. The Committee considers that, as children, the authors are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection states have heightened obligations to protect children from foreseeable harm. 10.14 Taking the abovementioned factors into account, the Committee concludes that [...] the authors have *prima facie* established that they have personally experienced a real and significant harm in order to justify their victim status.”⁸²⁴

Nonetheless, the Committee on the Rights of the Child ultimately rejected the case for non-exhaustion of domestic remedies, given that other domestic cases were pending and had been partly granted, as in France and Germany⁸²⁵.

Additionally, in 2022, the Human Rights Committee found that the inhabitants of the Torres Islands, located in the Australian Pacific, face several types of acute dangers, and can therefore request adaptation measures from the Australian State:

“the Committee observes that the authors – as members of peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is uncontested that the authors’ lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them. The Committee observes that in light of their limited resources

824 Committee on the Rights of the Child, *Sacchi et al v Argentina et al*, Decision concerning France, CRC/C/88/D/106/2019, 8 October 2021, § 10.13 - 10.14.

825 *Ibid.*, § 10.15 – 10.20.

and location, the authors would likely be unable to finance adequate adaptation measures themselves, on an individual or community level, to adjust to actual or expected climate and its effects in order to moderate harm. The Committee therefore considers that the authors are among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts. The Committee considers, based on the information provided by the authors that the risk of impairment of those rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility.”⁸²⁶

Overall, these opinions show that individual climate-related harms can be established, especially in circumstances where individuals are particularly vulnerable and exposed to global warming.

2.1.3.5 The confirmation by the ECtHR of the ability of NGOs to claim climate-related risks

In the *KlimaSeniorinnen* case, handed down by the Grand Chamber of the ECtHR, the Court granted standing to the association based on Article 8 ECHR, while dismissing the victim status of the individual applicants⁸²⁷.

More precisely, the ECtHR recognised that climate change harms human rights⁸²⁸. However, in the eyes of the Court, the individual applicants did neither achieve to demonstrate that they were, indeed, *personally and directly affected* nor that there was a “pressing need” to ensure their particular protection⁸²⁹. Hence, the Court agreed to some extent with the Swiss domestic courts concerning the individual claimants’ standing (see subsection 2.1.1.2.2). One cannot exclude the possibility that the Court dismissed those claims to prevent an almost infinite number of compensation requests for losses and damages related to global warming.

However, the Grand Chamber granted the association *Klimaseniorinnen* *locus standi* since it was “defending the rights and interests of individuals

826 Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication, No. 3624/2019, CCPR/C/135/D/3624/2019, 22 September 2022, § 7.10.

827 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 458 – 537.

828 *Ibid.*, § 431 – 436.

829 *Ibid.*, § 458 – 537, and § 487 – 488 and 531.

against the threats of climate change in the respondent State", including those of its members (who are also individual applicants)⁸³⁰.

By doing so, the Grand Chamber has introduced a significant exception to the *actio popularis* rule, although the Court recalled that it "must be mindful of the fact that its own approach cannot result in an acceptance of *actio popularis* which, as a matter of principle and established case law, is not provided for in the Convention system."⁸³¹ To prevent the admissibility of proper *actio popularis*, the ECtHR imposed certain conditions on the legal recourse brought before itself, by excluding the possibility of filing an "abstract complaint about a general deterioration of the living conditions of people without considering its impact on a particular person or group of persons."⁸³² The Court laid down more specific conditions in § 502 for recognising *locus standi* of NGOs, which must be:

"(a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention."⁸³³

Despite those conditions, which are, at the end of the day, not *that* strict, the Court added that the associations does not need to show "that those [individuals] on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context".⁸³⁴ These conditions give NGOs a significant advantage when it comes to establishing standing before the ECtHR.

The Court used comparative law arguments to justify the evolution of its jurisprudence, and notably observed that a significant number of European countries recognise "public interest litigation", notably cases initiated by

830 *Ibid*, § 523, and more broadly, § 521 – 526.

831 *Ibid*, § 501.

832 *Ibid*, § 500.

833 *Ibid*, § 502.

834 *Ibid*, § 502.

NGOs. Furthermore, the Aarhus Convention, to which all the Member States of the Council of Europe are (almost) part of, requires judicial systems to open their doors to NGOs in environmental matters⁸³⁵.

The ECtHR also found that NGOs are better placed to advocating in the field of climate-related issues due to the partly collective and intergenerational nature of the problem: “collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes.”⁸³⁶ With regard to climate more specifically, the Court argued that NGOs are as well better equipped than individuals to handle the factual and legal complexities of climate-related cases, given the need for “significant financial and logistical resources and coordination”⁸³⁷. The Court concluded that “the proper administration of justice” justifies granting standing to an NGO for climate-related human rights harms⁸³⁸.

Lastly, the Court considered that the association could only invoke Article 8 ECHR since neither the individual applicants nor the NGO could demonstrate any “real and imminent” risk to life, which is necessary to open the protection of Article 2 ECHR, which “cannot operate *in abstracto*”⁸³⁹. Thus, although the Grand Chamber recognised that global warming – including heat waves – endangers the right to life on a certain abstract level⁸⁴⁰, it ultimately decided that Article 8 already applies in circumstances of serious environmental risk that expose individuals to potential infringements of their private and family life⁸⁴¹.

835 *Ibid.*, § 490 – 501.

836 *Ibid.*, § 489.

837 *Ibid.*, § 497.

838 *Ibid.*, § 523.

839 *Ibid.*, § 511 – 513.

840 *Ibid.*, § 510: “Thus, the IPCC has found (*with medium confidence*) that anthropogenic climate change, particularly through increased frequency and severity of extreme events, increases heat-related human mortality. Other scientific studies have also found that heatwaves have caused tens of thousands of premature deaths in Europe since 2000. In this context, the IPCC has also found (*with high confidence*) that populations at “highest risk” of temperature-related morbidity and mortality include older adults, children, women, those with chronic diseases, and people taking certain medications”.

841 *Ibid.*, § 518.

2.1.3.6 Potential injuries under general international law

In 2018, the ICJ recognised in the *Costa Rica – Nicaragua* case that environmental damage, in the form of pure ecological loss, can constitute a cause of action, akin to French jurisdictions⁸⁴².

In its 2025 advisory opinion on climate change, the ICJ confirmed that global warming may take the form of different significant environmental harms⁸⁴³. Global warming is also an ecological damage *per se*, since the ICJ found that it “is causing significant harm to the *climate system* and *other parts of the environment*.”⁸⁴⁴ Thus, as the climate system is part of the environment, any State should be able to claim its protection. As to the other concrete environmental injuries related to global warming, they need to be established *in concreto* in individual cases, the ICJ argued⁸⁴⁵. Nonetheless, the ICJ rightly noted that global warming impacts will escalate, with every increment, and related loss and damages, and will be higher for 1.5°C and even higher for 2°C. In other words, the ICJ quoted the IPCC, which “concluded with high confidence that “[w]arming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems”⁸⁴⁶.

These findings are in line with the judgement of the Paris Administrative Court, which, in 2021, determined that the levels of warming at the time were already harming the atmosphere and therefore constituted an ecological injury. They are further compatible with the ILC commentary on guideline 2 of the Draft Guidelines on the Protection of the Atmosphere, which states that “climate change and depletion of the ozone layer are the two principal concerns leading to atmospheric degradation”.

842 ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v Nicaragua)*, 2 February 2018; See Kerbrat Y and Maljean-Dubois S, “La contribution en demi-teinte de la CIJ au droit international de l’environnement dans les affaires Costa-Rica - Nicaragua” (2018) *Droit de l’environnement* n°4, LexisNexis p 1133–1154.

843 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 274 – 279.

844 *Ibid*, § 274 (among others). Note that the terminology “*climate system* and *other parts of the environment*” was used multiple times by the ICJ and was part of the questions posed to it by the UNGA.

845 *Ibid*, § 278.

846 *Ibid*, § 44 – 49.

In addition, as climate change infringes human rights, which can be enforced by states to protect individuals in international cases⁸⁴⁷, States could also use these rights as a legal basis before the ICJ or any other international court. The ICJ confirmed this option in its advisory opinion⁸⁴⁸.

Lastly, the ICJ even confirmed that mitigation rules have an *erga omnes* character as they concern all States⁸⁴⁹, a position already endorsed by the ILC⁸⁵⁰ and notable authors of the legal literature⁸⁵¹. The category of *erga omnes*, originally established by the ICJ in the *Barcelona Traction* judgement of the ICJ⁸⁵², means that every State can institute mitigation litigation under international law to protect the climate system, as every State has “an objective interest for the respect of legality”⁸⁵³.

2.1.4 Provisional conclusion on standing regarding injury

Demonstrating standing in relation to injury is one of the traditional Gordian knots in climate litigation, which still inflames the debate before court bodies. Yet, despite the controversies, courts tend to increasingly grant standing in climate-related cases, particularly in cases based on *specific* legislation, but also in *general* CDD.

Notably, there seems to be a unanimous transnational trend towards establishing standing by relying on *specific* laws. For example, in the 2003-07 *Massachusetts v EPA* case, the US Supreme Court granted standing to the state of Massachusetts to sue the US Environmental Protection Agency

847 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010; ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, § 33 – 34.

848 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 372 – 393.

849 *Ibid.*, § 439 – 444.

850 ILC, Draft Guidelines on the Protection of the Atmosphere, with commentaries, A/76/10, Guideline 3, Commentary § 5 (Official Records of the General Assembly, Seventy-six Session, Supplement No. 10).

851 See, notably: Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 28.

852 ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, § 33.

853 See concurring opinion: Maljean-Dubois S, “The No-Harm Principle as the Foundation of International Climate Law” in *Debating Climate Law* (2021) p 5.

(EPA) for failing to regulate GHGs⁸⁵⁴. In 2019, the Irish Supreme Court allowed the NGO *Friends of the Irish Environment* to seek the establishment of a more consistent plan in line with the statutory net zero 2050 goal⁸⁵⁵. In 2020, the French Administrative Supreme Court (*Conseil d'Etat*) recognised the legal interest of a municipality to ensure the State is on track to meet its 2030 reduction target⁸⁵⁶, akin to the *Massachusetts* case. Eventually, a court in England awarded *locus standi* to NGOs to ensure the concrete measures are credible enough to achieve the reduction objectives⁸⁵⁷.

Other courts have dismissed some climate-related human rights claims entirely between 2019 and 2021 (i.e. legal *general* CDD), such as the Court of Justice of the EU in *Carvalho*⁸⁵⁸, and the Swiss Courts in *Klimaseniorinnen*⁸⁵⁹, and the English courts' decisions in *Plan B and others v UK*⁸⁶⁰. Thus, these courts have shown some resistance to recognising *general* CDD.

However, in other cases involving *general* CDD, including more recent judgements, courts have ultimately recognised violations of pre-existing rights, particularly human rights, when the framing of the violation reflects individual interests and the global and collective nature of climate change. As some of these opinions were delivered by supreme and supranational courts, they may ultimately prevail:

- In the 2015/19 *Urgenda* case, numerous individual applicants introduced with the Urgenda foundation a “class action” and convinced the Court

854 SCOTUS, *Massachusetts et al v EPA*, 549 U. S. ____ (2007), Opinion of the Court, p 14 – 17.

855 Supreme Court of Ireland, *Friends of the Irish Environment v The Government of Ireland*, 31 July 2020, § 5.32.

856 Supreme Administrative Court, *Grande-Synthe*, n° 427301, 19 November 2020, para 3.

857 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, 18 July 2022, [2022] EWHC 1841 (Admin).

858 CJEU, *Carvalho et al v EU*, C-565/19 P, 25 March 2021; see as well, General Court of the EU, *Carvalho et al v EU*, T-330/18, 8 May 2019.

859 Supreme Court of Switzerland, *KlimaSeniorinnen*, IC_37/2019, 5 May 2020.

860 Administrative High Court of Justice of London, *Plan B Earth et al v UK Secretary of State for Business, Energy and Industrial Strategy*, [2018] EWHC 1892 (Admin), 20 July 2018; High Court of London, *Plan B Earth et al v The Prime Minister et al*, 21 December 2021, [2021] EWHC 3469 (Admin); Court of Appeals, *Plan B. Earth & Others v The Prime Minister & Others*, CA-2021-003448, 18 March 2022.

that overstepping the 2°C target is so dangerous that it requires judicial intervention to ensure that the State limits warming to this level⁸⁶¹.

- In 2020, a US federal court of appeals partially recognised the injuries of young individuals in the *Juliana v USA* case. Nonetheless, the case was deemed not redressable (see subsection 2.3.2.2)⁸⁶².
- In early 2021, the French Paris Administrative Court recognised that global warming constitutes an ecological injury. The court added that the damage was evident based on the scientific evidence available at the time of the proceedings and that the consequences would be more severe if the temperature increase exceeded 1.5°C⁸⁶³.
- In 2021, the German Constitutional Court unanimously accorded standing to national and foreign individuals in a case aimed at protecting their individual human rights, including their basic freedoms, alongside those of future generations⁸⁶⁴.
- Some UN-HRTB have also found that individuals are exposed to human rights risks since the 1°C threshold was exceeded. Furthermore, the Committee on the Rights of the Child found *prima facie* victim status in cases filed by certain children⁸⁶⁵, whereas the Human Rights Committee granted standing to inhabitants of an island in Australia facing sea-level rise⁸⁶⁶.
- The ECtHR ruled that an NGO could file climate lawsuits to enforce the duty to limit warming to 1.5°C in the *Klimaseniorinnen* case, but rejected the individual applicants⁸⁶⁷.

861 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 5.2.1. – 5.3.1.

862 See United States Court of Appeals For The Ninth Circuit, *Juliana et al v USA*, No. 18-36082 D.C. No. 6:15-cv-01517-AA, 17 January 2020, p 18.

863 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 10 – 15 and § 40 – 45.

864 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 99 – 101.

865 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

866 Human Rights Committee, *Torres Islands case* (*Daniel Billy et al v Australia*), Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, CCPR/C/135/D/3624/2019, 22 September 2022.

867 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 458 – 537.

These different outcomes certainly blazed a path for the ICJ, which found in its 2025 advisory opinion that all States could claim enforcement of *general* CDD obligations due to their *erga omnes* character⁸⁶⁸.

2.2 Causation and attribution: embracing the specificities of climate change and the possibility of doing its share

Responsibility or liability depends on the acknowledgement of causation, i.e. whether a certain event or conduct can give rise to an injury. This criterion is certainly universally shared in any liability cases, and may be relevant at either the merits phase, or the admissibility and standing stage, depending on when and how it is assessed. According to the US criteria on Article, causation is an intrinsic element of the “standing” test as laid out at the beginning of Part 2. Since this thesis follows these criteria to test the enforceability of CDD, this subpart focuses on the causal link between the injury and the physical event at the source of the harm, independently of whether the latter is “redressable” or not⁸⁶⁹. This subpart is structured as follows.

Section 2.2.1 demonstrates that courts can recognise causation by relying on climate science and by embracing the global and cumulative nature of the phenomenon. Section 2.2.2 shows how due diligence can require the adoption of prevention measures even when certain events cannot be attributed to a specific author, such as the emissions from private actors to the State or so-called “scope 3” emissions to corporations (i.e., indirect emissions).

868 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 439 – 444. Some authors, including the author of this thesis, could argue that this development was foreseeable, see Maljean-Dubois S, “The No-Harm Principle as the Foundation of International Climate Law” in *Debating Climate Law* (2021) p 5.

869 As an additional preliminary methodological note concerning this section and the next one on redressability, it is important to note that the SCOTUS typology of the US constitutional standing requirements in Article III considers that often “the questions of causation and redressability overlap” (see *Massachusetts*, Dissenting Opinion of CJ Roberts, p 9).

2.2.1 Establishing the causal link between man-made GHGs and global warming

In climate litigation, establishing causation seems an obvious obstacle. Can it be convincingly argued that the individual emissions of public or private actors are the *direct* and *certain* cause of global warming, and, by extension, of the specific climate-related injury in question?

Firstly, while GHGs do appear to be the unequivocal cause of global warming nowadays, the lack of absolute certainty has long been used as an argument against regulating them. Furthermore, the concrete detrimental impacts of global warming are still the object of significant research, which generally forms the second main part of the causal link. Moreover, each time a climate-related event occurs, the question of its attribution to global warming arises. In light of this, the aim of this section is to answer two questions: From what point in time has it been necessary to mitigate global warming in light of the due diligence duties? And how has the evolution of science affected the main requirements over time?

Secondly, climate change is a diffuse and cumulative type of harm over time: GHGs, especially carbon dioxide (CO₂) have a long-lasting warming effect by remaining in the atmosphere for hundreds of years. However, the GHGs of a single player are not enough to deregulate the climate, even considering the present and historical emissions of the USA, which account for around 20% of global emissions. The current level of warming has only appeared through the accumulation of GHGs over *time* and *space*. Anthropogenic climate change is therefore a diffuse and cumulative phenomenon, which is the antithesis of the concept of *direct* cause. Many lawyers, among others, Chief Justice Roberts of the US Supreme Court, argued that the features of climate change are simply irreconcilable with the pillars of legal responsibility, especially causation⁸⁷⁰. In his dissent in *Massachusetts*, he argued more precisely that the petitioners had not established causation – contrary to the findings of the majority – and that their “true goal for this litigation may be more symbolic than anything else.”⁸⁷¹ So, are climate action initiatives doomed to failure or ineffectiveness, even in the event of success?

Subsection 2.2.1.1 examines how the level of uncertainty in physical climate science has evolved over time, in order to determine when it became feasible to establish a causal relationship between anthropogenic GHGs

870 *Massachusetts*, Dissenting Opinion of CJ Roberts.

871 *Ibid*, p 13.

and *dangerous* global warming, as well as its main detrimental effects. Subsection 2.2.1.2 shows that the judicial authorities adopted the concept of shared responsibility when examining climate-related claims in the different assessed legal systems (i.e., international law, human rights law, and domestic comparative tort law).

2.2.1.1 The foreseeability of man-made climate-related harms despite the scientific uncertainties⁸⁷²

The causal link between *anthropogenic* GHGs and *dangerous* global warming has been the subject of significant scientific research and controversy over time, and still is to a certain extent today. Indeed, the US President Trump's statements resonate in this respect, calling global warming a hoax in 2024⁸⁷³. Such discussions also affect the legal reasoning, particularly with regard to establishing causation and the foreseeability of the harm.

In the climate context, causation rests on two main links. The first part concerns the physical causal link between man-made GHGs and global warming, and the second part relates to the dangers triggered by climate change, i.e., its concrete harmful effects. Although this causal chain is made up of two parts, causation in the climate area cannot be considered direct, strictly speaking, but it is still "linear"⁸⁷⁴.

The scientific understanding surrounding these elements has evolved significantly over time. While they are to a great extent undeniable nowadays by any reasonable person, dangerous global warming was already foreseeable to a certain extent by the 1960s. However, it is unsettled as to precisely when a CDD duty to mitigate global warming was established, the precise requirements over time, and the potential breaches. Part 3 provides complementary analysis in this respect.

Thus, to conclude this succinct subsection, the IPCC and international community agree and recognise that there is no scientific uncertainty any-

872 This subsection relies on the findings of Part 3 of this thesis to elaborate the argument on causation.

873 Schonhardt S, "Why Trump's 2nd withdrawal from the Paris Agreement will be different", *Politico*, November 2024.

874 See, among others, ILC, Protection of the atmosphere, Draft guidelines on the protection of the atmosphere, A/76/10, Guidelines 1(c) and 2, including the commentary § 5). The opinion of the ILC was confirmed by ITLOS (§ 178) and the ICJ (§ 278) in their respective advisory opinions. See, furthermore, Court of Appeal of Hamm, *Sàul Luciano Lliuya v RWE*, Az. 5 U 15/17, 28 May 2025, p 54.

more as to the causal relationship between GHGs and man-made climate change due to the evolution of science and the increased manifestation of climate impacts. In light of this, no court nowadays can *reasonably* dismiss a forward-looking mitigation case due to uncertain causation, at least concerning the first links of the causal chain. Additionally, the impacts of global warming are increasingly well established and recognised today. However, plaintiffs may still face two types of difficulties: firstly, attributing injuries to climate change, as this depends on the concrete circumstances of the case⁸⁷⁵; and secondly, showing at what point a CDD duty emerged in light of the foreseeability of the risks, and at what point it could have been breached, and by which actors. Again, Part 3 aims to respond in much more detail to these latter questions.

2.2.1.2 Judicially embracing the shared responsibility principles

The subsection above showed that global warming and its deleterious consequences became increasingly foreseeable over time, likely requiring CDD, as set out just above. The legal conditions for establishing causation with regard to individual attribution or the recognition of shared responsibility principles must now be examined.

While the global and cumulative character pose difficult issues, the consolidating prevailing opinion recognises the possibility of accommodating climate change in the traditional principles around causation. In fact, courts recognised the basic tenet that any GHG emissions *contribute to* and *aggravate* global warming.

For example, the US Supreme Court recognised already in 2007 in *Massachusetts* that the “EPA’s refusal to regulate such emissions “contributes” to Massachusetts’ injuries”⁸⁷⁶ even though the USA’s automotive sector (i.e., the focus of the challenge in this case) represented “only” 4 per cent of global emissions. While the finding by the US Supreme Court majority

875 See, in particular, the final decision issued in the RWE case, in which the Court of Appeal of Hamm, dismissed the case seeking monetary compensation because the court expert was unable to prove that the claimant was facing a specific climate-related threat (Court of Appeal of Hamm, *Sàül Luciano Lliuya v RWE*, Az. 5 U 15/17, 28 May 2025).

876 SCOTUS, *Massachusetts et al v EPA*, opinion of the Court, 549 U. S. ____ (2007), p 20.

in *Massachusetts* was heavily criticised by the conservative judges in the minority⁸⁷⁷, the US Supreme Court still found causation.

The Dutch courts recognised in 2015-19 in *Urgenda*⁸⁷⁸ on their end that “[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere”. Despite the far smaller contribution of Dutch emissions to the world’s total (0.38% of annual global emissions), the Dutch courts still concluded that the Netherlands is *contributing* to the worsening of global warming and the resulting human rights risks. Accordingly, the Dutch State bears individual responsibility, a finding consistent with the principle of “common but differentiated responsibility” under international law⁸⁷⁹, and the customary rule that a *plurality* of States may be responsible in relation to the same wrongful act⁸⁸⁰. This joint responsibility obliges the State to “do its share”; i.e. to reduce its own GHGs in order to achieve the common global 2°C objective.

In its ruling on the *Grande-Synthe* case, the French Supreme Court cited the principles of international law relating to common but differentiated responsibility, which, in its view, establish France’s own recognition of its shared responsibility⁸⁸¹. However, the *Conseil d’Etat* did not need to address causation *per se*, since the purpose of the *recours en excès de pouvoir* is merely to review the legality of the administration’s conduct.

The Paris Administrative Court had to do so in *Notre affaire à tous* and *others v France* and found that:

“The *failure* to respect the trajectory it has set itself to achieve these objectives would result in additional greenhouse gas emissions, which will accumulate with the previous ones and will produce effects throughout

877 The Chief Justice of the Court stated that the scientific uncertainty combined with the relatively minor share of the USA’s automotive sector make “the connection [to the plaintiff’s injuries (sea-level rise)] far too speculative to establish causation”, see SCOTUS, *Massachusetts*, Dissenting Opinion of CJ Roberts, p 9 – 11. The significant opposition of the Chief Justice and three other judges illustrate the controversy in this respect. Furthermore, SCOTUS may still overrule this judgement, as discussed above in subdivision 2.1.1.1.1.

878 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 4.6 and § 5.7.5.

879 *Ibid*, § 5.7.2.

880 *Ibid*, § 5.7.6 referencing paragraph 8 of the commentary of Article 47 ILC Draft Articles on Responsibility States for Internationally Wrongful Acts (DARSIWA).

881 Supreme Administrative Court (Conseil d’Etat), *Grande-Synthe*, n° 427301, 19 November 2020, § 12.

the lifetime of these gases in the atmosphere, i.e. approximately 100 years, thus *aggravating* the ecological damage claimed”⁸⁸².

The collective nature of the invoked damage – the ecological loss – may have eased the demonstration of causation, as it is conceived as an alteration to the global ecological functions of the atmosphere. In other words, there was no need to make a link between global warming and precise climate-related impacts in France. However – in theory – this link could be easily established with the lens of human rights risks, for instance. In any case, the Court still had to recognise that France had *partially contributed* to this harm, which it eventually did: “the State must be regarded as responsible [...] for *part* of the ecological damage”⁸⁸³.

The German Constitutional Court also embraced the concept of individual contributory causation to global warming in the *German Climate Protection Act* case. Specifically, it recognised that the international dimension of the German constitutional provision obliges the State to fight climate change:

“As an obligation to take climate action, Art. 20a of the Basic Law has an *international* dimension. The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states.”⁸⁸⁴

In its full opinion, the Court further elaborated on the principle of shared responsibility by asserting that the interdependency between the international and national level necessarily leads to domestic obligations, as “it must avoid creating incentives for other states to undermine this cooperation”. Conversely, Germany must “strengthen international confidence”, particularly by taking coordinated action within the framework of a treaty,

882 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 21 and 31.

883 *Ibid.*, § 34.

884 Constitutional Court of Germany (*Bundesverfassungsgericht*), 1 BvR 2656/18, 24 March 2021, headnote 2 (c).

as climate action is about credibility and “mutual trust”⁸⁸⁵. This opinion corroborates the hypothesis of this PhD following which ensuring compliance with the duty to do one’s part counteracts the free-riding issue, which undermines trust, and ultimately climate action.

In Belgium, the Brussels Courts of First Instance and of Appeal also argued that “the global dimension of global warming cannot excuse Belgium from doing its part”⁸⁸⁶.

Lately, the ECtHR confirmed in April 2024 in *KlimaSeniorinnen* the causal relationship between the GHG emissions of one State and the human rights-related harms, further arguing that the classic but strict standards to determine causation (i.e., *conditio sine qua non* or the “but-for” cause) do not apply in the climate context. In fact, to determine State responsibility, the ECtHR also relied on the principles of customary international law, i.e., the CBDR and the possibility of holding an individual State to account even in the case of a plurality of authors⁸⁸⁷. Thus, the obligation for the State is restricted to doing its part⁸⁸⁸. The failure to perform it only causes a corresponding *loss of opportunity* to remain unharmed, since “what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real *prospect* of altering the outcome or mitigating the harm”⁸⁸⁹ (for more analysis on this case in light of the redressability angle, see subdivision 2.3.2.5.2).

Some courts have also recognised causation in corporate climate cases. Notable examples include the Dutch courts in *Milieudefensie v Shell*⁸⁹⁰. The Court of Appeal notably recognised that:

“companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies

885 *Ibid.*, § 203. See as well, Aust HP, “Climate Protection Act Case, Order of the First Senate” (2022) 116(1) *American Journal of International Law* p 150-157.

886 Court of First Instance of Brussels, *Klimatzaak*, p 107, § 181.

887 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 443.

888 *Ibid.*, § 439.

889 *Ibid.*, § 444. Note that the French version is more explicit concerning the notion of loss of chance.

890 District Court of The Hague, *Milieudefensie v Shell*, 26 May 2021, C/09/571932 / HA ZA 19-379, § 4.4.49.

like Shell thus have their own responsibility in achieving the targets of the Paris Agreement.”⁸⁹¹

Furthermore, by ruling that the claims are admissible and that the applicants have standing in *Notre Affaire à Tous et al v TotalEnergies*, the Court somewhat touched upon causation aspects, albeit without confirming the existence of a legal obligation:

“The purpose of the action brought is to enjoin TotalEnergies to include in its due diligence plan measures to identify the risks associated with the emission of GHGs that cause global warming and to reduce them through actions to be taken at the level of the activities of its group entities and those of its subcontractors, activities that take place in different parts of the world [...]. These associations will therefore be deemed admissible in their action.”⁸⁹²

Lastly, the ICJ confirmed in its 2025 advisory opinion that the customary international law principle pertaining to “*plurality* of responsible States” enables the responsibility of individual States for climate-related harms to be sought, despite factual difficulties in determining the extent of the corresponding breach⁸⁹³.

Thus, legal courts increasingly accept adapting the causation pillar in climate lawsuits, as it is scientifically established with certainty that anthropogenic GHGs cause global warming and that the failure of one specific actor contributes to global harm. On the contrary, the diffuse character in terms of time and the cumulative character of the causal relationship do not create insurmountable obstacles.

2.2.2 Establishing causation, or rather “contribution” of individual actors

Subsection 2.2.2.1 shows that due diligence is a legal basis that enables the establishment of State legal responsibility, even for acts and omissions that are not directly attributable to them, such as the GHG emissions of private actors. Subsection 2.2.2.2 argues that due diligence can also be used to

891 Court of Appeal of The Hague, *Milieudefensie v Shell*, 12 November 2024, § 7.27.

892 Court of Appeal of Paris, *Notre affaire à tous et al v TotalEnergies*, n° RG 23/14348, 18 June 2024, p 19-22.

893 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 429 – 430.

establish corporate responsibility for indirect emissions (so-called scope 2 and 3 emissions).

2.2.2.1 The existence of due diligence duties requiring the regulation of private actors and extraterritorial emissions⁸⁹⁴

Subdivision 2.2.2.1.1 shows that states have a general due diligence obligation to regulate the activities of private actors, even if these activities are carried out abroad and cannot be directly attributed to the states in question. Subdivision 2.2.2.1.2 demonstrates that under the climate conventions, due diligence requires action to extend significantly beyond territorial emissions.

2.2.2.1.1 The general State duty to regulate private actors and extraterritorial events

Most of the GHGs stem from private persons. Those emissions are not *directly* attributable to States. Nonetheless, due diligence still requires States to regulate emissions from private actors.

Under international law, the ICJ also ruled that due diligence requires the regulation of private actors to prevent genocide in the *Bosnian Genocide* case. Accordingly, a State must do everything within its power to prevent such harm caused by private parties, i.e., it is a best effort obligation. Nonetheless, a State would only be held accountable in the case of negligence, i.e., breach of due diligence by not adequately regulating or influencing private persons⁸⁹⁵.

The International Law Commission confirmed the existence of such an obligation of conduct to protect the environment⁸⁹⁶ and the atmosphere, requiring best efforts, and the regulation of private actors:

“Significant adverse effects on the atmosphere are caused, in large part, by the activities of individuals and private industries, which are *not nor-*

894 This subsection relies on the findings of Part I to elaborate this analysis.

895 ICJ, *Bosnian Genocide case*, Judgment, I.C.J. Reports 2007, § 430.

896 ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, Text adopted by the ILC at its fifty-third session in 2001 (A/56/10), Article 5 Commentary, § 3 (p 156).

mally attributable to a State. In this respect, due diligence requires States to “ensure” that such activities within their jurisdiction or control do not cause significant adverse effects. This does not mean, however, that due diligence applies solely to private activities since a State’s own activities are also subject to the due diligence rule. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. It also requires taking into account the context and evolving standards of both regulation and technology. Therefore, even where significant adverse effects materialize, that does not necessarily constitute a failure of due diligence. Such failure is limited to the State’s *negligence* to meet its obligation to take all appropriate measures to prevent, reduce or control human activities where these activities have or are likely to have significant adverse effects. The States’ obligation “to ensure” does not require the achievement of a certain result (obligation of result) but only requires the *best available good faith efforts* so as not to cause significant adverse effects (*obligation of conduct*).⁸⁹⁷

Lately, both the ITLOS and ICJ have confirmed the above interpretation of the ILC with full authority in their respective advisory opinions, and even argued that due diligence in the climate context should be interpreted as a *stringent* obligation of conduct⁸⁹⁸.

In the field of human rights law, the HRC has also asserted that due diligence is required even if certain events or conduct are not *directly* attributable to the State, but still entail a foreseeable threat to the right to life, such as when they are caused by private actors⁸⁹⁹. In such cases, States must adopt reasonable measures to prevent harm, but they cannot be obliged to achieve the desired result, especially if the necessary measures would “impose disproportionate burdens on them”⁹⁰⁰. As with international law,

897 ILC, Chapter IV Protection of the atmosphere, draft guidelines on the protection of the atmosphere, A/76/10, Article 3 commentary, § 6.

898 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024 § 236; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 282 and 428.

899 Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 7.

900 *Ibid.*, § 21.

due diligence in human rights law is merely an obligation of conduct. The HRC also confirmed that this obligation applies to climate change.

Similarly, the ECtHR held that States must regulate the private industry by exercising due diligence in the 2005 *Fadeyeva v Russia* case⁹⁰¹. While States have a so-called “margin of appreciation”, they still need to show that they adequately regulated the industry to ultimately curb the pollution. The Grand Chamber of the ECtHR also applied this approach in its *KlimaSeniorinnen* judgement of 9 April 2024⁹⁰².

Furthermore, various human rights bodies generally consider these regulatory duties to be applicable extraterritorially, if the State “may influence situations located outside its territory, consistent with the limits imposed by international law”⁹⁰³. This reasoning also applies to climate change and extraterritorial GHG emissions, including “embedded emissions” – i.e. emissions linked to the consumption of goods produced overseas⁹⁰⁴, emissions linked to financial flows⁹⁰⁵, or emissions linked to parent companies of multinational corporations⁹⁰⁶. Indeed, in all these circumstances, states have the authority to regulate these matters if they are linked to their territories. In this respect, the Maastricht Principles on Extraterritorial Obligations detailed the conditions under which States can intervene:

“a) the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-state actor’s activities are carried out in that State’s territory; e) where any conduct impairing economic, social and cultural

901 ECtHR, *Fadeyeva v Russia*, no. 55723/00, 30 November 2005, § 128 – 129.

902 ECtHR, *KlimaSeniorinnen*, no. 53600/20, 9 April 2024, § 435.

903 CESCR, General Comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, § 28.

904 ECtHR, *KlimaSeniorinnen*, no. 53600/20, 9 April 2024, § 287 – 288; see as well the individual opinion of Judge Tim Eicke, § 4.

905 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

906 Ibid; see as well, Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 22.

rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.”⁹⁰⁷

Having said that, the control that States have over territorial emissions is not necessarily the same as the control they have over extraterritorial emissions. Indeed, the emission reduction levers are not the same, meaning that the expectations may be different, and remain proportionate depending on the leverage one actor has over each respective type of emission.

In any case, given the ubiquity of due diligence, also existing in domestic law, as shown in Subpart 1.3, CDD could “close accountability gaps”⁹⁰⁸ and ensure some level of legal responsibility, even when the conduct is not directly attributable to a State, or when the emissions are partly occurring in other States.

2.2.2.1.2 The borderless obligations of the Climate Conventions

Although there are consensual standards to account for territorial emissions, the climate conventions also set out rules with extraterritorial effects.

Regarding territorial emissions, the IPCC published specific accounting guidelines in 2006 for emissions stemming directly from the States’ territories⁹⁰⁹. The international community validated these methods through the COP decisions⁹¹⁰. While neither the IPCC guidelines nor the COP decisions are legally binding, States have widely adopted these reporting mechanisms. This *opinio juris*, combined with this widely shared State

907 De Schutter O et al, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (2012) 34 *Human Rights Quarterly* Principle 25.

908 See, for a concurring opinion: Krieger H and Peters A, “Due Diligence and Structural Change in the International Legal Order” in Krieger H, Peters A and Kreuzer L (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) p 365 – 368, and 389.

909 IPCC, “Guidelines for National Greenhouse Gas Inventories”, Institute for Global Environmental Strategies, 2006, Vol. 1: General Guidance and Reporting.

910 Decision 18/CMA.1, ‘Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement’ (19 March 2019), UN Doc. FCCC/PA/CMA/2018/3/Add.2 <<https://unfccc.int/documents/193408>> accessed 12 January 2022, para 20: ‘Each Party shall use the 2006 IPCC Guidelines, and shall use any subsequent version or refinement of the IPCC guidelines.’

practice, has likely turned these scientific standards into customary international law.

Although this accounting system does not expect countries to report on extraterritorial emissions, due to double-counting issues, the UNFCCC and the PA do not limit the scope of State responsibility to territorial emissions. In fact, alongside the global LTTG, the Paris Agreement also sets out a correlated target on finance flows, to make them “consistent with a pathway towards low greenhouse gas emissions and climate resilient development”⁹¹¹. While no provision specifies that Article 2 (1) (c) on financial flows encompasses extraterritorial emissions, this can be inferred logically, given that financial flows are largely borderless by their very nature. Moreover, Articles 4 (5) and 9 to 11 stipulate that developed states must support developing countries for mitigation and adaptation purposes through climate finance, capacity building, and technology transfer. These provisions form part of a global cooperation system and may also be interpreted as a form of an extension of the responsibility of developed countries to ensure that global and overseas emissions in developing countries are curbed.

In any case, neither the PA nor the UNFCCC explicitly limit the responsibility of State parties to their domestic territorial emissions. This openness is consistent with due diligence, which is not restricted to territorial emissions or direct emissions.

Thus, despite the overlapping responsibilities over GHG emissions (i.e., emissions generally arise in one territory and are linked to other States in an extraterritorial manner), due diligence still requires different States to reduce them. The double-counting rule does not apply in the context of substantive mitigation duties.

2.2.2.2 The indirect emissions caused by corporations and their ability to reduce them

In numerous climate cases against oil and gas majors, claimants are asking for a reduction in corporate direct and indirect emissions, so-called “scope 1, 2, and 3 emissions”.⁹¹² However, the respondents deny any obligation

911 Article 2 (1) Paris Agreement.

912 Note that some US-American local public authorities such as Oakland and San Francisco filed lawsuits against numerous large oil & gas companies and seek thereby compensation for climate-related harms: <http://climatecasechart.com/case/>

relating to their indirect emissions, particularly those arising from the combustion of their fossil fuel products (scope 3), on the grounds that these emissions cannot be *attributable* to them.

Scope 3 emissions constitute one of the three perimeters originally developed by the GHG Protocol, a multi-stakeholder initiative originally composed of NGOs, experts, and corporate groups (including BP and Shell as oil and gas majors⁹¹³), which devised these three emission scopes to account for and report on the full carbon footprint of corporate groups⁹¹⁴. More precisely, the GHG Protocol established the following types of emissions:

- Scope 1, emissions stemming *directly* from companies' activities⁹¹⁵;
- Scope 2, *indirect* emissions linked to the energy consumed on the operated sites⁹¹⁶;
- Scope 3, all other *indirect* emissions, for example, those linked to sold products, or the financial activities of banks and insurance companies.⁹¹⁷

As the above definitions make it clear, the indirect emissions of one company (scope 2 or 3) are the direct emissions (scope 1) of another person. For example, the scope 3 of an oil and gas company can be the scope 1 of an electric utility. Additionally, regarding emissions released in the automotive sector, they involve the scope 3 emissions of car manufacturers, the scope 3 of oil and gas companies, and the scope 3 of financial players, among others. Akin to the State due diligence obligations, which require the regu-

people-state-california-v-bp-plc-oakland/, last accessed 28 October 2025. See below and the glossary for the definition of “scope 1”, “scope 2” and “scope 3” emissions.

913 The “GHG Protocol” initially established these three emission scopes; see the original report: World Resources Institute and World Business Council for Sustainable Development, “The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard, Revised Edition”, 2014.

914 The GHG accounting should include all controlled subsidiaries to reflect the full carbon footprint of the corporate groups, see the GHG Protocol report, op cit. p 17 – 18.

915 Scope 1 emissions are very high for coal power plant operators, the concrete, iron and steel industry, air transport carriers and others.

916 Regarding scope 2, the more a company conducts activities intense in energy, the more it releases scope 2 emissions if its energy supply is coming from a third party.

917 Scope 3 emissions are particularly significant in the automotive, oil & gas, and financial industries, since their products generally have a high ‘carbon intensity’ (cf carbon intensity is the average rate of GHGs of a given product, such as vehicles, hydrocarbons, or financial products of a bank). See the various scope 3 categories: <https://ghgprotocol.org/scope-3-technical-calculation-guidance>, last accessed 28 October 2025.

lation of private persons despite the absence of direct attribution possibility (see above, subsection 2.2.2.1), due diligence should require corporations to regulate indirect scope 2 and 3 emissions.

The contrary would mean that individual actors are only responsible for direct emissions, although they can also mitigate indirect emissions. This would create accountability gaps and contradict due diligence principles⁹¹⁸, which require adequate and proportionate prevention as soon as someone knows – or should have known – that they are contributing to causing harm, as shown in Part 1. Indeed, due diligence in international customary law⁹¹⁹ and in the UNGPs⁹²⁰ requires prevention if the harm is caused by another person. For example, States must regulate private actors' emissions, even though these are not their direct emissions. Since the scope 1, 2 and 3 methodology is well known and widely shared, and since companies can also reduce these emissions, it is reasonable to infer that due diligence requires their reduction, even if the scope 2 and 3 emissions of some actors are the scope 1 emissions of others.

This situation of multiple and overlapping responsibilities is, by the way, similar to the obligations incumbent on a parent or procuring company in relation to *any* damage that may occur in its value chain (beyond climate-related harm). In those situations, individual obligations are imposed on all the individual different actors, ranging from the subsidiaries and contractors to the economically dominant parent company⁹²¹. While the actions of the subsidiaries or the subcontractors are not directly attributed to the parent company, the latter still holds legal obligations in this respect, as it is linked to those emissions, and has some leverage to reduce them. It is precisely the situation that the business and human rights laws aim to regulate. Ultimately, in the climate realm, it is arguable that multiple overlapping responsibilities are conducive to global GHG reductions, as

918 See, for a concurring opinion: Krieger H and Peters A, “Due Diligence and Structural Change in the International Legal Order” in Krieger H, Peters A and Kreuzer L (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) p 365 – 368, and 389.

919 ICJ, *Bosnian Genocide case*, Judgment, I.C.J. Reports 2007, § 430.

920 UNGPs, Guideline 14 and 17; Ruggie J (Special Representative of the Secretary-General of the United Nations), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, HR/PUB/12/02, United Nations, 2012, response to Question 12

921 See, for concurring opinion, Mekki M, “Peut-on repenser la responsabilité à l’aune du devoir de vigilance, pointe avancée de la compliance” in M-A Frison-Roche (dir), *L'obligation de Compliance* (Dalloz, coll. “Régulations & Compliance”, 2024) § 18.

multiple actors share the responsibility for reducing the same emissions by using their own specific leverage.

It is worthwhile to recall here that the duty to reduce scope 1, 2 and 3 emissions in line with the “shared responsibility” principles was also confirmed by Dutch courts in *Milieudefensie v Shell* judgments⁹²². In an admissibility ruling, the Paris Court of Appeal gave concurring observations, authorising applicants to seek judicial review by the company, which has a potential CDD duty of vigilance with regard to climate matters⁹²³.

Additionally, it is important to note that recent corporate climate standards also expect companies to reduce their scope 1, 2 and 3 emissions in line with the internationally agreed temperature objectives, such as the 2022 UN Race to Zero criteria⁹²⁴, the 2022 UN High-Level Expert Group (HLEG) Report⁹²⁵, the 2023 update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct⁹²⁶, the 2023 ISO Net Zero Guidelines⁹²⁷, the 2023 interpretation of the UN Working Group on UNGPs⁹²⁸. These voluntary and soft law instruments underline the possibility of reducing scope 1, 2 and 3 emissions and should inform the conduct expected of corporations under their due diligence obligations. They further demonstrate the reasonableness of this conduct, a position with which the Hague Appeals Court notably concurred (see below).

A brief overview and comparison of *specific* legislation also indicates that it is possible to impose GHG reduction obligations on scope 1, 2 and 3 emissions. Indeed, some laws require companies to report and cut their

922 See subsection 2.2.1.2 above. See especially, District Court of The Hague, *Milieudefensie v Shell*, 26 May 2021, C/09/571932 / HA ZA 19-379, § 4.4.49-50; Court of Appeal of The Hague, *Milieudefensie v Shell*, 12 November 2024, § 7.27.

923 Court of Appeal of Paris, *Notre affaire à tous et al v TotalEnergies*, n° RG 23/14348, 18 June 2024, p 19 – 22.

924 Race to Zero, Interpretation Guide, Expert Peer Review Group, Version 2.0, June 2022.

925 UN UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, “Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions”, 2022, p 17: “Non-state actors must have short-, medium- and long-term absolute emissions reduction targets and, where

926 OECD, “Guidelines for Multinational Enterprises on Responsible Business Conduct”, 2023, p 41-42.

927 ISO, “Net Zero Guidelines: Accelerating the Transition to Net Zero”, IWA 42:2022(E), § 5.

928 Working Group on the issue of human rights and transnational corporations and other business enterprises, “Information Note on Climate Change and the Guiding Principles on Business and Human Rights”, June 2023, § 16 – 17.

direct and indirect emissions, which correspond to the emissions covered by the scope 1, 2 and 3 methodology, even if this terminology is not used.

– Implicit regulations of scope 1 emissions:

The EU ETS requires industrial facilities to reduce their scope 1 emissions within the EU⁹²⁹. Similar regulations also exist in other countries, such as Canada and California⁹³⁰. Some US regulations also require GHG reductions (see, among others, the EPA rules which are influential despite their instability). Legislation in Germany⁹³¹ requires furthermore ceasing the burning of coal, which impacts the scope 1 obligations of power plants and other industrial actors. The UK imposes a significant additional carbon tax on industrial actors in addition to the ETS mechanism⁹³².

– Implicit Regulations of Scope 2 and 3 emissions:

The EU and the USA have introduced GHG standards for automotive vehicles, which impact the scope 3 emissions of carmakers⁹³³. Furthermore, the EU requires fuel suppliers to reduce their scope 3 emissions (e.g. Fuel Quality Directive, Renewable Directive⁹³⁴). The EU also requires Member States to ensure that new buildings are well insulated and use 'nearly zero-energy' by the end of 2020⁹³⁵, thereby impacting the scope 3 emissions of building constructors. Some legislation restricts or forbids the development of new fossil fuel mines, affecting the scope 3 emissions of fossil fuel developers (such as oil and gas companies)⁹³⁶. Both the USA and the EU

929 Directive 2003/87/EC.

930 California Environmental Protection Agency, "Overview of ARB Emissions Trading Program", 2 September 2015, https://ww2.arb.ca.gov/sites/default/files/classic/cc/capandtrade/guidance/cap_trade_overview.pdf, last accessed 28 October 2025.

931 See full official name in German of the Act: Gesetz zur Reduzierung und zur Beendigung der Kohleverstromung und zur Änderung weiterer Gesetze (Kohleausstiegsgesetz), Gesetz vom 08.08.2020 - Bundesgesetzblatt Teil I 2020 Nr. 37 13.08.2020 S. 1818.

932 Hirst D et Keep M, "Carbon Price Floor (CPF) and the price support mechanism", *Research Briefing*, House of Commons Library, 8 January, 2018.

933 Section 202 (a) (1) of the American Clean Air Act 1963; Regulation (EU) 2023/851 amending Regulation (EU) 2019/631.

934 See Article 7 a (2) of the Directive 2009/30/EC on the Fuel Quality. See Article 25 of Directive 2018/2001/EU on the promotion of renewable energy.

935 See EU Directive 2010/31; Art 9 (3) (c) of the corresponding Directive even recommends to use renewable energy if the building is not self-sufficient.

936 Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement. Also see the commentary regarding the New Zealand ban by:

require impact assessments on the environment before planning and implementing any significant industrial project. If the latter project may lead to significant direct and indirect GHG emissions, the company carrying out the project must seek alternatives to avoid or reduce them⁹³⁷. Recently, the UK Supreme Court⁹³⁸ and the European EFTA Court⁹³⁹ confirmed that the environmental impact assessment regulations must cover the indirect emissions resulting from the oil combustion in the case of new production projects (scope 3).

The above examples show that the lawmakers impose not only mitigation obligations with respect to direct scope 1 GHG emissions but also indirect scope 2 and 3 obligations. These laws specifically demonstrate that reductions in scope 1, 2 and 3 emissions can be required, and that general due diligence obligations should therefore also require this.

These are the ideas behind the recent European legislation. In 2022, the EU enacted the European Corporate Sustainability Reporting Directive (CSRD), which explicitly requires companies to establish transition plans aimed at reducing the scope 1, 2 and 3⁹⁴⁰. Prior to the adoption of the CSRD, which reformed the Non-Financial Reporting Directive (NFRD) 2014/95⁹⁴¹, the EU had already mandated the disclosure of general information on climate. The 2019 non-binding Guidelines of the European Commission (2019/C 209/01) were the first to recommend using the scope 1, 2 and 3 typology to issue the climate information. Then, in 2024, the EU even enacted the Corporate Sustainability Due Diligence Directive (CSDDD), turning the duty to implement transition plans on scope 1, 2

Abraham-Dukuma MC and others, “The Limits of the Offshore Oil Exploration Ban and Agricultural Sector Deal to Reduce Emissions in New Zealand” (2020) 14(2) *Carbon and Climate Law Review (CCLR)*.

937 See Annex I (f) (g) and (h) of Directive 2001/42 and Article 3 of Directive 2011/92 and Annex IV of Directive 2014/52 that amends Directive 2011/92; see also similar requirements of article 5 (3) (c) and (d) of Directive 2011/92/EU.

938 UK Supreme Court, *Finch v Surrey et al*, [2024] UKSC 20, 20 June 2024.

939 EFTA Court, *Greenpeace Norway v Norwegian State*, Case E-18/24, 21 May 2025 (i.e., the European Free Trade Association (EFTA) Court is responsible for some contentious cases regarding European regulations also applying to Norway, Iceland, which is not a Member State of the EU).

940 Article 29 (b) CSRD (Directive EU 2022/2464 [...] as regard corporate social responsibility, 14 December 2022).

941 The Supplement on reporting climate-related information (2019/C 209/01) accompanies Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (both are called hereinafter ‘NFRD Climate Guidelines’).

and 3 emissions into a substantive and enforceable obligation⁹⁴². While Article 22 CSDDD was eventually removed in 2026 in the context of the “Omnibus” legislative amendment, these regulatory developments still indicated, at least for some time, a strong political consensus on creating legal responsibility over the reporting and reduction of scope 1, 2 and 3 emissions. It is now questionable whether rolling back Article 22 was lawful (see subsection 2.3.3.5).

Overall, in light of the above, a duty to cut scope 1, 2 and 3 emissions seems reasonable on the basis of *general* due diligence.

2.2.3 Provisional conclusion on causation

Establishing causation is entirely possible in judicial cases as due diligence obligations require public and private actors to do their share individually, despite the actions of others, including if certain emissions are not directly attributable to them (indirect and extraterritorial GHGs).

More precisely, section 2.2.1 showed that courts can establish causation based on *general* due diligence for the following two reasons.

Firstly, climate science, as reviewed by the IPCC in AR6 (2021-23), unequivocally establishes the link between man-made GHGs and dangerous global warming. As a result, no court *today* can reasonably dismiss a climate case on the grounds of alleged scientific uncertainties about the first part of the causal link (i.e. anthropogenic GHGs and global warming). Additionally, official governmental reports and studies in which the fossil fuel industry was involved had already indicated climate-related risks in the 1960s to 1980s. These findings were *probably* enough from a causation point of view to trigger CDD's applicability – at least its *procedural* dimension (i.e., deepen the research into the causes of warming and the potential mitigation techniques)⁹⁴³.

Secondly, courts are increasingly accepting climate-related cases and the corresponding principle of collective but individual responsibility, also

942 Directive EU 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

943 See notably: Charney et al (National Research Council), *Carbon Dioxide and Climate: A Scientific Assessment*, (1979), The National Academies Press 1979, Forward, p viii <http://nap.nationalacademies.org/12181>; Proceedings, World conference, Toronto, Canada June 27-30, 1988: the changing atmosphere : implications for global security, p 296.

known as “shared responsibility”, which requires each actor to do their share⁹⁴⁴. Consequently, the courts do not consider whether one actor alone can cause climate change. Instead, they look at the extent to which one *contributes* to the *aggravation* of global warming. For example, in the 2007 *Massachusetts* case, the US Supreme Court found causation even though the US automotive sector, which is subject to a duty to be regulated by the EPA, emits only 4% of annual worldwide GHGs⁹⁴⁵. Similarly, the Dutch Courts established in *Urgenda* the responsibility of the Netherlands despite contributing only 0.38% per year to global emissions⁹⁴⁶. In addition, the French State was found liable in the *Notre Affaire à Tous* case for exceeding its own GHG reduction targets⁹⁴⁷. On its end, the German Constitutional Court ruled that targets must be in line with the Paris Agreement to preserve trust in international negotiations⁹⁴⁸. Recently, the Grand Chamber of the ECtHR held in *KlimaSeniorinnen* that the failure to do its share causes a violation of the Convention, and specified that the classic causation tests, i.e. the *but for* test or *conditio sine qua non* principle, are not adapted to the climate context⁹⁴⁹. Courts applied similar reasoning in corporate climate cases, especially in the *Shell* case⁹⁵⁰ and, in the context of an admissibility judgement, in the *TotalEnergies* case⁹⁵¹. The ICJ has also recently acknowledged that linking GHGs to specific climate-related injuries is possible⁹⁵².

Next, in section 2.2.2, this thesis demonstrated that it is possible to establish individual causation (or, more accurately, *contribution*) by not only attributing direct emissions, but also indirect and extraterritorial GHGs.

944 See, notably, Nollkaemper A et al, “Guiding Principles on Shared Responsibility in International Law” (2020) 31(1) *European Journal of International Law* p 15 – 72.

945 SCOTUS, *Massachusetts et al v EPA*, opinion of the Court, 549 U. S. ____ (2007), p 20.

946 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 4.6 and § 5.7.2 and 5.7.5.

947 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 21 and 31.

948 Constitutional Court of Germany, 1 BvR 2656/18, 24 March 2021, headnote 2 (c) and § 203.

949 ECtHR, *Klimasenioren v Switzerland*, no. 53600/20, 9 April 2024, § 444.

950 District Court of The Hague, *Milieudefensie v Shell*, 26 May 2021, C/09/571932 / HA ZA 19-379, § 4.4.49.

951 Court of Appeal of Paris, *Notre affaire à tous et al v TotalEnergies*, n° RG 23/14348, 18 June 2024, p 19 – 22.

952 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 429 – 430.

State due diligence requires the regulation of private actors, including in the climate field⁹⁵³. This maxim means that States take responsibility for the indirect emissions of private actors, a widely shared interpretation, most lately by the ICJ in its advisory opinion on climate. Additionally, human rights case law and the international climate conventions do not limit this obligation to GHGs emitted directly within State territories; they also require action to be taken against extraterritorial emissions as well, such as import-based emissions⁹⁵⁴; emissions from multinational companies⁹⁵⁵ and financial flows⁹⁵⁶. More generally, the climate conventions do not limit the responsibility of State parties to their domestic territorial emissions. On the contrary, they require developed countries to support developing countries in various ways⁹⁵⁷.

Lastly, corporate due diligence requires the reduction of direct, indirect and transnational emissions (known as scope 1, 2 and 3 emissions), given the companies' ability to do so, and their broad acceptance of the scope 1, 2 and 3 methodology. The Dutch courts recognised the merits of this reasoning in the *Shell* case. The European lawmaker even established substantive CDD obligations in Article 22 CSDDD, before finally removing them for political reasons in 2026 through the Omnibus amendments (i.e., this amendment may be incompatible with CDD under international law, human rights law, European law; see subsection 2.3.3.5). Other pieces of legislation have already imposed GHG reduction targets on private actors for both direct and indirect emissions, despite not mentioning the notion of scope 1, 2 and 3⁹⁵⁸. For example, the UK Supreme Court and the EF-

953 See, notably, ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, Text adopted by the ILC at its fifty-third session in 2001 (A/56/10), Article 5 Commentary, § 3 (p 156); ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024 § 236; Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 21-22; Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019; ECtHR, *Fadeyeva v Russia*, no. 55723/00, 30 November 2005, § 128 – 129; ECtHR, *KlimaSeniorinnen*, no. 53600/20, 9 April 2024, § 435 – 436.

954 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 287; see as well, the individual opinion of partly concurring partly dissenting opinion of Judge Eicke, § 5.

955 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

956 Article 2 (1) PA.

957 See Articles 4 (5) and 9 to 11 of the PA.

958 See, among others, Section 202 (a) (1) of the American Clean Air Act 1963; Regulation (EU) 2023/851 amending Regulation (EU) 2019/631. See Article 7 a (2) of

TA Court have recently confirmed that environmental impact assessments must cover scope 3 emissions relating to oil projects.

2.3 Redressing CDD violations while providing discretion

Defendants have raised in climate cases⁹⁵⁹ the argument of lack of redressability or justiciability in (almost) every high-profile case so far by claiming a violation of the principle of the separation of powers, or a lack of justiciability of the requests (see the methodological introduction of part 3 on the definition of the notions of redressability and the other standing criteria). For example, in the USA, federal courts dismissed a prominent systemic case against the federal government called *Juliana* on those grounds, as they considered the political branch to be the only competent authority to deal with the requests of the plaintiffs⁹⁶⁰.

Additionally, in climate cases, redressability is intrinsically bound to causation and injury. It also relates to difficult factual problems, such as the “free riding” and “carbon leakage”⁹⁶¹ issues, which are characterised by the assumption that some do not do their share, or the fact that one’s climate actions will be replaced by another actor, leading to the maintenance of the *status quo* and business as usual.

This subpart dives deeper into these issues by assessing how courts grant or reject CDD requests, and on which criteria. This assessment eventually enables a better understanding of the extent to which an *ambitious* interpretation of CDD is enforceable. More precisely, it seeks to understand whether courts accept enforcing best efforts to limit warming to 1.5°C by

Directive 2009/30/EC on the Fuel Quality. See Article 25 of Directive 2018/2001/EU on the promotion of renewable energy. See EU Directive 2010/31; Art 9 (3) (c) of the corresponding Directive even recommends using renewable energy if the building is not self-sufficient.

959 Climate cases in the sense of legal proceedings requesting climate action (mitigation, adaptation, finance, loss and damages), see this PhD glossary. Thus, respondents or defendants in those cases are either public or private actors, allegedly not complying with CDD.

960 See Court of Appeal for the Ninth Circuit of the United States, *Juliana et al v USA*, No. 18-36082 D.C. No. 6:15-cv-01517-AA, 17 January 2020, Opinion of the Court. While the opinion stems from an Appeals Court and not from the SCOTUS, this decision is the final one in this prominent case as SCOTUS refused to review it.

961 See section 0.3.2 of the introduction, which further explains the problem, and the definition of the terms free-riding and “carbon leakage” in the glossary of this thesis.

doing their fair share, as the hypothesis of this PhD seeks to understand. Thus, this subpart is structured as follows:

Section 2.3.1 assesses domestic case laws that restrict the enforceability of the State's climate mitigation measures to *specific* legislation. Section 2.3.2 examines domestic and regional case law that has enforced *general* CDD against States. Section 2.3.3 analyses the judicial and legislative developments on corporate CDD, based on both *general* and *specific* CDD, which are very similar in this field. Section 2.3.4 looks at the redressability indications of *general* CDD that the ICJ and the ITLOS provide in their respective advisory opinions.

2.3.1 Enforcing specific State mitigation requirements while rejecting general CDD

As the judiciary is in principle entitled to apply the law, courts have opened different windows to enforce *specific* legislation. This section is structured as follows.

Subsection 2.3.1.1 focuses on the redressability aspects of the three decisions issued by the US Supreme Court in climate cases. Subsection 2.3.1.2 addresses the remedy awarded provided in the Irish case. Subsection 2.3.1.3 analyses the French decisions that enforced the GHG reduction targets. Subsection 2.3.1.4 examines the redressability aspects of some decisions issued by UK courts.

2.3.1.1 The intervention of the US Supreme Court limited to specific CDD

The US Supreme Court pioneered climate litigation and has so far issued three main climate-related judgements. Subdivision 2.3.1.1.1 assesses the redressability aspects of the *Massachusetts* ruling, which found that plaintiffs can request the EPA to regulate GHGs. Subdivision 2.3.1.1.2 examines the subsequent decision in *American Electric Power Company v Connecticut* of 2010, which determined that the EPA's regulatory powers pre-empt federal tort law. Subdivision 2.3.1.1.3 eventually looks at the more recent *West Virginia et al v EPA* (2022) decision, which restricted EPA's powers.

2.3.1.1.1 The pioneering redress in Massachusetts

The debate on redressability in *Massachusetts* was as productive and novel as those under the other standing criteria: a thin majority sided in favour of the redressable claims. It notably found that “[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere”, and that climate-related risks “would be reduced to some extent if petitioners received the relief they seek”⁹⁶².

As already mentioned previously in the subparts above on this case, the minority issued strong dissenting opinions in this case. Chief Justice Roberts especially did not mince his words concerning the majority, who asserted that “[t]he mismatch suggests that petitioners’ true goal for this litigation may be more symbolic than anything else. The constitutional role of the courts, however, is to decide concrete cases—not to serve as a convenient forum for policy debates.”⁹⁶³ CJ Roberts furthermore noted that 80 per cent of global GHG emissions originate outside the USA and that:

“developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century,” ante, at 23, so the domestic emissions at issue here may become an increasingly marginal portion of global emissions, and any decreases produced by petitioners’ desired standards are likely to be overwhelmed many times over by emissions increases elsewhere in the world.”

The problem addressed here by CJ Roberts partly refers to the development of so-called Global South countries, and the issue of the substitution of emissions (also called *carbon leakage*, see the glossary). Firstly, the fundamental right of developing countries to economic and social development cannot be withheld, and it is necessary to accept some increase in emissions as long as there are no decarbonisation techniques available. However, if the USA *decarbonises* by replacing its fossil fuel systems with low-carbon technologies, its emissions will be reduced in a sustainable manner. Furthermore, these decarbonisation techniques should likely spread to other countries due to the manifest and shared interest in implementing them worldwide, as they would reconcile economic development and climate mitigation.

962 SCOTUS, *Massachusetts et al v EPA*, opinion of the Court, 549 U. S. ____ (2007), p 23.

963 *Massachusetts*, Dissenting Opinion of CJ Roberts, p 13.

CJ Roberts took note of this argument by quoting the petitioner's declarations: "[i]f the U. S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U. S. program". However, he rejected this argument for reasons of uncertainty and cost, arguing that nobody knows what the other countries may do, and that new technologies are generally more expensive⁹⁶⁴. While CJ Roberts' argument may have had more merit in 2007 due to the lower availability of decarbonisation options at that time, and the need to invest at first, clean energy and electric cars are significantly cheaper and more affordable in 2025, thanks to the significant technical progress in this respect in China. This appears somewhat ironic when one considers that developed States such as the USA pioneered them (see part 3), which now pose substantial competition and geopolitical issues to the latter countries. Additionally, there is nowadays an acute climate emergency, which requires the quickest energy transition possible to achieve the universal LTTG, but is difficult to implement because of these geopolitical tensions.

In any case, CJ Roberts concluded that even if the EPA can reduce global emissions, it can *hypothetically* only do a "little bit", and not entirely redress or prevent the harm from occurring⁹⁶⁵. Although one can only agree with CJ Roberts on the relative uncertainty of the redress and its partial character, it is also necessary to remember that one given actor can, in any case, only do *its (very limited) share*. It cannot solve climate mitigation alone.

Despite CJ Roberts' position, the US Supreme Court majority ultimately granted the relief requested by Massachusetts. However, as noted above in subdivision 2.1.1.1.1 above, given that the majority has become substantially more conservative since Trump's first election, a reversal of the principles found in *Massachusetts* cannot be excluded.

2.3.1.1.2 Applying the *lex specialis* rule in *American Electric Power Company v Connecticut*

Additionally, in the 2011 decision *American Electric Power Company v Connecticut*, which was issued unanimously four years later than *Massachusetts*, the US Supreme Court concluded that the EPA is better placed to regulate GHG emissions than federal judges, who are constrained to a case-by-case

964 *Ibid*, p 12 – 13.

965 *Ibid*.

approach, and not equipped with the necessary scientific and expert knowledge.

“It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. See generally *Chevron U. S. A. Inc. v Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865–866 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.”⁹⁶⁶

The US Supreme Court added that the system of common law remedies is not suited to the issue of regulating the industry, since first-instance court decisions are not binding on other courts⁹⁶⁷. In the Court’s view, the piecemeal approach of climate tort litigation may lead to different and inconsistent solutions, at least until the appeal courts or the Supreme Court decides. Since uniformisation of the law seems crucial to ensure equal and fair rules for all, including industrial actors, the Supreme Court may have had a point.

While the need for last instance court interventions is important to provide an authoritative judgement, judicial bodies should at least uphold the basic CDD principles, i.e., making best efforts to limit warming as much as possible. As soon as such a principle-based judgement is issued, as the ICJ recently did at the international level in its advisory opinion, the basic law on mitigation (or CDD) should not change anymore. The only judgments that can be issued afterwards may concern the concrete due diligence requirements of a given actor, and whether they have complied with them. It should be noted, however, that CDD allows for significant flexibility in implementation by imposing an obligation of means, which facilitates its wide-scale establishment (see subpart 0.2 of the introduction).

966 SCOTUS, *American Electric Power Company v Connecticut*, 564 U. S. ____ (2011), p 14.

967 *Ibid*, p 14 – 15.

Nonetheless, the US Supreme Court dismissed the plaintiffs' proposition that one specific lawsuit may regulate all significant industrial actors in one single case by setting a precedent that could be replicated in other cases⁹⁶⁸. The Court considered that this avenue "cannot be reconciled with the decision-making scheme Congress enacted", i.e., the Clean Air Act, which it previously interpreted in *Massachusetts* as providing the authority for the EPA to intervene⁹⁶⁹. This outcome may make sense concerning the GHG emissions falling under the scope of the Clean Air Act (e.g. automotive sector, industrial sector). However, there is no specific legislation or regulation in the USA that addresses the reduction of indirect and extraterritorial emissions of multinational companies. These latter "statutory gaps" should imply the applicability of federal tort law (*general* CDD). Therefore, it may still be possible to request that US courts enforce basic due diligence standards (i.e. require the pursuit of best efforts to mitigate climate change in line with the international consensus) against the parent companies of multinational corporations, which remain unregulated in the USA⁹⁷⁰.

2.3.1.1.3 Limiting the judicial review of the Clean Air Act

In 2021, the Court of Appeals for the 2nd Circuit "vacated" (i.e., annulled) the Trump administration's "deregulation" in *American Lung Association v EPA*⁹⁷¹, which had previously replaced the 2014 Clean Power Plan under Obama with the 2019 Affordable Clean Energy Rule. The Court of Appeals deemed it to be contrary to the legislative provisions of the Clean Air Act, which requires the EPA to regulate GHGs, as the US Supreme Court found in *Massachusetts*.

More precisely, the Court of Appeals for the 2nd Circuit recalled that a political consensus exists between Republican and Democratic administrations on the fact that coal-fired power plants are the largest source of emissions in the USA and that the EPA has an obligation to establish the "best system of emission reductions" under section 111 of the Clean Air

968 *Ibid*, p 15.

969 *Ibid*, p 15.

970 See, additionally, section 2.3.2 and 2.3.3, addressing the adoption of the CSDDD and the KlimaSeniorinnen judgement, which impose these duties on private and public actors.

971 Court of Appeals for the District of Columbia, *American Lung Association v EPA*, No. 19-1140, January 19, 2021, v p 16.

Act⁹⁷². It then concluded that the new 2019 Affordable Clean Energy Rule, replacing the Obama administration's Clean Power Plan, is not only a major environmental step backwards in practice but also a "fundamental misinterpretation" of the Clean Air Act. Said differently, the Court agrees that the EPA's new regulations, which slow down the reduction of emissions, are "arbitrary and capricious", a classic standard of American administrative law, applicable within the realm of the Clean Air Act. Although this ruling only concerns energy production, it demonstrates that a *certain* judicial review of climate policy is possible in the USA based on the statutory provisions of the Clean Air Act.

However, this positivist approach, which relies on *specific* texts, remains precarious. In fact, its potential in terms of enforcing adequate mitigation ambition is unclear. It is probably insufficient in light of the conservative majority in the Supreme Court. In *American Lung Association v EPA*, a partly concurring and dissenting opinion expressed uncertainty as to whether the Obama administration's former *Clean Power Plan* complied with the Supreme Court's "*major questions doctrine*", as phrased in the USA, which requires the US Congress to issue a clear mandate to independent federal agencies such as the EPA when they adopt regulations of significant importance⁹⁷³. The Supreme Court had previously suspended the entry into force of the Clean Power Plan in 2016 on those grounds⁹⁷⁴, which the Trump administration exploited to justify its "deregulation".

As the political controversies in Congress were too intense to adopt any climate targets in the USA through the political avenue, the only option left to the Obama administration was to delegate the authority to regulate GHGs to the EPA, on the basis of the Clean Air Act. The problem with respect to the "major questions doctrine" lies, among other things, in the fact that the Clean Air Act does not explicitly regulate GHGs; instead, it only requires regulating "polluting emissions". As discussed previously, the US Supreme Court decided in *Massachusetts* that it indeed requires the EPA to regulate climate-related pollutants, but it left full leeway to the EPA to do so. For example, it did not prescribe the EPA to follow a specific ambition,

972 See 42 U.S. Code § 7411.

973 SCOTUS, *West Virginia et al v EPA*, 597 U. S. ____ (2022), Opinion of the Court, p 20.

974 See Supreme Court Order 577 U.S. of 9 February 2016 in *West Virginia et al v EPA* (<http://climatecasechart.com/case/west-virginia-v-epa/>). According to an article by a recognised expert, the Court's decision was one of the most damaging to the environment in decades: Gerrard M, "The Supreme Court Stay of the Clean Power Plan and the Paris Pledges" (2016) *Climate Law*, Sabin Center Blog.

such as the 1.5°C or 2°C target, or to achieve a certain emission reduction percentage etc. Thus, lawyers argue that there is significant uncertainty concerning the actual mandate of the EPA.

In light of these circumstances, the well-known Sabin Center for Climate Change Law at Columbia University suggested a new regulation with greater legal certainty to the then-newly elected Biden Administration in 2020⁹⁷⁵. The Sabin Center was right in advising the government this way since the US Supreme Court's 2022 ruling in *West Virginia v EPA* indeed concluded that the 2014 Clean Power Plan Rule, enacted under Obama, infringed the constitutional major question doctrine. Note that in another case concerning the tobacco industry (*FDA v Brown & Williamson Tobacco Corp.*, 529 U. S. 120 (2000)), which also had significant implications for the US American economy, the US Supreme Court invalidated the FDA's agency's regulatory powers, stating that only the legislature has the authority in this regard⁹⁷⁶.

Given the difficulties in finding a sufficiently ambitious political compromise in Congress, the US Supreme Court's position is problematic in terms of climate action and ensuring compliance with *general* CDD, notably in international and human rights law. Indeed, while it could still invalidate the rule because of the major questions doctrine, it should also compel at the same time the government to find a solution in favour of climate mitigation and the goal of the Paris Agreement, by leaving a margin of appreciation, like the European Courts did, given the difficulty in finding consensus in Congress (see, notably, the German Constitutional Court's ruling assessed in subsection 2.3.2.3 and the ECtHR judgement in *KlimaSeniorinnen* analysed in subsection 2.3.2.5). However, the US Supreme Court merely invalidated the EPA's climate rules⁹⁷⁷.

Despite this ruling, the Biden Administration still managed to enact the first legislation specifically aimed at reducing GHG emissions in the USA. The 2022 Inflation Reduction Act "would reduce U.S. GHG emissions by 33% to 40% by 2030 compared to 2005 levels"⁹⁷⁸. While this is to some

975 Burger M and Metzger DJ, "Climate Reregulation in a Biden Administration" (Sabin Center for Climate Change Law, Columbia Law School 2021) p 17 – 18.

976 SCOTUS, *Massachusetts et al v EPA*, 549 U. S. ____ (2007), p 8 – 9.

977 SCOTUS, *West Virginia et al v EPA*, 597 U. S. ____ (2022), Opinion of the Court, p 31.

978 US Congressional Research Service, *Inflation Reduction Act of 2022 (IRA): Provisions Related to Climate Change*, updated 26 October 2023.

extent praised as significant progress⁹⁷⁹, it still falls far short of the USA's fair share⁹⁸⁰. Nonetheless, even though Congress reached a bipartisan agreement to adopt the Inflation Reduction Act, the second Trump administration ordered the termination of funding stemming from it, which is the subject of further contentious cases⁹⁸¹.

2.3.1.2 The Irish Supreme Court's enforcement of specific due diligence

In 2020, the Supreme Court of Ireland granted the application for judicial review of the NGO Friends of the Irish Environment (FIE). The Court ruled that the government had failed to properly implement the Climate Action and Low Carbon Development Act 2015, thereby acting *ultra vires*. More precisely, it deemed that the absence of specific measures to achieve the "objective of zero net carbon emissions by 2050" to be unlawful⁹⁸². The Chief Justice of the Court, who drafted the opinion, stated:

"the 2015 Act, and in particular s.4, requires a sufficient level of specificity in the measures identified in a compliant plan that are required to meet the National Transitional Objective [NTO] by 2050 so that a reasonable and interested person could make a judgement both as to whether the plan in question is realistic and as to whether they agree with the policy options for achieving the NTO which such a plan specifies. The 2015 Act as a whole involves both public participation in the process leading to the adoption of a plan but also transparency as to the formal government policy, adopted in accordance with a statutory regime, for achieving what is now the statutory policy of meeting the NTO by 2050. A compliant plan is not a five-year plan but rather a plan covering the full period remaining to 2050. While the detail of what is intended to

979 Lashof D, "What is the Biden Administration Doing to Fight Climate Change?", *World Resources Institute*, 2024; see as well, Webb Romany M et al, Implementing the Inflation Reduction Act: Progress to Date and Risks from a Changing Administration, September 2024.

980 See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, "National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law" (2021) 21(8) *Climate Policy* p 18.

981 Magill K, Trump administration ordered to resume IRA funding, *Manufacturing Dive*, 16 April 2025.

982 Supreme Court of Ireland, *Friends of the Irish Environment v The Government of Ireland*, 31 July 2020, § 4.1, 4.3 and 6.18.

happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050.”⁹⁸³

This judgement shows that *specific* legislation aimed at implementing *general* CDD (CDD in international customary law, human rights law, tort law, etc) is enforceable in Ireland. However, the Court rejected the constitutional and ECHR human rights claims due to lack of standing (i.e., the NGO Friends of the Irish Environment could not argue the violation of personal rights, such as human rights as a legal person in the eyes of the court – see 2.1.2.1 above), but it left open the question of whether or not the ECHR imposes tackling climate change, by leaving the matter to the ECtHR⁹⁸⁴. In light of the ECtHR's 2024 decision in *KlimaSeniorinnen*, *general* CDD linked to human rights should now be redressable in Ireland as well (see subdivision 2.3.2.5.2).

While this subdivision will not further analyse whether the specific legislative framework of Ireland suffices, it is clear that its objective of achieving carbon neutrality by 2050 is not enough, according to the fair share assessments⁹⁸⁵. Hence, significant doubts exist about the adequacy of the Irish-specific legislation.

2.3.1.3 The enforceability of specific mitigation targets in France and the rejection of general CDD

Subdivision 2.3.1.3.1 shows that the French Supreme Court enforced *specific* legislation but excessively deferred to the lawmakers' will, thereby hindering the enforcement of the intrinsically dynamic *general* CDD principles. Lastly, Subdivision 2.3.1.3.2 demonstrates that the Paris Administrative Court found a *general* CDD obligation, which is theoretically enforceable, without finding a corresponding breach, though in this specific case.

983 *Ibid.*, § 9.2.

984 *Ibid.*, § 5.18.

985 See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, “National ‘Fair Shares’ in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law” (2021) 21(8) *Climate Policy* p 18. See as well, Hare William et al, Achieving the 1.5°C Limit of the Paris Agreement: An Assessment of the Adequacy of the Mitigation Measures and Targets of the Respondent States in Duarte Agostinho v Portugal and 32 other States, Climate Analytics, 7 January 2022, p 94.

2.3.1.3.1 An excessive deferral to the lawmakers' will by the Supreme Court, hindering the enforcement of general CDD

In France, the Administrative Supreme Court (*Conseil d'Etat*) acknowledged the possibility of evaluating the overall sufficiency of specific mitigation measures against climate-related targets enshrined in the legislation and, if necessary, prescribing additional measures⁹⁸⁶. More precisely, the Supreme Court established that the State had been at fault for *not being on track* to achieve its *legislative 2030 target*. In other words, not implementing credible measures fit to achieve its *target* becomes a violation of the law. This violation can be redressed in court.

However, the French courts restricted their jurisdiction to overseeing compliance with the reduction targets of *specific* legislation and regulations, in order to remain ultimately faithful to their stringent views on separation of powers, requiring them to look at the will of the legislator⁹⁸⁷. In the view of the General Advocate Hoynck, this case was about “interpreting the provisions of the applicable law in line with the will of the legislator to implement the Paris Agreement.”⁹⁸⁸ Still, the Supreme Court somewhat developed the law because the Constitutional Council (*Conseil constitutionnel*) had previously stated that legislation setting out targets is *non-binding* due to its “*programmatic*” nature, including the French climate target specifically⁹⁸⁹. Hence, despite this development, the potential

986 In the event of a failing trajectory, the Court can enjoin the State to correct its GHG reduction curve on various grounds; see Article L. 911-1 of the Code of Administrative Justice for the *ultra-vires* framework (judicial review, *excès de pouvoir*); see the CE ruling of 27 July 2015, no. 367484 for the possibility of the Court in so-called “full-liability” cases (*plein contentieux*) prescribing an injunction. In addition, the Civil Code, from which the administrative judge regularly draws inspiration from these principles (as the Paris TA did in the case of the century), has, since the adoption of the Biodiversity Act no. 2016-1087, authorised the institution of proceedings for the exclusive purpose of preventing and putting an end to ecological damage (see art. 1252 of the Civil Code).

987 See Hoynck S, in *Grande-Synthe* (Administrative Supreme Court (*Conseil d'Etat*), *Grande-Synthe v France*, n° 427301, 19 November 2020), p 17 – 18. See furthermore, the following statement of the former Chair of the Court: Lasserre B (Vice-président du Conseil d'Etat), “Regards croisés du Conseil d'Etat et de la Cour de cassation: L'environnement – les citoyens, le droit, les juges” (Cour de cassation, 21 May 2021). See furthermore subsection 1.3.2.3 above addressing this point in French administrative law.

988 *Ibid* (Hoynck S).

989 *Ibid*, p 12 - 14.

encroachment on the separation of powers is low or even non-existent with the approach the Conseil d'Etat took in *Grande-Synthe*, since the court refused to consider whether it would be appropriate to increase ambition under *general* CDD considerations. It needs to be noted that France's goal of reducing its territorial emissions by 40% compared to 1990 is well below the indications of what is fair by the scientific assessments⁹⁹⁰.

Nonetheless, the *Conseil d'Etat* cited some elements which could have led to the recognition of *general* CDD. For example, it stressed that the IPCC reports highlight a "worsening of climate risks". However, it stopped short of finding the *need* to limit global warming to 1.5°C. It has clearly resisted doing so because this would have certainly required it to order the legislator to increase its 2030 target, which would have conflicted with its conception of the separation of powers.

Furthermore, the Supreme Court rejected the claims to "make climate priority mandatory" and to prohibit any measure likely to increase GHG emissions on constitutional grounds. In the *Conseil d'Etat's* view, this would have required the intervention of the legislature. Such an option "falls outside the *jurisdiction* of the administrative courts"⁹⁹¹. While the applicants may have framed the request in another manner, it seems clear that the court did not want to go beyond the enforcement of *specific* legislation.

Additionally, the *Conseil d'Etat* even refused to enforce the updated European target of -55% GHG reduction by 2030 compared to 1990 for procedural reasons, which may appear quite formalistic. In fact, in the preliminary decision issued in late 2020, the Supreme Court mentioned the back then imminent legislative enhancements to the EU's GHG reduction targets⁹⁹², and the relevance of the Paris Agreement in interpreting the applicable provisions⁹⁹³. However, it left aside the option to enforce the enhanced European target. In its third decision on the renewal of the injunction in 2023, the Supreme Court noted that the -55% reduction goal has become a fully applicable European legislation (regulation) since 2021, but it still confined the enforcement proceeding to the -40% target for 2030.

990 See, for instance the fair share indications concerning France by CAT authors and the law Professor Rajamani: See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, "National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law" (2021) 21(8) *Climate Policy* p 18.

991 Administrative Supreme Court of France, *Grande-Synthe v France*, n° 427301, 19 November 2020, § 2.

992 *Ibid.*

993 *Ibid.*, point 12.

The Conseil d'Etat's deference to the will of the *French* lawmaker did not facilitate compliance with the enhanced European targets, which require being on track as soon as possible.

In any case, even if the Supreme Court had enforced the EU enhanced 2030 target, it would still have been insufficient in relation to the fair share indications⁹⁹⁴. The European Scientific Advisory Council on Climate Change, an official body established by the European Climate Law, confirmed the insufficiency of the EU's reduction pathway and therefore recommended increasing ambition, including for 2030⁹⁹⁵. It will be interesting to see whether and how the 2024 ECtHR decision in *KlimaSeniorinnen* and the 2025 ICJ advisory opinion can make these issues justiciable before the French Courts.

2.3.1.3.2 Despite establishing a general CDD obligation, no breach finding in the *Notre affaire à tous* case

Shortly after the Conseil d'Etat's decision, the Paris Administrative Court found that overstepping the carbon budget applicable for the 2015-2018 period is unlawful in the case of *Notre Affaire à Tous et al v France*⁹⁹⁶.

This decision extended the Supreme Court's rulings, which did not characterise the regulatory carbon budget set by a regulatory act (*décret*) as binding. Instead, the Supreme Court considered that overstepping the 2015 – 2018 budget merely highlights a lack of credibility⁹⁹⁷. In that regard, the Paris administrative court further restricted the government's leeway.

The Paris Administrative Court's judgment further differs from that of the *Conseil d'Etat* as it established the existence of a *general* obligation to fight against climate change based on the ECHR and the domestic provisions of the Environmental Charter associated with the French Constitution. In the Court's view, the ratification of the climate treaties (UNFCCC, Paris Agreement), which include the principle of common but differentiat-

994 See the arguments presented in subdivision 2.3.1.3.2.

995 European Scientific Advisory Board on Climate Change, "Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050", 15 June 2023 p 15.

996 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 33 and 34.

997 See the first and second decision: Administrative Supreme Court, *Grande-Synthe v France*, n° 427301, 19 November 2020, § 15 - 16; and the second decision issued on 1 July 2021, § 5.

ed responsibility, and the adoption of various domestic climate laws, show a tacit recognition by the State of its ability and willingness to act against climate change⁹⁹⁸. In this respect, the Paris Administrative Court's position is similar to *Urgenda* and the other *general* CDD cases (see the next section 2.3.2).

Nonetheless, the Paris Administrative Court did not find any breach of *general* CDD despite the low ambition concerning the 2030 target, requiring the French State to reduce its emissions by 40%. According to the IPCC, GHGs need to be reduced by around 45% by 2030 compared with 1990 on a *global scale* in order to align with the 1.5°C trajectory⁹⁹⁹. France must even take the lead under the climate conventions as a developed country. Thus, being in line or even below the global average range cannot be compatible with the fair share principles, linked to equity and CBD/RRC of the same conventions. Instead, fair share studies, including those with a legal dimension, find that France should be carbon neutral by 2030¹⁰⁰⁰. Moreover, the 2030 target was adopted by France in 2015, and it has not enhanced it since. This stagnation seems to contradict the principle of progression enshrined in Article 4 (3) of the PA. Nevertheless, the applicants did not raise these points¹⁰⁰¹, which may explain perhaps why the Paris Administrative Court found that “the claimants did not establish that the inadequacy of those commitments directly caused the environmental damage relied on.”¹⁰⁰²

This finding does not mean, though, that the *general* CDD duty found by the Administrative Court is not redressable. In any case, the new EC-

998 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 18 to 21; see, as well, the opinion of the public rapporteur Amélie Fort-Besnard also recognised the validity of the analysis relating to the existence of the general obligation to combat climate change, while inviting the Administrative Court of Paris to refrain from ruling in this respect, given the failure to comply with the objectives set by the legislature, which constituted a sufficient breach of the law

999 see IPCC, SR 15, SPM, § C.1.

1000 See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, “National ‘Fair Shares’ in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law” (2021) 21(8) *Climate Policy* p 18.

1001 See the full submissions of the NGOs in *Notre affaire à tous et al v France* (« *affaire du siècle* »), p 54–59: <https://laffairedu siecle.net/wp-content/uploads/2019/05/Argumentaire-du-M%C3%A9moire-compl%C3%A9mentaire.pdf>, last accessed 28 October 2025.

1002 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 32.

tHR judgement in *KlimaSeniorinnen* should enable the enforcement of *general* CDD (see subsection 2.3.2.5), and the ICJ advisory opinion should strengthen this possibility.

2.3.1.4 The redressability of general due diligence and specific legislation in the UK

The UK courts handled at least three systemic mitigation cases, and only one of those was successful¹⁰⁰³. Like in Ireland, claimants must show at the admissibility stage that they have an *arguable* case with realistic prospects of success, and that the requested redress would provide them with advantages¹⁰⁰⁴. These conditions are also similar to the redressability condition under the US standing criteria. This subsection is structured as follows. Subdivision 2.3.1.4.1 explains the dismissal of the first *Plan B et al* case launched in 2017, which did not fulfil the due diligence requirements in terms of scientific underpinning. Subdivision 2.3.1.4.2 analyses the reasons why the second *Plan B et al* case also failed, and whether British courts rightly defer to the validity of the domestic specific legislation, the Climate Change Act. Subdivision 2.3.1.4.3 shows that the specific CDD claims worked in a third climate-related case filed by three different NGOs (FoE, Good Law Project and Client Earth).

2.3.1.4.1 The failure of the first *Plan B* case due to the lack of consensual scientific elements

In 2018, the British courts rejected the first *Plan B et al* case, which contended that the government must increase the ambition of its 2050 target to limit warming to 1.5°C in light of the Paris Agreement.

According to the information provided by the judgment, the claim did not rely on consolidated and consensual scientific elements, such as IPCC reports, although it is a necessary feature of due diligence, which only requires taking measures if it is scientifically founded (see the criteria in the introduction, notably in section 0.2.1).

1003 Administrative High Court of Justice of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, 18 July 2022, [2022] EWHC 1841 (Admin).

1004 Judiciary For England And Wales, *The Administrative Court: Judicial Review Guide* 2021, July 2021, § 9.1.3. – 9.1.4.

More precisely, the problem was that Plan B requested the government to set out a 1.5°C ambition, but before the IPCC published its Special Report on 1.5°C (SRI.5)¹⁰⁰⁵. While the Paris Agreement already recognised in its LTTG the objective of pursuing efforts to limit warming to 1.5°C, the serious risks associated with the exceedance of the 1.5°C threshold were only scientifically clearly established from the SRI.5 onwards. Therefore, it was only after the publication of this report that it became reasonable to claim that warming must not exceed 1.5°C¹⁰⁰⁶. Prior to this, numerous scientists and legal experts had taken the view that the target of well below 2°C was the most relevant one, given the historical focus of the COP on this target, the wording of the Paris Agreement, and the corresponding scientific evidence mainly focusing on this target¹⁰⁰⁷. After the SRI.5 publication, however, legal bodies and the international community strengthened their focus on the 1.5°C goal, resulting in a widely shared due diligence best-efforts obligation to limit warming to 1.5°C¹⁰⁰⁸, as the ICJ has also recognised it in its recent 2025 advisory opinion¹⁰⁰⁹.

Plan B made another bold claim, following which the scientific advice provided by the official scientific body of the UK in this respect – the Committee on Climate Change – was irrational, and, thus, unlawful too. The Committee had previously refrained from advising the government to revise its 2050 target in October 2016, despite finding that “[t]o stay close to 1.5°C CO₂ emissions would need to reach net zero by the 2040s.”¹⁰¹⁰ While the UK was aiming for an 80% reduction in 2050 compared to 1990, the UK scientific body insisted on the need to ramp up short-term action in order to keep open a possible revision of the long-term ambition

1005 The application for judicial review was filed in June 2018, whereas the SRI.5 was published in October 2018.

1006 For more details, see section 3.3.3 of this thesis, which sets out the evolution of the science, the international policies, and the reception by the courts.

1007 See Part 3 of this thesis which lays out the evolution of the science, policies, and legal requirements over time.

1008 Fore, more details, see the concurring findings in section 3.3.3; see, more precisely, the COP 28, “First Global Stocktake”, *FCCC/PA/CMA/2023/L.17*, 13 December 2023, § 4, 25 – 28. “21. Recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and resolves to pursue efforts to limit the temperature increase to 1.5 °C”.

1009 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 224; see the analysis of this opinion in this regard in subdivision 2.3.4.2.2.

1010 Administrative High Court of Justice of London, *Plan B Earth et al v UK Secretary of State for Business, Energy and Industrial Strategy*, [2018] EWHC 1892 (Admin), 20 July 2018, § 21.

upwards later on. Given the lack of clear scientific consensus on the need to limit warming to 1.5°C, but the established need to already increase climate action in the short term, either way, this recommendation did not sound unreasonable as such.

The Court concluded that it was *not* “arguable that the Secretary of State’s refusal to amend the 2050 target is an unlawful exercise of his discretion”¹⁰¹¹ since “the executive has a wide discretion to assess the *advantages* and *disadvantages* of any particular course of action”¹⁰¹². While the ECtHR confirmed in *KlimaSeniorinnen* that governments benefit from a wide margin of appreciation as to the overall approach, it also stated that it must implement consistent measures to achieve global objectives (see subdivision 2.3.2.5.2). The Court, moreover, dismissed the claim that the Committee on Climate Change had “misunderstood” the Paris Agreement¹⁰¹³. The Court of Appeal confirmed the judgment in 2019.

In light of the above, it is clear that the British courts did not disregard the main CDD requirements. Instead, Plan B has not met the necessary ingredients to render its claim redressable.

2.3.1.4.2 The failure of the Second Plan B case, given the merits of the specific UK legislation

Regarding the more recent *Plan B Earth et al* case, filed in 2021¹⁰¹⁴, the claimants again argued that the UK had failed to align with the Paris Agreement’s 1.5°C objective¹⁰¹⁵. They alleged that this failure leads to human rights breaches under the Human Rights Act 1998 (implementing the ECHR in the UK – corresponding to *general* CDD), and the Climate Change Act (corresponding to *specific* CDD claims)¹⁰¹⁶.

The courts dismissed this second case of Plan B, mainly because of i) a lack of willingness to recognise *general* CDD in human rights law, and ii) an absence of a manifest error of appreciation. While one must keep in

1011 *Ibid*, § 43.

1012 *Ibid*, § 49.

1013 Administrative High Court of Justice of London, *Plan B Earth et al v UK Secretary of State for Business, Energy and Industrial Strategy*, [2018] EWHC 1892 (Admin), 20 July 2018, § 44 – 46.

1014 Administrative High Court of Justice of London, *Plan B. Earth & Others v The Prime Minister & Others*, [2021] EWHC 3469 (Admin)

1015 *Ibid*, § 3.

1016 *Ibid*, § 3.

mind that this case was the NGO's second attempt, which made similar requests to the first dismissed case, and which may have suffered from an additional lack of standing concerning injury¹⁰¹⁷, British courts *partly* erred in law, and in factual analysis, by not prompting a more detailed analysis of the sufficiency of the specific legislation against the *general* CDD requirements.

More precisely, the courts reasoned that the Paris Agreement had not been incorporated into domestic law, and therefore, it could not be enforced¹⁰¹⁸. This argument is widely shared among domestic courts, which agree on the lack of direct effect of the Paris Agreement. However, many apex courts rightly consider that the Agreement's provisions need to be taken into account for interpretative purposes (see, among others, *Grande-Synthe*¹⁰¹⁹; *Urgenda*¹⁰²⁰; and the ECtHR in *KlimaSeniorinnen*¹⁰²¹, and the ICJ in its respective advisory opinion¹⁰²²).

Nevertheless, the British courts were wrong to refuse to seek compliance with the Paris Agreement through the ECHR, or rather, to take it into account¹⁰²³. Indeed, the claimants proposed, in reality, to consider the agreement for interpretative purposes¹⁰²⁴. Thus, in this regard, the British Courts manifestly erred in law. They should have at least recalled, for

1017 The ECtHR even dismissed the application to review the case for reasons related to victim status according to the summary of the case provided by the Sabin Center's climate case chart (*Plan B. Earth and Others v United Kingdom*, <https://climatecaschart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/>, last accessed 28 October 2025).

1018 Administrative High Court of Justice of London, *Plan B. Earth & Others v The Prime Minister & Others*, [2021] EWHC 3469 (Admin), § 25.

1019 Administrative Supreme Court (Conseil d'Etat), *Grande-Synthe v France*, n° 427301, 19 November 2020, § 12.

1020 While the Dutch first instance court only considered the "reflex effect" of the climate conventions; the Court of Appeal and Supreme Courts further considered the Paris Agreement's provisions; see subsection 2.3.2.1.

1021 See: ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 456.

1022 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 287.

1023 Administrative High Court of Justice of London, *Plan B. Earth & Others v The Prime Minister & Others*, [2021] EWHC 3469 (Admin), § 53.

1024 The Court of Appeal indeed specified that the claimants' argument that "the Paris Agreement temperature limit of 1.5oC [should only be seen] as evidence of the international consensus on what must be done to avoid intolerable risks to life and to family life [...] is a distinction without a difference in substance" (see Court of Appeals, *Plan B. Earth & Others v The Prime Minister & Others*, CA-2021-003448, 18 March 2022, § 4 – 5).

example, that section 8 on setting carbon budgets of the Climate Change Act refers to the need to comply with the UK's international obligations, and hence, indirectly, the Paris Agreement. It is worth noting that this is an indication of the willingness of specific UK legislation to be compatible with international conventions, including general CDD, which ultimately demonstrates that there is a broad consensus that specific CDD must comply with general CDD due to the hierarchy of norms, as set out in the introduction.

Moreover, the British courts dismissed the ECHR claims due to the previous lack of corresponding climate jurisprudence of the ECtHR at that time. They disregarded the *Urgenda* case due to their alleged lack of knowledge of the Dutch constitutional context¹⁰²⁵. In essence, they considered that the *specific* domestic legislation, the UK Climate Change Act, should be the legal reference point for determining whether the government had acted lawfully¹⁰²⁶. In the view of this doctoral dissertation, these arguments were insufficiently justified with regard to *general* CDD, and may have constituted a violation of the fundamental right to a legal recourse under Article 13 of the ECHR. In fact, the *KlimaSeniorinnen* judgement of the ECtHR confirmed that human rights require adequate protection against climate change, as did the ICJ in its recent advisory opinion. In light of these developments, the British courts should have prompted an analysis of whether the *specific* UK legislation was sufficient, since the latter must comply with *general* CDD, existing in international law, human rights law and tort law, etc.

While the courts clearly erred in developing the law, did they also err in applying the UK Climate Change Act (i.e., *specific* legislation)? In this regard, the London High Court noted that the government fulfilled all the relevant procedural obligations laid out in this Act (i.e., setting targets, laying out concrete policies, submitting reports to Parliament, and considering the reports of the Committee on Climate Change). The judge further ruled that “[d]isagreement with the merits of those proposals and policies (etc.) does not give rise to an arguable case that there has been a breach of the statutory duties.”¹⁰²⁷ In the same vein, the Court recalled that “the State

1025 Court of Appeals, *Plan B. Earth & Others v The Prime Minister & Others*, CA-2021-003448, 18 March 2022.

1026 Administrative High Court of Justice of London, *Plan B. Earth & Others v The Prime Minister & Others*, [2021] EWHC 3469 (Admin), § 54 – 58.

1027 *Ibid.*, § 34.

enjoys a wide margin of appreciation in matters of that kind”¹⁰²⁸ and that it is not arguable that a legal and administrative framework has not been put in place in response to the threats posed by climate change.”¹⁰²⁹ While this reasoning does not seem entirely wrong, as it overlaps to some extent with the finding of the ECtHR *KlimaSeniorinnen* (which found though that there is a reduced margin of appreciation in the “setting of the requisite aims and objectives”¹⁰³⁰), it was still necessary to delve deeper into the factual issues raised by Plan B to assess the adequacy of the UK Climate Change Act.

The courts further recognised that the Committee on Climate Change had criticised the Government notably for not being on track to net zero by 2050 in most sectors. Nonetheless, in the view of the Court, these critiques “on the generality of the measures or lack of measures adopted by the Defendants does not make this a suitable case, or an arguable case, for judicial review”. Instead, it noted that at the same time, “the 2008 Act is working as Parliament intended”¹⁰³¹. These elements show difficulties in relying on the Climate Change Act as a *specific* CDD to ensure the effectiveness of the climate mitigation measures, since not being on track is considered by French courts and the ECtHR to be unlawful. However, other claimants were successful in another case by framing a breach slightly differently (see the subdivision 2.3.1.4.3 just below).

Additionally, if one takes a step back, the net zero goal for 2050 was adopted on 27 June 2019, representing an increase in ambition from the contested -80% reduction goal in the first *Plan B* case¹⁰³². The application for judicial review of Plan B was filed in early 2021 and decided at the end of the same year. Given these short time periods and the fact that the government had to deal with the crisis caused by the COVID-19 pandemic in the meantime, it may seem reasonable that it takes some time to adjust the precise carbon budgets and corresponding measures until 2050. At the end of the day, the ECtHR requires the State to show that it is “in the process of complying, with the relevant GHG reduction targets” as laid out in *KlimaSeniorinnen*¹⁰³³.

1028 *Ibid*, § 50.

1029 *Ibid*, § 58.

1030 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 543.

1031 Administrative High Court of Justice of London, *Plan B. Earth & Others v The Prime Minister & Others*, [2021] EWHC 3469 (Admin), § 36.

1032 *Ibid*, § 49.

1033 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 550.

To conclude, the UK Court of Appeals considered the Act to be sufficient, as it also foresees the adequate involvement of the Parliament, in a manner compatible with the separation of powers¹⁰³⁴. It is true that the *specific* legislation of the UK does not seem *blatantly* insufficient if it is compared to the ECtHR *KlimaSeniorinnen* requirements, but further analysis is needed to determine the full implications of this comparison. It notably remains necessary for a court to examine whether the UK satisfies the requirement to set out a domestic ambition that aims to match its 1.5°C fair share¹⁰³⁵.

2.3.1.4.3 The Friends of the Earth et al case, a successful specific CDD case

In contrast to the unsuccessful cases launched by Plan B, the High Court of London granted the application for judicial review brought by Friends of the Earth UK, Client Earth, and Good Law¹⁰³⁶, in a similar fashion to the Irish and French case *Grande-Synthe*. The High Court of London recognised that the UK authorities had failed to implement Sections 13 and 14 of the UK Climate Change Act, which oblige the government to prepare proposals to *achieve* the carbon budgets¹⁰³⁷ and to report to Parliament how it intends to achieve its climate goals.

More precisely, the Court sided with the applicants in its claims that the proposed measures would not fully achieve the emission reductions for the

1034 Court of Appeals, *Plan B. Earth & Others v The Prime Minister & Others*, CA-2021-003448, 18 March 2022: “this is not a matter for the courts of this country, in our constitutional context. The fact is that the Government and Parliament take the view that the 2008 Act is sufficient. Others (such as these Claimants) disagree. As the Judge observed, that debate is very much a matter for debate in the democratic forum and is not for the courts.”

1035 See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, “National ‘Fair Shares’ in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law” (2021) 21(8) *Climate Policy* p 18.

1036 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022.

1037 See section 13 of the UK Climate Change Act: “Duty to prepare proposals and policies for meeting carbon budgets : (1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met. (2) The proposals and policies must be prepared with a view to meeting— (a) the target in section 1 (the target for 2050).”

sixth carbon budget, valid for the period 2033 – 2037, by a margin of 5%¹⁰³⁸. The Court also ruled that the government had failed to explain the issue to Parliament in a transparent manner¹⁰³⁹.

Furthermore, the Court granted a declaratory relief instead of a quashing order since the applicants recognised that the remainder of the government's policies were "commendable". A quashing order would have cancelled all the government policies¹⁰⁴⁰; however, with a declaratory order, the government remains free to remedy the unlawfulness as it deems appropriate¹⁰⁴¹. This is another example illustrating the tendency of courts to leave a margin of appreciation when it comes to redressing CDD shortcomings.

However, the High Court of London again dismissed the human rights claims of the NGO Good Law and the individual claimant who joined the NGO's application¹⁰⁴², stating that it is preferable to wait for the outcome of the pending climate cases before the ECtHR than to elaborate domestic standards that could depart too heavily from the incremental development of the Strasbourg case law¹⁰⁴³. However, the UK authorities, including its judicial bodies, will have to review their position following the ECtHR outcome in *KlimaSeniorinnen*, as it consolidated the need to ensure that *specific* legislation complies with *general* CDD¹⁰⁴⁴.

1038 *Ibid*, § 16 and 221.

1039 *Ibid*, § 16 and 260.

1040 Judiciary For England And Wales, The Administrative Court: Judicial Review Guide 2021, July 2021, p 64, § 12.3: "A quashing order quashes, or sets aside, a challenged decision. The consequence of a quashing order is that the challenged decision does not have legal force or effect."

1041 *Ibid*, § 12.5.2: "A declaration does not have any coercive effect. This means that it cannot be enforced."

1042 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022, § 261 – 265.

1043 *Ibid*, § 272 referencing the following passage of the *Al-Skeini v Secretary of State for Defence* [2008] AC 153 at [106] to justify this stance.

1044 Provided that the proposed replacement of the Human Rights Act 1998 with the draft "Bill of Rights" will not give domestic courts the authority to set aside Strasbourg case law. For more information on this possibility, see Gentile G, "The Bill of Rights Bill and the Damages of UK's Unilateralism" (2022) *VerfBlog*, DOI: 10.17176/20220719-233624-0.

2.3.1.5 Intermediate conclusion

The enforcement of the obligations and GHG reduction targets provided in the *specific* legislation is one task courts can take over when addressing CDD. Granting this relief may provide more effectiveness to the adopted legislative or executive measures by ensuring their implementation without infringing on the separation of powers. However, this framework of judicial intervention does not allow questioning the overall sufficiency of the *specific* statutes. Indeed, as the comparative case law analysis above shows, courts have granted claims based on the *specific* mandates of the legislation, but rejected attempts to seek judicial review of their overall sufficiency against *general* CDD criteria.

Concerning the US case laws (subsection 2.3.1.1): Although the US Supreme Court pioneered climate action through case law in 2007, by requiring the EPA to regulate GHGs in *Massachusetts*, it subsequently ruled in *American Electric Power Company v Connecticut* (2010) that the applicability of federal tort law is pre-empted by the EPA's authority. More recently, in *West Virginia v EPA*, the Court's conservative majority significantly restricted the EPA's powers by deferring the question of whether or not the EPA can mandate a transition to other low-carbon energy to the US Congress. The Court did this without setting any objective for the latter, such as the need to find an outcome compatible with the temperature objective of the Paris Agreement, which is problematic since the USA is not exhibiting adequate efforts to meet its fair share.

In Ireland (subsection 2.3.1.2), the Supreme Court agreed to enforce *specific* CDD, but left open the question of the applicability of *general* CDD based on human rights. While this thesis did not seek to analyse whether the specific legislative framework of Ireland suffices, it still noted that Ireland's legislative carbon neutrality objective by 2050 does not meet the 1.5°C fair share ambition of developed countries. Consequently, there is a presumption of an overall deficiency in Ireland's mitigation efforts.

In France (subsection 2.3.1.3), courts monitored compliance with the GHG reduction targets and carbon budgets enshrined in the *specific* legislation and regulation, but they did not question compliance with overall *general* CDD requirements. For example, the Administrative Supreme Court (*Conseil d'Etat*) consciously refrained from calling the validity of the specific legislation into question by giving precedence to the choice of the lawmaker over *general* due diligence requirements. As to the French administrative court of Paris, it recognised a *general* CDD obligation, with-

out finding a corresponding breach, due to the lack of arguments from the applicants' side, despite the manifest insufficiencies of France's ambition with respect to its 1.5 fair share.

In the UK (subsection 2.3.1.4), courts handled three systemic mitigation cases and only accepted to enforce *specific* legislation. More precisely, in the first case, the NGO Plan B did not meet the *general* due diligence requirements, requiring the use of the best available scientific evidence. The second *Plan B* case raised more difficult questions: while the British courts dismissed the case because of the alleged validity of the *specific* legislation, their refusal to recognise *general* CDD and oversee the sufficiency of the *specific* legislation is criticisable. Lastly, the last climate-related case, filed by three different NGOs (FoE, Good Law Project and Client Earth), shows that the enforcement of *specific* legislation ultimately worked. Nonetheless, the UK is – like other countries – still far away from exhibiting domestic ambition matching its 1.5°C fair share.

Given the manifestly insufficient ambition of developed countries, it is crucial that some form of *general* CDD remains applicable to remedy shortcomings in *specific* legislation. Additionally, showing the pre-existence of *general* CDD could lead to the establishment of corresponding historical shortcomings, as Part 3 of this thesis shows.

2.3.2 The increasing possibility of redressing general CDD against States by providing leeway

While some courts awarded the requested reliefs in *general* CDD cases against States, they also stressed that they must carry out this task with restraint to respect the separation of powers. To better understand the redressability conditions for awarding requests based on *general* CDD, this section carries out a comparative case-law analysis and is structured as follows:

Subsection 2.3.2.1 discusses the conditions that Dutch courts deemed necessary to meet in order to set by way of injunction the precise GHG reduction target. Subsection 2.3.2.2 analyses the reasons for the failure of the *Juliana et al v USA* case on the redressability front. Subsection 2.3.2.3 dives into the justiciability conditions laid out by the Administrative Court of Berlin and the German Constitutional Court. Subsection 2.3.2.4 briefly examines the Brussels Courts' decisions in *Klimatzaak*, which confirmed the validity of the reasoning in *Urgenda*. Subsection 2.3.2.5 eventually assesses

the ECtHR decisions by providing an analysis before and after the Grand Chamber judgments of 9 April 2024, especially the *KlimaSeniorinnen* case.

2.3.2.1 The enforceable target in *Urgenda* due to the scientific consensus and the State recognition of the necessity to reduce emissions by 25%

One of the most debated questions in the *Urgenda* case was whether the applicants' request infringed the principle of the separation of powers. While the government has a margin of discretion, the courts emphasised that their role is to ensure compliance with the rule of law and the limits within which the State is obliged to comply. All Dutch courts concluded that the State had failed to ensure the minimum level of protection guaranteed by the tort duty of care and the positive obligations of the ECHR¹⁰⁴⁵ (in short, the *general* CDD).

To arrive at this result, the judges relied in particular on the fourth report of the IPCC in 2007, which demonstrates the serious risks of warming above 2°C. The judges concluded that exceeding this limit is “dangerous”, in line with the scientific and COP findings back then. Even the EU recognised the need to limit warming to 2°C from 1996 onwards¹⁰⁴⁶.

To avoid exceeding the 2°C limit, the IPCC's 2007 report shows that developed countries must reduce emissions by 25% to 40% by 2020 compared with 1990 levels. The COP in Bali and in Durban then recognised the necessity of achieving such an ambition¹⁰⁴⁷. Between 2007 and 2011, the EU aimed to reduce emissions by 30% by 2020 compared to 1990, *provided* that the international community aligned itself with this level of ambition¹⁰⁴⁸. However, since other States did not pursue a 2°C compatible ambition, the European texts were revised downwards in 2011, and ultimately only provided for a 20% reduction, which implied a 14 to 17% for the Netherlands¹⁰⁴⁹. The Dutch courts then observed that this latter reduction was not compatible with the 2°C pathway for a developed country such as “the Netherlands [which] is one of the countries with very high per capita

1045 District Court of The Hague, *Urgenda v Netherlands*, C/09/456689 / HA ZA 13-1396, 2015, p 1; Court of Appeal of The Hague, *Urgenda*, *op.cit.*, § 67.

1046 See point 7.2.8 of the judgment of the Dutch Supreme Court, *op cit*.

1047 District Court of The Hague, *Urgenda op.cit.*, § 4.24.

1048 See points 7.2.6. and 7.3.1 of the judgment of the Dutch Supreme Court, *op cit*. District Court of The Hague, *Urgenda op.cit.*, § 4.25.

1049 District Court of The Hague, *Urgenda op cit*, § 4.25.

emissions of greenhouse gases"¹⁰⁵⁰. These passages clearly show that global equity and fairness considerations shaped the courts' reasoning.

The Court of First Instance considered that this incompatibility was contrary to the requirements of the tort *duty of care*¹⁰⁵¹. Since Member States have the right to introduce "reinforced measures" at the national level in environmental matters, under Article 193 of the Treaty on the Functioning of the European Union (TFEU), and as recalled by the EU climate regulation¹⁰⁵², the court found that the domestic tort duty of care must require greater protection. In this sense, the Dutch general *duty of care* does not overrule *specific* climate legislation of the EU; it merely reinforces it to ensure it pursues an adequate level of protection, in line with *general* CDD. Similar reasoning has been used by the Court of Appeal and the Supreme Court, which based their injunctions on articles 2 and 8 of the ECHR¹⁰⁵³.

Concerning the separation of powers, the Dutch Supreme Court¹⁰⁵⁴ argued that the injunction did not violate this fundamental principle of democratic constitutional systems, as long as the judges *limit* their control over the political branches of government and follow the "common ground" method, which requires finding consensual elements to interpret human rights provisions¹⁰⁵⁵:

"In determining the State's minimum obligations, the courts must observe restraint, especially if rules or agreements are involved that are not binding in themselves. It is therefore only in clear cut cases that the courts can rule, on the grounds referred to above in 6.3-6.5, that the State has a legal obligation to take measures."¹⁰⁵⁶

Some authors argue that the Courts' injunctions to reduce emissions by 25% were merely based on a target which was accepted by the EU and,

1050 Dutch Supreme Court, *Urgenda*, ECLI:NL:HR:2019:2006, 19/00135, 20 December 2019, § 2.3.2 and/or I § 7.3.4.

1051 District Court of The Hague, *Urgenda*, *op cit*, § 4. 54 et seq.

1052 See paragraph 17 of the preamble to Decision (EU) 406/2009 on Effort sharing.

1053 Unlike the District Court, the higher courts considered that the *Urgenda* association could rely directly on the ECHR despite its status as a legal person. In any event, these two bases led to the same result, namely the recognition of an obligation to reduce greenhouse gases emanating from its territory in order to prevent dangerous anthropogenic disruption of the climate system.

1054 Dutch Supreme Court, *Urgenda*, *op cit*.

1055 ECtHR, *Demir and Baykara v Turkey*, no. 34503/97, 12 November 2008.

1056 Dutch Supreme Court, *Urgenda*, *op cit*, § 6.6.

by extension, the Netherlands¹⁰⁵⁷. Nevertheless, this stance plays down the interpretative effort of the Dutch courts: Firstly, the indication of a 25% reduction seems to have concerned all developed countries, meaning that courts could have inferred the absence of respective individual obligations to contribute at that specific level¹⁰⁵⁸. Secondly, as recalled above, the EU explicitly rejected the original 30% reduction target in the scenario in which no other countries followed a similar ambition. Thus, the Dutch Courts still went far beyond merely applying a voluntary GHG reduction target. They determined the standard of conduct in climate mitigation matters. They further established that this standard can be more stringent than the mandates of *specific* laws by considering scientific indications and political commitments. Given this interpretative effort, some authors have criticised the Dutch Courts' decisions for providing overly creative rulings that go beyond interpretation, and are ultimately arbitrary¹⁰⁵⁹.

The Dutch judges emphasised that they had confined themselves to ordering a *limited* increase in the 2020 target, i.e., -25% compared to 1990¹⁰⁶⁰, pointing out that this was the lowest IPCC value for the 2°C target. They added that they had not prescribed the specific type of measure to be adopted, leaving the government with some discretion to comply. The courts also saw no collusion with the separation of powers, even if compliance with the injunction required the adoption of legislative measures. In this respect, the Supreme Court referred to Dutch judicial precedents demonstrating that courts have the capacity to remedy a normative deficiency¹⁰⁶¹. Hence, the judicial restraint exercised by the Dutch courts, which obliges them to find consensual elements in science and policy to provide

1057 See, for example: Maljean-Dubois S, "The No-Harm Principle as the Foundation of International Climate Law" in *Debating Climate Law* (2021) p 3 - 4.

1058 See the argument in this sense: Zahar A, "The Urgenda Appeal Decision and the Argument from Physical Necessity", 2018, <https://ssrn.com/abstract=3285076>.

1059 *Ibid*; see as well Mayer B, "The State of the Netherlands v Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)" (2019) 8(1) *Transnational Environmental Law*; Mayer B and van Asselt H, "The Rise of International Climate Litigation" (2023) *RECIEL* p 8.

1060 Before 2011, a 30% reduction was provided for in European regulations, see ECLI:NL:HR:2019:2006, Hoge Raad, 19/00135, 12/20/2019, pp 4-5. "Furthermore, the order which the Court of Appeal issued to the State was limited to the lower limit (25%) of the internationally endorsed, minimum necessary reduction of 25- 40% in 2020."

1061 Dutch Supreme Court, *Urgenda*, ECLI:NL:HR:2019:2006, Hoge Raad, 19/00135, 12/20/2019, § 8.2.3 - 8.2.7.

redress, fundamentally restricts judicial interventions when reviewing compliance with *general* CDD.

So, is the Urgenda-type outcome unique to the Netherlands, or is it shared among legal systems? So far, both the Brussels Court of Appeal and the ECtHR in *KlimaSeniorinnen* have recognised, in an *ex-post* manner, that a 25% reduction was necessary by 2020 compared to 1990¹⁰⁶². However, with regard to the forward-looking injunctions, only the Brussels Court of Appeal has issued a precise, clear-cut enhanced reduction order, mandating that the State reduce its GHG by 55% by 2030 compared to 1990. As the injunction was based on the target in the European Climate Law¹⁰⁶³, it also contains *specific* CDD elements (see the corresponding subsection below 2.3.2.4). In contrast, the remedy granted by the ECtHR leaves Switzerland with considerably more discretion regarding the level of ambition¹⁰⁶⁴. This outcome is certainly due to the lack of an adequate legislative target for Switzerland for 2030, and the lack of consensus regarding what developed countries must do. In any case, the ECtHR's approach is more in line with what courts can do, according to a commentary on *Urgenda* by Mayer¹⁰⁶⁵.

In any case, despite all the innovative and ambitious thinking brought by the *Urgenda* case, its substantive results are not a *panacea* either for the following reasons: Firstly, it did not comprehensively address State responsibility in climate mitigation matters, as it omitted to consider extraterritorial emissions and financial flows, among other things. Secondly, the 25% reduction figure by 2020 is the *lowest* point in a range consistent with a 2°C scenario, not 1.5°C¹⁰⁶⁶. Thirdly, the Bali Box, which provided the scientific

1062 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 569.

1063 Court of Appeal of Brussels, *Klimatzaak*, 2021/AR/1589, 2022/AR/737; 2022/AR/891, 30 November 2023.

1064 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 550 – 574 and § 657.

1065 See section 0.4.3 of the introduction referring to Voigt C, “The Power of the Paris Agreement in International Climate Litigation”, *RECIEL*, 2023 p 249; Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law*; Mayer B, “The State of the Netherlands v Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)” (2019) 8(1) *Transnational Environmental Law*.

1066 See also Liston G, “Enhancing the Efficacy of Climate Change Litigation: How to Resolve the ‘Fair Share Question’ in the Context of International Human Rights Law” (2020) 9(2) *Cambridge International Law Journal*, p 248 quoting Robiou du Pont Y and Meinshausen M, “Warming assessment of the bottom-up Paris Agreement emissions pledges”, *Nature Communications* 9 (2018) 4810.

and evidentiary basis for the injunction, caused many controversies before and after the judgement, including in developing countries where it was considered too onerous for them¹⁰⁶⁷ (see section 3.2.3 for more information and analysis concerning the “Bali-Box”). Fourthly, Mayer even argued that *Urgenda* had not led to any concrete GHG reductions worldwide, and that it may have caused a political backlash against climate mitigation within the population¹⁰⁶⁸.

2.3.2.2 The dismissed *Juliana v USA* case due to justiciability concerns and non-consensual requests

The *Juliana* case, which was brought in 2015 by twenty-one young citizens against the federal government, was based on fundamental rights derived from the Constitution, in particular the right to life and property (as set out in the Fifth and Fourteenth Amendments to the Constitution¹⁰⁶⁹), which require due diligence.

The plaintiffs requested the Court to compel the government to draw up an *immediate* and *comprehensive* plan to switch from fossil fuels to non-carbon fuels, with the aim of limiting any further increase in the global temperature and returning it to below 350 ppm¹⁰⁷⁰, or 1°C warming. This threshold is considerably more ambitious than the international consensus, perhaps even impossible to achieve. Indeed, the international community pursued the 2°C objective before the Paris Agreement, and pledged to limit warming to 1.5°C after its adoption, a commitment that is even more justified after the publication by the IPCC of the SR1.5.

1067 Lahna B and Sundqvist G, “Science as a ‘fixed point’? Quantification and boundary objects in international climate politics”, *Environmental Science & Policy* 67 (2017).

1068 Mayer B, “The Contribution of *Urgenda* to the Mitigation of Climate Change” (2023) 35(2) *Journal of Environmental Law*.

1069 The plaintiffs in *Juliana* also relied on the principle of the “public trust” doctrine imposing on the State the obligation to protect natural resources and the atmosphere; see Blumm MC and Wood MC, “No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine” (2017) 67 *American University Law Review* 101.

1070 See the plaintiffs requests in the Amended Complaint of 2015 (Case 6:15-cv-01517-TC, Document 7, Filed 09/10/15, § 256 et seq., https://climatecasechart.com/wp-content/uploads/case-documents/2015/20150910_docket-615-cv-1517_complaint-2.pdf, last accessed 29 October 2025).

Firmly opposed to this approach, the US federal government considered that this legal action constituted a political demand that substantially threatened the balance of power.

Despite those arguments, the Court of First Instance ruled in 2016 that the plaintiffs had standing and that their requests were considered to be redressable¹⁰⁷¹. To justify this stance, it notably cited a passage from Alexis de Tocqueville's *Democracy in America*, according to which "there is almost no political question in the United States that is not sooner or later resolved into a judicial question"¹⁰⁷².

However, in 2020, the Court of Appeal for the Ninth Circuit dismissed the lawsuit by a two-to-one majority, ruling that it lacked *redressability*. This was the final motivated decision, as the US Supreme Court later refused to review the case without providing any justification. According to the majority of the Court, a court cannot "order, design, supervise and implement the remedial plan", as this would require highly complex decisions that go beyond the remit of the judiciary¹⁰⁷³. Two judges out of three, therefore, "reluctantly" concluded that the claims should be brought before the political branches or the electorate, who only have a "moral responsibility"¹⁰⁷⁴.

One judge issued a dissenting opinion, however. Judge Staton considered that the principles in *Massachusetts v EPA* could be used to establish standing, including redressability¹⁰⁷⁵. In response, the majority of the Court of Appeals stated that the State of Massachusetts had asserted a right that was essentially procedural in nature, insofar as it derived from the *Clean Air Act*, which permits anyone to request that the EPA comply with the *specific* provisions of the Act. The majority recalled that the plaintiffs were not required to meet the usual redressability standards in *Massachusetts*, since the latter case was merely about a procedural right to seek judicial review of

1071 District Court of Oregon, *Juliana et al v USA*, case n° 6 :15-cv-01517-tc, opinion and order, 11 October 2016.

1072 See the chapter entitled "What tempers the tyranny of the majority in the United States" of *Democracy in America*, the court seems to suggest that the judiciary's role is to uphold the rule of law when it is endangered by the electoral majority (see District Court of Oregon, *Juliana*, p 6).

1073 Court of Appeals for the Ninth Circuit, *Juliana*, No. 18-36082, 17 January 2020.

1074 *Ibid*, p 32.

1075 *Ibid*, p 46 - 47.

the EPA's decision in line with statutory requirements, whereas the *Juliana* claims aimed to *substantively* modify the public climate policies entirely¹⁰⁷⁶.

The majority of the Court of Appeals for the Ninth Circuit conceded that it had been asked to regulate all the details of the remediation plan requested by the plaintiffs, when it could have restricted itself to verifying whether the government had implemented sufficient measures to achieve a certain objective, as in other US Supreme Court's decisions (such as *Brown v Plata*), and other European successful climate cases, such as *Urgenda* or *KlimaSeniorinnen*¹⁰⁷⁷. Furthermore, in previous cases, the US Supreme Court has ruled that courts can provide redress if *specific* statutes violate the US Constitution by not respecting basic rights¹⁰⁷⁸. However, the Appeals Court retorted that no minimum standard of protection could be derived from the Constitution¹⁰⁷⁹ and that, in any event, reviewing this standard would exceed the powers of the court due to its complexity and the potential need to provide constant supervision¹⁰⁸⁰. The Court of Appeals further asserted that, in a democracy, it must exercise judicial restraint and that only the political branches are "the appropriate bodies" to induce change¹⁰⁸¹.

Although the dissenting judge insisted that the applicants had proposed an appropriate remedy (i.e., a return to a concentration of 350 ppm) and that complexity could not be a reason for dismissing the action¹⁰⁸², it should be remembered that the solution requested (350 ppm, which equates to

1076 *Ibid*, p 24; see also the commentary on *Massachusetts* in subdivision 2.3.1.1.1 of this thesis.

1077 *Ibid*, p 26 referring to Supreme Court decision *Brown v Plata*, 563 U.S. 493, 537-38 (2011): "in some circumstances, courts may order broad injunctive relief while leaving the "details of implementation" to the government's discretion. *Brown v Plata*, 563 U.S. 493, 537-38 (2011)."

1078 SCOTUS, *Obergefell v Hodges*, 576 U.S. ____, slip op at 24 (2015): "Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decision-making. *Id.*, at ____ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity."

1079 Court of Appeals for the Ninth Circuit, *Juliana*, *op cit*, p 27 - 28: "As the Supreme Court recently explained, "a constitutional directive or legal standards" must guide the courts' exercise of equitable power. *Rucho v Common Cause*, 139 S. Ct. 2484, 2508 (2019) [...] Absent those standards, federal judicial power could be "unlimited in scope and duration," and would inject "the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role."

1080 *Ibid*, p 26 - 27.

1081 *Ibid*, p 28.

1082 *Ibid*, p 59 - 61.

1°C limitation) is much more ambitious than that proposed by *Urgenda* (450 ppm, which equates to 2°C limitation) so much so that it never featured within the work of the IPCC. Additionally, the request seems to have posed significant feasibility issues, given that humanity overstepped 350 ppm in the 1990s, and that ppm levels in 2020 were above 410 ppm¹⁰⁸³. In fact, returning to this level of concentration would require considerable negative emissions through the large-scale deployment of Carbon Dioxide Removal (CDR), which itself faces “multiple feasibility and sustainability constraints”¹⁰⁸⁴. This prospect has not yet been studied by the IPCC, which has instead focused on the less demanding but still very challenging 1.5°C and 2°C targets.

In contrast, the successful *general* CDD cases in Europe relied on the PA and the IPCC, constituting international consensual ingredients, both legally and scientifically, and can thereby inform the content of *general* due diligence (see *Urgenda*, *Klimatzaak*, the German constitutional case, *KlimaSeniorinnen*, among others). The ICJ and the ITLOS confirmed the relevance of this approach in their respective advisory opinions. Said differently, all these courts asserted that climate mitigation is justiciable despite its complexity, as it sets out a number of standards (1.5°C), even though it primarily requires the actions of the political branches. In contrast, the plaintiffs’ focus on the 350 ppm threshold (or 1°C of warming) might explain why the US Court of Appeals did not find any “constitutional directive or legal standards” or any “metric for judicial determination” in *Juliana*¹⁰⁸⁵.

Lastly, it should be noted that 350 ppm is a global metric. It would probably be impossible for the USA to reduce the global CO₂ concentration to 350 ppm alone, as it does not unilaterally control the emission sources stemming from other countries. Thus, the requests in *Juliana*, which were framed in a global manner¹⁰⁸⁶, exceeded the *shared* responsibility of the USA, or its individual and collective responsibility.

1083 IPCC, AR 6, WG II, SPM., Box 1.

1084 IPCC SRI.5, SPM, Box SPM 1 and § C.3.

1085 Court of Appeals for the Ninth Circuit, *Juliana*, *op.cit.* p 27: “As the Supreme Court recently explained, “a constitutional directive or legal standards” must guide the courts’ exercise of equitable power.”

1086 See the Amended Complaint in *Juliana v USA*, Case No.: 6:15-cv-01517-TC, 09 October 2015, https://climatecasechart.com/wp-content/uploads/case-documents/2015/20150910_docket-615-cv-1517_complaint-2.pdf, last accessed 27 October 2025: “order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO₂ emissions, as well as

While those critiques *may* explain why the US Court of Appeals dismissed the redressability of *Juliana*, the chances of success of a more “reasonable” and “consensual” interpretation of *general* CDD are very low in the US federal court system, as long as the composition of the SCOTUS remains as “conservative” as it is today¹⁰⁸⁷. This view is evidenced by the Supreme Court’s decision in *Dobbs v Jackson*, one of the most widely discussed judicial decisions in recent history, which gave precedence to a law that contradicted its own previous interpretations of the Constitution¹⁰⁸⁸. This judgement, alongside *West Virginia v EPA* (assessed above, notably in subdivision 2.3.1.1.3), demonstrates an increasing trend towards granting *excessive* authority to government decision-making. However, as in any other country, it is crucial that the US judiciary plays its role in preventing the risk of the “tyranny of the majority”¹⁰⁸⁹, including decisions that exacerbate global warming in a dangerous and thus unlawful way.

2.3.2.3 The German Courts’ recognition of general CDD by leaving significant margins of appreciation

Subdivision 2.3.2.3.1 firstly addresses the decision of the 2019 Berlin Administrative Court. Subdivision 2.3.2.3.2 then dives deeper into the 2021 decision of the German Constitutional Court.

take such other action as necessary to ensure that atmospheric CO₂ is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system.”

1087 Totenberg N, “The Supreme Court is the most conservative in 90 years”, *NPR*, July 2022.

1088 SCOTUS, *Dobbs et al v Jackson et al*, 597 U. S. ____ (2022). More precisely, the Supreme Court disregarded its own case law on ensuring a constitutional right to abortion, and, instead, upheld a state law that forbids abortion.

1089 Tocqueville Alexis de, *De la démocratie en Amérique*, tome I, 2e volume, Michel Lévy, 1864 (*Œuvres complètes*, volume 2), p 161–187, quoted by District Court of Oregon, *Juliana*, *op cit*, p 6.

2.3.2.3.1 A first court decision by the Berlin Administrative Court testing the Urgenda principles

In the first German systemic climate mitigation case, eleven individual applicants from three farming families alongside the NGO Greenpeace filed a complaint with the Berlin Administrative Court against the German State for not achieving the 2020 GHG reduction objective, which required Germany to reduce emissions by at least 40% by 2020 compared to 1990¹⁰⁹⁰.

This case featured both a *specific* and a *general* CDD dimension. Regarding the *specific* CDD part of the claim, the applicants argued that the 40% reduction figure was enforceable since it was the government's own GHG reduction target. However, the Court dismissed this claim, as the target was neither enshrined in legislation nor in an executive act. Instead, it was part of an interministerial decision, which is considered as binding only for the members of the government among themselves (*Binnenrecht*). Accordingly, under German administrative law, third parties cannot challenge this type of act.

As to the *general* CDD argument, the Court compared the ambition of the German 2020 reduction target of 40% with the contested one in *Urgenda* (14 to 17%), which turned out to be 25% after the injunction. The Court observed that, when the German government first decided in 2007 to commit to a 40% reduction in emissions by 2020 compared with 1990, the IPCC indicated a range of -25% to -40% for a 2°C scenario in its so-called Bali Box, which justified the injunction in the *Urgenda* ruling (see subsection 3.3.2.1 and section 1.2.3 above). The Court remarked that the target of a 40% reduction in emissions by 2020 was the most ambitious point in the range provided by the Bali box, the scientific foundation of the *Urgenda* case. However, the Court overlooked the fact that Germany had already significantly reduced its emissions at the beginning of the 1990s for external reasons, due to the dismantling of the industry in the former USSR, including in East Germany, which had joined the Federal Republic of Germany¹⁰⁹¹ (see section 1.2.2 above). This argument does not appear to have reached the Court, however.

1090 Administrative Court of Berlin, *Eleven Farmers and Greenpeace v Germany*, 31 October 2019 (VG 10 K 412.18).

1091 A significant portion of the former USSR's industrial activity ceased after 1990, leading to almost 50% of GHG reductions in some former USSR countries. Note that "West Germany" merged with "East Germany" in 1991. See concurring opin-

The Court concluded that there was no evidence to support the view that the target of a 40% reduction in greenhouse gases by 2020 constituted the minimum standard guaranteed by the Constitution. Thus, while this case was rejected, it still somewhat confirmed the reasoning in *Urgenda*¹⁰⁹², which adapted the concept of the “minimum level of protection” of the ECtHR to the climate realm.

Furthermore, the Court pointed out that the government had not been entirely inactive, having implemented some of the measures set out in its 2020 climate programme. If the government achieves its target three years later than foreseen, the Court could not see this as a breach of the minimum level of protection that must be constitutionally guaranteed. These reasons were enough for the Berlin Court to reject the application for *manifest lack of fault*.

Instead of appealing, the applicants decided to join the constitutional proceedings against the 2019 German Climate Law – which introduced GHG reduction targets for 2030 and 2050 – by bringing their own complaint directly to the Federal Constitutional Court (BVerfG) in Karlsruhe. In Germany, it is possible to directly challenge legislative provisions according to Article 93 (1) 4a Basic Law with allegations of basic rights infringements, and in this case, three separate constitutional complaints were already previously brought by various plaintiffs, including individuals from Bangladesh and Nepal.

2.3.2.3.2 The recognition and development of general CDD by the German Constitutional Court

In March 2021, the German Federal Constitutional Court issued an important decision on the German Climate Protection Act. The Court ruled that climate change impacts the right to life and the right to private and family life, and that the German government contributes to this impact. The State is therefore required to protect by providing mitigation and adaptation actions. The Court also confirmed the need to rely on international agreements, such as the Paris Agreement, and scientific consensus in order

ion: Rosen A M, “The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change”, *Politics & Policy* (Wiley Online Library, 2015).

1092 See for the full argument: Mougeolle P, “Familles d’agriculteurs bio et Greenpeace c. Allemagne (2019)” in Christel Cournil (ed), *Les grandes affaires climatiques* (DICE Éditions 2020) § 15.

to enforce and interpret *general* CDD. This ruling thereby validates the fundamental principles established in *Urgenda*.

However, the Court did not find any violation of the positive duty to protect human rights, despite having discussed in length the insufficiencies surrounding the 2030 target of 55% compared to 1990, including by noting the scientific critiques of the German Expert Body on Environmental Issues¹⁰⁹³. Among other issues, this target was linked to the outdated 2°C ambition of the German government. However, according to the Court, the scientific uncertainties surrounding the *permissible* temperature target from a legal angle, the respective carbon budgets and the related approach to burden sharing were too great to invalidate the 2030 target¹⁰⁹⁴. Furthermore, the State's ability to mitigate global warming by financing GHG reductions overseas or by relying on technologies called "carbon dioxide removal" (CDR) or "negative emissions" provides, in addition to implementing adaptation measures¹⁰⁹⁵, the government with further leeway¹⁰⁹⁶. In brief, the Court could not identify clear-cut elements for establishing the unconstitutionality of Germany's former 55% reduction goal with respect to the duty to protect, as expressed in the duty to reduce territorial emissions¹⁰⁹⁷.

Nonetheless, the Court found that Article 20a of the German constitution, which protects future generations and the environment, imposes an enforceable "special duty of care" on lawmakers¹⁰⁹⁸. By recognising the justiciability of this constitutional provision, previously considered as to be "programmatic", the Court further developed the law in a manner somewhat similar to the French decisions¹⁰⁹⁹, in which GHG reduction targets were also considered "programmatic" there¹¹⁰⁰.

Still, the German Constitutional Court went way beyond the French decisions in terms of legal reasoning, as it found that the absence of specific

1093 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 167.

1094 *Ibid.*, § 163 – 166 and § 222.

1095 *Ibid.*, § 164.

1096 *Ibid.*, § 226–228.

1097 *Ibid.*, § 163 and § 166 – 167.

1098 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, Headline 2.

1099 French Courts labelled before the *Grande-Synthe et al v France* and *Notre affaire à tous et al v France* climate case law the French GHG reduction targets as programmatic too, see subsection 2.3.1.3 above.

1100 *Ibid.*, § 205 – 206.

and ambitious enough GHG reduction targets for the period *after* 2030 violates the latter provision. In the eyes of the Constitutional Court, the lack of clarity with respect to Germany's GHG reduction pathway poses a threat to all the freedoms protected by the Constitution in an intertemporal manner¹¹⁰¹.

Shortly after the publication of the judgement, the German government reinforced the climate targets set out in the Climate Protection Act between 2030 and 2050, thereby complying with the judgement. Nonetheless, by increasing the ambition of the 2030 GHG reduction target by 10 percentage points, the government went beyond the Court's orders. In fact, as mentioned above, the Court did not find the 2030 target strictly speaking unconstitutional, but it did criticise its potential inadequacy, notably stating that the law may need to be significantly more ambitious in the period following 2030 to comply with the duty to protect¹¹⁰². The Court also found that imposing sudden and drastic reductions after 2030 could jeopardise constitutional freedoms. In light of these court findings, the executive and legislative branches of government eventually felt compelled to increase the ambition of Germany's "target for the year 2030 from at least 55 per cent to at least 65 per cent reduction compared to the base year 1990", in order to diminish the risk of violating fundamental liberties, and to comply with the enhanced EU target (i.e., the European Climate Law of 2021 increased the European 2030 target by 15 percentage points, from -40% to -55% compared to 1990 levels)¹¹⁰³.

Compared to the other preceding judgements, these Court findings are different and original for three reasons.

Firstly, the Court did not directly increase the ambition of the challenged target in the "*Urgenda* style"¹¹⁰⁴. However, it emphasised the need to ensure intergenerational equity with regard to the burden of mitigation measures. It is worth noting that the German Constitutional Court issued this judgement during the pandemic, when the entire country, and to some extent the world, had been shut down and basic liberties seriously curtailed. This experience may have influenced the Court's decision to protect constitutional liberties from disproportionate measures.

1101 *Ibid.*, § 243.

1102 *Ibid.*, § 117.

1103 Draft law of the Federal Government, Draft of a First Act to amend the Federal Climate Protection Act, 19/30230, 19. Election period, 02.06.2021, p 18.

1104 Maxwell L, S Mead and D van Berkel, "Standards for adjudicating the next generation of *Urgenda*-style climate cases", *Journal of Human Rights and the Environment*, March 2022.

Secondly, while the Court acknowledged the critiques in the scientific literature, it did not redefine the required level of ambition itself. Instead, it left this decision to the legislature. As in many other democratic systems, the legislative branch is the only one constitutionally entitled to strike a precise balance of fundamental rights in Germany¹¹⁰⁵. In any case, the Court ordered a revision of the Climate Protection Act by the end of 2022¹¹⁰⁶. This judicial approach is consistent with the obligations of the Paris Agreement, which require setting out the highest possible ambition to achieve equitable burden sharing in terms of mitigation, while giving individual State Parties some leeway. It is also worth noting that the ECtHR also followed a similar judicial approach in this respect in *KlimaSeniorinnen v Switzerland*.

Thirdly, the German Constitutional Court also innovated by recognising extraterritorial jurisdiction, and thus the corresponding reach of certain obligations, including in the realm of climate finance. Moreover, the Constitutional Court has also acknowledged the justiciability of a constitutional duty to collaborate at the global level¹¹⁰⁷. In other words, the Constitutional Court recognised that the duty to cooperate globally – recognised on the international level as customary law¹¹⁰⁸ – is enforceable domestically. This position appears to be unique among domestic courts¹¹⁰⁹, as they tend to leave this area to the exclusive domain of the political and diplomatic branches. In fact, courts in the Netherlands, France, the UK and the ECtHR, recognised an individual obligation to take climate mitigation measures independently of others' actions, but they did not affirm a duty to cooperate globally¹¹¹⁰. While their position should eventually prevent obstruction to global cooperation, they have only taken a passive approach towards the global consensus, as they “only” compelled State actors to do their share to achieve the objective agreed internationally in the Paris Agreement. Hence, translating the international duty to cooperate into domestic law seems to be an interesting and welcome development that

1105 Constitutional Court of Germany, *Climate Protection Law*, *op cit*, § 262.

1106 *Ibid*, § 268. The power to mandate the review of the law is based on Art 93 *Bundesverfassungsgerichtsgesetz – BVerfGG*.

1107 Constitutional Court of Germany (*Bundesverfassungsgericht* in German), *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 200 – 205.

1108 See, among others, ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 294 – 321.

1109 Aust HP, “Climate Protection Act Case, Order of the First Senate” (2022) 116(1) *American Journal of International Law* p 150-157 <https://doi.org/10.1017/ajil.2021.74>.

1110 See the respective analyses of those court opinions in this subpart on redressability.

other courts could and should follow, to ensure meaningful international cooperation.

Nonetheless, despite these various innovative judicial developments, the Court stopped short of articulating precisely all these obligations.

In any case, the unanimous findings by the highest German court remain very important as they confirm the relevance and enforceability of *general* CDD, albeit in a more subtle manner than the injunction provided in *Urgenda*. The question remains, nonetheless, whether the court could have gone further by mandating, among other things, that the State make best efforts to fill the ambition gap by 2030 in order to lean towards its fair share¹¹¹¹.

2.3.2.4 The Brussels Courts' enforcement of general and special due diligence

In 2021, one court of first instance in Brussels found the State responsible for human rights and tort law violations ("*devoir de prudence et de diligence*" from Articles 1382 and 1383 of the Belgium Civil Code; i.e., *general* due diligence), because it did not respect its own 2020 GHG reduction targets of -20% compared to 1990¹¹¹². As claimants were dissatisfied with this result, including the lack of ANinjunction, they filed an appeal.

In 2023, the Brussels Court of Appeal granted the claimants' appeal. Firstly, it recognised that the Belgian State had a duty to reduce emissions by at least 25% by 2020 compared to 1990, based on tort and human rights law¹¹¹³. In this regard, the Brussels Court of Appeal fully confirmed the outcome of the *Urgenda* case. Secondly, the Court of Appeal compelled the State to reduce its 2030 emissions by a minimum of 55% compared to

1111 See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, "National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law" (2021) 21(8) *Climate Policy* p 18.

1112 Court of First Instance of Brussels (French-speaking), *Klimaatzaak*, 2015/4585/A, 17 June 2021, p 67 and p 83.

1113 Court of Appeal of Brussels, *Klimaatzaak*, 2021/AR/1589, 2022/AR/737 et 2022/AR/891, 30 November 2023, p 90: "The Court concluded that it had been clear to the respondents since 2007, and at the very least since 2009, that in view of its obligations under Article 2 ECHR, Belgium had to reduce its GHG emissions by at least 25% by 2020 in order to limit global warming to 2°C."

1990 to ensure that the Belgian State does its part¹¹¹⁴. This court order bears additional similarities with the injunction imposed by Dutch courts, as it also prescribed a specific mitigation outcome.

Regarding the handling of the scientific elements, the Brussels Court of Appeal found that the IPCC SRI.5 confirms the necessity to raise the ambition from 2°C to 1.5°C¹¹¹⁵. This finding confirms the Dutch Supreme Court's considerations in *Urgenda*, and goes beyond the German Constitutional Court, which considered the well-below 2°C target of the Paris Agreement as not inadequate (see just above). This scientific underpinning also justified the selection of the -55% target by 2030¹¹¹⁶, linked to the 1.5°C ambition according to the so-called "European Climate Law", adopted in 2021 by the EU¹¹¹⁷. The Brussels Court of Appeal thus considered that the ambition of this legislation was the minimum applicable.

This case shows that the Court also relied on IPCC elements (scientific consensus) and State recognitions (institutional consensus) to enforce *general* CDD. However, given that the Court relied on the "European Climate Law" to ground its injunction, it is arguable that the Court actually enforced *specific* CDD rather than *general* CDD. Nonetheless, since the -55% target of the "European Climate Law" applies to the EU as a whole, and not to Belgium individually (i.e., the outcome of the specific effort sharing regulation and the other pieces of the EU legislation may require slightly different expectations for Belgium). Hence, the Brussels Court of Appeal enforced a mixture of *general* and *specific* CDD.

Note furthermore that the ECtHR flagged the European Climate Law as a good example in terms of conception in its *KlimaSeniorinnen* judgment of 9 April 2024 (see subdivision 2.3.2.5.2).

Lastly, regarding the separation of powers, the Court argued that this injunction can in no way constitute an infringement of the political branches since it is limited to a GHG emissions reduction target validated in

1114 *Ibid*, p 150, § 286.

1115 *Ibid*, p 123, § 238: "The IPCC's 2018 special report confirmed that the 2°C target should now be replaced by the 1.5°C target."

1116 *Ibid*, p 158.

1117 *Ibid*, p 107, § 203 referring to "Regulation (EU) 2021/1119 of The European Parliament And Of The Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), see recital 3: "That report confirms that greenhouse gas emissions need to be urgently reduced, and that climate change needs to be limited to 1,5 °C, in particular to reduce the likelihood of extreme weather events and of reaching tipping points."

legislation, and whose relevance is not contested by the respondents¹¹¹⁸. The Brussels Court actually refused to go beyond a reduction by 55%, including for separation of powers considerations, as it could not see any valid justification for going further (i.e. the applicants requested a reduction of 65% by 2030)¹¹¹⁹. This PhD did not, however, assess the applicants' submissions. Hence, it cannot determine whether the submitted arguments met the *general* CDD enforcement requirements identified by this research.

To conclude, the *Klimatzaak* case clearly exhibits the restraint exercised by the judges in redressing *general* CDD. It remains questionable, however, to what extent the Belgian courts could have gone further by mandating Belgium to carry out best efforts to be consistent with its fair share, noting that the literature expects it to be neutral by 2030¹¹²⁰, or by considering extraterritorial emissions.

2.3.2.5 The ECtHR's margin of appreciation doctrine in *Klimaseniorinnen*

By providing views on the cases decided by the ECtHR until 2024, this subsection delves deeper into the open questions of how far courts can go to enforce national fair shares when there are no precise consensual elements around that, such as in the *Urgenda* case.

Subdivision 2.3.2.5.1 addresses these questions before the ECtHR issued its decisions on 9 April 2024 (i.e., this subdivision was drafted before the Court's judgement). Subdivision 2.3.2.5.2 comments on the important ECtHR judgement in *KlimaSeniorinnen v Switzerland*, which confirms that the State must set out an overall fair share approach when complying with human rights CDD, while granting a so-called margin of appreciation, akin to the Paris Agreement.

¹¹¹⁸ *Ibid*, p 127, § 244.

¹¹¹⁹ Court of Appeal of Brussels, *Klimatzaak*, 2021/AR/1589, 2022/AR/737 et 2022/AR/891, 30 November 2023, p 100, § 189.

¹¹²⁰ See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, "National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law" (2021) 21(8) *Climate Policy* p 18.

2.3.2.5.1 Preliminary assessment of the chances of success of the fair share argument¹¹²¹

Applicants requested the enforcement of the fair share principles before the Grand Chamber of the ECtHR in *Duarte Agostinho et al v 33 countries* and *Klimaseniorinnen et al v Switzerland*. To do so, they relied on the 1.5°C goal and on the fair share models established by the Climate Action Tracker (CAT).

The CAT is an interesting organisation created by some IPCC authors to systematically estimate the fair shares of individual countries¹¹²². It expects developed countries to be carbon neutral around 2030. However, the IPCC itself did not incorporate the CAT's studies into its reports. Additionally, States generally do not accept the CAT results, except perhaps some least developed countries, or small island States.

Given the case-law outcomes analysed above, which all show that it is necessary to rely on consensual elements in science and policy to enforce and interpret general CDD, may the CAT fair share argument still serve to enforce general CDD?

The quick response to this question seems negative. However, there are some subtleties which render the fair share analysis not entirely irrelevant.

Before delving into this question, it is necessary to go deeper into the degree of recognition of the CAT's studies, notably in the IPCC reports, to understand whether there are consensual elements.

The IPCC AR6 mention some elements around fair share, such as *quoting* the Rajamani et al study, elaborated by a recognised climate legal scholar (Professor Rajamani) and the CAT members. However, the IPCC itself did not highlight any specific result of the CAT or the Rajamani study, nor any precise indications on what developed and developing states should do. Still, former IPCC reports (AR4 and AR5) have shown a similar analytical framework for measuring the State's fair shares to those used by the CAT¹¹²³. The IPCC even recalled that "it is only in relation to such a "fair share" that the adequacy of a state's contribution can be assessed in the context of a global collective action problem"¹¹²⁴. Consequently, the idea of

1121 Note that this section was drafted before the ECtHR rulings in the climate cases.

1122 The Climate Action Tracker was notably founded by two organisations, Climate Analytics (Prof Dr Bill Hare) and New Climate Institute (Prof Dr Höhne), themselves IPCC authors.

1123 *Ibid.*

1124 IPCC, AR6 (2021-23) WG III, Chapter 14.

doing its fair share and the corresponding methodology are supported by the IPCC.

Additionally, the AR4 even provided some results on the fair share of Annex I and non-Annex I countries in the so-called “Bali box” (see section 3.2.3 of this thesis). However, these indications were linked to the 2°C target, and since then, the IPCC has not provided further indications, as already stated. This gap may also have been a reason for the CAT to provide regular updates on the results of individual countries, particularly developed states. Moreover, from a methodological angle, the CAT considers all the results of the equity literature, akin to the general IPCC method, which peer-reviews the existing relevant scientific literature.

States and COP also recognise the need for doing their fair share and equity, and to limit global warming to 1.5°C. In fact, the recent COP decisions recognised certain things which concord with the CAT’s analysis, being, firstly, the significant advantages in terms of risk reduction if warming is limited to 1.5°C¹¹²⁵. Additionally, the COP also acknowledged the need to step up and accelerate mitigation this decade, while recalling the relevant equity principles, and the common but differentiated responsibilities (already recognised as international law principles either way in the UNFCCC and the PA)¹¹²⁶. These principles are the legal underpinning of the ethical fair share principles.

Developed countries, however, provided very little information so far on whether their targets are fair in their NDCs, contrary to the Paris rulebook. For example, while the EU itself adopted the European Climate Law to limit warming to 1.5°C, it did not explain whether its contribution is fair¹¹²⁷. According to the CAT and the fair share studies, the target of -55% by 2030 compared to 1990, does not properly reflect an equitable ambition. Instead, it reflects more *grandfathering*, i.e. an unfair view of the burden share which implies that everyone needs to pursue the same level of ambition by following the global required range, despite the global inequalities, especially in terms of historical emissions and current levels of economic and social development¹¹²⁸.

1125 COP 26 decision, “Glasgow Climate Pact”, *FCCC/PA/CMA/2021/10/Add.1*, 13 November 2021, § 4 and 5 and 22.

1126 *Ibid.*, § 23.

1127 See, for instance, recital 3 of the European Climate Law (Regulation (EU) 2021/1119).

1128 Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, “National ‘Fair Shares’ in Reducing Greenhouse Gas Emissions within the Principled Frame-

Thus, there is some high-level recognition by States and the COP of the need to be more ambitious and fair by 2030, but there is no agreement on the specific results. This may be due to the vague method, but certainly also the implications of the required mitigation actions, which can be difficult or even impossible to implement due to the radical nature they represent. Nonetheless, while achieving climate neutrality by 2030 seems clearly out of reach for developed states, Rajamani and CAT scientists specified that “these states would need to support others to reduce their emissions to make their fair share contribution”¹¹²⁹. The applicants in *Duarte Agostinho* and *KlimaSeniorinnen* integrated this articulation into their requests, by arguing that the States must prioritise domestic GHG reductions, while specifying that financing GHG reductions overseas is admissible to make up for a potential shortfall. This dimension may ensure *some* sort of feasibility for developed states to reach their fair share.

In light of what precedes, the ECtHR – or other courts – would *unlikely* directly enforce fair share indications as estimated by the CAT due to the lack of scientific and political consensus around its recognition. However, it seems arguable that States must consider the specific ranges provided by the CAT to devise an overall consistent and fair ambition, including with respect to climate finance, following their “margin of appreciation”¹¹³⁰.

If shortcomings are to be established, the ECtHR could recognise violations of the duty to protect human rights in their operative parts, without granting any court injunction to achieve a specific result. Actually, the ECtHR never orders injunctions. The Committee of Ministers is in charge of supervising the execution of the judgements according to Article 46 ECHR¹¹³¹. In any case, the State Parties to the Convention are then in charge of implementing the judgement adequately.

By doing so, the ECtHR could – with regard to the fair share issue – ensure a harmonious interpretation of domestic provisions with interna-

work of International Environmental Law” (2021) 21(8) *Climate Policy* p 10 ; see as well, Knight C, “What is grandfathering?”, *Environmental Politics* (2013) 22(3) p. 410–427.

1129 *Ibid* (Rajamani et al), p 18.

1130 See the discussion of this margin in the following third party intervention: Burger M and Tigre MA (on behalf of the Sabin Center for Climate Change Law, Columbia Law School), “Third-Party Intervention in the Case of *Verein KlimaSeniorinnen and Others v Switzerland* (Application No 53600/20)” (5 December 2022), § 17 – 19.

1131 European Court of Human Rights (Public Relations Unit of the Court), European Court of Human Rights: The ECHR in 50 questions, p 10.

tional provisions, being the UNFCCC, the PA, and the COP decisions, serving as relevant interpretative texts of the conventions, as the ICJ usually does¹¹³². This is a consensual outcome supported by comparative climate case-law (see above), authoritative experts of the legal doctrine (i.e., the Paris-aligned interpretations)¹¹³³, and previous ECtHR case law specifying that the ECtHR “usually takes into account elements of international law in its reasoning” including soft law if its “sufficiently indicative of a common standard between the member States”¹¹³⁴.

It remains to be seen the extent to which the ECtHR – or other courts – may assess the sufficiency of State measures with regard to climate finance in an extraterritorial manner; as it is necessary to make finance flows consistent with low emitting pathways according to Article 2 (1) (c) of the Paris Agreement, but also to potentially finance GHG reductions overseas to make up for the lack of adequate territorial reductions in line with the *faire share*, according to Article 6 or Article 9 of the same Agreement. However, the ECtHR has not yet addressed these issues in its decisions, see subdivision just below.

2.3.2.5.2 The ECtHR’s redress with a margin of appreciation in KlimaSeniorinnen

As expected, the ECtHR largely agreed with the previous case law that had granted requests based on *general* CDD. It confirmed, in essence, that States must do their part by carrying out CDD. Although the term “due diligence” only appeared once, the concept still shaped the court’s approach, as in previous case-law (see section 1.2.2 above). For example, the Court referred to the corresponding criteria and requirements of due diligence multiple times:

“what is important, and sufficient to engage the responsibility of the State, is that *reasonable* measures which the domestic authorities *failed to*

1132 International recommendations – even though they are not binding – are taken into account by the ICJ if they are adopted by consensus: see ICJ, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgement, 31 March 2014, § 46.

1133 See Voigt C, “The Power of the Paris Agreement in International Climate Litigation”, *RECIEL*, 2023.

1134 See, for instance, ECtHR, *Pavlov et al v Russia*, Concurring Opinion of Judge Krenc, § 3.

take could have had a real prospect of altering the outcome or *mitigating* the harm [...] In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to *anticipate, prevent or minimise* the *causes* of climate change and mitigate its adverse effects.”¹¹³⁵

Furthermore, in light of the CBDR-RC, the Court stressed that the individual responsibility to fight climate change is itself “determined by the State’s own capabilities rather than by any specific action”¹¹³⁶. This is another silent recognition of due diligence, since it requires acting in proportion to one’s capacities.

The Court also stated that its complementary role in the climate realm is enabled by the *consensus* among Member States due to the following factors¹¹³⁷. Firstly, States acknowledge the need to tackle climate change due to its impact on the enjoyment of human rights, especially those above 1.5°C¹¹³⁸. Secondly, State parties acceded to international climate conventions, such as the UNFCCC and the PA¹¹³⁹. These findings are in line with the case-law analysis of this section 2.3.2, which found that the judiciary must rely on consensual elements to enforce and interpret general principles such as due diligence. Hence, the main argument of this section, following which there is a need to have consensual elements – especially in science and policy – at hand to judicially intervene on the basis of *general* CDD, is confirmed by the Grand Chamber of the ECtHR.

The reunion of those elements, in the context of the *Klimaseniorinnen* (or *Duarte Agostinho*), did not, however, enable a judicial intervention in the *Urgenda*-style, as requested by the applicants. The outcome is, as expected, more general because no precise elements on the State’s fair share, like in the AR4 Bali Box, were recognised for the 2030 targets or beyond, as the above subdivision 2.3.2.5.1 explained. Indeed, the Court was “unable to be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the present judgment”.¹¹⁴⁰ However, the Grand Chamber still confirmed the findings of the Dutch and

1135 ECtHR, *Klimaseniorinnen v Switzerland*, no. 53600/20, 9 April 2024, § 444.

1136 *Ibid*, § 442.

1137 *Ibid*, § 456.

1138 *Ibid*, § 432 and 436.

1139 *Ibid*, § 431 and 433.

1140 *Ibid*, § 657.

Belgian courts that reducing emissions by 25% by 2020 compared to 1990 was necessary¹¹⁴¹.

Regarding the 2030 timeframe and beyond, the ECtHR stated that there is a “reduced margin of appreciation for the States” concerning “the setting of the requisite aims and objectives”, while States benefit from “a wide margin of appreciation” about the choice of means (i.e., the concrete policies to implement mitigation goals)¹¹⁴². More precisely, the temperature goal of the Paris Agreement “must inform the formulation of domestic policies”¹¹⁴³ and that it is “currently required” to limit warming to 1.5°C¹¹⁴⁴. According to the unanimous Grand Chamber, “Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades.”¹¹⁴⁵ This finding does not meet the applicants’ requests in *Klimaseniorinnen* and *Duarte Agostinho*, and the expectations of this thesis, laid out in the subdivision above. In fact, the CAT, Rajamani and others determined that developed States like Switzerland should be neutral by 2030. And although the applicants argued that Switzerland could compensate for a domestic lack of fair share with climate finance or compensatory measures overseas, the Court remained silent in this respect.

To assess the consistency of Switzerland’s targets with the global 1.5°C objective, the ECtHR (only) provided indications in relation to the *equal per capita* criterion¹¹⁴⁶. While the criterion *equal per capita* is part of the fair share methodology, it does not represent fairness in itself, as it assumes that everyone in the world has contributed equally to warming or has the same level of economic capability, which is not true. However, the Court stated Switzerland’s approach was inconsistent “*even*” under this criterion¹¹⁴⁷, meaning that it would be *even* less consistent under the others. Nonetheless, the Court did not provide any further indications, despite acknowledging the relevance of respective capabilities (CBDR-RC

1141 *Ibid*, § 558: “This meant that the industrialised countries (such as the respondent State) had to reduce their emissions by 25-40% by 2020 compared to 1990 levels.”

1142 *Ibid*, § 543.

1143 *Ibid*, § 547.

1144 *Ibid*, § see especially 558: “the currently required 1.5oC limit”.

1145 *Ibid*, § 548.

1146 *Ibid*, § 569.

1147 *Ibid*, § 569.

principle)¹¹⁴⁸, and “the States’ generally inadequate track record in taking action [...] in the *past several decades*.”¹¹⁴⁹ In the view of this thesis, these elements should have prompted an assessment in relation to capability and historical responsibility. Hence, despite leaving many doors half-opened, it is somewhat disappointing that the Court did not further specify how the margin of appreciation is reduced by basing itself on the different fair share criteria, including historical responsibility and economic capabilities. Still, the Court could assess historical responsibility in future cases (see Part 3 of this thesis).

However, beyond the duty to define the overall ambition, which must be consistent with the related global carbon budgets¹¹⁵⁰ (a), the ECtHR also stated that States must set out sectoral and intermediate targets (b), which are effective and credible (c), while also ensuring that they are updated based on due diligence and best available evidence (d), and implemented adequately and in “good time” (e)¹¹⁵¹. While those obligations overlap to some extent with those of the Paris Agreement¹¹⁵², this thesis believes, in line with other authors of legal literature, that it was important for the Court to interpret at least the Convention in harmony with the Paris Agreement to ensure judicial supervision of climate mitigation¹¹⁵³.

Regarding redressability, the Court argued that one shortcoming or “lacunae” as the Court phrased it in the context of this case, is not necessarily enough to find non-compliance with the Convention¹¹⁵⁴. Moreover, the

1148 *Ibid*, § 571.

1149 *Ibid*, § 542.

1150 *Ibid*, § 550 (a) and § 572.

1151 *Ibid*.

1152 For example, similar to the duty to show that the concrete measures are sufficient and duly implemented pursuant to § 550 (c), Article 4 (2) PA specifies that the domestic mitigation measures must be set out “with the aim of achieving the objectives” of the NDCs. Furthermore, NDCs shall meet the standards of “clarity, transparency and understanding” (Article 4 (8)). Additionally, akin to the obligation to update the GHG reduction targets based on due diligence and best available evidence established in § 550 (d), Article 4 (4) PA provides that each (updated) NDC “will represent a progression”. Article 4 (1) PA foresees the consideration of “best available science”. Moreover, akin to the duty to act in good time established in § 550 (e), Article 4 (1) of the PA requires “rapid reductions”, paragraph 9 of the same article compels State parties to update their NDCs every five years; which can furthermore be adjusted any time (para 13).

1153 See, notably, Voigt C, “The Power of the Paris Agreement in International Climate Litigation”, *RECIEL*, 2023 p 244 -248; Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law*.

1154 ECtHR, *Klimaseniorinnen v Switzerland*, no. 53600/20, 9 April 2024, § 551.

Court found that States can supplement the protection afforded by mitigation with adaptation measures¹¹⁵⁵, akin to the German Constitutional Court's (see subdivision 2.3.2.3.2 above). These findings may give the State even more leeway to determine the right level of mitigation ambition.

Lastly, it is worth noting that the Court did not set out the expectations with regard to extraterritorial emissions, although it did allude to the applicability of the law to "embedded emissions" related to the import of goods¹¹⁵⁶.

Still, despite leaving certain matters unsettled, and despite granting a relatively broadly defined margin of appreciation to States, the ECtHR's judgement *could* favour climate action thanks to the three following factors:

- (i) the ECtHR's assertion that human rights protection also requires the tackling of climate change (recognition of general CDD), which hinders a possible defence of States – as highlighted by authors in the literature – that they retain full control over substantive climate policies due to the absence of proper substantive climate obligations, or perhaps even contradictory human rights obligations¹¹⁵⁷;
- (ii) similarly, the harmonised interpretation of the Convention with the PA (so-called "Paris aligned interpretation"¹¹⁵⁸) enables a consistent interpretation of the law, and, in turn, prevents the fragmentation of the law;
- (iii) the ECtHR judgement sets up a parallel but legally binding forum that compels States to justify their stance, both through its own jurisdiction, and through the enforcement capacities of its judgments by the Committee of Ministers, which is tasked to "assess the specific measures to be taken"¹¹⁵⁹. The simple fact of recognising the applicability of a preexisting legally binding system relevant to 46 States to climate action – one crucial missing element of the PA – may strengthen mitigation and adaptation (see the arguments of the added value of climate litigation with respect to the PA in subdivision 1.3.2.2.3).

1155 *Ibid*, § 552.

1156 *Ibid*, § 287 – 288; see as well the individual opinion of Judge Tim Eicke, § 4

1157 See for arguments of authors in the legal literature in that respect: Mayer B, "Climate Change Mitigation as an Obligation under Human Rights Treaties?" (2021) 115(3) *American Journal of International Law* p 436.

1158 Voigt C, "The Power of the Paris Agreement in International Climate Litigation", *RECIEL*, 2023 p 249.

1159 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 657.

However, despite the balanced outcome, Switzerland has not accepted this judgement, criticising instead “the extension of the ECHR to include protection against climate change”¹¹⁶⁰. The government even claimed to comply with the judgment, as the Swiss Parliament adopted a new legislation on climate action, some time before the Court issued its judgement¹¹⁶¹. The Committee of Ministers will thus have to determine whether the Swiss stance is valid – or not –, and more generally, what the ECHR system can play a role in ensuring adequate climate action¹¹⁶². At the time of writing, the Committee of Ministers already considered that Switzerland indeed complied with the judgement by welcoming its new Swiss framework legislation, and its implicit attempt to calculate the remaining carbon budget, and merely requesting that Switzerland establish a scientific counselling body¹¹⁶³. As some authors of the literature rightly pointed out, these decisions by the Committee of Ministers are “deeply concerning” since they do not correspond to what the ECtHR required¹¹⁶⁴.

Beyond Switzerland, it remains unclear whether the ECtHR could, for example, establish lacunae in the EU's policies. The EU seems to have complied with multiple courts' requirements, as it enhanced its laws between 2021 and 2024 to respond to the 1.5°C goal, particularly by adopting the so-called “European Climate Law”¹¹⁶⁵. The ECtHR even cited this European legislation as a good example in the *KlimaSeniorinnen* judgement with regard to its *procedural* dimension¹¹⁶⁶. Furthermore, the EU's objective of a 55% reduction by 2030 compared to 1990, and the climate neutrality objective by 2050, *could* be in line with the ECtHR's indications – albeit

1160 See, Conseil fédéral de la Suisse, “Le Conseil fédéral clarifie sa position sur le verdict de la Cour européenne des droits de l'homme concernant la protection du climat”, Berne, 28 August 2024; see as well this press article, Euronews, “An ‘embarrassment’: Experts explain what could happen as Switzerland rejects landmark climate ruling”, 7 September 2024.

1161 *Ibid.*

1162 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/209, April 2024, § 657.

1163 Committee of Ministers, Ministers' Deputies, Decisions CM/Del/Dec(2025)1537/H46-37, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (Application No. 53600/20), § 5.

1164 Heri C, Blattner C E and Cadalbert T, “Another Brick in the Wall of KlimaSeniorinnen: The Committee of Ministers' September 2025 Monitoring Decision” (2025) *EJIL: Talk*.

1165 Regulation (EU) 2021/1119 of The European Parliament And Of The Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’).

1166 *Ibid.*, § 571.

this point remains unclear. Moreover, the fact that the Grand Chamber rejected *Duarte Agostinho v 32 States* (including all States of the EU) could be interpreted as another indication that the EU may comply with the principles in *KlimaSeniorinnen*. However, this was rejected for other reasons, including extraterritorial jurisdiction, exhaustion of domestic remedies, and victim status.

More precisely, regarding extraterritorial jurisdiction in *Duarte Agostinho*, the Court stuck to its previous jurisprudence and dismissed the case, even though the CRC and the German Constitutional Court have upheld complaints from foreign individuals (see section 2.3.2.3). The ECtHR considered that the principle governing Article 1 of ECHR is different, and, in principle, restricted to a territorial approach¹¹⁶⁷. Additionally, the ECtHR feared an unlimited number of cases against European States if it had provided for extraterritorial jurisdiction, which could have had far-reaching consequences¹¹⁶⁸. In the view of this doctoral dissertation, the Court could have made an exception for climate cases, especially *mitigation* cases, since the pronouncement of the legal obligations in this area requires, in principle, only one judgement, unless some circumstances change significantly over time.

To conclude this subdivision on the ECtHR's judgements, this thesis argues that the ECtHR's position reflects *general* due diligence in the human rights area and represents a consistent incremental development of law, in harmony with relevant international law, with the following caveats:

- (i) Firstly, this thesis deems that the ECtHR judgements did not set out clearly enough the fair share requirements, including with respect to climate finance (consideration of all criteria, especially historical responsibility and economic capabilities). This lack of clarity does not make the mandate to supervise the implementation of the ruling by the Committee of Ministers an easy task. Nonetheless, the Court could elaborate in later cases on secondary obligations if applicants submit historical violations of the primary duty (see part 3 of this thesis).
- (ii) Secondly, the Court should have provided for extraterritorial jurisdiction in the *Duarte Agostinho* case, at least exceptionally in the climate mitigation realm.

1167 ECtHR, *Duarte Agostinho et al v 32 countries*, no. 39371/20, 9 April 2024, § 210 – 214.

1168 *Ibid.*, § 206 – 208.

- (iii) Thirdly, the Court could have clarified the expectations with regard to the duty to regulate extraterritorial emissions.

In other words, while the Court did not fall into one of the traps identified by Mayer and Van Asselt, its pronouncements remained somewhat too cautious and vague¹¹⁶⁹.

2.3.2.6 Intermediate conclusion

While some courts awarded the requested reliefs in *general* CDD cases against States, they all stressed that they must carry out this task with restraint to respect the separation of powers.

Concerning subsection 2.3.2.1: The *Urgenda* case, the first “framework” or “systemic mitigation” case having granted a claim based on *general* CDD, broke new ground by redefining court powers concerning holding a State to account for the worldwide problem of climate change. To do that, it relied on the “common ground” method¹¹⁷⁰, especially two main ingredients: firstly, on the consensual science to establish the risks and the required level of ambition, notably the IPCC reports; and secondly, on the international COP decisions and EU commitments to show that States – the EU and The Netherlands – recognised the risks and the need to reduce emissions at least by 25% by 2020 compared to 1990. Hence, while this case somehow leaves the impression that it “reshaped” the State’s ambition (by raising the ambition upwards from 14-17% to 25%), one must also be clear that this ambition was previously recognised as necessary by the State and the international community, and that the reunion of these elements fundamentally limits any creative interpretation of *general* CDD.

Concerning subsection 2.3.2.2: While the systemic mitigation *Juliana et al v USA* case failed before the US Court of Appeals and the Supreme Court, it is important to recall that the plaintiffs’ requests far exceeded the ambition of the requests in *Urgenda*; as they requested the limitation of warming to 1°C (or 350 ppm), which is considerably more ambitious than the 2°C (450 ppm) objective enforce by the Dutch courts. This difference means that the plaintiffs in *Juliana* did neither rely on the IPCC science nor on high-level diplomatic decisions of the COP, nor the international

1169 Mayer B and van Asselt H, “The Rise of International Climate Litigation” (2023) *RECIEL* p 8.

1170 ECtHR, *Demir and Baykara v Turkey*, no. 34503/97, 12 November 2008.

climate conventions such as the UNFCCC or the PA. The absence of those ingredients, combined with the radicality of the requests – framed in such a way to seek the exclusive responsibility of the USA to return to 1°C, contrary to the shared responsibility principles – may explain the failure of this case. Either way, no one can rule out the possibility that US courts approve the redressability and ultimately grant a claim relying on the consensual science in the future and by leaving more leeway to the government, although the current conservative majority at the US federal Supreme Court recently provided opposing signals.

Concerning subsection 2.3.2.3: The German courts partly confirmed the validity of the *Urgenda* reasoning in two cases: firstly, the Berlin Administrative Court applied the *Urgenda* criteria, but, it did not find any manifest violations due to the apparent higher ambition pursued by Germany in terms of mitigation than The Netherlands with respect to 2020 (i.e., the State aimed to reduce its emissions by 40% compared to 1990). Subsequently, the German Constitutional Court recognised the applicability of the duty to protect human rights in the climate realm and found that the lack of sufficiently specific reduction targets and measures for the period after 2030 violated the intertemporal liberties protected by the Constitution, aimed at protecting the young and future generations. Although this finding is different from the one in *Urgenda*, the Court also confirmed to some extent the validity of the *Urgenda* principles with respect to the need to set out a minimum level of ambition in the GHG reduction targets, which need to be fair with respect to the international community. As to the effects of the judgement, while the government quickly reacted and increased the ambition of its 2030 target, one must keep in mind that the government did this voluntarily, also in view of complying with the enhanced European climate targets. Said differently, the judgement itself did not compel to do so.

Concerning subsection 2.3.2.4: The Brussels courts (first instance and appeal) confirmed as well the *Urgenda* reasoning by recognising the applicability of the ECHR in the climate realm and the breach due to a *specific* non-compliance; the Court of Appeal subsequently issued an injunction to reduce the 2030 emissions by 55% compared to 1990, based on human rights and tort law. To issue such an injunction, the Brussels Court of Appeal also relied on IPCC science and EU policies, considering it is necessary to achieve this minimum level of protection to ensure Belgium does its part to limit warming to 1.5°C.

Concerning subsection 2.3.2.5: This section addresses the relevant issues in the ECtHR cases, especially those concerning the extent to which courts can enforce the most onerous interpretation of fair shares in the framework of *general* CDD (i.e., the applicants claimed that European States needed to be climate neutral by 2030), which eventually resulted in rather careful decision position by the Grand Chamber of the ECtHR on 9 April 2024. This decision left a margin of appreciation similar to the PA to determine the required level of ambition. Factual elements can explain this: no precise and consensual elements existed on the States' fair share. While the merits of this judgement remain contested by Switzerland, it remains to be seen whether the Convention system can effectively and adequately ensure redress.

In any case, none of the judgements established that States must limit warming to 1.5°C by properly considering historical responsibilities and economic capabilities (i.e., *fair share*), nor that developed States should be climate neutral around 2030¹¹⁷¹. Theoretically, secondary obligations aimed at compensating historical wrongful conduct could fulfil this goal and ensure the historical responsibility criterion of the fair share is considered (see Part 3 and the general conclusion).

2.3.3 Corporate CDD: towards the redressability of 1.5°C best efforts requests

After having found that it is necessary to rely on consensual elements in science and policy to interpret and enforce *general* CDD against States, this section assesses the redressability of *corporate* CDD by considering developments in case law and legislation. It is structured as follows:

Subsection 2.3.3.1 discusses the *Shell* case and the extent to which the *general* corporate CDD duty to limit global warming to 1.5°C can be specified in light of the applicants' claims. Subsection 2.3.3.2 performs a similar exercise with the pending cases in France, especially the *TotalEnergies* case, which was recently declared admissible by the Paris Court of Appeals in June 2024. Subsection 2.3.3.3 argues that the German courts' dismissals of cases against carmakers because of *lex specialis* reasons do not demonstrate

1171 See, among others, Rajamani L, Jeffery L, Höhne N, Hans F, Glass A, Ganti G and Geiges A, "National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law" (2021) 21(8) *Climate Policy* p 18.

the inapplicability of the general CDD of parent companies over scope 3 emissions. In a similar vein, Subsection 2.3.3.4 contends that the US federal courts' case dismissals due to *lex specialis* and other related separation of powers issues do not demonstrate that reasonable cases seeking individual due diligence requirements over worldwide emissions are not redressable. Subsection 2.3.3.5 lastly argues that the European Corporate Sustainability Due Diligence Directive (CSDDD), enacted in 2024, but under renewed political discussion due to global competitiveness concerns and US political pressures, could miss an opportunity to lawfully harmonise the *general* CDD requirements in the EU.

2.3.3.1 The Milieudefensie v Shell case testing the Urgenda approach

The question of the applicability of the *Urgenda* case law to corporations arose in 2018 when the NGO Milieudefensie sent a formal notice to the parent company of the multinational corporation Shell (i.e., the top holding company of the group)¹¹⁷².

As mentioned in the introduction, the Hague court of first instance ordered Shell to reduce its worldwide direct and indirect greenhouse gas emissions (scopes 1, 2 and 3) by 45% by 2030 compared with 2019¹¹⁷³. However, the Hague Court of Appeal reversed the injunction in 2024, while still upholding many previous findings¹¹⁷⁴. Hence, are the principles in *Urgenda* still applicable and adaptable to a private actor that controls activities worldwide?

2.3.3.1.1 The redressability of a general corporate CDD duty

As in the *Urgenda* judgment at first instance, the only legal basis for this injunction is the duty of care under Dutch tort law¹¹⁷⁵. Both courts linked

1172 Milieudefensie et al, *Formal Notice to Shell (Liability for Inadequate Climate Policy)* (4 April 2018) https://www.foei.org/wp-content/uploads/2018/06/Milieudefensie_legal_letter_Shell_4-April-2018.pdf, last accessed 20 October 2025.

1173 District Court of The Hague, *Milieudefensie et al v RoyalDutch Shell*, 26 May 2021, § 5.

1174 Court of Appeal, *Shell*, ECLI:NL:GHDHA:2024:2100, 200.302.332/01, 12 November 2024.

1175 The Court also cited Book 6 Section 162 Dutch Civil Code, alongside the *Kelderluik* judgment of 5 November 1965 by the Dutch Supreme Court which set out the

the standard of care of the “reasonable person” to the Human Rights Due Diligence (HRDD) concept of the UNGPs¹¹⁷⁶.

Some authors criticised this linkage for its lack of legal certainty, given that the UNGPs are only soft law¹¹⁷⁷. While legislators in France¹¹⁷⁸ and Germany¹¹⁷⁹ have enacted laws to implement the UNGPs into “hard law”, has the Dutch Court exceeded its powers by interpreting the common tort duty of care as a climate extraterritorial duty for Shell? The state of the law differs in the Netherlands from France and Germany, as no specific laws require(d) parent companies of multinationals to reduce emissions in the Netherlands – except, the European Directive CSDDD, adopted in 2024, which is, however, at the time of writing, not transposed in the Netherlands and the subject of renewed political discussion on the European level (see below). Thus, the duty of care under general common law remains applicable by default, and also enforceable¹¹⁸⁰. Also, as was seen in the introduction, the central concept of HRDD is itself inspired by the general duty of care. The Court’s reasoning is therefore not incongruous; on the contrary, the “cross-fertilisation” between these two elements seems entirely logical, since parent companies have the capacity to prevent harm that may be caused by their groups by establishing appropriate group-wide policies.

Moreover, the finding of the courts that each company must do its part to contribute to the Paris Agreement by adequately reducing scope 1, 2 and 3 emissions, is perfectly in line with the case law that has enforced *general* CDD against States, including Urgenda¹¹⁸¹ (see section 2.3.2 above). It is worth underscoring that the Court of Appeal of The Hague has confirmed

standard of the reasonable person (ECLI:NL:HR:1965:AB7079). The Court uses the expression “standard of care” in the *Shell* judgment in the English translation, whereas it used the term “duty of care” in the *Urgenda* case. However, it refers to the same concept, as shown in the introduction and Part I.

1176 District Court of The Hague, *Milieudefensie v Shell*, 26 May 2021, *op cit*, § 4.4.11. to 4.4.22.

1177 Aurer VIL, “An assessment of the Hague District Court's decision in *Milieudefensie et al v Royal Dutch Shell PLC*”, *Climate Law Blog*, 28 May 2021.

1178 Se. Explanatory memorandum of the Proposition de Loi n° 2578 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, registered at the Presidency of the National Assembly on 11 February 2015. p 4.

1179 See Bundesregierung, *Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten*, 19/28649, 19. Wahlperiode, 19.04.2021, pp 2 and 3 and p.23.

1180 The Court of Appeal of Den Haag confirmed this view: see *Milieudefensie v Shell*, ECLI:NL:GHDHA:2024:2100, 200.302.332/01, 12 November 2024, § 7.28 - 7.53.

1181 See District Court of The Hague, *Shell*, *op cit*, § 4.4.49-50.

this general obligation¹¹⁸². This recognition of an overarching duty supports the hypothesis in the introduction and the findings in Part 1, which consider that each actor contributing to global warming – whether private or public – must carry out due diligence to mitigate warming. It is further the corollary of the overarching duty to limit global warming in line with the international consensus, as laid out by ECtHR in *KlimaSeniorinnen*¹¹⁸³, and the ICJ in its advisory opinion¹¹⁸⁴.

These developments show that Dutch courts are ready to redress *general* corporate CDD violations by overseeing whether the respondent approached the mitigation issue with due diligence and implemented all reasonable measures to limit warming to 1.5°C. Nonetheless, it is unclear whether it is possible to specify this general obligation.

2.3.3.1.2 The level of consensus surrounding the claims, and the discretion left by them

The plaintiffs' requested injunction in *Shell* draws heavily on the way in which the Urgenda Foundation made its case against the State. The same lawyer, Roger Cox, was behind the inception of those cases. The legal strategy was twofold. The first step consisted of highlighting the risks of overstepping 1.5°C to ground a general duty to limit warming to this level. Subsequently, the claimants advanced one of the key values of the 1.5°C pathways without or limited overshoot, namely that *global* GHGs must be reduced by approximately 45% by 2030 compared to 2010¹¹⁸⁵. This indication stems from the summary for policymakers of the 2018 IPCC SR1.5, meaning it was reviewed and accepted by States. The COP 26 decision also recognised the need to achieve this reduction after the judgement was issued¹¹⁸⁶. Therefore, there was a strong consensus behind this indication.

Moreover, as the plaintiffs have pointed out, even if the world manages to reduce emissions by 45% by 2030 (which seems impossible in 2026, at

1182 See Court of Appeal of The Hague, *Shell*, *op cit*, § 7.67.

1183 ECtHR, *KlimaSeniorinnen*, no. 53600/20, 9 April 2024, § 550 (see subdivision above 2.3.2.5.2).

1184 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 282 – 292.

1185 IPCC, SR1.5, SPM, § C.1.

1186 COP 26 decision, “Glasgow Climate Pact”, *FCCC/PA/CMA/2021/10/Add.1*, 13 November 2021, § 15 – 17.

the time of writing), there would be only a 50% chance of achieving the 1.5°C objective, and an 85% chance of staying below 2°C¹¹⁸⁷. The NGO Milieudéfensie, therefore, asked the court to order Shell to align itself with this percentage reduction. The court of first instance accepted this reasoning, even if it means that the company needs to adjust its energy mix and reduce its fossil fuel production. One of the points that tipped the balance in favour of climate protection was the court's weighing of the protection of human rights against the company's economic interests¹¹⁸⁸, with the court arguing that the threat of potential violations is such that "private companies such as Shell may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions in order to prevent dangerous climate change". In the first instance court's view, this stance is even more justified in light of Shell's position, a very profitable company from the Global North.¹¹⁸⁹ While this stance seems valid to a certain extent, the Court should have probably gone further in the proportionality assessment, as some issues exist with the injunction to reduce emissions by 45% by 2030.

Firstly, one important difference with the *Urgenda* case is that this scientific indication was not accepted by the respondent, in the sense that the company did not set such a target for itself. However, Shell did share the 2050 target in line with the 1.5°C pathway, as part of its aim to become a net zero company by then. Hence, as the end goal was also recognised by the company, there may still be some voluntary recognition of the 1.5°C pathway.

Secondly, while the 45% reduction goal was one of the most consensual ones, both scientifically and diplomatically, it is questionable whether it is adapted to the situation of a multinational oil company¹¹⁹⁰. In fact, in the

1187 Milieudéfensie et al, *Summons to Shell*, unofficial translation of the Dutch original (2018) § 33, 740 milieudéfensie-et-al-v-royal-dutch-shell-plc_8e611f046b2e29d3e930e2c2439d2245.pdf, last accessed 20 October 2025; The uncertainties are linked to various factors including the precise accumulation of GHG emissions over time and the transient response of the climate to the concentration of GHG in the atmosphere (the precise warming resulting from a certain concentration). For more information on this subject, see IPCC, SRI.5, TS, 2018, p 33.

1188 District Court of The Hague, *Shell*, 26 May 2021, *op cit*, § 4.4.53.

1189 *Ibid*, § 4.4.53.

1190 These developments, and those that follow, are inspired by the following published articles: Mougeolle P, "La diligence raisonnable en matière des droits de l'homme: un catalyseur de la responsabilité climatique des multinationales?" (2022) *Journal européen des droits de l'homme* ; Mougeolle P, "La responsabilité climatique de

most ambitious 1.5°C scenario indicated by the 2018 IPCC special report on 1.5°C (SR1.5), world oil production would fall by 37% in 2030 compared with 2010, and global gas production by 25%¹¹⁹¹. These values are even lower in the 1.5°C scenario recently developed by the International Energy Agency (IEA) in 2021, which forecasted a reduction of 2.3% per year for oil over the decade 2020-2030 (so, a 20.7% reduction between 2020 and 2030) and 1.6% per year for gas (so a reduction by 14.8% by 2030)¹¹⁹². Further, on a global scale, the 45% cut by 2030 is supposed to be achieved by various means, including a major cut in the use of coal (as it is the most polluting fossil fuel), but also a reduction in energy consumption, an increase in energy efficiency, and the rise of decarbonised energies. As Shell only has the power to mitigate global warming by addressing its oil and gas operations, the global GHG reduction indications may seem somewhat irrelevant to the company. Instead, it should consider sectoral figures when devising mitigation objectives and measures. Similar considerations led the Dutch Court of Appeal of The Hague to dismiss the case for lack of consensus¹¹⁹³.

Nonetheless, given that it is a *general* due diligence case, concerned with indirect and worldwide scope 3 emissions¹¹⁹⁴, the Court should, in principle, only impose a best efforts obligation, given its limited control over those emissions (see subsection 2.2.2.2 on attribution of indirect emissions such as scope 3). However, the court of first instance went somewhat beyond this by imposing “a *significant best-efforts*” obligation on scope 3 emissions¹¹⁹⁵, which basically means that expectations are high and stringent. In any case, the nature of the best efforts obligation – including the “significant” best efforts obligation – means that the company is not in breach of its obligation if it can justify that its implementation involves consequences that are impossible to achieve, ineffective, or entirely dispro-

la société mère de Shell selon le Tribunal de la Haye et ses effets d’entraînement attendus en France” (2021) *La Revue des droits de l’homme*.

1191 IPCC, SR1.5, SPM, p 14; note that the other, less ambitious scenarios that rely on such technologies (scenarios P2, P3 and P4 in the 1.5°C special report cited above), the reductions indicated for the oil and gas sector are significantly lower.

1192 IEA, “Net Zero by 2050: A Roadmap for the Global Energy Sector”, 2021, p 195, Table A.1.

1193 Court of Appeal of The Hague, *Shell*, *op cit*, § 7.67 - 7.96.

1194 Scope 3 emissions make 85 to 90% of the emissions of oil and gas companies such as Shell, as they only extract, refine and transport hydrocarbons to the end user, who *ultimately* combusts them, the stage that emits the most GHGs in their life cycles (see also Heede R, *The Carbon Majors Dataset*, CDP, 2017 p 5).

1195 District Court of The Hague, *Shell*, 26 May 2021, *op cit*, § 4.4.55 of the judgment.

portionate. In the *Shell* case, this nature of the injunction means that the company must use all the means at its disposal to reduce emissions by 45%, but if this objective is impossible to achieve due to external factors, then the company does not incur liability.

As explained in subpart 0.2 of the introduction and subpart 1.3 on domestic general law, this best efforts nature is inherent to the concept of *general* due diligence. This is furthermore highlighted by the interpretation of due diligence in the UNGPs¹¹⁹⁶, the French Duty of Vigilance¹¹⁹⁷, the German Supply Chain Law¹¹⁹⁸, and, most recently, the CSDDD¹¹⁹⁹. The best efforts nature of the obligation enables conciliation of opposing interests, such as the human rights of affected individuals, companies' interests, and the interests of other States, as further explained by the CESCR General Comment n° 24¹²⁰⁰ and in subsection 0.2.2.3 of this thesis. It also provides the opportunity for the concerned actors to reconcile opposing interests in the context of a lack of consensus, while ensuring court supervision. Said differently, the notion of best efforts takes a similar role to the concept of the margin of appreciation under the ECtHR *KlimaSeniorinnen* ruling in that it provides leeway and discretion to the duty bearer.

In light of these conditions, the court order *could* have been upheld by the Court of Appeal, which, however, decided to overrule the injunction, because of a lack of consensus and effectiveness surrounding the requested target¹²⁰¹.

1196 V Principle 17 of the Guidelines and the definition of due diligence set out in the introduction.

1197 Potier D, "Rapport No. 2628 sur la proposition de loi (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", 11 March 2015, p 31: "[d]ue diligence constitutes an obligation of means and not of result."

1198 According to the explanatory memorandum to the German legislation, "The law creates an obligation to make efforts, but not an obligation to achieve results". V Bundesregierung, *Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten*, 19/28649, 19. Wahlperiode, 19.04.2021, p 2.

1199 CSDDD or "Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence" Recital 19.

1200 CESCR, General Comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, § 33.

1201 Court of Appeal of The Hague, *Shell*, C/09/571932 / HA ZA 19-379, 12 November 2024, § 7.67 - 7.96. See as well, the following short commentary: Van Asselt H and Savaresi A, "Corporate Climate (Un)Accountability? Landmark Shell Ruling Overturned on Appeal", *Centre for Climate Engagement, Hughes Hall, University of Cambridge*, 13 November 2024.

2.3.3.1.3 The need to provide proportionate claims based on due diligence

The problem of the effectiveness or proportionality of the requested injunction can be summarised as follows. To comply with the reduction order, it is almost certain that Shell should stop exploring new oil and gas fields to meet a 1.5°C trajectory, or curb the production of its existing wells. If implementing this is not profitable for the company, which is likely to be the case, Shell will probably sell the problematic assets to third parties. This resale is possible as long as its competitors do not face the same obligation. Such a *substitution* constitutes some form of *carbon leakage*, as Shell argued, and would not bring the desired reductions on a global scale. The UN criteria of the UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities and the ISO Guidelines also request that companies avoid transferring fossil fuel and polluting assets to other actors to prevent leakage¹²⁰². The Court of Appeal agreed with this reasoning and therefore cancelled the injunction for lack of effectiveness, but should have rather mentioned the principle of “proportionality”. Indeed, the lack of proportionality was an entangled reason to overrule the first judgment¹²⁰³.

This problem requires further discussion. It seems that there was a misunderstanding regarding the required outcome. The Court of Appeal noted that the applicants had argued that the consequences of the ruling should lead Shell to sell its assets to others, in line with its very stringent reduction obligation¹²⁰⁴. However, the court of first instance imposed a “significant best-efforts” duty, which cannot require measures that are disproportionate, even more so if they are ineffective, such as the resale of assets to comply with a personal reduction order. In this regard, the Court of Appeal misunderstood the meaning of a best efforts duty, which cannot, in principle, require those actions.

1202 UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, “Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions”, 2022, p 23; ISO, “Net Zero Guidelines: Accelerating the Transition to Net Zero”, IWA 42:2022(E), p 20, § 9.1.2.

1203 Court of Appeal of The Hague, *Shell*, C/09/571932 / HA ZA 19-379, 12 November 2024, § 7.108 - 7.110.

1204 *Ibid*, § 7.110: “It has not been established in the present proceedings that downsizing the resale activities of Shell Trading will lead to a reduction in CO2 emissions. Since the latter is precisely what Milieudéfensie et al seek to achieve with the reduction order they claimed, the conclusion is that such an order with regard to scope 3 emissions is not effective and Milieudéfensie et al therefore have no interest in their claim.”

It is further interesting to delve into the reasons why the court of first instance took a different view on those issues. The reasons for the difference of opinions lie mainly in two main factors. Firstly, according to the *Production Gap Report* published by the United Nations Environment Programme (UNEP)¹²⁰⁵, a temporary reduction in oil and gas production leads to a certain decrease in consumption. The Court of Appeal contested the relevance of this study for showing the same relationship of cause and effect in the Shell case, by noting that it concerned the American market, and that the conclusions could not have been extrapolated to a specific company such as the defendant in the context of this case¹²⁰⁶. However, it is unclear whether the Court of Appeals has overlooked other expert reports showing similar effects in the context of a specific company, as an expert in the proceedings argued¹²⁰⁷.

Secondly, the first instance court noted that Shell's defence referred to the context of *business as usual* to support its argument relating to *perfect substitution*. However, the court pointed out that the international community concluded the Paris Agreement in 2015, and that its implementation necessarily entails an energy transition, in other words, a *dynamic* completely different to a *static* business-as-usual scenario. This means that other fossil fuel producers will necessarily have to *do their part* too¹²⁰⁸. Furthermore, the court may also have been receptive to the applicants' argument, following which its injunction could have indirect ripple effects, leading to wider changes in this direction. They supported their argument by showing that, since the *Urgenda* case, numerous other claimants have succeeded in suing other States¹²⁰⁹. A similar scenario cannot be excluded for corporate

1205 District Court of The Hague, *Shell, op cit*, § 4.4.50 of the *Shell* judgment referring to Production Gap report 2019, p 50. Moreover, according to the expert report commissioned by the plaintiff associations, even a temporary halt in production - linked, for example, to a resale of Shell's assets - would disrupt energy supplies and increase prices, which would also have the effect of reducing consumption in the long term: Erickson P, "Review of Mulder et al 2020", Stockholm Environment Institute (U.S. Center), 11 December 2020, <https://www.sei.org/wp-content/uploads/2021/05/erickson-shell-letter-final.pdf>, last accessed 28 October 2025.

1206 Court of Appeal of The Hague, *Shell, op cit*, § 7.107.

1207 Green F, "Shell v Milieudefensie: Sowing the Seeds for Future Climate Litigation against Fossil Fuel Producers" (2024) *Climate Law and Litigation Blog of the British Institute of International and Comparative Law*.

1208 See District Court of The Hague, *Milieudefensie v Shell*, 26 May 2021, C/09/571932 / HA ZA 19-379, § 4.4.49 – 4.4.50.

1209 Rotman J, "Expert Report in *Milieudefensie et al v Royal Dutch Shell*", C/09/571932 / HA ZA 19-379, 2021.

cases. In reality, this scenario materialised to some extent, as the Shell case influenced the European Union, which ultimately integrated climate due diligence obligations in the CSDDD¹²¹⁰. However, the Court of Appeal has not appeared to be receptive to these arguments. It only stated that “a potential signalling effect of a reduction order on other fossil investors is too speculative, and too far removed from Shell’s alleged unlawful conduct to serve as an interest in the reduction order.”¹²¹¹ By simply rejecting one dimension of this argument, the Court of Appeal seems to have dealt too quickly with this case.

Lastly, there is one ultimate limitation, linked to the international business freedoms and the level-playing field, and the fungibility of businesses: Shell could simply relocate the parent company’s headquarters (as it did by moving to London¹²¹²) to circumvent the injunction. While the existence of climate-related harms in a given country, such as the Netherlands, *could* ground the jurisdiction of the corresponding domestic courts (see, for instance, the provisions of the Brussels I Regulation¹²¹³), the judgement still needs to be enforced then by foreign authorities, if the parent company located overseas refuses to comply. The relocation of the parent companies is a classic problem in the regulation of multinationals¹²¹⁴. Only an international solution could provide an adequate solution to this problem, such as adopting a business and human rights treaty, like the one discussed annually in Geneva, or further developing the COP decision to transition

1210 The impact assessment of the CSDDD prepared by the European Commission staff notably mentioned the *Milieudefensie v Shell* judgement multiple times (see European Commission, “Commission Staff Working Document Impact Assessment Report”, Accompanying the Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 February 2022, p 34 especially).

1211 Court of Appeal of The Hague, *Shell*, C/09/571932 / HA ZA 19-379, 12 November 2024, § 7.109.

1212 Bloomberg, “Shell Investors Back Headquarters Move to U.K.”, 2021.

1213 See Article 7 (2) of the Brussel I Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)).

1214 See the following article discussing the constitutional compliance of the law on due diligence with freedom of enterprise (a constitutional principle in France): Mougeolle P, “Sur la conformité constitutionnelle de la proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre” (2017) *La Revue des droits de l’homme* [Online], Actualités Droits-Libertés.

away from fossil fuels¹²¹⁵. In the meantime, States should require the adoption of best efforts in line with the universal human rights and tort law requirements.

Given that the top parent company of Shell has displaced its headquarters to London, it is possible that the plaintiffs will need to pursue the case in the UK to enforce it, should the applicants ultimately succeed before the Dutch Supreme Court. Since the UK jurisdiction pioneered the imposition of a tort *duty of care* on parent companies of multinational companies¹²¹⁶, the UK could prove to be a fertile ground for CDD's enforcement, as seen above in subsection 1.3.3.4¹²¹⁷. In any event, the final outcome of *Milieudefensie et al v Shell* before the Supreme Court will have to be followed closely.

Whatever the outcome of this case before the Supreme Court, a perfect regulatory solution cannot be provided by the sole intervention of a *domestic* State (including its judicial branch) because of the limits imposed by the principle of sovereignty in international law. In fact, one particular State cannot regulate the global demand for hydrocarbons, which is projected to remain relatively stable under current policies either way, still in 2023¹²¹⁸. The only way to properly counter this *global* trend is to rely on international collective agreements, but, in the absence of clear coordinated efforts, systemic actors, whether public or private, shall still do *their share* by carrying out *general* due diligence and the related best efforts.

2.3.3.2 The redressability issues in the French corporate climate cases

The French case of *Notre Affaire à Tous et al v TotalEnergies* (NAAT) is also a systemic mitigation case against a so-called 'carbon major', similar

1215 COP 28, "First Global Stocktake", FCCC/PA/CMA/2023/L.17, 13 December 2023, § 27 - 28.

1216 De Schutter O, "Les affaires Total et Unocal : complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme" (2006) 52 *Annuaire français de droit international* p 94 ; Palombo D, "Chandler v Cape: An Alternative to Piercing the Corporate Veil Beyond *Kiobel v Royal Dutch Shell*" (2015) *British Journal of American Legal Studies* (Max Planck Institute Luxembourg for Procedural Law).

1217 Varvastian Samira and Kalunga Felix, "Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe*", *Transnational Environmental Law*, 2020, p 16-21.

1218 IEA, WEO 2021, p 19-20; IEA, WEO 2023, p 29 – 30.

to Shell¹²¹⁹. Another similar case was launched in 2022 against the financial actor BNP Paribas by NAAT and others, requesting the consistent implementation of the 1.5°C strategy.

2.3.3.2.1 The level of consensus surrounding the claims, and the discretion left by them

Unlike the claimants in *Shell*, NAAT et al requested the enforcement of the overarching corporate CDD duty to limit global warming to 1.5°C by reducing scopes 1, 2 and 3, as a fallback option. They also submitted more precise requests by taking a more sectoral approach focused on fossil fuels. Thus, the specific requests of the claimants in *TotalEnergies* ultimately differ from those in *Shell*, but the general approach remains similar (see subsection 2.3.3.1 just above).

Concerning the legal bases, the applicants rely on the first mandatory due diligence legislation worldwide, namely, the French Law regarding the Duty of Vigilance of parent companies, which obliges large undertakings to supervise their subsidiaries and supply chains to prevent serious human rights abuses and environmental harms, in France and abroad¹²²⁰. In addition, they also base their claims on the general obligation of environmental ‘vigilance’, found by the Constitutional Council in 2011¹²²¹, combined with Article 1252 of the Civil Code. This latter provision, introduced into the Code in 2016, enables courts to order reasonable measures to cease or prevent pure ecological damages in tort cases¹²²². As Part 1 shows, these general legal bases apply to climate change. This opinion was confirmed in

1219 According to the Carbon Majors Reports, TotalEnergies (formerly Total) is one of the 20 companies contributing the most to global warming worldwide (see Carbon Disclosure Project, Heede R, “Carbon Majors Report 2017”) since Total’s direct and indirect GHG account each year for approximately 1% of global emissions (458 Mt CO₂eq).

1220 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, for an English translation and presentation of the Law.

1221 This obligation of environmental vigilance derives from articles 1 and 2 of the French Environmental Charter and has been recognized by the Constitutional Council in the decision: *Michel Z*, n° 2011-116 QPC, 8 April 2011.

1222 Before this reform was passed in 2016, the French Civil Code did not provide for the possibility of claiming pure environmental losses (i.e. *préjudice écologique*); it was only a jurisprudential notion. The lawmaker then also introduced preventive legal actions apart from interim proceedings.

a case against the French State by the Administrative Court of Paris, which ruled that global warming constitutes an ecological injury.

Despite those specific legal bases, some uncertainty remains concerning the extent to which it is possible to request changes in corporate conduct to prevent climate-related harms. Against this background, the NGOs make the following arguments. Firstly, they argue that the 1.5°C transition remains consensual and feasible on a global scale, by showcasing the main corresponding findings of the IPCC and the IEA reports, which also provide indications for the oil and gas industry¹²²³.

Secondly, the applicants consider that the respondent companies have the ability to reduce hydrocarbon production and stop their contribution to further fossil fuel exploration. This is also necessary in order to achieve the 1.5°C goal of the Paris Agreement, as recognised by various different scientific bodies¹²²⁴, specific institutions working on corporate climate standards¹²²⁵, the international community at COP¹²²⁶, or even the French government¹²²⁷. Multinational oil and gas companies such as TotalEnergies and global financial actors such as BNPP, which provide the financial resources to fossil fuel enterprises, are indeed well placed to take action.

Thirdly, even TotalEnergies and BNP recognise the relevance of the temperature objective of the Paris Agreement, and their ability to reduce emissions. More specifically, TotalEnergies adopted in 2020 a “net zero goal

1223 IEA, “Net Zero by 2050: A Roadmap for the Global Energy Sector”, 2021, p 13: “The pathway described in depth in this report [...] is designed to maximise technical feasibility, cost-effectiveness and social acceptance while ensuring continued economic growth and secure energy supplies.”

1224 See, among others, IPCC, AR6, WG III, TS, p 90, Box TS.8; IEA, NZE by 2050, Special Report, May 2021, p 21: “There is no need for investment in new fossil fuel supply in our net zero.”

1225 UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, “Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions”, 2022, p 7: “net zero is entirely incompatible with continued investment in fossil fuels.”

1226 COP 28, “First Global Stocktake”, FCCC/PA/CMA/2023/L.17, 13 December 2023, § 28 : “28. Further recognizes the need for deep, rapid and sustained reductions in greenhouse gas emissions In line with 1.5 °C pathways and calls on Parties to contribute to the following global efforts: [...] (d) Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner”.

1227 The following legislation confirmed that it is necessary to stop new fossil fuel exploration globally to achieve the Paris Agreement temperature objective, see Explanatory Memorandum of the *Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement*.

with society” by 2050¹²²⁸, recognised the need to “transitioning away” by quoting the COP 28 decision¹²²⁹, sets out emissions reduction goals and measures on scope 1, 2 and 3 emissions; and BNP claims to adhere to a 1.5°C strategy in its vigilance plan, including in its financing and investment activities, to reduce the scope 3 emissions¹²³⁰.

Thus, given the preceding analysis in Part 2, the Court of Appeals judgement of The Hague, French courts should at least enforce the overarching *general* corporate duty to implement climate due diligence, such as the one adopted by the CSDDD. It is questionable, however, whether courts can go beyond and specify the requirements by notably ordering specific outcomes with respect to fossil fuels.

2.3.3.2.2 The adequacy and proportionality of the requests

While the 1.5°C energy transition remains possible, in theory, if everyone cooperates to mitigate climate change profoundly¹²³¹, the world is not acting correspondingly, nor is it on track to achieve this objective. According to the international community reunited at COP 28 in 2023, current existing measures lead to 2.1 to 2.8°C¹²³². Thus, the same questions exist as in the *Milieudefensie et al v Shell* case. What can one corporate actor do if the world is not implementing the corresponding 1.5°C measures, especially in the fossil fuel sector? Shouldn’t private enterprises only adapt to State regulations, such as Total did with its commitment to reach net zero in Europe by 2050, consistent with the European Green Deal? Wouldn’t that be counterproductive if only TotalEnergies and BNP Paribas reduce their emissions and cease their oil and gas activities/funding by selling their assets to others, but without any real impact on worldwide emissions (i.e., if their activities are simply substituted)?

1228 Notre Affaire à Tous (NAAT) et autres, *Nouvelles ambitions de Total en matière de changement climatique : une "neutralité carbone" à géométrie variable* ? 5 mai 2020.

1229 TotalEnergies, Document d’enregistrement universel 2023, 29 mars 2024, p 179.

1230 Notre Affaire à Tous, *Benchmark de la vigilance climatique des multinationales* (2023), p 42, and 56.

1231 See, among others, IEA, “Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach”, 2023 Update, p 17 and 147.

1232 COP 28, “First Global Stocktake”, *FCCC/PA/CMA/2023/L.17*, 13 December 2023, § 18.

It is entirely clear that one single private actor cannot effectively mitigate climate change if worldwide state regulations are not in place, nor in a single country. For example, States cannot entirely avoid some rate of carbon leakage when they issue domestic or regional mitigation measures. Nevertheless, the applicants claim in essence that every single actor must *do their part*, as in the contentious cases against States, and therefore, be *proactive*, as the OECD Guidelines establish¹²³³.

In addition, the French Duty of Vigilance Law was rightly adopted to require multinational companies to proactively tackle serious human rights and environmental risks by adhering to a certain *minimum* standard of care, even if the situation abroad or globally does not provide the legal or factual circumstances to meet this standard¹²³⁴. Considering that the Paris Agreement was ratified almost universally and that considerable social and environmental risks are associated with global warming, it is clear that there is a strong interest in pursuing its realisation. Further, as stated above, compelling reasons exist to require relevant corporate actors such as TotalEnergies and BNPP to limit warming to 1.5°C. Accordingly, French courts should at least compel TotalEnergies and BNPP to establish such a Paris-compliant 1.5°C strategy, akin to the CSDDD. If so, the company would still conserve a significant margin of discretion, akin to that of Switzerland, after the ECtHR *KlimaSeniorinnen* ruling (see the subdivision above 2.3.2.5.2).

What could applicants argue if they consider the measures implemented by TotalEnergies to still be insufficient after a possible injunction? Could the courts impose more precise measures?

The applicants notably contend that companies must cease the development and financing of new oil and gas projects, a measure which would significantly curtail the companies' discretion. Despite the recognised need to stop oil and gas exploration, which has been recognised multiple times in legislation, institutional and scientific reports, one can still reasonably doubt that it is enough for a strict obligation of results, given that there is no international law forbidding this activity. Nonetheless, it is worth noting that the ICJ recognised in its 2025 advisory opinion on climate change that the failure to adequately regulate fossil fuel production, or exploration, may

1233 OECD, "Guidelines for Multinational Enterprises", 2011 Edition, § 69.

1234 Potier D, "Rapport No. 2628 sur la proposition de loi (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", 11 March 2015, p 31.

constitute a wrongful act¹²³⁵. In light of this, and since CDD and the French Duty of Vigilance is an obligation of conduct – or means¹²³⁶, a court could issue an injunction to cease oil and gas exploration, as it would necessarily leave some margin of appreciation to the company. These conditions are sufficiently proportionate and sufficiently effective to be redressable in court in the view of this PhD dissertation.

2.3.3.3 The probable lack of redressability of the specific claims in Germany against carmakers

In Germany, different individual plaintiffs supported by the NGOs Greenpeace and DUH (Deutsche Umwelthilfe) filed three systemic mitigation cases in 2022 against significant car manufacturers (Volkswagen, BMW, Daimler)¹²³⁷.

2.3.3.3.1 A lack of consensus or discretion in the precise requests

The claimants asked the respondent companies to reduce their carbon footprints in line with *specific* calculations they made, and to cease the production of combustion cars by 2030. As a legal basis, they rely on the *general* duty of care enshrined in German tort law (hence, *general* due diligence, see section 1.3.3). To further ground their claim, the applicants also relied on the 2021 German Constitutional Court decision.

Regarding the specific calculations, the applicants inferred from the IEA scenarios the need to reduce the GHG emissions by 65% by 2030 and to cease the sales of combustion cars by then¹²³⁸. To find the end date 2030, the applicants inferred from the average lifecycle of the automotive vehicles indicated by the IEA (around 17 years) that their sales should stop before 2035, since climate neutrality must be reached by 2050. However,

1235 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 427.

1236 Potier D, Rapport No. 2628 sur la proposition de loi (n° 2578), *op cit*, p 31.

1237 See, for instance: *Barbara Metz (Deutsche Umwelthilfe e.V.) v Bayerische Motoren Werke (BMW) AG*, 21. September 2021. Similar complaints were brought against Volkswagen and Daimler.

1238 See, for instance, the claim against Volkswagen before the Court of Braunschweig: *Kaiser et al v Volkswagen AG*, p 58 et seq, <https://climatecasechart.com/non-us-cases/kaiser-et-al-v-volkswagen-ag/>, last accessed 28 October 2025.

in subsequent reports, the IEA has not provided concurring opinions in this respect. Instead, the IEA stated that no combustion cars should be sold anymore by 2035 globally, thus five years later than the applicants' requests. While the IEA provides in some sector-specific indications for OECD countries, which are often more ambitious than for the rest of the world, it has not done this in the automotive sector, perhaps because a significant part of the electric vehicle production comes from China, a non-OECD country¹²³⁹. Note furthermore that the IPCC does not provide specific indications on the exit of combustion cars. Thus, in light of the previous findings of this subpart 2.3 on redressability, the requests in these pending cases do not reflect consensual scientific indications, a needed condition to grant this type of request, and since they do not leave any margin of appreciation concerning the setting of objectives.

Furthermore, in the automotive sector, the EU regulated the emissions performance of cars. In 2023, the EU agreed to cease the sale of combustion cars by 2035 and decided to remove the incentive for zero-emissions cars by 2030¹²⁴⁰. Said differently, the lawmaker already devised these standards. Can due diligence go beyond those?

2.3.3.3.2 Specific requests preempted by *lex specialis* according to the courts

The German courts, ruling in first instance and in appeal, have all dismissed the corporate cases so far, arguing that the *lex specialis* apply and that there is no manifest lack of *general* CDD violation by the car-making companies.

For example, the lower court of *Braunschweig* noted in the case against Volkswagen that the *specific* law of the EU requires minimal standards in the automotive sector, therefore concluding that the reformed EU regulation establishes the relevant conduct¹²⁴¹. Furthermore, the court argued that the EU regulation is more legitimate than the specific requests in this context since it balances all the relevant different interests, those of the

1239 IEA, "Net Zero by 2050: A Roadmap for the Global Energy Sector", 2021, p 138.

1240 Regulation (EU) 2023/851 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2019/631 as regards strengthening the CO₂ emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition.

1241 Landgericht Braunschweig, *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023, see especially p 19 - 20

industry, the wider population and the international community¹²⁴². The Court's response only seems partially valid since it only concerns the EU geographic space, whereas the applicants' request relates to the worldwide activities of the corporate group. There should still be room for requesting 1.5°C due diligence measures on scopes 1, 2 and 3 by leaving some margin of appreciation, akin to the requirements of the CSRD and CSDDD (see the subsection 2.3.3.4 on those European Directives). However, according to the published complaints and the courts' judgements, this request was not presented. Nonetheless, as found by the Court of Appeal in The Hague, with which this thesis agrees, this request should be redressable.

Furthermore, the *Braunschweig* court stated that the applicants cannot request Volkswagen to go beyond State regulations based on *general* tort law¹²⁴³. While this stance may be partly valid in the specific circumstances of this case, due to Germany's *a priori* compliance with CDD after the Constitutional Court ruling, due diligence requires, in principle, private actors to do their share *proactively*, especially if there is no regulation in place, or if they are insufficient. Nonetheless, the Braunschweig Court argued that the Constitutional Court recently clarified the State's duty to protect, and that the German Parliament subsequently issued updated carbon budgets for the transportation sector, including to comply with the judgement¹²⁴⁴. Furthermore, the EU adopted the regulation on the exit of combustion cars by 2035 to implement the European Climate Law, aimed at limiting warming to 1.5°C. Consequently, the Court considered that the State, and, implicitly, the EU, may have complied with its own due diligence, and therefore, the applicants were not in a position to request any conduct different from those regulations¹²⁴⁵.

Lastly, the *Braunschweig* court stated that the fear of the respondent company of being substituted by competitors producing combustion cars after 2030 on the global market is not invalid if it has to implement the claimants' requests¹²⁴⁶. It also stated that the applicant's request may infringe on their business liberties and the general liberties protected by the German constitution¹²⁴⁷. These principles indeed apply to those cases, and

1242 *Ibid.*

1243 *Ibid.*

1244 *Ibid.*, p 18 and p 26.

1245 *Ibid.*

1246 *Ibid.*, p 26 – 27.

1247 *Ibid.*, p 26 – 27 (*ibid.*).

the Court may not have erred in this respect, since the plaintiffs' request did not leave any flexibility to the companies.

However, the claimants could have still proposed to judicially review the conduct of the respondent by assessing whether the respondent parent companies approached the issue with due diligence, i.e., whether they indeed performed all the necessary steps to combat climate change with respect to the worldwide activities, by claiming the overarching general 1.5 CDD duty. Again, they did not request this, but they could still potentially do so in a parallel case, which is pending before the Court of Appeal in Hamm¹²⁴⁸.

In the other case against Daimler (Mercedes-Benz), the Stuttgart court considered, like the *Braunschweig* court, that the lawmaker has the constitutional reservation to decide on this issue, and that the EU institutions lawfully exercised this power. The Stuttgart court added that individual lawsuits cannot correct any insufficiencies of the *specific* legislation regulating corporate actors, such as the EU Regulation providing for the 2035 thermal car exit, as the German Constitutional Court requires an exhaustive regulatory approach ("*Gesamtkonzept*"), meaning that providing "corrections" through the casuistic approach of interpreting tort law would not fulfill this requirement¹²⁴⁹. While this reasoning does not seem entirely invalid either in the context of the specific requests of the plaintiffs, it is worth noting that the general CDD duty, which requires a 1.5°C transition plan under either the CSDDD or tort law, applies to all corporate actors. Making this type of request would offer the court the chance to enforce existing law, grant some flexibility to the respondents, and avoid the need to find casuistic interpretation.

The Court of Appeals of Stuttgart also dismissed the case against BMW. However, the applicants in this case – supported by the NGO DUH – announced in a press release their appeal to the Supreme Court (*Bundesgerichtshof*)¹²⁵⁰. These cases are, therefore, now in the hands of the German Supreme Court (*Bundesgerichtshof*). Only one case remains with the Court of Appeals of Hamm. This thesis finds that it is unlikely that the Supreme

1248 See the following press release by the coordinating NGO Greenpeace, indicating a parallel case before the Court of Appeal of Hamm: Greenpeace Germany, "VW-Klage vor Gericht", *Greenpeace*, 25 July 2024.

1249 Landgericht Stuttgart, 13.9.2022 – 17 O 789/2, § 25 - 26.

1250 Deutsche Umwelthilfe e.V., "Klimaklage gegen Mercedes-Benz: Deutsche Umwelthilfe zieht vor den Bundesgerichtshof", 2023, <https://www.duh.de/presse/pressemitteilungen/pressemitteilung/klimaklage-gegen-mercedes-benz-deutsche-umwelthilfe-zieht-vor-den-bundesgerichtshof/>, last accessed 19 October 2025.

Court will decide differently, given that the applicants' requests are not adequately supported by consensual ingredients. However, the Supreme Court could still provide an *obiter dictum* on the redressability of *general* CDD, or the CSDDD, as stated above, in a similar manner to the Hague Court of Appeal.

2.3.3.4 Lex specialis and separation of powers issues in the USA

Akin to German courts, US federal courts rejected the lawsuits for *lex specialis* reasons and wider separation of powers issues.

Indeed, in *American Electric Power Company v Connecticut*, the Supreme Court of the USA rejected a request to regulate the emissions of fossil-fired power plant operators because the Clean Air Act displaces the applicability of federal tort law, and the corresponding competence of the federal judge. Consequently, this task falls within the remit of the EPA (i.e., Environmental Protection Agency), which has the duty to decide over those issues, as found by the Supreme Court in *Massachusetts*¹²⁵¹.

To further justify this decision, the Supreme Court explained that federal courts do not have a creative power akin to Congress¹²⁵². It further stated that activities emitting GHGs play a significant role in the economy, and that the “energy needs and the possibility of economic disruption must weigh in the balance.”¹²⁵³ This balancing act should be done by the political branches, especially the EPA, which has the expertise and not the courts, in the Supreme Court's view. This consideration on the *lex specialis* shows the intimate link of this concept with the separation of powers¹²⁵⁴.

Despite the application of the *lex specialis* principle, tort law still applies to all other climate matters not regulated by the Clean Air Act, at least in principle. However, in subsequent cases, while plaintiffs tried to frame the cases in such a manner to ensure the applicability of general tort law, courts still rejected them.

1251 SCOTUS, *American Electric Power v Connecticut*, 564 U. S. ____ (2011).

1252 *Ibid*, p 8.

1253 *Ibid*, p 13.

1254 See the concurring opinions by the Court of Appeals For The Ninth Circuit, *Kivalina v Exxonmobil et al*, No. 09-17490, 21 September 2012, p 11656; District Court For The Northern District Of California, *City of Oakland v BP et al*, Case 3:17-cv-06011-WHA, 2018, p 10.

For example, the native village of Kivalina sought compensation in 2008 from large energy companies by arguing that, before the *Massachusetts* ruling and the subsequent endangerment finding by the EPA, GHG-emitting activities were not regulated. However, the Court of Appeals for the Ninth Circuit argued that the *lex specialis* displacement concerns all types of remedies, whether it is injunctive relief for mitigation claims, or compensation.¹²⁵⁵ Thus, the Court of Appeal for the Ninth Circuit extended the displacement ruling over past fossil fuel emissions of oil producers, even if these emissions were not at all regulated¹²⁵⁶, a decision which the Supreme Court confirmed by rejecting the appeal to it¹²⁵⁷.

In doing so, US federal courts considered that the lawmakers decided “to occupy the entire field” by enacting the Clean Air Act¹²⁵⁸. In reality, the US lawmakers never specified when enacting the latter Act that they intended to regulate climate mitigation at all, nor that they wanted to do so by occupying the entire field of corporate climate regulation. Rather, the Supreme Court found that the EPA has a duty to regulate emissions, given that the Clean Air Act mandates the regulation of dangerous pollutants (see commentary of *Massachusetts*). In this light, *Kivalina* is highly problematic, even more so since corporate groups – especially fossil fuel companies – succeeded in lobbying the federal government not to regulate, despite knowing that their GHG emissions and products would cause climate-related harm (see Part 3).

In more recent cases filed by public local authorities seeking compensation for emissions linked to the worldwide combustion of oil and gas products (i.e., so-called scope 3 emissions after the publication of the Heede report¹²⁵⁹), federal courts also rejected those claims, while other cases are still pending before state courts. It is worth explaining that the responsibility of oil companies over their products (and related scope 3 emissions) was strictly speaking not regulated by the Clean Air Act, nor by state law. However, courts decided in the same direction. Firstly, they ruled again that these emissions are eventually regulated by the CAA, since the domestic automotive and industrial emissions regulated by the CAA overlap with

1255 United States Court of Appeals For The Ninth Circuit, *Kivalina v Exxonmobil et al*, No. 09-17490, 21 September 2012, p 11655.

1256 *Ibid*, p 11655.

1257 See, *Native Village of Kivalina v ExxonMobil Corp*, <https://climatecasechart.com/case/native-village-of-kivalina-v-exxonmobil-corp/>, last accessed 29 October 2025.

1258 United States Court of Appeals For The Ninth Circuit, *Kivalina*, *op cit*, p 11655.

1259 Heede R, *The Carbon Majors Dataset*, CDP, 2017.

the scope 3 emissions of oil and gas companies¹²⁶⁰. Furthermore, a district court in California stated that the problem before this lawsuit regarding oil was too little availability for a long period of time, and that a specific Act (Energy Policy Act) aimed to reduce dependence on the import of oil, by increasing the domestic production¹²⁶¹. Given this interference of the claimants' requests with those policies, regulating the consumption of fossil fuels rests with the political branch.

Moreover, the same Californian district court stated that oil and gas companies cannot be sued for their indirect scope 3 emissions because they cannot be attributed to those companies and because they arise abroad¹²⁶². This reasoning contradicts, to some extent, the subsection of this thesis on causation and attribution, which found that due diligence obligations require adequate and proportionate measures in line with the capacity to reduce those emissions, meaning that full and exclusive responsibility cannot be imposed on Scope 3 emissions. Notwithstanding these considerations, the local public authorities requested full compensation¹²⁶³, which is not consistent with the due diligence and shared responsibility principles.

Regarding extraterritoriality, a Californian court applied the so-called doctrine of the "presumption against extraterritoriality" of federal law. Recently applied by the Supreme Court in cases against foreign corporate actors under the so-called *Alien Tort Statute*, a Californian court argued that federal tort law or other general statutes whose extraterritorial applicability was not affirmed by Congress cannot apply extraterritorially¹²⁶⁴. However, the Court of Appeals for the Second Circuit questioned the applicability of the doctrine of the "presumption against extraterritoriality" to federal law. It stated that this doctrine is restricted to statutory interpretation. Hence, the Court of Appeals did not extend this doctrine to federal law, but it still rejected the case as it was "reluctant to give judge-made rules international effect in this context."¹²⁶⁵

1260 United States Court of Appeals For the Second Circuit, *City Of New York v Chevron Corporation*, Case 18-2188, Document 267-1, 04/01/2021, p 10 and 29 - 36.

1261 District Court For The Northern District Of California, *City of Oakland v BP et al*, Case 3:17-cv-06011-WHA, 2018, p 10.

1262 *Ibid*, p 9.

1263 *Ibid*, p 11.

1264 *Ibid*, p 10; referent to *Jesner v Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (citing *Sosa*, 542 U.S. at 727).

1265 United States Court of Appeals For the Second Circuit, *City Of New York v Chevron Corporation*, Case 18-2188, Document 267-1, 04/01/2021, p 45.

The judge further noted the *amicus brief* of the US government, which argued that producing and consuming fossil fuels is lawful everywhere worldwide. The judge concluded that climate change is a global problem that “deserves a solution on a more vast scale than can be supplied by a district judge”¹²⁶⁶. However, requesting proactive and best efforts to limit global warming to 1.5°C, by transitioning away from fossil fuels, is in line with the Paris Agreement and the international COP 28 decision. Not implementing these steps is at odds with due diligence and constitutes negligence. Thus, this request should still be enforceable.

Lastly, some requests did not reflect shared responsibility principles, such as the desired full compensation for remedying the loss. Indeed, as the Court of Appeal in New York noted, “to avoid all liability, then their only solution would be to cease global production altogether”¹²⁶⁷. This proposal is not consistent with the principles of proportionality or shared responsibility, upheld in the successful cases. Thus, in theory, these cases did not exhaust the attempts to impose due diligence types of efforts on parent companies located in the USA over worldwide emissions.

Consequently, this PhD thesis argues that these US cases did not meet the conditions of successful cases. Firstly, the claims did not reflect the international consensus (none of the claims quoted the Paris Agreement, or IPCC elements), nor shared responsibility (i.e., individual and limited responsibility over scope 3 emissions). Thus, this PhD considers that the chances of success of remaining cases before state courts are very low if the framing of the requests remains similar, even though some state courts recognised that they have jurisdiction to hear those cases.

2.3.3.5 The redressability of the EU Corporate CDD 1.5°C transition plan obligation

The EU adopted in 2024 the Corporate Sustainability Due Diligence Directive (CSDDD), which required corporate actors to carry out best efforts to

1266 District Court For The Northern District Of California, *City of Oakland v Bp et al*, Case 3:17-cv-06011-WHA, 2018, p 15.

1267 United States Court of Appeals For the Second Circuit, *City Of New York v Chevron Corporation*, Case 18-2188, Document 267-1, 04/01/2021, p 24. See as well District Court For The Northern District Of California, *City of Oakland v BP et al*, Case 3:17-cv-06011-WHA, 2018, p 11.

implement human rights and environmental due diligence¹²⁶⁸. By having done so, the EU attempted to harmonise *general* due diligence, an interpretation shared by the European Commission, which stated that “[t]he Directive establishes a general horizontal framework (*lex generalis*) for sustainability due diligence for very large EU and non-EU companies.”¹²⁶⁹ The CSDDD also entailed an obligation of means to establish and implement a 1.5°C transition plan in line with the Paris Agreement on so-called “scope 1”, “scope 2” and “scope 3” emissions¹²⁷⁰ in its Article 22:

“Article 22: Combating climate change 1. Member States shall ensure that companies referred to in Article 2(1), points (a), (b) and (c), and Article 2(2), points (a), (b) and (c), adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 o C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities. The design of the transition plan for climate change mitigation referred to in the first subparagraph shall contain: (a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category; (b) a description of decarbonisation levers identified and key actions planned to reach the targets referred to in point (a), including, where appropriate, changes in the product and service portfolio of the company and the adoption of new technologies; (c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and (d) a description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation.”

1268 CSDDD stands for “Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence”.

1269 European Commission, Directive on Corporate Sustainability Due Diligence, Frequently asked questions, 2024.

1270 See the glossary for the definition of “scope 1”, “scope 2” and “scope 3” emissions.

In this regard, this PhD considers that this obligation is – or was – the attempt to consolidate in legislation the overarching corporate *general* CDD duty. While this Directive was modified at the end of writing this doctoral dissertation under the so-called “Omnibus” Proposal (see below), this section first seeks to understand whether *general* CDD or Article 22 could have been enforced by judicial bodies, and then discusses the validity of the CSDDD after the Omnibus reform post 2026.

Regarding the potential redressability of former Article 22, the EU did not specify whether the climate-related provision in Article 22 was linked to the civil liability provisions of Article 29. Delving into the main provisions of the Directive and the legislative developments is necessary to better understand whether Article 22 could have been judicially monitored.

The initial CSDDD Proposal of the Commission explicitly left out climate (CDD) from the general regime, including its links to the civil liability provisions¹²⁷¹. It only provided for administrative enforcement as regards CDD. The version adopted by the European Parliament in 2023 strengthened the substantive climate requirements and made them fully enforceable, including via explicit links to civil liability¹²⁷². The final version, approved by all institutions, then maintained a substantive best efforts obligation in Article 22 (1), linked to administrative enforcement (Article 24 (1) and Article 25 (1)). While Article 29 provisions on civil liability did not explicitly provide for an applicability to CDD, by neither mentioning Article 22 nor specifically climate-related issues in general, Member States had leverage to decide this in the course of the transposition procedure.

Additionally, human rights violations, especially the right to life, and environmental issues – including “harmful emissions” – could form a valid cause of action according to Article 29 CSDDD on civil liability¹²⁷³. Given the consolidated case-law on the links between human rights, the environment, and climate change (see especially Part 1 of this thesis), climate should eventually be captured by the civil liability provisions. Moreover,

1271 See Articles 15, 17 and 29 (d) of the European Commission, “Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937”, Brussels, 23 February 2022, COM(2022) 71 final 2022/0051 (COD).

1272 European Parliament, “Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence”, (Ordinary legislative procedure: first reading), 1 June 2023.

1273 See CSDDD, Article 29 (1) on civil liability relates to the rights, prohibitions, and obligations included in the Annex, Part I and II.

the Directive stipulated that more stringent developments in domestic law in terms of human rights or environmental protection should remain unaffected by the CSDDD transposition¹²⁷⁴. Thus, the CSDDD should have eventually led to the judicial enforceability of CDD.

In this light, it seems reasonable to argue that the Directive CSDDD consolidated and harmonised the emerging corporate CDD requirements, alongside the parallel developments in case law in some countries, among others, the Netherlands, France, and Germany¹²⁷⁵. It clarifies that corporate groups must implement appropriate measures to set up 1.5°C strategies, akin to States, which must endeavour their best efforts in this respect as well (see the *KlimaSeniorinnen* judgement or the international advisory opinions of the ICJ and ITLOS).

Despite these developments, competitiveness issues, accentuated by the re-election of Donald Trump, have overtaken European achievements. Indeed, the European legal developments contrast with those in the USA: litigation attempts in the USA are not successful, probably because they do not request best efforts in line with international consensus, but instead full liability (see subsection 2.3.3.4 just above); and the US regulator (the Securities and Exchange Commission) has dropped Scope 3 disclosure rules in February 2024 under the Biden Administration¹²⁷⁶. This fragmented landscape of legal requirements prompted the EU to rethink its recent legislation. More precisely, the September 2024 “Draghi” report on EU competitiveness recommended a reduction in the regulatory burden following European reforms relating to the Green Deal and corporate sustainability issues¹²⁷⁷, in particular the CSDDD¹²⁷⁸.

1274 See Article 4 CSDDD.

1275 This thesis mentioned several times the judgement of the Supreme Court of New-Zealand in *Smith v Fronterra et al*, SC 149/2021 [2024] NZSC 5, 2024 (see, among others, subdivision 1.3.4.5); however, there are as well similar pending cases in Belgium, Italy, and other countries.

1276 Prentice C et al, “Exclusive: US regulator drops some emissions disclosure requirements from draft climate rules”, *Reuters*, 23 February 2024.

1277 Draghi M (coordinator), “The future of European competitiveness, Part B: In-depth analysis and recommendations”, September 2024, p 318–322.

1278 See, as well, Marcu A, Mehling M and Ruiz A, *Evaluation of the Corporate Sustainability Due Diligence Directive* (ERCST – European Roundtable on Climate Change and Sustainable Transition, 9 December 2024).

Based on this report, the European Commission proposed a series of legislative amendments as part of the “*Omnibus*” text¹²⁷⁹. More specifically, this proposal aimed to further relax the constraints of the climate transition plan in Article 22 of the CSDDD by blurring the lines on the corresponding obligation to implement the plan, which is no longer stated as clearly. Furthermore, the Commission disclosed its willingness to “align” Article 22 of the CSDDD regime with the duty to disclose a climate transition plan under the CSRD, even though the latter is a directive on reporting, which in itself only imposes communication obligations¹²⁸⁰. These developments are at odds with the obligation to regulate companies effectively in relation to climate issues¹²⁸¹.

Furthermore, with regard to Article 29 on civil liability, the European Commission proposed to remove most of its specific provisions, so that national civil liability regimes can (potentially) apply instead¹²⁸². Such a proposal seems unsatisfactory given the complexity of the obligations and factual situations involved, which require, according to the international and human rights State duty to regulate¹²⁸³, clear, precise and, preferably, harmonised liability law, at least at the EU level. In fact, as shown by the cases currently pending before the national courts, the proceedings are excessively lengthy in view of the need for preliminary decisions on the jurisdiction and admissibility of these cases, whereas these proceedings could be more clearly defined. This wastes valuable time for the judicial system, particularly for victims and the fight against climate change.

Even the European Central Bank (ECB) has adopted a critical stance towards the proposed reforms, arguing that the Omnibus amendment proposals on climate transition plans create ambiguity and increase the ‘risk of greenwashing’¹²⁸⁴. In addition, the European Network of National Human

1279 European Commission, Proposal for a Directive amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (E.U.) 2024/1760, as regards certain corporate sustainability reporting and due diligence requirements, COM(2025) 81 final, 2025/0045 (COD), Brussels, 26.2.2025.

1280 *Ibid*, p 19 and Article 4(10) of the proposed Omnibus Directive

1281 See subdivision 2.2.2.1.1, besides the ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 282.

1282 *Ibid*, p 8 and Article 4(12) of the proposed Omnibus Directive.

1283 See, for example, Subdivision 2.2.2.1.1, which addresses the general “State duty to regulate private actors and extraterritorial events”.

1284 ECB, Opinion on proposals for amendments to corporate sustainability reporting and due diligence requirements (CON/2025/10), 8 May 2025, § 4.1.2.

Rights Institutions (ENNHRI)¹²⁸⁵ and the French National Consultative Commission on Human Rights (CNCDH) issued respective unfavorable opinions on the European Commission's Omnibus proposal, which could undermine "essential regulatory advances to protect human rights and the environment in the context of corporate activities."¹²⁸⁶

Despite these opinions, in the summer of 2025, the EU made a commitment to the United States to ensure that the CSDDD does not impose undue restrictions on transatlantic trade within the framework of the bilateral agreement in principle between the EU and the United States on customs tariffs and other trade issues¹²⁸⁷.

Article 22 was eventually deleted by the EU at the beginning of 2026¹²⁸⁸. This political reform, adopted in a context in which the Trump administration exercised pressure alongside fossil fuel producers such as Exxon and TotalEnergies on the EU institutions to remove this provision¹²⁸⁹, seems inconsistent with the State CDD duty to regulate corporate actors under international and human rights law¹²⁹⁰, but also with the non-regression principle, recognised both in the Treaties and in the CSDDD¹²⁹¹.

1285 ENNHRI, ENNHRI raises important concerns over the European Commission's Omnibus I proposal, Mar. 2025.

1286 CNCDH, *Omnibus I proposal: resisting deregulation at the expense of human rights and the environment*, 20 May 2025.

1287 European Commission, Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade, 21 Aug. 2025, § 12.

1288 See Council of the EU, Council and Parliament strike a deal to simplify sustainability reporting and due diligence requirements and boost EU competitiveness (Press release, 9 December 2025), <https://www.consilium.europa.eu/en/press/press-releases/2025/12/09/council-and-parliament-strike-a-deal-to-simplify-sustainability-reporting-and-due-diligence-requirements-and-boost-eu-competitiveness/>. See the consolidated Directive here: Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainability due diligence requirements (Text with EEA relevance).

1289 Leth D O, The secretive cabal of US polluters that is rewriting the EU's human rights and climate law, *SOMO*, 3 December 2025.

1290 See the concurring opinion by more than fifty Professors of Law: Wetzer T et al, Legal Scholars: "Abandoning Article 22 CSDDD Risks Policy Incoherence and Litigation Risk", 23 November 2025 Letter-from-legal-scholars-on-Art.-22-CSDDD.pdf.

1291 Article 191 (1) Treaty on the Functioning of the EU obligates Member States of the EU to pursue progress regarding the protection of the environment and human health; hence, any regression should be prevented. Article 1 (2) CSDDD also

In any event, the validity of the current version of the CSDDD will certainly be questioned before domestic and European courts. Nonetheless, the regulatory battle is certainly far from over. New strategies to exert influence are to be expected in a context marked by the tabling of a bill in the US Senate aimed at blocking the implementation of the CSDDD¹²⁹².

2.3.3.6 Intermediate conclusion

Subsection 2.3.3.1 showed that the Dutch courts confirmed the existence of a *general* corporate CDD duty to reduce scope 1, 2 and 3 emissions in line with the Paris goals. Furthermore, this subsection argued that the reduction order to cut emissions by 45% by 2030 compared to 1990 could have been further confirmed by the Court of Appeal, provided the obligations were framed as a best efforts one. Indeed, the encompassed flexibility in the latter notion could have overcome the lack of consensus and proportionality of the first instance order.

Subsection 2.3.3.2 showed that the French Duty of Vigilance Law can require French parent companies to perform *general* CDD to limit global warming to 1.5°C, by reducing scope 1, 2 and 3 emissions. It further argued that the sectoral fossil fuel requests could be redressable in light of the consensus surrounding those, and the leeway granted by the notion of obligation of means of the latter Law.

Subsection 2.3.3.3 demonstrated that the claimants' requests in the German cases do not reflect scientific and institutional consensus, nor do they leave enough margin of appreciation, facing therefore redressability issues. Furthermore, while lower and appeals courts rejected those cases for *lex specialis* reasons, these decisions do not rule out the applicability of the *general* CDD of parent companies over scope 3 emissions.

Similarly, subsection 2.3.3.4 showed that US federal courts dismissed corporate cases for similar reasons as in Germany (i.e., *lex specialis* and other related separation of powers issues). However, like in Germany, these judgements do not exclude from the outset reasonable cases seeking compliance with individual due diligence requirements by parent companies.

Subsection 2.3.3.5 discussed the Corporate Sustainability Due Diligence Directive (CSDDD), recently enacted in 2024, but politically challenged in 2025 through legislative amendments proceedings (Omnibus) alongside

provides for a similar principle, while noting that the 2026 version of the Directive was modified in a manner to combat the emergence of climate obligations through the incremental development of domestic (case) laws.

1292 See the Protect USA Act: Text - S.985 - 119th Congress (2025-2026): PROTECT USA Act of 2025.

external pressure coming notably from the USA. This PhD thesis considers that this Directive imposed redressable climate-related obligations, including ensuring corporate actors have a *general* CDD obligation to establish transition plans in order to limit global warming to 1.5°C with respect to their scope 1, 2 and 3 emissions. Moreover, should the Directive be substantially altered and weakened, this subsection concludes that it may become incompatible with the State duty to regulate.

2.3.4 The established redressability of CDD in international law, leaving discretion as well

This last section 2.3.4 on international law is somewhat special, as it does not address redressability aspects of due diligence in international law in light of previous judgments¹²⁹³, but in light of the advisory opinions of the ICJ¹²⁹⁴ and ITLOS.

Advisory opinions may be more relevant than contentious cases as courts can thereby clarify the law for all States without pointing to the misconduct of certain individual States¹²⁹⁵. Nonetheless, even the mere judicial intervention through an advisory opinion was somehow controversial. Some prominent authors in the legal literature notably questioned the ICJ's jurisdiction, due to the political nature of the questions, and the risks of interfering in the delicate political process at COP¹²⁹⁶. For example, Bodansky suggested "that courts might not be 'the appropriate institution to determine what states must do to address climate change'"¹²⁹⁷ and even

1293 Some authors do not rule out the expansion of climate litigation on the international level, see Maljean-Dubois S, "The No-Harm Principle as the Foundation of International Climate Law" in *Debating Climate Law* (2021) p 5.

1294 UN General Assembly, "Obligations of States in respect of Climate Change, Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276", 29 March 2023.

1295 See, notably, Sands P, "Climate Change and the Rule of Law: Adjudicating the Future in International Law" (Public Lecture, King's College London, 17 September 2015) p 19; Bodansky D, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections" (2017) *Arizona State Law Journal* p 705–711.

1296 Mayer B and van Asselt H, "The Rise of International Climate Litigation" (2023) *RECIEL*.

1297 *Ibid*, p 4 quoting Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary' (2023) 32 *Review of European, Comparative and International Environmental Law* (RECIEL).

asserted that courts “have a greater potential to cause mischief than to do good”¹²⁹⁸.

These issues could have been raised by a State opposed to the advisory opinion, such as the USA, the only State that expressed disagreement according to the meeting's coverage by pretending that “the climate crisis is best achieved via diplomatic efforts.”¹²⁹⁹ However, the USA did eventually not oppose the ICJ's jurisdiction in the course of the proceedings. Thus, the ICJ succinctly resolved the issue regarding its jurisdiction quickly in favour of giving the opinion advisory opinion. Despite this circumstance, this section still begins by addressing some of the concerns of some authors in more depth, given their relevance for the “redressability” topic.

To do so, Subsection 2.3.4.1 analyses the issues concerning the ICJ's jurisdiction and the related redressability issues discussed in the preceding advisory opinions. Next, Subsection 2.3.4.2 highlights the main CDD requirements as set out by the ITLOS and ICJ, including their potential judicial redressability.

2.3.4.1 The ICJ's jurisdiction in the climate advisory opinion case

In the advisory opinion proceedings of the *Nuclear Threat and Construction of a Wall*, some States challenged the jurisdiction of the ICJ with two main arguments. Firstly, they argued that the Court and the UNGA were simply not competent to request and issue an opinion on this issue since other bodies have an overriding competence in the relevant matters. The second type of challenge concerned the “compelling reasons” to refrain from issuing an advisory opinion in this case (i.e., this is a potential challenge if the questions are neither appropriate nor useful), by arguing that the questions were too vague, abstract, complex, and political; and that a response would not assist the international community, but instead equate to a lawmaking exercise eventually interfering and undermining the current negotiations¹³⁰⁰.

In light of what precedes, subdivision 2.3.4.1.1 addresses the general UNGA and ICJ's competencies concerning advisory opinions. Subdivision

1298 Bodansky D, “The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections” (2017) *Arizona State Law Journal* p 692.

1299 *Ibid.*

1300 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, § 10 – 19.

2.3.4.1.2, in turn, assesses the “compelling reasons” to refrain from issuing an advisory opinion in the climate mitigation context.

2.3.4.1.1 On the UNGA and ICJ’s competencies concerning advisory opinions

The UNGA has the authority to seek legal advice from the ICJ on “any legal question” according to Article 96 of the UN Charter¹³⁰¹. In turn, the ICJ “may give an advisory opinion on any legal question” according to article 65 (1) of its statute. Moreover, the UNGA has the competence relating to “any questions or any matters” pursuant to Article 10 of the UN Charter¹³⁰². Given these basic elements, the ICJ swiftly concluded it has jurisdiction in other advisory proceedings, a position that it also followed in the climate case.

As to the political dimension of the request for an advisory opinion, the ICJ argued in *Nuclear Weapons* and *Construction of a Wall* that this issue is almost constantly present in international law matters, and that it therefore cannot constitute a sufficient reason to abdicate its jurisdiction¹³⁰³. No reason justified another decision in the *Climate* request.

In the case regarding *Construction of a Wall*, Israel contested the ICJ’s jurisdiction due to a corresponding lack of specificity of the legal question¹³⁰⁴. The court dismissed this argument, arguing that the question retains a legal character, although generally phrased. The Court also stated that it frequently brought clarity in those situations, and that it would only apply and interpret the law¹³⁰⁵. Given this stance, there were no manifest reasons to believe the Court would have decided otherwise in the advisory opinion on climate change, even if the vague character was challenged by some authors in the literature¹³⁰⁶.

Additional jurisdictional issues came up in *Construction of a Wall*. The first was the argument that the Security Council of the UN already inter-

1301 *Ibid*, § 10.

1302 *Ibid*, § 11.

1303 *Ibid* § 13.

1304 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p 136, § 36.

1305 *Ibid*, § 38 - 39.

1306 Mayer B and van Asselt H, “The Rise of International Climate Litigation” (2023) *RECIEL* p 3.

vened in this respect, rendering any action of the UNGA “ultra vires”¹³⁰⁷. The legal basis of Israel’s reasoning was Article 12 of the UN Charter which states that “the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”. Israel thus claimed that the UNGA measures were invalid¹³⁰⁸. This argument bears some resemblance to the *lex specialis* debate between the PA and general due diligence¹³⁰⁹. However, the Court made clear that the UNGA did not issue any “recommendation” itself, instead, it requested an advisory opinion¹³¹⁰.

Even if the UNGA had issued a recommendation, it can normally do so on conflict-related issues pursuant to Article 14 UN Charter¹³¹¹. By looking at the practice of the UNGA and Security Council, the ICJ found that the UNGA, over time, distinguishes itself from the Council by approaching conflict-related issues more exhaustively, by considering humanitarian, social and economic aspects, while the Council strictly deals with peace-keeping measures¹³¹². The ICJ accepted this practice, and ultimately took the view that the UNGA advisory opinion request in *Construction of a Wall* did not contravene Article 12 UN Charter¹³¹³. The relevant lesson that for the climate advisory case is that although one cannot dismiss the legitimacy of the UNGA to position itself on climate change, its added value with respect to the COP is less clear, as both organisations host almost all countries in the world and function in a similar democratic way, by taking decisions based on majority votes. The added value of the UNGA lies, however, in its approach and the legal bases: while the COP focusses on the implementation of the UNFCCC and PA, the UNGA takes, so far, a more holistic approach, by relying on general international law, human rights, and other

1307 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p 136, § 24.

1308 Article 12, paragraph 1, of the UN Charter provides that: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

1309 See subsection 1.1.2 of this thesis, demonstrating that the climate conventions do not derogate *legi generali*.

1310 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p 136, § 25.

1311 *Ibid*, § 26.

1312 *Ibid*.

1313 *Ibid*, p 136, § 28.

legal branches, etc¹³¹⁴. In other words, the UNGA can tackle *general* CDD, while the COP aims at implementing the *specific* international climate regime.

A last issue in *Construction of a Wall* pertinent to the climate case was the fact that the UNGA recommendation was even more legitimate given the failure of the Security Council to tackle this issue adequately, by not finding the required consensus¹³¹⁵. Hence, the UNGA was competent to request the ICJ's advisory opinion. A parallel with the climate context is the persistent failure of the COP to *effectively* bring States in alignment with the LTTG¹³¹⁶ and to find consensus on *concrete* climate action in general¹³¹⁷, even though there is progress (i.e., COP 28 found that the pathway was previously leading to 4 °C, but now 2.1–2.8 °C are considered realistic)¹³¹⁸. Consequently, given the similarities of the issues in the other preceding cases, the ICJ would have been in a position to fully justify its jurisdiction, even if it had been challenged by a State in this regard.

The ICJ's response on climate was expected with high expectations since no international authoritative body directly expressed itself on those issues with clarity before. Indeed, the ILC did not firmly address climate change in its Guidelines on the Protection of the Atmosphere due to a lack of a corresponding State mandate¹³¹⁹.

1314 See, for instance, the framing of the request for the Climate advisory and its reliance on human rights.

1315 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p 136, § 30. The Council needs to take all decisions by consensus, thus, requiring no veto from one of the permanent state members, being, France, the UK, the USA, China, Russia, otherwise it cannot act.

1316 See, among others, UNEP, "Emissions Gap Report 2022: The Closing Window", 2022, p 1.

1317 See, among others, Bodansky D, "The Forever Negotiations" (EJIL: Talk!, 2022).

1318 COP 28, "First Global Stocktake", *FCCC/PA/CMA/2023/L.17*, 13 December 2023, § 18.

1319 See, for opinions on the insufficiency of these Draft Principles: Attia I, "The Protection of the Atmosphere and the "Regressive" Development of International Law" (EJIL: Talk!, 2022); Mayer B, "A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere" (2019) available at: <https://ssrn.com/abstract=3447108>.

2.3.4.1.2 No “compelling reason” to refrain from giving an advisory opinion

As some States argued, and as the ICJ agreed in *Nuclear Weapons*, the Court has *some* (limited) discretion to decide whether it should or not give the requested advisory opinion¹³²⁰. In principle, the ICJ should not refuse to satisfy a request by a UN body acting lawfully¹³²¹. The above subsection found that the UNGA and the ICJ had jurisdiction in this respect. Only “compelling reasons” could have led to a refusal. However, the bar was high, as the ICJ never refused to give an advisory opinion based on its discretionary powers¹³²², as it noted in *Nuclear Weapons* and in the *Construction of a Wall* that it¹³²³.

In *Nuclear Weapons*, some States below argued that “the question presented is vague and abstract” and that it would undermine “progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization”¹³²⁴.

Concerning the vagueness and abstract framing of the question, the Court stated similarly as under the jurisdiction issue that it is a critique “devoid of any justification” which cannot constitute a reason to refrain from exercising its jurisdiction¹³²⁵. Further, in *Nuclear Weapons*, some States argued that there was a risk that the ICJ would make “hypothetical or speculative declarations outside the scope of its judicial function”. The ICJ issued a clear response, which could have been relevant to the climate case:

“The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write “scenarios”, to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.”¹³²⁶

The Court also argued that even if the ICJ’s advisory opinions are limited in scope or in terms of usefulness, it cannot consider this limitation as

1320 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, § 14.

1321 *Ibid.*

1322 *Ibid*; see as well *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p 136, § 44.

1323 *Ibid* (*Nuclear Weapons*), § 19; and *Construction of a Wall*, § 65.

1324 *Ibid* (*Construction of a Wall*), § 14.

1325 *Ibid*, § 15.

1326 *Ibid*, § 15.

a ground to dismiss the requests. In the eyes of the ICJ, “[a]n entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all.”¹³²⁷ Indeed, if the Court would have refrained from giving an opinion, this thesis argues some States and authors could have inferred from it the non-existence of binding climate obligations in international customary law and human rights law (*general CDD*), which could have been dangerous as such.

Additionally, it is the UNGA which (politically) decided to request such an opinion. As the Court argued in previous advisory opinions, “[t]he General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs”¹³²⁸. Since the UNGA endorsed the resolution to request the opinion by consensus, the Court could have applied the same considerations to the climate case. Indeed, there was a widely shared recognition among States of the need for an advisory opinion to clarify international climate obligations in an authoritative manner¹³²⁹. Almost all the countries praised Vanuatu and the group of small island States at the initiative for their efforts on this initiative, except the USA. Even if some States had doubts on this opinion, the Court made clear that the useful character of its opinion is ultimately a matter of (subjective) appreciation¹³³⁰.

Regarding the risks of interference with the diplomatic process or States’ interests (whose materialisation is very likely), the Court already argued in the *Nuclear* opinion and *Construction of a Wall* that releasing its opinion cannot satisfy everybody¹³³¹ and that the political implications of the opinion cannot constitute a reason to refrain from exercising its jurisdiction. Therefore, this ground, which should be either way mitigated by taking a

1327 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 § 19.

1328 *Ibid.*, § 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p 136, § 61.

1329 See United Nations, “General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States’ Obligations Concerning Climate Change”, *Meetings Coverage and Press Releases*, Seventy-Seventh Session, GA/12497, 29 March 2023.

1330 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 § 17: “Beyond that, the effect of the opinion is a matter of appreciation”.

1331 *Ibid.*, § 17.

consensual approach, like in the domestic general CDD cases (*Urgenda*, German Constitutional Court, *KlimaSeniorinnen*), cannot constitute a reason for the ICJ to decline its jurisdiction, even more so since the UNGA ultimately decided to forward this request¹³³².

The last “compelling reason” to not exercise its jurisdiction in the *Nuclear* opinion was the argument that the Court will transform itself into a law-making body¹³³³. To respond to this fear, the Court simply reaffirmed that it would only apply and interpret the law¹³³⁴. The ICJ took the same position in the climate case, but again, there was no need to justify itself in this respect.

Among these challenges, Israel brought others in *Construction of a Wall*, equally relevant to the climate proceedings, arguing that it did not accept the jurisdiction of the Court and that, therefore, the advisory opinion is only a way to circumscribe a contentious case. Many countries could have brought this very challenge since almost no country accepted the ICJ's jurisdiction under the UNFCCC or in general. But no country did so.

2.3.4.2 The international courts' views on the redressability of CDD

The group of small island States at the initiative of the ICJ advisory opinion also sought an advisory opinion from the International Tribunal on the Law of the Sea (ITLOS), as requesting it was significantly easier to do than to adopt a resolution within the UNGA¹³³⁵. The ITLOS then released its opinion on the primary obligations flowing notably from the international law of the Sea (2.3.4.2.1), one year before the ICJ, which also positioned itself on secondary obligations, i.e., on State responsibility for breach (2.3.4.2.2).

1332 *Ibid.*

1333 *Ibid.*

1334 *Ibid.*

1335 Seeking the advisory opinion from the ITLOS did not require a vote by majority among the State Parties to the UN Convention on the Law of the Sea (UNCLOS). Instead, it was possible to do so through the creation of a “Commission of Small Island States” among only a certain low number of States (Antigua and Barbuda, Tuvalu, the Republic of Palau, Niue, the Republic of Vanuatu and Saint Lucia). This group of States sent the request to ITLOS on 12 December 2022.

2.3.4.2.1 The ITLOS opinion on CDD's existence

The ITLOS recently released its advisory opinion on 21 May 2024, whereby it set out in more detail the extent of the CDD obligations under the international law of the Sea, which requires similar conduct to the general customary due diligence duty¹³³⁶.

As to jurisdiction, the ITLOS established it without significant difficulty¹³³⁷, against certain prospects from the literature¹³³⁸, and the challenges of China, for instance¹³³⁹. As to the ITLOS discretion regarding the use of its jurisdiction, it simply stated that States largely support the issuing of an advisory opinion¹³⁴⁰, and that the questions “raised by the Commission are clear and specific enough”.¹³⁴¹ In just two sentences, the ITLOS cleared all the questions discussed in the subsections just above on the ICJ's jurisdiction.

As to the main substantive points of the opinion, the ITLOS made three main findings. Firstly, GHGs harm the marine environment and, therefore, constitute pollutants under Article 1 of the UN Convention on the Law of the Sea (UNCLOS). This view, similar to the main finding of the US Supreme Court in Massachusetts, enables the applicability of the duty to protect and preserve under Articles 192 and 194 of UNCLOS to climate change; in addition to the customary due diligence rule of avoiding causing damage to third states¹³⁴². Additionally, Climate conventions do not consti-

1336 See among others the comparison made by ITLOS between due diligence under the Convention and customary law by referring to ICJ jurisprudence: ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 235.

1337 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 84 - 109.

1338 Mayer B and van Asselt H, “The Rise of International Climate Litigation” (2023) *RECIEL* quoting among others Holst R, “Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change” (2022) *Review of European, Comparative & International Environmental Law (RECIEL)*.

1339 China and other countries also challenged the jurisdiction of the ITLOS: see, for example, The People's Republic of China, “Written Statement in ITLOS Case No. 31”, 15 June 2023.

1340 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 115.

1341 *Ibid*, § 120.

1342 *Ibid*, § 441 (a and d).

tute *lex specialis* with respect to the customary law or the law of the Sea¹³⁴³. This opinion confirms the findings of this thesis in Part 1.

Secondly, and importantly, this duty includes an individual and collective duty to *mitigate* global warming to 1.5°C in accordance with global standards such as the PA and the UNFCCC¹³⁴⁴, besides a duty to cooperate¹³⁴⁵. The due diligence standard that is expected in this respect is “stringent” according to the Tribunal because of “the high risks of serious and irreversible harm to the marine environment from such emissions.” While due diligence requirements may vary according to the capabilities and available resources of each State, they still require everyone “to do whatever it can”¹³⁴⁶. Given the recognition of the capabilities of the States within the due diligence terminology, the ITLOS implicitly recognised the relevance of the socio-economic factors within the duty, akin to the corresponding criterion of the fair share terminology. Furthermore, to discharge this duty, States must consider the best available science and the precautionary approach, and carry out environmental impact assessments to identify and mitigate climate change¹³⁴⁷. Thus, the ITLOS confirmed the main aspects of *general* CDD as interpreted in *Urgenda* and in other cases such as *KlimaSeniorinnen*.

Thirdly, developed States must assist the most vulnerable developing States in mitigating climate change by providing capacity-building, scientific expertise, technology transfer and other matters¹³⁴⁸. While this obligation also refers to international equity between States, it also touches upon fairness. This dimension is addressed in Part 3 and the general conclusion of this thesis, especially in its opening thoughts.

Overall, this PhD thesis considers that spelling out these obligations could be considered helpful for some persons to some extent, but they were foreseeable in the view of this PhD thesis, as the requirements of due diligence are known, which require tackling any serious risks, including climate change.

As shown below, the ICJ eventually confirmed this interpretation. While this seems like a welcome development, it remains unclear whether these

1343 *Ibid*, § 224.

1344 *Ibid*, § 235 – 244; 441 (f).

1345 *Ibid*, § 441 (b) and (j) and § 297 – 305 for further details.

1346 *Ibid*, § 441 (c) and § 241.

1347 *Ibid*, § 441 (l).

1348 *Ibid*, § 441 (k).

advisory opinions could, *per se*, usefully complement the ongoing COP negotiations and strengthen climate action¹³⁴⁹.

2.3.4.2.2 The ICJ confirmation of CDD's existence and redressability

The ICJ also concluded expeditiously that the UNGA questions are legal questions and that the Court has jurisdiction to answer them¹³⁵⁰. Moreover, there were no compelling reasons against their use¹³⁵¹. The Court was thus able to respond to the UNGA's questions. This subsection will mainly focus on the nature of the due diligence requirements and their redressability.

Concerning customary due diligence, the Court defined this notion as follows:

“136. The conduct required by due diligence has several elements. These elements include States taking, to the best of their ability, appropriate and, if necessary, precautionary measures, which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State's respective capabilities. Other elements of the required conduct include undertaking risk assessments and notifying and consulting other States, as appropriate.”

To specify the standard of due diligence, the Court argued that there is a need to do this exercise on a case-by-case basis, as it requires an *in concreto* assessment. However, it also reiterated that this does not preclude identifying a general standard of conduct, which depends “on the overall character of the risk to the part of the environment in question”. The Court confirmed the existence of a corresponding general standard of conduct, whose concrete requirements depend, though, on “the principle of common but differentiated responsibilities and respective capabilities” (CBDRRC)¹³⁵². By stating this, the Court confirmed the relevance of the CBDRRC for the due diligence concept in climate matters, to ensure that some fairness considerations are taken into account.

1349 Holst R, “Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change” (2022) *Review of European, Comparative & International Environmental Law (RECIEL)*.

1350 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 37 – 43.

1351 *Ibid*, § 44 – 49.

1352 *Ibid*, § 137.

Furthermore, the ICJ agreed with the ITLOS that the due diligence standard is “stringent” given the very high climate risks, and that it requires “a heightened degree of vigilance and prevention”.¹³⁵³ These findings are similar to the conclusion of the Hague District Court in *Shell*, which imposed a “significant best-efforts obligation” (see above).

The Court also found that there are no inconsistencies in the relationship between the rules in the climate regime and the customary obligations, nor any discernible intention to displace other possible applicable rules by the climate regime¹³⁵⁴. The fact that the climate regime was “carefully negotiated” does not make it a *lex specialis*¹³⁵⁵. The rules must therefore be interpreted harmoniously as a single set of compatible obligations¹³⁵⁶. Similarly, the *lex posterior* interpretation rule, whereby newer obligations take precedence over older ones in the event of incompatibility, does not apply either¹³⁵⁷. The Court emphasised again that there is no conflict between the three climate treaties and customary international law¹³⁵⁸. On the contrary, they mutually reinforce each other.

Next, as to the treaty obligations, which are relevant for the interpretation of customary international law, the Court noted that Article 4 (1) UNFCCC sets out two types of obligations. Firstly, the obligation to report GHG emissions is one of result¹³⁵⁹. Second, the mitigation obligation is an obligation of conduct (best efforts)¹³⁶⁰. In any case, both are legally binding and relevant to establishing breach¹³⁶¹.

Regarding the Paris Agreement, the Court stated that the 1.5°C goal was conceived first “as an additional effort” next to the well-below 2°C goal, when the Agreement was adopted. However, the “1.5°C has become the scientifically based consensus target under the Paris Agreement”, following the IPCC reports and COP decisions¹³⁶². The ICJ specified that Parties must act with due diligence and use all means at their disposal to comply with CDD¹³⁶³. Failure to prepare and communicate NDCs would constitute

1353 *Ibid*, § 138.

1354 *Ibid*, § 168.

1355 *Ibid*, § 170.

1356 *Ibid*, § 165.

1357 *Ibid*, § 189.

1358 *Ibid*, § 195.

1359 *Ibid*, § 203.

1360 *Ibid*, § 203.

1361 *Ibid*, § 202 – 208.

1362 *Ibid*, § 224.

1363 *Ibid*, § 229.

a breach of the PA¹³⁶⁴. However, complying with the obligations of Article 4 is not sufficient. The principle of “progression” means that NDCs “must become more demanding over time”¹³⁶⁵. Furthermore, NDCs must reflect States’ “highest possible ambition” in pursuing the 1.5°C objective. Thus, the Paris Agreement does not allow for full discretion. Rather, the NDC must make an adequate contribution to achieving the LTTG, in light of the global stocktake results, which specified the need to reduce emissions by 43 % by 2030¹³⁶⁶.

In light of the CBDRRC principle, the expectations will vary, depending on historical contributions, the level of development, and national circumstances¹³⁶⁷. The ICJ also noted that the Paris Rulebook further requests that Parties set out in their NDCs how these are “fair and ambitious [...]”, including in relation to “[f]airness”. These points are another reference to the need for each Party to do its fair share¹³⁶⁸. The Court further argued that all NDCs, when taken together, must be “capable of realizing the objectives of the Agreement which are set out in Article 2”. This requirement shows that the duty to do its fair share is part of an individual but collective responsibility framework¹³⁶⁹.

Next, the Court specified that pursuing mitigation measures under the climate treaties and customary international law is an obligation of conduct¹³⁷⁰, which is particularly relevant in the context of emissions directly emitted by private companies¹³⁷¹.

In light of what precedes, the ICJ inferred that the main customary international law obligations require the adoption of:

“appropriate rules and measures [... including] regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions. These rules and measures must regulate the conduct of public and private operators within the States’ jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.”¹³⁷²

1364 *Ibid*, § 236.

1365 *Ibid*, § 241.

1366 *Ibid*, § 243.

1367 *Ibid*, § 246 – 247.

1368 *Ibid*, § 248.

1369 *Ibid*, § 249.

1370 *Ibid*, § 251.

1371 *Ibid*, § 252.

1372 *Ibid*, § 282.

As per the obligations of the Paris Agreement, customary CDD obligations must be further informed, among others, by science, current standards – including COP decisions –, the capabilities of a State, as reflected in the CBDRRRC¹³⁷³. While due diligence allows for some discretion, it cannot serve as an excuse to evade compliance. The Court concluded that specifying the due diligence standard in a given situation may be complex, but that the objective elements considered until then provide enough guidance to identify an objective standard of care.¹³⁷⁴

The Court further argued that full compliance with the climate regime (or *specific* CDD) suggests compliance with customary international law (*general* CDD)¹³⁷⁵. However, customary international law applies irrespective of a State's adherence to treaties. Consequently, if a State is not party to the climate regime, "it has the full burden of demonstrating that its policies and practices are in conformity with its customary obligations"¹³⁷⁶.

With regard to redressability and question b) of the UNGA, the Court argued that these different legal obligations could be remedied in the event of a violation. Indeed, injuries could be established, including causation, despite the difficulties in these respects, which were discussed in Subparts 2.1 and 2.2. To establish wrongful conduct and a breach of due diligence, the Court recalled that it is not sufficient to establish injury. Rather:

"a State acts wrongfully if it fails to use all means at its disposal to bring about the objective envisaged under the obligation, but will not act wrongfully if it takes all measures at its disposal with a view to fulfilling the obligation even if the desired objective is ultimately not achieved."¹³⁷⁷

Importantly, the Court asserted that a wrongful act may be found in the failure to adequately regulate fossil fuel production or end exploration¹³⁷⁸.

If a breach can be ascertained, the ICJ affirmed that it can give rise to the "entire panoply of consequences provided for under the law of State responsibility, i.e., the DARSWA, which have a customary international law status"¹³⁷⁹. The ICJ firstly argued that the violation of the primary duty

1373 *Ibid*, § 283 – 292.

1374 *Ibid*, § 300.

1375 *Ibid*, § 315.

1376 *Ibid*, § 315.

1377 *Ibid*, § 409.

1378 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 427.

1379 *Ibid*, § 405 – 407 and 445.

does not affect the duty to perform the obligations¹³⁸⁰. In other words, there is “a secondary obligation”¹³⁸¹ to cease the act if it is continuing, and still in force; or an “obligation to put an end to the wrongful act.”¹³⁸² To do so, responsible States must employ all means to reduce GHG emissions, and to take additional measures to comply, in other words, exercise due diligence. Responsible States could further be required to offer guarantees of non-repetition¹³⁸³, i.e., provide assurances that they will indeed adequately reduce GHGs and not deregulate the underlying policies. Regarding reparations, the ICJ stated that they could arise, but that they cannot be assessed in the abstract, as they depend on particular circumstances¹³⁸⁴. Restitution, which involves returning to the prior situation, may not be feasible, but reparation could take the form of rebuilding infrastructure, restoring ecological damage, or monetary compensation¹³⁸⁵. While it may be difficult to calculate the exact damage, the ICJ stated, by referencing prior cases, that “the amount of compensation due [can be determined] on the basis of equitable consideration” and take the form of a “global sum”¹³⁸⁶. Lastly, the remedy of satisfaction – i.e., a formal declaration of responsibility – can be adequate, depending on the circumstances of each case¹³⁸⁷.

The Court specified that there are no specific rules in the climate treaties that take precedence over the rules on State Responsibility¹³⁸⁸. Indeed, the soft compliance mechanisms under Article 15 of the Paris Agreement and the Warsaw International Mechanism for Loss and Damage do not address breaches in the context of State responsibility for wrongful conduct; rather they focus on *voluntary* cooperation¹³⁸⁹. Furthermore, since Articles 14 UNFCCC and 24 of the Paris Agreement contain compromissory clauses providing for the jurisdiction of the ICJ or any other tribunal to settle disputes arising from the treaties, which do not specify which rules apply, the general rules on State responsibility therefore apply¹³⁹⁰.

1380 *Ibid*, § 446.

1381 *Ibid*, § 104 and 446 – 448.

1382 *Ibid*, § 446 – 448.

1383 *Ibid*, § 448.

1384 *Ibid*, § 449 – 450.

1385 *Ibid*, § 451 – 452.

1386 *Ibid*, § 453 – 454.

1387 *Ibid*, § 455.

1388 *Ibid*, § 413 – 420.

1389 *Ibid*, § 414 – 416.

1390 *Ibid*, § 417.

Given the findings of this advisory opinion, could the ICJ impose those secondary obligations in contentious cases? As discussed by the ICJ, there are two main ways to ground the jurisdiction of the ICJ in contentious cases: either rely on the climate conventions (UNFCCC) and the *specific* due diligence they contain, or assert the general jurisdiction on the basis of its statute and customary international law. However, so far, only the Netherlands and some small island states have accepted the compulsory jurisdiction of the ICJ under Article 14 of the UNFCCC or Article 24 of the Paris Agreement¹³⁹¹. Regarding the ICJ's general jurisdiction (see Article 36 (2) (b) of the ICJ Statute), some major emitters, including those in the Global North, have accepted the ICJ's compulsory *ipso facto* jurisdiction without any further special agreement (Australia, Canada, Germany, Japan, Poland, and the United Kingdom)¹³⁹². However, the USA withdrew their general acceptance of the ICJ's jurisdiction in 1986 after it was ruled against it in the *Nicaragua v USA*¹³⁹³. This lack of acceptance so far restricts the possibilities of interstate case on the international level. Nonetheless, the recognition of jurisdiction can evolve, or may be grounded in other compromissory clauses. Thus, it remains to be seen whether international courts will play a further role in defining secondary obligations. In any case, the findings of the Court with respect to the secondary obligations were quite innovative, as few courts have articulated the consequences of violating climate obligations, beyond the duty to perform (i.e. the duty to mitigate). In the view of this thesis, the Court usefully clarified that there can be consequences of past breaches, including historical responsibility, in line with the findings of Part 3.

Despite the broad scope of this opinion, the Court humbly stated that it can only play a limited role in light of its jurisdiction and the far-reaching nature of global warming, which affects all activities in our societies¹³⁹⁴. The Court thus asserted that it had played its part, and expressed “the hope that its conclusions will allow the law to inform and guide social and

1391 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law*.

1392 Bodansky D, “The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections” (2017) *Arizona State Law Journal* p 690–711, see especially footnote 114 to “Declarations Recognizing the Jurisdiction of the Court as Compulsory”.

1393 See US Council on Foreign Relations, “The United States and the ICJ”, last accessed 19 January 2025.

1394 *Ibid.*

political action to address the ongoing climate crisis.”¹³⁹⁵ This last paragraph of the court seems particularly wise in light of the previous critiques of the legal literature. The Court was aware that it was uncertain whether its advisory opinion could usefully complement and strengthen climate action in and of itself¹³⁹⁶. However, since the UN General Assembly requested the advisory opinion, the ICJ merely played its part. It clarified the primary CDD obligations, and, for the first time, laid out the potential consequences of their violations. This opinion usefully clarifies many aspects of climate law and sets out the path for potential contentious cases.

2.3.4.3 Intermediate conclusion

CDD is redressable under international law. While no contentious case demonstrated this in international climate law, the ICJ, however, asserted this in general in its advisory opinions.

In light of this, subsection 2.3.4.1 assessed the issues with respect to jurisdiction in advisory opinion of the ICJ, and found that there would have been no significant issue in this regard if a State had challenged it, despite the critiques raised in the literature, notably by the prominent authors Bodansky and Mayer. Indeed, both the UNGA and the ICJ were acting fully lawfully and legitimately. Whether it is useful for the ICJ to express itself on general due diligence is a matter of political subjectivity, as the Court rightly argued. Conversely, dismissing the request for an advisory opinion could have fuelled arguments about the absence of general obligations.

Subsection 2.3.4.2 pursued this by commenting on the ITLOS and ICJ opinions on the obligations they found, and their redressability in case of violations. Both courts established that States need to carry out due diligence to limit warming to 1.5°C, including by considering their economic capabilities and historical responsibilities, and, thereby, preventing significant damage to multiple international law interests. Breaching these obligations can lead to the full range of secondary obligations, from the duty to perform (i.e., injunctions) to the duty to compensate. While it remains uncertain whether these opinions can strengthen the existing specific obligations under the conventions and the ongoing annual COP discussions,

¹³⁹⁵ *Ibid.*

¹³⁹⁶ Mayer B and van Asselt H, “The Rise of International Climate Litigation” (2023) *RECIEL*.

both courts have clarified international law and played their part in this respect.

2.3.5 Provisional conclusion on redressability

Subpart 2.3 showed that redressability is the most controversial issue in all climate cases. Nonetheless, courts from different jurisdictions, as well as some lawmakers, have developed consistent criteria aimed at redressing CDD shortcomings.

More precisely, section 2.3.1 assessed the different domestic case laws which enforced *specific laws* against States. Several national (supreme) courts have already asserted their authority to construe environmental protection statutes in favour of climate mitigation. For example, in 2007, the US Supreme Court already recognised the EPA's authority to regulate GHG emissions under the Clean Air Act in *Massachusetts v EPA*. The Irish, French and UK courts required their respective governments to specify mitigation measures in order to meet the legislative or regulatory GHG reduction targets (*Friends of the Irish Environment, Grande-Synthe, Notre affaire à tous et al v France, Friends of the Earth et al v UK*).

At the same time, these same courts rejected demands based on *general CDD* because of redressability issues. In the USA, the Supreme Court found that the EPA's powers under the *lex specialis* Clean Air Act displace federal tort law (*American Electric Power Company v Connecticut*, 2010). Similarly, in France, the Administrative Supreme Court restricted its jurisdiction in the *Grande-Synthe* case to *specific CDD*, favouring the lawmaker's will over the judicial interpretation of unspecified human rights provisions. On the other hand, the Paris Administrative Court acknowledged the existence of *general CDD* in the *Notre affaire à tous et al v France* case, including on the basis of human rights, without finding a corresponding breach, though. In the UK, courts dismissed the first *Plan B et al v UK* case as the claimants did not fulfil CDD's redressability conditions by arguing a 1.5°C obligation somewhat too early, i.e. before the recognition by the IPCC and the domestic body to limit warming to that level. In the second case initiated by the NGO Plan B, British courts refused to hear the case fully due to the alleged absence of an arguable case, given the existence of *specific* legislation and the lack of manifest error of appreciation. Clearly, the absence of a decision of the ECtHR itself – at the time of these different judgements – constituted a factor in the dismissal of *general CDD*. The ECtHR *KlimaSeniorinnen*

ruling of 9 April 2024 should now trigger compliance assessments concerning the sufficiency of the *specific* legislation.

Section 2.3.2 addressed climate cases against States which somehow seek the development of the law based on *general* CDD. Some (supreme) European courts granted “systemic mitigation CDD” cases in the Netherlands (*Urgenda*), in Germany (*Constitutional Court case*), in Belgium (*Klimatzaak*), and ultimately the ECtHR (*KlimaSeniorinnen*). These courts compelled their States to achieve a minimum level of mitigation ambition to protect claimants’ human rights by relying on two main ingredients: scientific and institutional consensual elements, indicated by IPCC, the international community, or the respondent States themselves. These conditions to judicially intervene – linked to the separation of powers – fundamentally limit the “creative” interpretation of CDD. While Dutch and Belgian courts required the reduction of a specific percentage, the German Constitutional Court and the ECtHR did not specify it and allowed a margin of appreciation. This section concludes that while *general* CDD against States is judicially “redressable” to a certain extent, it remains unclear whether those rulings truly reinforce climate action.

In any case, the development in European case law contrasts sharply with that in the United States, where the courts rejected the *Juliana v USA* case precisely on the grounds of lack of *redressability*. It should be stressed, however, that the claims in the latter case were much more radical than those in the European cases, in that they were not based on the consensual elements of the IPCC reports or international agreements. Still, the chances of success of a “more reasonable” case in the US federal system based on international consensus seem very low in light of the federal courts’ tendency to prioritise congressional lawmaking interventions over directly interpreting federal statutes or the Constitution.

The third section 2.3.3 analysed the redressability of corporate mitigation CDD by assessing both case law and legislative developments. Firstly, Dutch courts considered in *Shell* that *general* CDD with respect to its indirect worldwide scope 1, 2 and 3 emissions exists, as the adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) confirmed it. However, there is disagreement and uncertainty regarding the extent to which courts can redress and specify this general obligation. Indeed, the reduction obligation of -45% by 2030 compared to 2019, which was similar to the injunction in *Urgenda*, was later reversed by the Appeals court. Nonetheless, this thesis argued that the court could and should have decided otherwise, by upholding the injunction, as long as it is framed as

a best efforts obligation. A level of discretion is necessary as long as no specific consensus exists as to what multinational groups must do precisely. However, this thesis argues that the level of consensus surrounding the reduction indication of -45% by 2030 was sufficient to impose a best efforts obligation.

This conclusion should also apply to the French and German cases based on tort and corporate due diligence laws, as long as they seek best efforts to achieve an internationally recognised objective. Therefore, requesting a reduction in fossil fuels in order to transition away from them and to limit warming to 1.5°C, in line with the COP28 decision, should be redressable, such as in the case against TotalEnergies. While the cases against corporate actors were dismissed in the USA and Germany for reasons related to *lex specialis* and the separation of powers, this thesis considers that these decisions do not close the doors to reasonable and proportionate claims against parent companies, in line with the international consensus, as laid out by the Paris Agreement, the COP, and the IPCC. Indeed, these claims must eventually be awarded since States have human rights and international due diligence obligations to regulate companies in line with science and the Paris Agreement (see ECtHR, ICJ, ITLOS). Conversely, national-level corporate due diligence regulations such as the CSDDD, the French Loi de Vigilance, or the German Supply Chains Act, which are the corollary of State CDD, must be adopted, maintained, and implemented properly. Said differently, the adopted CSDDD should not be substantively weakened by legislative reform, and its judicial redressability – including in its climate provisions – shall be clearly confirmed.

The fourth section 2.3.4 delved into the question of the *general* CDD's redressability under international law, by assessing the advisory opinions, as they were the only pending cases. The international courts established their jurisdiction succinctly, and could have done so either way, even if States had challenged it. Further, both the ICJ and ITLOS confirmed the redressability of the *general* CDD obligation in light of scientific and political consensus. The ICJ specifically found that its violation could lead to the full range of secondary obligations. While some authors raised strong concerns about the usefulness of developing general due diligence under international law, this dissertation rather disagrees with those authors, and, in any case, considers, like the ICJ, that this issue falls into the category of political subjectivity.

Given those results, enforcing CDD is compatible with judicial bodies' powers in three different situations: (i) where claims are based on specific

CDD obligations; (ii) where general CDD is invoked in conjunction with clear scientific and institutional consensus; and (iii) where general CDD is invoked absent such consensus, requiring courts to afford a margin of appreciation to duty-bearers.

2.4 Interim Conclusion on CDD's enforceability and the corresponding obligations

Part 2 found that CDD is, in principle, enforceable before domestic, regional and international courts.

While some courts still have rejected climate lawsuits for lack of demonstrated individual and specific climate-related injuries, the majority of the courts in the assessed cases have recognised individual and/or collective harms. Given the progress of science and the aggravation of global warming, this thesis deems that more injuries – including more types of individual injuries – could be established in future.

Additionally, courts around the world adapted the causation pillar to global warming, thanks to the embracement of the concept of shared responsibility, enabling the attribution of a part of the harm to an individual actor, implying in turn a duty to do (only) its share. Further, due diligence attributes responsibility regarding indirect and transnational events, grounding causation in this respect against States and corporations.

As to the redressability of CDD, judicial bodies largely accept enforcing targets and measures enshrined in *specific* legislation. As to claims based on *general* due diligence, which aim to increase the ambition of the public or private actors, they pose significant redressability challenges, especially in light of the separation of powers. Given this delicacy, courts are only willing to admit strongly consensual elements when interpreting *general* CDD. In their absence, it appears that courts and legislators can still impose best efforts obligations and leave a margin of appreciation on the substance (see, notably, *KlimaSeniorinnen*, or the CSDDD).

These case law developments show that CDD as a *primary* obligation requires the following conduct, which is enforceable by way of judicial oversight and court injunction. States and corporations have since 2015-18 *individual* and *collective* CDD duties to limit global warming to 1.5°C and meet their “fair share”, meaning:

States have a *general* duty to:

- set out adequate, ambitious, and fair targets aligned with the Paris goals (especially 1.5°C) for territorial and extraterritorial emissions, reflecting their common but differentiated responsibilities.
- effectively implement short-, medium- and long-term objectives and exhibit the credibility of their overall approach (by calculating their remaining domestic carbon budget).
- cooperate globally to find effective solutions to climate action, and, at least, not obstruct it.

Overall, while States retain some level of discretion in setting the specific ambition, their margin of appreciation remains nonetheless limited (see especially ECtHR, ICJ and ITLOS opinions in this regard).

Corporations have similar *general* duties as they must:

- make their best efforts to limit warming to 1.5°C by reducing their emissions proactively and setting targets concerning direct and indirect “scope 1”, “scope 2” and “scope 3” emissions¹³⁹⁷.
- implement their measures effectively and exhibit their credibility like State actors.

Businesses also benefit from some leeway in setting the GHG reduction targets and designing their decarbonization measures.

While this Part – and the jurisprudence – did not address whether corporate actors must also cooperate with other public and private actors to find effective solutions to climate action, it seems at the very least arguable that they shall not obstruct the adoption of climate-related measures, if it hampers any adequate and reasonable climate action efforts, and undermine the credibility and effectiveness of any of their mitigation measures.

However, the current comparative case law does not offer proper assessments of whether due diligence obligations already applied to climate change in the past and whether the required efforts were implemented over time. Only the ICJ asserted in its advisory opinion that due diligence pre-existed and that its violation may lead to the full range of consequences of State responsibility under customary international law. The need to find

1397 See below and the glossary for the definition of “scope 1”, “scope 2” and “scope 3” emissions.

compensation for the damages to come, and the need to strengthen climate action to mitigate and prevent more serious climate-related harms, will certainly give rise to additional climate cases arguing historical responsibility and the imposition of so-called “secondary obligations”. The question of whether findings of historical non-compliance are possible – and useful – is assessed in Part 3, which carried out a large-scale analysis of whether general CDD pre-existed and was not complied with.

