

PART XII

SPECIAL SUBJECT MATTERS

CHAPTER 5

ENVIRONMENTAL PROCEEDINGS FROM A COMPARATIVE PERSPECTIVE WHEN SUBSTANCE DRIVES PROCEEDINGS

Maria José Azar-Baud

<https://www.cplj.org/publications/12-5-environmental-proceedings-from-a-comparative-perspective-when-substance-drives-proceedings>

Section 1 Typology of Environmental Litigation

TABLE OF CONTENTS

1	Introductory Summary	1
2	Typology of Environmental Disputes	4
2.1.	The Subject Matters	4
2.2	The Main Features of Environmental Litigation.....	8
3	Flexibility in the Opening of Environmental Proceedings.....	16
3.1	Types of Actions.....	16
3.1.1	Creative Uses of Substantive Grounds as Facilitators of Environmental Litigation.....	16
3.1.2	Ad Hoc Environmental Procedural Mechanisms	22
3.1.3	General Procedural Mechanisms Frequently Used to Bring Environmental Lawsuits.....	26
3.1.4	Environmental, Social and Governance (ESG) Class Actions	34
3.2	Standing to Sue.....	39
3.2.1	Nature as a Subject Having Standing to Sue	40
3.2.2	Enlargement of Persons Having Standing to Sue For the Protection of the Environment.....	45
4	An Assertive Development of Environmental Proceedings.....	53
4.1	Jurisdiction: Ordinary or Specialized Tribunals/Courts	53
4.1.1	Ordinary or Specialized Jurisdictions	54

4.1.2 Branch of Jurisdiction: Administrative, Constitutional and Judicial Courts	56
4.1.3 Criminal and Civil Judges	64
4.1.4 Venue	71
4.2 Role of the Parties and of the Judges	75
4.2.1 Role of the Parties	76
4.2.2 Role of the of the Judge in Environmental Justice	78
4.2.2.1 Lis Pendens and Connexion	83
4.2.2.2 Bifurcation	86
4.2.2.3 Public Hearings	86
4.2.2.4 Scope of Res Judicata	88
4.2.2.5 Costs and Professional Fees	89
4.3 Evidence	90
4.3.1 Burden of Proof and Presumptions	90
4.3.2 Experts and Scientific and Technical Evidence: An Assumed Reference ..	93
4.4 Remedies	104
4.4.1 Reparation	104
4.4.2 Damages	106
4.4.3 Quantum	107
4.4.4 Measures	113
4.4.5 Enforceability	115
5 Conclusion	116
Abbreviations and Acronyms	118
Legislation	121
International/Supranational	121
Cases	128
International/Supranational	128
National	129
Bibliography	144

‘Un arbre est un édifice, une forêt est une cité... la forêt de Fontainebleau est un monument’ - V Hugo, La Renaissance littéraire (1872).

1 INTRODUCTORY SUMMARY

- 1 The chapter on Environmental Proceedings from a comparative perspective discusses private litigation related to the protection of the environment or the compensation of damage thereto (thus excluding ‘pure’ public administrative litigation, regarding namely authorizations, and criminal litigation, including ecocide). As with all the chapters in the segment, it raises the question of the way substance drives proceedings. It does so from a comparative perspective, even though not strictly throughout a classic comparative law methodology. Indeed, few commonalities can be found within civil law systems or common law ones, provided we could still refer to them as categories.
- 2 To draw a procedural picture of the *status quo*, the *comparative approach* is an appropriate method. Firstly, because environmental problems are observed and discussed on a global scale and the enforcement of environmental law is played out in all jurisdictions. Secondly, comparative law grants access to sources containing techniques, strategies and institutions that function elsewhere, and therefore enhances their use by the main actors in the area, such as researchers, lawmakers, judges and NGOs. The ultimate goal is to put forward the suppleness offered by some procedural systems so far, needed to overcome the resistance to environmental litigation opposed by classic procedural rules, and so forth.
- 3 From a methodological perspective, this chapter will put forward solutions arising out of national provisions and case law with the purpose of coping with procedural issues in environmental litigation. This chapter does not intend to provide an exhaustive analysis, but rather an overview of the national legal systems which the author has been able to consult, through original sources, in English, French and Spanish. Notwithstanding, the outline also features solutions from other systems in circumstances where comments on them have been found in one of the said languages. Due to editorial constraints, important topics such as cost issues, third-party funding or crowdfunding are only mentioned but have not been treated.
- 4 The second Section is dedicated to the Typology of Environmental Litigation. It puts forward the reasons which have led to an upsurge and to the proliferation of environmental litigation. It features ecological reasons such as threats and concerns regarding greenhouse gases, heat waves, intensification of cyclones, fires, increased migration of ‘climate refugees’ and climate litigation, collapse of wildlife and biodiversity. It also describes environmental activism and the importance of strategic litigation. Indeed, through the diversity of actions brought and the messages they seek to convey in many countries, this shapes the judiciary into a public arena to counterbalance ‘ideas’ and a participatory tool allowing plaintiffs, for instance, to place climate change at the heart of the public debate (2.1).

- 5 Furthermore, the section considers the features of environmental litigation through the diverse nature of disputes at stake, aimed at restoring legality and/or at establishing responsibility. The rights at stake are far-ranging and may concern classic subjective rights as well as the general interest, diffuse and collective interests as well as homogeneous-individual rights, or even a new legal construct: the common environmental interest which is proper to environmental litigation and often at stake in case law. Additionally, rights may integrate humans and non-humans into the community, and even the interests of future generations, and the progressive personification of natural realities, as is currently happening in various countries. If the defence of these interests can be hampered by the requirement of demonstrating injury to a personal interest, case law has been firmly and positively tackling the issue.
- 6 Of relevance is the fact that many of the sources granting access to environmental justice have a *fundamental-rights* cradle or rely on *principles* rather than on rules *stricto sensu*. Moreover, environmental litigation raises questions of public and/or private law, taking place in the domestic, European or international sphere. For these reasons, as well as due to the plurality of the legal grounds of action and the different types of jurisdictions in the world coping with environmental matters (civil, administrative, constitutional), it is difficult to define and to focus exclusively on pure 'private litigation' before civil courts (2.2).
- 7 If one may argue that the traits expounded in section one are not *unique* to environmental proceedings, the said features do entail special consequences bearing witness to the fact that subject drives proceedings. This specificity enhances the flexibility of environmental proceedings which is reflected in the following sections.
- 8 The third section states there is some Suppleness in the Opening of the Proceedings (Sec 3), reflected through the specificities in the way access to judges operates in environmental disputes.
- 9 The variety in the types of actions that are admitted, be they public or private, before judiciaries or alternative methods, further enhances access to judges and thus contributes to the elasticity in the opening of environmental proceedings (3.1).
- 10 Broad standing to sue is another originality of environmental proceedings. Oversimplified, the question arises as to the protection of nature as an object, or as a subject. The former leads towards the enlargement of the persons having standing to sue – encompassing citizens, youth, Ombudsmen, NGOs, Officials, municipalities, and local states – and the latter leads to the acknowledgement of nature as a holder of rights. In other words, in some systems, Mother Earth, mountains, rivers, and trees do have standing, which is provided by a constitutional provision or an act (3.2).
- 11 The fourth and last section exposes a somewhat Assertive Development of the Course of Environmental Proceedings, thus, access to environmental justice (Sec 4).

- 12 The challenges environmental litigation poses to common rules of civil procedure during the course of proceedings, are illustrated, firstly, with venue. Indeed, environmental disputes can have a planetary or a transboundary nature, such as global warming. Then, from a jurisdictional standpoint, environmental matters are handled by ordinary (judicial, administrative or constitutional courts) or by specialized jurisdictions depending on the national legal system. A debate regarding the necessity of having *green tribunals*, whether they are environmental courts or specialized sections is live. Some countries have chosen to set up environmental commissions, such as independent authorities. The question of specialization has even arisen in the international order, notably with the idea of creating a specialized court, on the model of the WTO (4.1).
- 13 The proactive role of civil society has also changed the role of the parties and that of the judges during proceedings. Coalitions of action or mock trials also contribute to a *metamorphose* of the role of judges because of the increasing pressure on them. Judges become the new guarantors of environmental justice. Judges endorse special powers through public hearings, and control of the execution of interim and protective measures, in a rationalized way (4.2).
- 14 Additionally, standard and burden of proof, evidentiary means including scientific and technical data and the capacity of the judges to handle them, concurrent evidence, the standard of *state of scientific knowledge*, presumptions and the reversal of the burden of proof, are discussed (4.3).
- 15 Furthermore, environmental proceedings can seek classic remedies (injunctions, orders-to-cessate, compensation of individual damages), generally speaking, they also target specific remedies (such as restoration, compensation of damages to the common goods *per se*, ecological damage, or damage to the diffuse and/or the collective interest, namely through class, group, or popular actions). The types of actions that can be brought and the remedies that can be sought, in particular structural injunctions, render justiciable matters, which would otherwise have been considered as *non justiciable* (4.4).
- 16 An underlying idea in the chapter is that there is a dialogue between judges at an international level. Cross-fertilization is an on-going process since comparative reasoning arises out of judgments. Major creative rulings have been rendered with the recognition of new prejudices, overcoming difficulty in terms of causality, and allocation of public fines to public and private NGOs. The question of judicial governance arises. Authors perceive the construction of an emerging global ecosystem, in the absence of global regulatory bodies.

2 TYPOLOGY OF ENVIRONMENTAL DISPUTES

- 17 Never before has our society been so *concerned about its environment*. *Uncontrolled emission of greenhouse gases, heat waves of unprecedented power*, intensification of cyclones and fires, increased migration of ‘climate refugees’, as well as collapse of wildlife and biodiversity, namely in the Amazonian Forest, amongst many other disorders, shall suffice to embrace the full measure of this fretfulness.¹ The importance of the subject matters reflects on the variety of litigation (2.1) and on the features of the cases thereof (2.2).

2.1 The Subject Matters

- 18 The diversity of situations giving raise to environmental litigation is undeniable: oil spills, dam construction, mining operations, deforestation, waste abandonment and toxic product dumping, air, soil or water pollution. Raising questions of public and/or private law, taking place in the domestic, European or international sphere and involving the application of the main principles or more specific environmental rules, disputes can be of a very diverse nature, aimed at restoring legality and establishing responsibility.²
- 19 The *judiciary has become a public arena*.³ Facing these facts and the failure of the existing legislation, *actors of civil society* have given birth to the ‘environmental cause’.⁴ They make themselves visible as a community defending the environment through petitions and demonstrations, expressing a global public opinion and demanding changes to the current state of play. Citizens more frequently use the means of lawsuits and courtrooms, and recourse to the judge is a fundamental part of the legal means that civil society can use to assert its rights towards the environment.⁵ Thus, *access to justice* in environmental matters cannot solely be considered as a right-guarantee, but it is also as in the category of rights-participation,⁶ as established by the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Therefore, in addition to public information and participation,

¹ The proliferation of environmental litigation before all the courts of the different legal orders, such as ‘Erika’, ‘Belo Monte’, ‘Deep Water’, ‘Shell’, ‘Probo Koala’, ‘Chevron’ to name only a few, illustrates the variety of cases concerned. The NGO End Ecocide on Earth has identified no less than 25 situations that constitute ecocide on the planet <https://ihej.org/programmes/justice-penale-internationale/du-genocide-a-lecocide-dans-les-pas-de-rafael-lemkin/> accessed 9 November 2022.

² M Hautereau-Boutonnet and È Truilhé, ‘Quel modèle pour le procès environnemental ?’ (2017) 15 *Recueil Dalloz* 827.

³ Referring to courts as new ‘battlefields in climate fights’, see L Vanhala, ‘The comparative politics of courts and climate change’ (2013) 22 (3) *Environmental Politics* 447.

⁴ D Salas, ‘La cause environnementale: Droit, philosophie, arts’ (2019) 3 *Les cahiers de la justice* 403.

⁵ L Favoreu and others, *Droit des libertés fondamentales* (7th edn, Paris, Dalloz 2015) 389.

⁶ *Ibid* 355.

access to the courts constitutes a real means to provoke a contentious debate between actors regarding the environmental risks encountered within the territories.⁷

- 20 In particular, environmental activism has given birth to *climate justice and climate litigation*. Since the 1980s, non-governmental organizations (NGOs) and particularly environmental justice organizations (EJOs) have been using concepts of political ecology that were subsequently adopted by both the academic world and governments.⁸ Aside from classic climate *activism actions*, notably the passive resistance of Extinction Rebellion,⁹ which led to criminal issues, NGOs are multiplying the number of recourses against states to force them to honour their national and international commitments. Hence, *administrative climate lawsuits* function as a participatory tool allowing plaintiffs to place the implementation of climate change at the heart of the public debate. Developing innovative approaches, landmark cases brought undoubtedly constitute a milestone for climate activism. Youth, the bridge between current and future generations, is involved in its own way so that its future, and that of the youngest, are not compromised by the passivity of states in the fight for the climate, by bringing lawsuits and by the multiplication of school strikes, most often on Fridays.¹⁰ Through the diversity of their actions and the messages they seek to convey, environmental activists play a major role in the development of legislation designed to help preserve and protect health and the environment.

⁷ Some authors consider access to environmental justice to be a procedural right: the right to the environment must be understood 'as the right to protection of the environment and the procedures for ensuring this protection [...] available to individuals'; A C Kiss, 'Les origines du droit à l'environnement: le droit international' (2003) special issue, *Revue Juridique de l'Environnement* 13, 13.

⁸ J Martinez-Alier and others, 'Between activism and science: grassroots concepts for sustainability coined by Environmental Justice Organizations' (2014) 21 *Journal of Political Ecology* 19.

⁹ Describing itself as a global movement 'of 1080 national, regional and local groups of people' campaigning for urgent responses to the carbon emission state of play, whose philosophy is based on 'Nonviolent Direct Action'.

¹⁰ G Thunberg, *Rejoignez-nous: #grevepourleclimat* (Kero 2019) 13; UNICEF, *Droit de cité: La participation citoyenne des enfants et des jeunes* (Paris, Ivry-sur-Seine, Les Éditions de l'Atelier 2011) 11.

- 21 This is how ‘climate change litigation’ alone is estimated to be more than 1,000 cases today.¹¹ The current and future cases are of fundamental interest for the future of climate litigation. They raise new issues of public law, both from a litigation point of view, in terms of liability, and in terms of the states’ accountability for a sustainable climate. Building on this democratic function of climate justice and the role played by activism, Christian Huglo stressed ‘what the study of climate jurisprudence reveals is the emergence of a real paradigm shift that opposes an international law confiscated by states. Civil society must organize itself and create an international level of exchange of experiences’.¹²
- 22 Several types of climate change litigation have been distinguished: strategic cases, with a visionary approach, aiming to influence public and private climate accountability;¹³ and routine cases, less visible ones, dealing with, for example, planning applications or allocation of emissions allowances under schemes such as the EU emissions trading scheme.¹⁴ The literature also makes an interesting distinction between ‘proactive’ litigation, which is initiated to promote policy change (such as by requesting the adoption or reform of legislation), and ‘re-active’ litigation, which is initiated to oppose such change (by challenging the adoption of new or reformed legislation).¹⁵

¹¹ C Huglo, C Cournil and L Varison, *Les procès climatiques. Entre le national et l'international* (Éditions A Pedone 2018); C Huglo, *Le contentieux climatique: une révolution judiciaire mondiale* (Brussels, Bruylant 2018); C Cournil, ‘Les prémisses de révolutions juridiques? Récents contentieux climatiques européens’ (2021) RFDA 957; M Torre-Schaub, *Les dynamiques du contentieux climatique: Usages et mobilisations du droit* (Paris, coll de l’Institut des sciences juridique et philosophique de la Sorbonne 2021); M Torre-Schaub, ‘La justice climatique, À propos du jugement de la Cour de district de La Haye du 24 juin 2015’ (2016) 3 *Revue internationale de droit comparé* 699; UN Environment Programme, ‘Global Climate Litigation Report: 2020 Status Review’ (January 2021) <https://www.unep.org/fr/resources/rapport/rapport-mondial-sur-les-litiges-relatifs-au-climat-bilan-de-la-situation-en-2020>; <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> accessed 26 June 2023. In general on the subject, J Rochfeld, *Justice pour le climat, les nouvelles formes de mobilisation citoyenne* (Odile Jacob 2019); PNUC and Sabin Center for Climate Change Law, ‘The status of climate change litigation a global review’ (May 2017); European Environment Agency, ‘The European environment: state and outlook 2015’ (SOER2015 March 2015) <https://www.eea.europa.eu/soer/2015> accessed 26 June 2023.

¹² Huglo (n 11) 317.

¹³ B Hess, ‘Strategic Litigation: A New Phenomenon in Dispute Resolution?’ (2022) 3 MPILux Research Paper Series 20. Notwithstanding, ‘not all cases challenging the design or application of climate policies and measures fit this description. There are cases which might not oppose climate action as their primary objective but will delay the finalisation or implementation of climate policy responses. For example, Individuals bringing rights-based climate cases might not object to climate action but rather to how such action is carried out or its impacts on the enjoyment of human rights. These cases can be called “just transition” cases’. J Setzer and C Higham, ‘Global trends in climate change litigation: 2022 snapshot’ (2022) Grantham Research Institute on Climate Change and the Environment, Policy report, 7.

¹⁴ I Alogna, ‘Increasing Climate Litigation: A Global Inventory’ in J B Auby and others (ed), *1 French Yearbook of Public Law* (1st edn, 2023).

¹⁵ J Setzer and R Byrnes, ‘Global Trends in Climate Change Litigation: 2019 Snapshot’ (2019) Grantham Research Institute on Climate Change and the Environment, Policy report, 2.

- 23 *New paradigms* have slowly but steadily emerged and entail a shift in conceptions, be they natural, social, legal, or economic.¹⁶ They are less dualistic and more diffused, based on constant revaluations of categories of all sorts. *With the entry into the Anthropocene, it seems impossible to split humans and nature.* Climatic hazards, for example, are as much cultural as natural, both interacting within the Earth-system. But the environmental cause goes further than climate.
- 24 For the first time in human history, it is now acknowledged, following the latest publications by the Intergovernmental Panel on Climate Change (IPCC), that the human species can cause their own extinction by modifying, without precaution, the great ecological balances of the planet. Because of uncontrolled climate warming, the collapse of biodiversity and the millions of people who die every year from an excessively polluted environment, water or air contamination, environmental law is generally seen as ineffective, inappropriate or an unenforceable right.¹⁷
- 25 Massive public condemnation of this worrying environmental reality stresses the need to fight effectively against attacks on the natural environment by means of appropriate investigation techniques and sanctions. The triptych ‘avoid, reduce, compensate’,¹⁸ in place in several countries and aiming to fight against environmental damage, carried by public agents such as ministries of ecology, thus has to find its counterpart in judicial systems with the triple objective of preventing, more effectively, penalizing and

¹⁶ R Lorenzetti and P Lorenzetti, *Global Environmental Law* (Environmental Law Institute 2020).

¹⁷ Most recently, the joint report by the Intergovernmental Panel on Climate Change (IPCC) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), ‘Biodiversity and Climate Change Report’ (28 June 2021) <https://eco-act.com/fr/changement-climatique/rapport-giec-ipbes-biodiversite/> accessed 26 June 2023. IPCC, ‘Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty’ (8 October 2018) www.ipcc.ch/sr15 accessed 26 June 2023.

¹⁸ The *Éviter/Réduire/Compenser* (Avoid/Reduce/Compensate) concept sequence, known as ‘ERC’, is the expression of the anticipated consideration of the environment in the design of a plan, programme or project. This integration of the environment, from the outset, is essential in order to prioritise: avoiding impacts, reducing impacts, and compensating for residual impacts on the environment if the two previous stages have not eliminated them; B Cinotti and others, ‘Une justice pour l’environnement. Mission d’évaluation des relations entre justice et environnement’ Report of the mission to assess the relationship between justice and the environment, CGEDD No 012671-01 and IGJ No 019-19 19 (2019) https://www.justice.gouv.fr/sites/default/files/migrations/portail/art_pix/rapport_justice_pour_envir_onnement.pdf accessed 22 January 2025. Bruno Cinotti and Jean-François Landel were appointed by the CGEDD and Delphine Agogue, Daniel Atzenhoffer and Vincent Delbos for the IGJ. They were assisted for part of the mission by Iris Sarda, a student at Sciences Politiques and intern at the IGJ.

repairing environmental damage.¹⁹ The sensitivity of citizens to environmental risks has considerably increased. It translates into vast disapproval of environmental damage, especially if there are consequences for health or biodiversity, and sometimes into environmental litigation.

2.2 The Main Features of Environmental Litigation

- 26 Environmental litigation seeks *the enforcement of environmental substantive law and shares the same specifics*.²⁰ Similarly to environmental law, which is *transdisciplinary*, environmental proceedings may then be irrigated by different law branches and disciplines such as energy law, mining law, consumer law, commercial law,²¹ merger

¹⁹ Ibid; M Delmas-Marty, *Les forces imaginantes du droit- cours au collège de France notamment IV: Vers une communauté de valeurs* (Le Seuil Paris 2011); M Prieur and others, *Droit de l'environnement* (Paris, 7th edn, Précis Dalloz 2016); J Rochfeld, *Justice pour le climat !: les nouvelles formes de mobilisation citoyennes* (Paris, Odile Jacob 2019); M Hautereau-Boutonnet and È Truilhé, *Le procès environnemental, Du procès sur l'environnement au procès pour l'environnement* (Dalloz 2021); M Delmas-Marty, *Aux quatre vents du monde, petit guide de navigation sur l'océan de la mondialisation* (Le Seuil Paris 2017); C Lepage and C Huglo, *Nos batailles pour l'environnement* (Paris 2021); I Sachs, *Estratégias de transição para o século XXI: desenvolvimento e meio ambiente*, Prologue: MF Strong; M Lopes (tr) (São Paulo, Studio Nobel, Fundação do desenvolvimento administrativo (FUNDAP) 1993); F Jarrige and T Le Roux, *La Contamination du monde: Une histoire des pollutions à l'âge industriel* (Le Seuil Paris 2017); P Abadie, *Entreprise responsable et environnement: recherche d'une systématisation en droits français et américain* (Brussels, Bruylant 2013); SciencesPo Centre de Recherches Internationales, 'RULNAT - Judiciariser la nature. Animaux et environnement au tribunal (2020-2024)' <https://www.sciencespo.fr/ceri/fr/content/rulnat-judiciariser-la-nature-animaux-et-environnement-au-tribunal-2020-2024> accessed 12 November 2022; R Romi, *Droit et administration de l'environnement* (Paris, 9th edn, Montchrestien 2016); P Thieffry, *Traité de droit européen de l'environnement* (3rd edn, Bruylant 2015); G Thunberg, *Rejoignez-nous #grevepourleclimat* (Paris, Calmann Levy 2019); C Huglo, *Avocat pour l'environnement: mes grandes batailles judiciaires* (Paris, Lexisnexis 2013); F Vargas, *l'humanité en péril: virons de bord, toute !* (Paris, Flammarion 2019); F Nicolino, *Le crime est presque parfait: L'enquête choc sur les pesticides et les SDHI* (Paris, Les liens qui libèrent 2019); M de Certeau, *L'Invention du quotidien, 1: Arts de faire and 2: Habiter, cuisiner* (L Giard (ed), Paris, Gallimard 1990); R Dumont, *Terres vivantes. Voyage d'un agronome autour du monde* (Plon, Paris, collection Terre 1961 (written between 1959 and 1961 on notes taken in the field since 1956)); R Dumont, *L'Afrique noire est mal partie* (Paris, Le Seuil 1962 (collection 'Esprit', reprinted 2012)); L'Utopie ou la mort (Paris, Seuil 1973); P Servigne, R Stevens and G Chapelle, *Une autre fin du monde est possible* (Seuil 2018); Gébé, *l'an 01* (Paris, Folio Gallimard 1973); P Charbonnier, *Culture écologique* (Presses de Sciences Po 2022); F Varga, *L'humanité en péril* (Paris, L'Harmattan: Flammarion 2019); B Latour, *Face à Gaïa* (Paris, La découverte 2015).

²⁰ But terms such as the environment or environmental law do not have codified definitions, neither in the national legal systems, in European Union legislation nor at the international level (treaties and covenants). Born with the development of the law of nuisance, these overarching definitions are to be found in the literature regarding European environmental law, according to which environment can be defined as the surroundings or conditions in which humans, plants, and animals function; J van Zebe and A Rowell, *A Guide to EU Environmental Law* (University of California Press 2020).

²¹ R de Quenaudon, 'Responsabilité sociale des entreprises (2017) Dalloz Répertoire de droit du travail; FG Trébulle, 'Responsabilité sociale des entreprises: entreprise et éthique environnementale (2018) Rép sociétés; A Lienhard, 'Loi PACTE: consécration de l'intérêt social et des enjeux sociaux et environnementaux' (2019) Dalloz actualité; A Lecourt, 'Compétence exclusive du tribunal judiciaire de Paris pour connaître du devoir de vigilance des grandes sociétés: une issue critiquable?' (2022) 1 Revue trimestrielle de droit commercial et de droit économique 65.

acquisition, rural law, public law, financial law, torts and liability,²² civil law, criminal law,²³ foreign and migrants law, international law,²⁴ labour law,²⁵ transportation law,

²² B Parance, 'L'action des associations de protection de l'environnement et des collectivités territoriales dans la responsabilité environnementale' (2009) 6 *Environnement*, Dossier 4; C Jubault and C Puigelier, 'Revue des thèses' (2021) *La Revue trimestrielle de droit civil* 971; H Gali, *Le préjudice moral: Étude de droit de la responsabilité civile* (Preface L Neyret, Dalloz 2021); L Neyret, *Atteintes au vivant et responsabilité civile* (Preface C Thibierge, Paris, LGDJ 2006); L Neyret and M Hautereau-Boutonnet, 'Préjudice moral et atteintes à l'environnement' (2010) *Dalloz* 912; L Neyret and GJ Martin, *Nomenclature des préjudices environnementaux* (Paris, LGDJ 2012); B Parance, 'Plaidoyer pour une réparation cohérente des dommages causés à l'environnement' in *Mél en l'honneur de G Martin: Pour un droit économique de l'environnement* (DC 2013) 445, 456; M Bacache, 'Quelle réparation pour le préjudice écologique?' (2013) *Environnement et développement durable*, Étude 10.

²³ B Parance, 'Loi Climat et Résilience, beaucoup de bruit pour presque rien!' (2021) *JCP G, Doctrine* 1069, No 9; P Dufourq, 'Loi "Climat et résilience": aspect de droit pénal' (2021) *Dalloz actualité*; E Monteiro, 'Les orientations de la politique criminelle actuelle en matière d'atteintes à l'environnement' (2014) 1 *Revue de Science Criminelle et de Droit Pénal Comparé* 49; G Beaussonie, 'Sauver l'environnement par le droit pénal?' (2022) 4 *Revue de Science Criminelle et de Droit Pénal Comparé* 873. (*Loi No 2020-1672 relative au parquet européen, à la justice environnementale et à la justice pénale spécialisée* (Law No 2020-1672 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice) of 24 December 2020 [Official Gazette of France of 26 December 2020, No 4] (France); Law No 2021-1104 of 22 August 2021 on combating climate change and strengthening resilience to its effects) (France).

²⁴ E Álvarez-Armas, 'Le contentieux international privé en matière de changement climatique à l'épreuve de l'Art 17 du règlement Rome II: enjeux et perspectives' (2020) 3 *Revue de Droit International d'Assas* 109.

²⁵ A Casado, 'Le droit social à vocation environnementale' (2019) 44 *Recueil Dalloz* 2425. M Despax, 'Environnement et droit du travail' (1994) *JurisClasseur Environnement*, Fascicle 982; A Bugada, 'L'influence du droit de l'environnement sur le droit du travail' (2005) 1232 *Semaine sociale Lamy*; F Héas, 'La protection de l'environnement en droit du travail' (2009) *Revue de Droit du Travail* 565; P Bobe, 'Du bilan social au bilan écologique' (1994) 37 *Droit et ville* 59; M Despax, 'Propos introductifs' (1994) *Droit du travail et droit de l'environnement: Droit et ville* 12; L Hamoudi, 'Mettre en place le télétravail pour protéger l'environnement' (2019) (2019) 11 *Bulletin Joly Travail* 56.

international law,²⁶ procedural law,²⁷ administrative law,²⁸ constitutional law²⁹ and human rights.³⁰ Finally, an increasing volume of environmental litigation is brought on the basis of fundamental rights,³¹ namely access to, and enjoyment of, certain goods and public spaces, and the right to life and health.³²

- 27 Even though the body of EU environmental policy and regulation is very advanced and comprehensive, Europe's environment is rapidly deteriorating.³³
- 28 Furthermore, *subject matters* involving environmental conflicts are *undefined*, so that the *perimeter of environmental disputes is global and diverse*. *Specific protection regimes* exist for water, air, spaces, species and natural resources, as well as for so-called *classified* installations according to the risks of ecological damage that they may generate. In a broader sense, environmental protection extends to the fields of land use planning, both in urban and rural areas, and to food safety. Forced cross-border

²⁶ S Doumbé-Billé, 'Le droit international de l'environnement et l'adaptation aux changements planétaires' in *Mél en l'honneur de M Prieur: Pour un droit commun de l'environnement* (Daloz 2007) 91; L Boisson de Chazournes, 'La protection de l'environnement global et les visages de l'action normative internationale' in *Mél en l'honneur de M Prieur Pour un droit commun de l'environnement* (Daloz 2007) 41.

²⁷ Hautereau-Boutonnet and Truilhé (n 2) 827; M Torre-Schaub, 'Le juge peut-il sauver le climat ? Les dynamiques du contentieux pour répondre à l'urgence climatique' (2020) Recueil Dalloz 760; JL Cioffi, 'La justice civile environnementale, après les lois des 24 décembre 2020 et du 22 août 2021, vers une nouvelle avancée?' (2022) 3 *Energie - Environnement - Infrastructures*, Étude 6; FX Bréchet, 'Compétence nantaise en matière d'éolien en mer: autant en emporte le vent?' (2022) *L'Actualité juridique: Droit Administratif* 32; M Bacache, 'L'action de groupe en matière environnementale' (2017) *Energie - Environnement - Infrastructures - Revue Mensuelle Lexisnexis Jurisclasseur*.

²⁸ L Fonbaustier, 'Climat, biodiversité....environnement: comprendre les actions contre l'Etat' (2019) JCP G, Doct 615; A d'Argoubet Raybaud, 'Commande publique et droit de vivre dans un environnement sain' (2021) 40 *L'Actualité juridique. Droit administratif* 2332; M Moliner-Dubost, 'Quand les collectivités se rebellent contre l'État: l'exemple de la politique environnementale' (2022) 2 *AJ Collectivités Territoriales* 84; Recueil Lebon: Recueil des décisions du conseil d'Etat (2011) Duration of authorisation of plant protection products and proof of their harmlessness; Judgment of the Council of State, 3rd and 8th joint Chambers, 3 October 2011, No 336647, (2022) *L'Actualité juridique: Droit administratif* 753; S Hoyncck, Council of State, 6th and 5th joint Chambers, 10 February 2022, No 455465, 'Le défi d'intégrer les projets soumis à autorisation individuelle à la trajectoire de réduction des gaz à effet de serre', Premiers éléments de réponse; AJDA 753, para 3.

²⁹ A Gaillet and D Grimm, 'La décision Climat de Karlsruhe. Penser les droits fondamentaux sur le long terme: une réponse contentieuse à l'urgence climatique?' (2022) 3 *Actualité juridique. Droit administratif* 166; F Savonitto, 'Le Conseil constitutionnel et le contentieux climatique, Un acteur au milieu du gué' (2022) 3 *L'Actualité juridique: Droit administratif* 152.

³⁰ Y Dyukova, 'Le droit international des droits de l'Homme face à l'urgence environnementale' (2020) 3(3) *Revue de droit international d'Assas* 38.

³¹ From the commons developed in Italy and widely discussed in France and abroad, it is also necessary to make room for common interests that are closely linked.

³² The Lancet, 'Lancet countdown on health and climate change' (October 2017 and October 2021): [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01787-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01787-6/fulltext) accessed 26 June 2023; cf B Parance, 'Les enjeux de santé Environnementale' (2017) *Energie - Environnement - Infrastructures*, Dossier 27.

³³ H O Pörtner and others, 'Climate Change 2022: Impacts, Adaptation, and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC) (2022).

displacement of those suffering from environmental change is protected under international human rights law.³⁴

- 29 More generally, *environmental policies*, meaning the administrative, legal, economic and technical regulation, made by governments tend towards the same goal of protecting the environment and natural ecosystems. The said policies rely on the principles of *precaution, prevention, and rectifying pollution* at the source, and on the ‘polluter pays’ principle, with their definitions codified in European Union law, since they operate together to form its foundations.³⁵ The outcome is a *dense, dispersed, complex and heterogeneous regulation*. Moreover, these regulations are weighed against, or even conflict with, legitimate but contradictory political, economic and social interests. Environmental litigation is sometimes about challenging such policies.
- 30 Environmental law is regularly criticized for its *lack of effectiveness*.³⁶ Whilst substantive solutions are often put forward in several legal systems (ie, the increasing of environmental crimes or delicts such as ecocide), procedural solutions cannot be overlooked, the latter contributing to the effectiveness *and the enforcement* of the former. Thus, they need to be envisaged together. For instance, the fact that

³⁴ I Borges, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge 2019).

³⁵ European Parliament, Fact Sheets on the European Union: Environment Policy: General Principles and Basic Framework, <https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework> accessed 15 November 2020. Polluter pays is a principle that aims to ensure that costs are internalized by those engaged in polluting activity; van Zeven and Rowell (n 20) 52. The Precautionary Principle is a central tenet of EU environmental law and can be defined as an EU principle related to risk management which provides that if there is the possibility that a given policy or action might harm the public or the environment, and there is an absence of scientific consensus, the action should not be pursued. Consolidated Version of the Treaty on the Functioning of the European Union (2008) OJ C 115/47 (hereinafter TFEU) Art 15; van Zeven and Rowell (n 20) 10. Similarly, the Preventative Principle is a principle that seeks to minimize harm from known environmental problems, which allows for action to be taken at an early stage but is not as far-reaching as the precautionary principle; van Zeven and Rowell (n 20) 52; AJ Oskam, *EEA Glossary: Prevention Principle*, European Environment Agency (2017), <https://www.eea.europa.eu/help/glossary/eea-glossary/prevention-principle#:~:text=This%20principle%20allows%20action%20to,reach%20as%20the%20precautionary%20principle>. accessed 10 November 2022.

³⁶ P Granet, ‘L’effectivité des droits passe par des procédures adaptées: Entretien Avec: Jean-Claude Magendie, premier Président de la cour d’appel de Paris’ (2008) 22 La semaine juridique – édition générale; A Van Lang, ‘Le droit de la transition écologique en devenir’ (2022) L’Actualité juridique: Droit administratif 133.

environmental substantive law is based on *principles* to a greater extent than in classic provisions such as subjective rights will influence the admissibility of the action.³⁷

- 31 Likewise, the rights and interests at stake in environmental litigation are special. Behind an environmental dispute like the one arising out of an oil spill, such as that of the Erika in France, there are sometimes a multitude of *injured interests*. They can be *individual*, affecting certain individuals and have a patrimonial nature, such as loss of income, or extra-patrimonial, such as fishermen who are no longer able to carry out their activity, and who may suffer from stress, anxiety, or depression. They can also be *supra-individual* and concern *damage to nature itself* as well as the interests of *society as a whole*.
- 32 If the classic legal constructs, *subjective right* and *general interest*, can sometimes be helpful to embrace the myriads of situations concerned by environmental litigation, they are still insufficient.³⁸ Largely inspired by comparative law, the legal constructs of *pluri-individual and homogeneous rights*, *transindividual interests*, find an important role in environmental litigation in comparative law.³⁹ The Model Code for collective proceedings for Iberian-American countries has distinguished *collective and diffuse*

³⁷ Cinotti and others (n 18); M Delmas-Marty, *Les forces imaginantes du droit- cours au collège de France notamment IV vers une communauté de valeurs* (Le Seuil Paris 2011); M Prieur and others, *Droit de l'environnement* (7th edn, Paris, Précis Dalloz 2016); J Rochfeld, *Justice pour le climat les nouvelles formes de mobilisation citoyennes* (Paris, Odile Jacob 2019); M Hautereau-Boutonnet and È Truilhé, 'Le procès environnemental - Du procès sur l'environnement au procès pour l'environnement: Rapport pour la mission Droit et Justice' (Research report 2019), hal-03194063, 9; P Marcantoni, 'Les principes généraux du code de l'environnement' (2020) 11 *Revue de Droit Immobilier* 572; In 2020, the Environmental Code [was] 20 years old; the general principles that introduce it [were] 25 years old. They were in fact enshrined for the first time explicitly and in a general provision by the Barnier Act of 1995 (L No 95-101, 2 February 1995 on strengthening environmental protection). Their recognition is, however, the result of the codification process (C Cans, 'Grande et petite histoire des principes généraux du droit de l'environnement dans la loi' du 2 févr. 1995' (1995) 2 *Revue Juridique de l'Environnement* 195): 'the inclusion of guiding principles in the preamble to the Code was proposed by the commission of experts responsible for drafting it. Bound by the obligation to codify in constant law, it suggested taking advantage of the draft law on the reinforcement of environmental protection discussed from 1993 onwards to include the guiding principles of the subject - temporarily codified in Articles L 200-1 and L 200-2 of the rural code - while waiting to be able to transfer them to the head of the future environmental code in a first title entitled 'General Principles'.

In the mid-1990s, the legislator was not starting from scratch. In 1976 (L No 76-629, 10 July 1976 on the protection of nature), the law had already outlined a few guidelines for the subject, including the general interest nature of environmental protection. But the structuring of environmental law around major principles was inspired above all by international law. Very early on - Stockholm in 1972, Rio in 1992 - the drafters of the conventions sought to bring coherence to a field that was developing in a chaotic way, in order to make it more readable and predictable (L Boisson de Chazournes and S Maljean-Dubois, 'Les principes du droit international de l'environnement' (2016) Fascicle (2010) *Juris-Classeur Environnement et développement durable* 1). European environmental law is built on the same pattern. The link between these supranational texts and the 1995 law was expressly mentioned by Mr Barnier when he presented his bill: France must in turn take these principles into account, without waiting for them to be imposed on it (A Van Lang, *Droit de l'environnement* (4th edn, Presses universitaires de France 2016) 67).

³⁸ See B Parance, *La défense de l'intérêt général par les associations: Intérêt général versus intérêts collectifs* (LGDJ, coll Les grands colloques 2015).

³⁹ On these categories: MJ Azar-Baud, 'L'action de groupe, une valeur ajoutée pour l'environnement?' (2015) 22 *Hors-série VertigO*.

interests within transindividual interests.⁴⁰ More recently, a shift in the focus from the legal sphere to the object in common or the common itself has led to the emerging notion of *common interest* or *interest of a community*.⁴¹ The latter has been put forward in particular in the Colombian, Italian, Portuguese and Brazilian regimes.⁴²

- 33 *Environmental litigation*, thus understood as litigation concerning the enforcement of environmental law, including various rights and interests, and environmental principles, has a specific and unique nature.
- 34 Still, environmental litigation is burdened by *procedural difficulties*. Amongst others, they arise out of the multiplicity of injured interests affecting human and non-human species, the complexity of scientific and technical data involved or the articulation of local and global levels. Moreover, global causes and consequences of the potential infringements, the risks at stake, amongst many other factors, render general procedural rules ill-suited to cope with the specifics of environmental disputes. Indeed, the court remarked, in the *Duda Salabert Rosa* case, that ‘the Citizen Suit is not an appropriate procedural means for the demand sought’, thereby dismissing the action.⁴³ Therefore, Hautereau-Boutonnet and Truilhé plead for the construction of a model of a ‘trial for environment’, rather than for an ‘environmental trial’; in other words, to seek justice *for* the environment.⁴⁴
- 35 To overcome some of the said problems, the specific nature of the sources granting access to justice in environmental matters can be a very powerful tool.
- 36 Fundamental sources granting access to justice in environmental matters are twofold. First, they are to be found in international conventions and several pieces of EU legislation that acknowledge a right to a fair trial and the right to a legal remedy in certain international and regional human rights treaties, such as the 1966 International

⁴⁰ On Argentinean categories, see L J Giannini, ‘Los procesos colectivos en la Ley General Ambiental. Propuestas de reforma’ in RO Berizonce (ed), *Aportes para una justicia más transparente* (La Plata, Platense 2009) 105-169; R Lorenzetti and P Lorenzetti, *Global Environmental Law* (Environmental Law Institute 2020) 293-294.

⁴¹ MP Camproux Duffrène, ‘Propositions de réformes relatives à la chose commune – La biodiversité comme chose commune’ in J Rochfeld, M Cornu and G Martin (ed), *L'échelle de communalité: Propositions de réforme pour intégrer les biens communs en droit*, Report No 17-34 for the Law and Justice Mission (2021); B Morizot, *Les Diplomates: Cohabiter avec les loups sur une nouvelle carte du vivant* (Marseille, Wildproject 2016) 289; C Larrère, ‘La communauté biotique: l’héritage d’Aldo Léopold’ in C Larrère (ed), *Les philosophies de l’environnement* (Presses Universitaires de France 1997).

⁴² Rochfeld, Cornu and Martin (n 41) *Annex 2: Leçon de droit comparé No 5*; A Aragão, ‘La reconnaissance des intérêts diffus au Portugal’.

⁴³ *Duda Salabert Rosa v estado de Minas Gerais e Taquaril Mineração SA*, Case APop 5020547-95.2022.8.13.0024 (Minais Gerais, Brazil).

⁴⁴ In this context, and in light of the issues that have just been described, the title of the ‘Justice and the Environment’ mission has been restated as ‘Justice for the Environment’, adopting a concept developed in the research report by de M Hautereau-Boutonnet and E Truilhé for the Law and Justice research mission on environmental litigation (n 37).

Covenant on Civil and Political Rights,⁴⁵ the 1950 European Convention on Human Rights (ECHR) (Art 6 and 13) and the 2000 Charter of Fundamental Rights of the European Union (the EU Charter) (Art 47).⁴⁶ The second relevant development is the increasing influence of the concept of public participation in environmental matters, as fundamental right character guaranteed by the international treaty, the Aarhus Convention (AC), ratified by the EU and its Member States with the goal of improving environmental democracy.⁴⁷ Access to justice in environmental matters is thus one of the three ways of public participation, together with access to environmental information and with public participation in environmental-related decision-making processes.⁴⁸

- 37 Because of the fundamental foundations of the sources, environmental law is *a set of principles*⁴⁹ more than it is a set of rules.⁵⁰
- 38 The draft of the Global Pact for the Environment is only indicative but serves as an illustration of the concrete form it could take. It contains the following principles: right to a sound environment; duty to take care of the environment; principle of integration and sustainable development; intergenerational equity; prevention; precaution; polluter

⁴⁵ International Covenant on Civil and Political Rights Art 2 para 3 (a)-(b); Art 14.

⁴⁶ C Redgwell, 'Access to Environmental Justice' in F Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 153-158.

⁴⁷ The Aarhus Convention requires its Parties to provide members of the public with access to justice in environmental matters. All Member States, as well as the EU itself, are Parties to the Aarhus Convention. It is legally binding upon the EU institutions and its Member States, including the courts; the EU Charter of Fundamental rights; and the case law of the Court of Justice of the EU (CJEU); C Redgwell (n 46).

⁴⁸ The 'Rio Declaration on Environment and Development' (1992) 1 UN Conference on Environment and Development, UN Doc A/CONF.151/26Rev. 1, 3.b) also refers to these three elements of the concept, while Principle 23 highlighted the importance of access to justice as a means for redressing environmental harm; B Richardson and J Razzaque, 'Public Participation in Environmental Decision-Making' in B Richardson and S Wood (ed), *Environmental Law for Sustainability* (Hart Publishing 2006) 165 ff.

⁴⁹ P Marcantoni, 'Les principes généraux du code de l'environnement' (2020) 11 *Revue de Droit Immobilier* 572; L No 2012-1460, 27 December 2012, Art 1; L No 2016-1087, 9 August 2016; sometimes presented as a principle itself: Rapp An No 2064 of the Commission on Sustainable Development on the Draft Law on Biodiversity No 1847, 24 June 2014; Sénat, Report (2014-2015) No 607 made on behalf of the Regional Planning and Sustainable Development Commission, 8 July 2015; Van Lang (n 36) 153; Charter of the Environment, Art L 160-1; for example, Art L 411-6: on decisions to withdraw or suspend authorizations for invasive exotic species; for the precautionary principle, *Association Coordination Interrégionale Stop THT and others*, Case 342409 (Council of State, Assembly, France), Judgment 12 April 2013 [ECLI:FR:CEASS:2013:342409.20130412] Lebon; *L'Actualité juridique: Droit Administratif* (2013) 767; Chronicle X Domino and A Bretonneau; Dalloz (2013) 1008, Obs; E Royer; Obs FG Trébulle; AJDI (2013) 531, Obs S Gilbert; Étude S Gilbert; RDI (2013) 305, Obs A Van Lang; AJCT (2013) 421, Obs M Moliner-Dubost; RFDA 2013. 610; Conclusions of A Lallet; Ibid, 891, Chronicle C Santulli; Étude M Canedo-Paris; 1231, Chronicle C Mayeur-Carpentier, L Clément-Wilz and F Martucci; Constitutions (2013) 261, Obs E Carpentier; RTD eur; (2013) 880, Obs A Bouveresse, *Association générale des producteurs de maïs (AGPM)*, Case No 358103 (Council of State, France), Decision 1 August 2013 [ECLI:FR:XX:2013:358103.20130801] Lebon; *L'Actualité juridique: Droit administratif* (2013) 1656; Dalloz (2014) 104, Obs FG Trébulle.

⁵⁰ G Lhuillier, 'Les règles de la justice environnementale' (2022) 1 *La Semaine juridique: Édition Générale*, Étude 38.

pays; public information; public participation; access to environmental justice; education and training; research and innovation; and cooperation. The following principles are also included within the list, as emerging ones: effectivity; non-regression; resilience; and *in dubio pro natura*.

- 39 Intergenerational equity (Art 4 of the Pact) has been invoked by national and sub-national courts in the procedural matter of granting standing to representatives of future generations, while the principle of integration (concerned in Art 3), is argued to lay down 'primarily procedural duties'.⁵¹ Applied to Article 11 of the Pact, which ensures 'the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law', new approaches to legal remedies are being considered. For example, the UK courts' consideration of 'a more flexible jurisdiction [...] than is commonplace' in the *ClientEarth* case.⁵²
- 40 Principles can be helpful to interpret procedural rules and may have a considerable influence in the course of proceedings. Amongst others, sustainable development, equity, transboundary responsibility, public participation and transparency, precautionary principle, polluter pays, *and* prevention can be added. Judges have already put such principles into practice, especially in national courts.⁵³ In doing so, they demonstrate that 'with a degree of judicial imagination, and within a strongly interpreted Constitution, even the "soft law" of a non-binding international declaration can sometimes be given hard edges, and so provide practical remedies within the domestic courts'.⁵⁴
- 41 Procedural law rules are not always well suited to the enforcement of environmental law because of *the features* of the latter. Procedural provisions may even undermine an effective contribution.⁵⁵ Whereas some countries have adopted specific rules for environmental disputes and are constantly in progress, others struggle to start recognizing the need to adapt and/or to adopt proper environmental procedural

⁵¹ Y Aguila and J E Viñuales (ed), *A Global Pact for the Environment – Legal Foundations* (Cambridge, C-EENRG 2019) 49, 53–54.

⁵² *Client Earth No3* (High Court of England, UK), Judgment 21 February 2018 [EWHC 315 (Admin)].

⁵³ For example, Lord Carnwarth in *Fishermen and Friends of the Sea v Minister of Planning* (Trinidad and Tobago) (Privy Council, UK), Judgment 27 November 2017 [UKPC 37] (application of the Polluter Pays principle) and the Chief Justice of the Lahore High Court in *Maple Leaf Cement Factory v EPA WP*, Case 115949/2017 (Lahore High Court, Pakistan), Judgment 21 December 2017.

⁵⁴ Lord Carnwarth, 'Climate Justice and the Global Pact' Judicial Colloquium on Climate Change and the Law in Lahore, Pakistan (2018).

⁵⁵ M Hautereau-Boutonnet and È Truilhe, 'Le procès environnemental - Du procès sur l'environnement au procès pour l'environnement: Rapport pour la mission Droit et Justice' (Research report 2019) hal-03194063, 9; *Procès et environnement: Quelles actions en justice pour l'environnement?* (online edn, Droits International, Comparé et européen 2020).

provisions. Rules which need to be reviewed range from the opening to the end of the proceedings.

- 42 Therefore, the next section discusses the way in which the said specifics drive the opening of environmental proceedings.

3 FLEXIBILITY IN THE OPENING OF ENVIRONMENTAL PROCEEDINGS

- 43 From the outset of proceedings, the types of actions that can be brought (3.1) and legitimacy (3.2) witness to the suppleness in the commencement of environmental proceedings in many countries.

3.1 Types of Actions

- 44 An analysis of the types of actions brought in environmental litigation from a comparative standpoint foreshadows a creative use of classic substantive grounds oftentimes acts as a facilitator of environmental litigation (3.1.1). Nonetheless, some national legal systems have created specific procedural mechanisms for the defence of the environment (3.1.2). Other legal systems have procedural tools available, which, even though they have not been specifically designed for environmental litigation, have become a common and useful practice (3.1.3). Last, environmental, social and governance class actions also play an important role in the litigation landscape (3.1.4).

3.1.1 Creative Uses of Substantive Grounds as Facilitators of Environmental Litigation

- 45 In the last years, new forms of *climate activism* have emerged with the multiplication in movements of young climate activists growing, invoking international bases, namely the International Convention on the Rights of the Child of 1989 (CRC).⁵⁶ The latter constitutes an interesting foundation for the proliferation of climate litigation brought by youth around the world by considering the child as an active member of society and a holder of rights that he/she can exercise,⁵⁷ as it offers children a means of participating in environmental decisions, the right to be heard by a judge in judicial and administrative

⁵⁶ Launched by the Swedish schoolgirl Greta Thunberg, a movement of school disobedience has spread throughout Europe: G Thunberg, *Rejoignez-nous: #grevepourleclimat* (Kero 2019) 13.

⁵⁷ Thus, some speak of the advent of a general regime of 'prematurity'; J Roque, 'La prémajorité' (2009) 4 *Revue trimestrielle de droit familial*. In practice, the United Nations Organization (UNO) integrates youth in environmental, and more particularly climatic, issues. J Mc Fadden, 'Sommet de la jeunesse 2015: à la recherche de solutions pour le climat' <https://blogs.worldbank.org/fr/voices/sommet-de-la-jeunesse-2015-la-recherche-de-solutions-face-au-changement-climatique> accessed 21 November 2022.

proceedings, and to access the courts concerning well-being and health.⁵⁸ Furthermore, the ‘best interests of the child’, enshrined in its Art 3-1, is directly related to the right to a healthy environment according to the Committee on the Rights of the Child.⁵⁹ Cases of this type, against the State’s passivity in climate matters, are pending, namely in Norway, Pakistan and India.⁶⁰

46 However, since climate litigation constitutes no exception regarding the conditions for the admissibility of the action, the plaintiff seeking representation of future generations must invoke a current, direct, personal, and certain *interest to act*, or the existence of a *case*.

47 In many cases,

*the plaintiffs try to demonstrate that they are more or more specifically concerned by global warming than the general population. In sum, the first challenge for European judges of the different courts will be to move beyond the general interest debate and determine whether victimhood emerges from any of these propositions in order to consider the case on its merits.*⁶¹ [emphasis added]

48 That was the case in *Duarte Agostinho and others v Portugal* and 32 other countries, which pointed to both a *geographical specificity*, and the *young age of the plaintiffs* (meaning there is a prolonged period of time during which they can suffer the effects of global warming). The plaintiffs stressed a *specific harm* to narrow the link between the applicant and the impact of climate change. The *topographical particularity* is also a key

⁵⁸ Through a reasoning of cascading correlations, the Committee on the Rights of the Child has been able, in its work, to highlight a set of composite elements that outline a right for the young person to access the courtroom. Art 12 CRC; The Committee on the Rights of the Child, the body in charge of the respect of the CRC, underlined in its 2009 General Comment that the right to be heard constitutes a right to participate in decision-making processes and that this right must be applied in a broad manner. If we look at the content of the CRC, we can see that Art 24 recognizes the child’s right to health and enjoins the signatory States, among other health measures, to take into account the dangers and risks of pollution of the natural environment. From this consecration by the CRC, the ‘right to claim’ aspect of the right to the environment logically follows, which implies a positive action of the State: to implement the necessary measures for the protection of the health of children. However, in its work, through a reasoning of ‘cascading correlations’, the Committee establishes the link between access to the judge and the right to the environment ‘General Comment No 12 (2009): the right of the child to be heard’ UN Doc CRC/C/GC/12, Sec 2, 3, 86; and 27; J Vieira, ‘Eco-citoyenneté et démocratie environnementale’ (thesis, Université de Bordeaux 2017) 392.

⁵⁹ ‘General comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)’ (17 April 2013) UN Doc CRC/C/GC/15.

⁶⁰ *Greenpeace Nordic and Nature & Youth v Ministry of Petroleum and Energy*, Case 16-166674TVI-OTIR/06 (Oslo District Court), filed 18 October 2016, appealed before the Norwegian Supreme Court in 2020, and filed at the ECtHR in 2021 (Application No 34068/21); *Rabab Ali v Federation of Pakistan & Another*, Case I of 2016 (Supreme Court of Pakistan), Constitutional Petition filed 4 April 2016; *Ridhima Pandey v Union of India*, Case 187 of 2017 (National Green Tribunal), filed 22 March 2017.

⁶¹ M Brillat, ‘L’urgence climatique devant la Cour européenne des droits de l’homme: enjeux et perspectives à partir des audiences du 29 mars 2023’ (2023) Dalloz actualité.

point in the *Carême* case. Another element put forward by respondent states is the identification of the state responsible for the violation. This matters when assessing

the ‘fair share’ of responsibility of each state. This is undoubtedly one of the central points of the case of the Portuguese children who directed their application against 23 States Parties to the Convention: the effects of greenhouse gas emissions go beyond state borders.⁶²

- 49 Yet, before the ECtHR in April 2024, *Duarte Agostinho* was declared inadmissible by the Court, in a unanimous decision on jurisdiction and non-exhaustion grounds.⁶³ Specifically, concerning the extraterritorial jurisdiction of the respondent States other than Portugal, the Court found no grounds in the Convention for the extension of their extraterritorial jurisdiction as requested by the applicants. A comprehensive system of remedies was found to exist in Portugal, providing mechanisms for complaining about the length of proceedings and access to legal representation for those who cannot otherwise afford it.⁶⁴ In a novel Swiss case, four women over the age of 80, in addition to the Swiss association ‘Verein KlimaSeniorinnen Schweiz’, had raised complaints about threats arising from climate change and claimed to be especially subject to adverse effects of climate change on their life, health, well-being and quality of life under the ECHR.⁶⁵ None of the four individual applicants fulfilled the victim-status criteria under Article 34 of the Convention and the Court duly declared their complaints inadmissible. Their susceptibility to heatwaves as older people was insufficient. The applicant association, in contrast, was granted locus standi. The Court was careful not to allow *actio popularis* (the ECHR does not contain an *actio popularis* provision).⁶⁶ To prevent individual actions on climate change issues from opening the floodgates before it, the Court established a narrow definition of ‘victim’ status. It was held that individuals will only have standing if 1) they are subject to intense exposure to the harmful effects of climate change and 2) there is a compelling need to ensure the individual protection of the claimant, due to the absence of reasonable or adequate measures to mitigate the

⁶² Ibid; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, App no 53600/20 (ECtHR), Judgment 9 April 2024 [ECLI:CE:ECHR:2024:0409JUD005360020] (*Verein KlimaSeniorinnen*) and *Carême v France*, Case 7189/21 (ECtHR), Hearing 29 March 2023, Judgment 9 April 2024 [ECLI:CE:ECHR:2024:0409DEC000718921]. Adde: C Perruso, ‘Protection des droits des générations futures par le Conseil constitutionnel: les apports de la QPC du 27 octobre 2023’ (2023) Dalloz; *Association Meuse nature environnement et autres*, Case No 2023-1066 QPC (Constitutional Council, France), Judgment 27 October 2023; AJDA 2023 1965; Dalloz 2023, 1950 and Obs. The latter case is part of ‘expected developments in the protection of the rights of future generations’, which is ‘currently the focus of various international initiatives’. Advisory opinions ‘issued a priori by international courts are also expected’: eg, UNGA, Request for Advisory Opinion on State Obligations in Relation to Climate Change, A/77/276, 29 March 2023; Request for Advisory Opinion on Climate Emergency and Human Rights to the Inter-American Court of Human Rights of Colombia and Chile, 9 Jan 2023. The 2023 decision sets out guidelines for action by the legislature.

⁶³ *Duarte Agostinho and Others v Portugal and 32 Others*, App no 39371/20 (ECtHR), Judgment 9 April 2024 [ECLI:CE:ECHR:2024:0409DEC003937120].

⁶⁴ Ibid para 224.

⁶⁵ *Verein KlimaSeniorinnen* (n 62).

⁶⁶ Ibid para 483-84.

damage.⁶⁷ It was in this way that the ECtHR rejected the individual applications in *Carême v France* in 2024.

- 50 Notwithstanding this, in environmental litigation in general and climate litigation in particular, collective and intergenerational interests prevail; hence, case law in various countries has developed innovative and evolving jurisprudence to grant those claims. For instance, in 1993, the Supreme Court of the *Philippines* decided in favour of 44 minors in an action against the Secretary of the Department of the Environment seeking an order that the State cancel the (then) current logging licences and that it did not grant any additional new ones, because of the irreparable consequences of this activity on the tropical rainforests.⁶⁸ The action was brought on the minors' behalf and on behalf of future generations. The decision recognized the children's interest in invoking the right to a healthy environment, and, more specifically, the right to benefit from the natural resources provided by these forests and the right of potential future unborn victims who would suffer even more from the damage caused by logging.⁶⁹
- 51 Considering certain resources essential because, vitally, they belong to a common heritage, jurisdictions in different countries have applied the *public trust doctrine* in environmental matters and often in climate litigation brought by young activists. According to this jurisprudential doctrine, which originated in the United States and gradually spread to various common law countries, these resources (as a trust) are placed by the nation under the custody of the state and not under its ownership.⁷⁰ Therefore, states shall act as managers and guarantors (trustees) of their proper conservation, so that future generations may benefit from them. Public authorities have a duty to preserve certain natural resources and thus to put in place reasoned management or even the repair of these resources for the benefit of present and future

⁶⁷ Ibid para 487.

⁶⁸ *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*, Case 101083 (Supreme Court, Philippines), Judgment 30 July 1993.

⁶⁹ This decision is original in several ways. First, it explicitly recognizes a role for minors in the country in sustainable development. Although represented by their parents as well as by the Philippine Ecological Network, these young people are closely associated with a remedy against perpetrators of environmental damage. Even if for the children the interest to act is obvious because of the violation of their right to the environment, it is less so within the framework of recourse exercised on behalf of future generations for a future damage. Finally, the solution given by the judge in this case resounds like a natural law, an obvious and universal rule that does not need to be written down in any case. While the Philippine Supreme Court based its decision on the Preamble of the 1987 Constitution, which guarantees respect for the rights of present and future generations, the Court stated that the right to a healthy environment for present and future generations does not need to be explicitly guaranteed by a text because its scope is so universal.

⁷⁰ J Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Mich L Rev 471.

generations. In case of mismanagement, the trustees can be sued for liability to present and future generations.⁷¹

- 52 Based on this trust doctrine, the American NGO *Our Children's Trust* has brought actions in at least *six states*⁷² on behalf of young people, focusing on the rights of future generations. Also, in 2011, in the case of *Chernaik v Kitzhaber*, a group of children from the State of Oregon and their families filed a lawsuit in the district court, on the grounds of the public trust doctrine, to force the state of Oregon and its governor Kitzhaber to take action against climate change.⁷³ Relying on the public trust doctrine, in the well-known *Juliana v the United States of America* case, young plaintiffs brought an action against the United States and various institutions such as the Environmental Protection Agency, seeking to hold the US government liable for the increase in greenhouse gases (GHGs). They claimed a violation of the constitutional rights of young people based on

⁷¹ The trustee must therefore honour various obligations such as not transferring these resources, preserving them, managing them solely in the interests of their present and future beneficiaries and obtaining compensation in the event of degradation. Initially restricted, the public trust doctrine has been considerably extended in environmental cases. Thus, this doctrine is applied to fishing, navigation and commerce, but also to beaches and shores, navigable waterways and their tributaries, the preservation of habitats and marshes, or even submerged lands; E Cornu-Thenard, 'Éléments sur l'apport de la doctrine américaine du public trust à la représentation de l'environnement devant le juge' (2015) 22 Hors-série Vertigo, 3 ff; *Matthews v Bay Head Improvement Ass'n* (Supreme Court of New Jersey, US), Judgment 2 February 1984 [471 A.2d 355]; *Nat'l Audubon Soc'y v Superior Court* (Supreme Court of California, US), Judgment 17 February 1983 [658 P.2d 709]. *City of Berkeley v Superior Court* (Supreme Court of California), Judgment 22 February 1980 [606 P.2d 362], 365; R M Frank, 'The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future' (2012) 45 UC Davis Law Review, 665 ff. In the context of climate justice, the public trust doctrine has been applied in the United States, in common law countries (India, the Philippines, Pakistan, Uganda, Kenya, Nigeria, Canada and South Africa), and also in certain Romano-Germanic law countries such as Brazil and Ecuador. Applied to the climate trial, this intergenerational dimension has been invoked by various young people as representatives of future generations and beneficiaries of the trust in order to raise the responsibility of the state in which they live: this is notably the case in *Chernaik v Kitzhaber*, *Juliana v the United States of America* or *Foster v Washington* concerning the United States; the public trust has also been invoked by Indian or Pakistani children; MC Blumm and RD Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision' (2012) 45 University of California Davis Law Review, 741 ff.

⁷² C Huglo, *Le contentieux climatique: une révolution judiciaire mondiale* (Brussels, Bruylant 2018) 201; Oregon, Maine, Massachusetts, Colorado, Pennsylvania and Washington.

⁷³ The Oregon Court of Appeals recognized the State as a gatekeeper of the atmosphere as a natural resource, with a duty to protect that resource from the effects of climate change. This group of children asked that Governor Kitzhaber be held accountable for his failure to act diligently to protect the atmosphere as well as any other natural resource. They also sought an injunction to require Oregon to implement a plan to reduce GHG emissions; *Chernaik v Kitzhaber*, Case 16-11-09273 (Circuit Court of the State of Oregon for Lane County, US), Complaint for Declaratory Judgment and Equitable Relief 19 May 2011; *Chernaik v Kitzhaber*, Case A151856 (Oregon Court of Appeals, US), filed 11 June 2014. In *Meuse nature environnement et autres*, Case No 2023-1066 QPC (Constitutional Council, France), Judgment 27 October 2023, the French Constitutional Council enshrined the protection of the rights of future generations in the Charter of the Environment. This was a 'priority question' on constitutionality (*question prioritaire de constitutionnalité* (QPC)) and is part of 'expected developments in the protection of the rights of future generations', which is 'currently the focus of various international initiatives'. Advisory opinions 'issued a priori by international courts are also expected'. Cf C Perruso, 'Protection des droits des générations futures par le Conseil constitutionnel: les apports de la QPC du 27 octobre 2023' (2023) Dalloz.

the *Fifth Amendment* to the US Constitution, which would sanction the federal government's inaction against current and future generations.⁷⁴ Finally, to name only a few, in a case brought by two children represented and assisted by their parents, the Supreme Court established constitutional liability against the State and ordered the State of Washington to promulgate regulations on CO2 emissions in *Foster v Washington*.⁷⁵

- 53 As Vieira notes, while iconic, these cases invoking the public trust doctrine are far from isolated.⁷⁶ The author recalls the decision of the Supreme Court of *Colombia* granting the petition filed by 25 children and young adults against the State, also acting on behalf of future generations, insofar as they would suffer the negative consequences of climate change due to the State's inaction.⁷⁷ In the decision, a *duty of intergenerational solidarity* was put forward, as well as the consideration of nature as the foundation of the environmental rights of future generations.
- 54 Through evolving jurisprudence, judges around the world are developing *strong precedents* that can be applied in other countries through a ripple effect. The *similarity of the reasoning* in the Pakistani case of *Leghari v Federation of Pakistan*⁷⁸ with that of the American Our Children's Trust litigation is glaring.⁷⁹ In *France*, a landmark decision of the Montreuil Administrative Court regarding air pollution is noteworthy. A young girl, represented by her mother, brought an action against the State for its inaction in the face of air pollution. In a decision dated 25 June 2019, the Court recognized the inadequacy of the measures taken to remedy the exceeding of the limit values and acknowledged that it constituted a faulty failure to act that could engage the responsibility of the State.⁸⁰

⁷⁴ *Kelsey Cascade Rose Juliana v the United States of America*, Case 6:15-cv-01517-TC (District Court, US), Opinion and Order 10 November 2016, 32-33 <http://climatecasechart.com/case/juliana-v-united-states/> accessed 9 June 2023. At the time of writing, the case and a trial is pending following the defendant's application to dismiss and stay the litigation. The plaintiffs amended their complaint moving forward; the relief requested from the court was modified (injunction), with the court previously holding that the executive and legislative branches needed to be entrusted with the necessary remedial policy decisions.

⁷⁵ *Zoe and Stella Foster et al v Washington Department of Ecology*, Case 14-2-25295-1 SEA (Superior Court of the State Washington for King County, US), Order 19 November 2015.

⁷⁶ J Vieira (n 58).

⁷⁷ *Claudia Andrea Lozano Barragán, et al v Présidence de la République et al*, STC- 4360-2018 (Supreme Court of Justice, Colombia), Judgment 5 April 2018.

⁷⁸ J Vieira (n 58); *Ashgar Leghari v Federation of Pakistan*, Case WP No 25501 (Lahore High Court, Pakistan), Judgments 4 and 14 September 2015.

⁷⁹ C Cournil and C Perruso, 'Réflexions sur "l'humanisation" des changements climatiques et la "climatisation" des droits de l'homme. Émergence et pertinence' (2018) *La Revue des droits de l'homme*; 14 *Revue du Centre de recherches et d'études sur les droits fondamentaux*.

⁸⁰ No 1802202 (Regional Administrative Court, Montreuil), 25 June 2019 [AJDA 1315; Dalloz 1488] O Le Bot (interview).

3.1.2 *Ad Hoc Environmental Procedural Mechanisms*

- 55 Amongst the countries having awarded specific actions that can be brought namely to defend the environment, Brazil is to be mentioned. An action for *compensation for damage caused to the natural environment* is provided for in Art 225 para 3 of the Federal Constitution, and in A4, VII of the Environmental national politics.⁸¹ The main legal actions are the public civil action and the popular action, and they are to be exerted within civil proceedings.⁸² Law 7.347 of 1985, implementing the *public civil action*, provides for a legal action to engage the liability arising from material, moral⁸³ and ecological damage in several scopes, namely environmental.⁸⁴ The regime for environmental damage is based on strict liability.⁸⁵ Thus, the fault of the perpetrator is not considered. All persons, natural or legal, have an obligation to protect the environment because of the legal nature of the environment.⁸⁶ Depending on whether the damage affects one or more individuals, a group of the latter or all of them in an indeterminate way, the public civil action is exercised in case of violations of 'diffuse' rights, collective rights and individual rights. In a public civil action, the individual right must be homogeneous, that is, it must belong to several identifiable individuals linked by a factual situation. Therefore, all individuals must have suffered the same damage, even if this collective action does not deprive the victims of the right to bring their own civil action for the compensation of their own damage, such as personal moral or economic damage resulting from the environmental infringement.
- 56 The Brazilian *public civil action* can be brought both by public and private subjects. Regarding the former, the Public Ministry and the organs of the Brazilian federation can engage the proceedings.⁸⁷ In addition, the Public Prosecutor's Office has jurisdiction to

⁸¹ Environmental Law Act L 6.938 of 31 August 1981 (Brazil).

⁸² On this subject, cf interview with C Costa de Oliveira by M Hautereau-Boutonnet, 'Le droit brésilien: un modèle pour la réparation du préjudice écologique?' (2014) *Environnement et développement durable*, Interview 5.

⁸³ REsp (Special Appeal) No 791653/RS (Superior Court of Justice, Brazil), 6 February 2007, cited in C Costa de Oliveira, 'Le cas brésilien: la procédure civile comme instrument par excellence de la responsabilité environnementale' (2016) *Energie - Environnement – Infrastructures*, Dossier 16; *Revue Mensuelle Lexisnexis Jurisclasseur*.

⁸⁴ The areas concerned are: the environment, consumption, goods of artistic, aesthetic, historical, tourist, town planning or economic value.

⁸⁵ Art 14, Sec 1 L 6.938/1981. Cf on this subject J R M Leite and P A Ayala, *Dano ambiental: do individual ao coletivo extrapatrimonial. Teoria e prática* (São Paulo, 4th edn, Revista dos Tribunais 2011).

⁸⁶ Under the Federal Constitution, the environment is described as a 'public good' (*bem de uso comum do povo*). Art 225 specifies that it is a good that cannot be appropriated by anyone. The Constitution also states that rights relating to the environment include individual, collective and diffuse rights. This explains why, in Brazil, while on the one hand environmental management is an obligation that falls within the remit of the public authorities, on the other, the duties to protect the environment benefit all individuals, both public and private.

⁸⁷ According to Art 127 of the Brazilian Constitution, the Public Prosecutor's Office is a permanent and independent institution, whose role is to defend the legal order, the democratic system and the interests of the public, collectively and individually. Art 129, III provides for the right to take legal action through public civil proceedings.

carry out civil investigations concerning the damage, which allows it to gather more evidence to initiate the proceedings.⁸⁸ Regarding private actors, associations that have been in existence for more than one year and whose purpose is the protection of these diffuse, collective or individual rights can also introduce the public civil action.⁸⁹ Whilst public bodies only need to demonstrate the interest to act according to their statute, associations must also demonstrate that their statutes provide—explicitly or implicitly—for the defence of collective and diffuse rights,⁹⁰ notwithstanding the geographical location of the association.⁹¹ In order to avoid the greater negative media impact on the defendant,⁹² public civil actions are often mediated.⁹³ If they go to trial, the defendant is frequently held liable. The judge may order the performance of an obligation to make reparation, to refrain from acting, or to pay damages. As for the latter, material, moral and ecological damages coexist.⁹⁴ When compensation for ecological damage is awarded, the amount of damages related to ecological harm is transferred to a ‘Fundo de Defesa de Direitos Difusos’⁹⁵ (public fund) governed by the competent federal, state or municipal bodies, and must be used to compensate the environmental damage. The effects of the court decision are *erga omnes*, within the territorial jurisdiction of the body that gave rise to the action, thus going beyond the persons qualifying as parties to the action.⁹⁶ The central role of the Public Prosecutor’s Office and of civil associations in

⁸⁸ The power to initiate civil investigations is provided for in Art 129, III of the Federal Constitution and Art 8, Sec 1 of Law 7.347/1985.

⁸⁹ L 7.347 of 1985, Art 5. Cf on the subject E Milaré, *Direito do ambiente* (São Paulo, 9th edn, Revista dos Tribunais 2014) 1482; CAP Fiorillo, *Curso de direito ambiental brasileiro* (São Paulo, 14th edn, Saraiva 2013) 696.

⁹⁰ C Costa de Oliveira (n 83).

⁹¹ For example, the protection of the environment has been interpreted as an objective of promoting the quality of life. Cf REsp No 31.150/SP (Second Panel, Superior Court of Justice, Brazil), Judgment 20 May 1996. Therefore, the judge cannot restrict the right to act in Amazonia only to associations constituted in that State. The political objective of the law was to encourage associations to defend diffuse and collective interests. Cf in this regard Milaré (n 89) 1483.

⁹² International Commission of Jurists, ‘Acesso à Justiça: violações de Direitos Humanos por Empresas Brasil Um projeto da Comissão internacional de Juristas’ (Geneva 2011) 80 <https://www.conectas.org/publicacao/violacoes-por-empresas/> accessed 9 June 2023.

⁹³ Costa de Oliveira (n 83).

⁹⁴ For the possibility of the coexistence of the preparation of material, moral and ecological damage: REsp 1.328.753-MG (Superior Court of Justice, Brazil), Judgment 28 May 2013; [REsp No 896.863-DF], Judgment 19 May 2011; [REsp No 1.180.078], Judgment 2 December 2010.

⁹⁵ Created by the 1985 Law, *Le décret qui a réglementé le fonds est le suivant*: D 1.306, 9 November 1994. The amount deposited in the fund may be the result of the conviction of material or moral damage independently. On the other hand, there are very few cases in the jurisprudence where the judge foresees the monetary value to be deposited in the fund. Moreover, the public civil action gives the same solution to a specific case, while the individual actions can vary in different decisions. In addition, through these actions, victims can have a more qualified legal defence than if they are brought by a lawyer. Companies have the means to pay for the best lawyers, while most victims do not. It is important to emphasize that even if this action is not used, this does not mean that victims lose the right to bring their own civil action for compensation for their own damages resulting from the environmental damage.

⁹⁶ Art 16 of Law No 7.347/1985. Cf E Milaré (n 89) 1523.

environmental protection explains the preponderance of public civil action in environmental civil liability.

- 57 Regarding the *popular action*,⁹⁷ this is a procedural tool to take action in order to obtain compensation for certain ecological damage without the representation of a competent body.⁹⁸ In Portugal, it is enshrined as a constitutional right granted both to citizens and NGOs. In Brazil, a popular action allows any citizen⁹⁹ to defend the public patrimony and diffuse goods without having to demonstrate a personal interest in the act that caused the damage.¹⁰⁰ And, even if it has not been very successful in the Brazilian judicial practice regarding environmental protection, its features regarding standing to sue are interesting and made *popular action* a complementary tool that can be used when the bodies competent to exercise public civil action do not to initiate such proceedings. Unlike the public civil action, the popular action is granted to the *citizen*, a term to be interpreted broadly, including all Brazilians and foreigners but excluding civil associations. Representation by a lawyer is mandatory. The popular action can be addressed against public and private persons.¹⁰¹ In the former, however, the objective of the lawsuit is not to seek redress but to challenge the act of the public authority.¹⁰² Because of the said limits of the popular action, the public civil action is the most widely used procedure in Brazil with respect to environmental civil liability.
- 58 Last, the *Termo de Ajustamento de Conduta* (Conduct Adjustment Agreement) (TAC) is an original extrajudicial procedure¹⁰³ enshrined in the law on public civil action and going beyond the environmental framework.¹⁰⁴ The conduct adjustment agreement is a preventive and/or punitive legal agreement that seeks to influence the behaviour of the person responsible in order to force them to adopt a different course of conduct that will avoid the damage. The aim is then to find an out-of-court solution for compensation or reparation before the conflict turns into a dispute and ends up before the judicial system. The agreement must meet formal written requirements concerning the identification of the parties, the content of the clauses and obligations, the duration, the financial obligations, the conditions of application and the penalties in case of non-compliance. The State, the municipalities, the prosecutor, state entities and the various environmental agencies of Brazil (Brazilian Institute of Environment and Renewable

⁹⁷ It is an action provided for by constitutional and sub-constitutional norms.

⁹⁸ Cf on the subject PAL Machado, *Direito ambiental brasileiro* (21st edn, São Paulo, Malheiros 2012) 427; Milaré (n 89) 1534.

⁹⁹ Legal persons are not competent to propose popular action, according to Súmula (precedent) 365 of the STF (Federal Supreme Court, Brazil).

¹⁰⁰ Cf on the subject JRM Leite and PA Ayala, *Dano ambiental: do individual ao coletivo extrapatrimonial. Teoria e prática* (São Paulo, 4th edn, RE 2011) 160; E Milaré (n 89).

¹⁰¹ Art 6 of L 4.717/1965; cf JRM Leite and PA Ayala (n 100) and E Milaré (n 89) 167.

¹⁰² Art 11 of L 4.717/1965.

¹⁰³ On this subject cf C Costa de Oliveira, L Paixao Silva Oliveira and P Pereira de Andrade, 'Environmental damages caused by oil exploitation in Brazil: the conduct adjustment agreement as means to circumvent civil liability ineffectiveness' in C Oliveira (ed), *Le droit brésilien: un modèle pour la réparation du préjudice écologique?* (forthcoming).

¹⁰⁴ Art 42 of Federal Decree No 99.274, 6 June 1990 (Brazil).

Natural Resources, IBAMA) are entitled to enter this type of contract with the companies that caused the damage. This measure is therefore not offered to NGOs. Without necessarily putting an end to the proceedings, the TAC provides for the prevention or the repair of the ecological damage in kind or in money with the guarantee of the binding force of the contract and the possible control of the judge on the content of the obligations and their good execution. Indeed, the agreement can be negotiated at the outset of the public civil action and throughout the investigation and implementation phase of the action. For example, in the *Chevron* case,¹⁰⁵ a maritime oil pollution case that took place in 2011, a TAC was signed between Chevron and Prosecutors of the Public Ministry of Rio de Janeiro in 2013.¹⁰⁶ The agreement allowed the parties, during the course of the action, to accelerate the prevention and repair of damage without waiting for the judgment, since in 2012 the competent court had denied provisional measures.¹⁰⁷ The agreement provided for obligations regarding the adoption of preventive and precautionary measures to prevent future damage. Another agreement was reached between the State of Rio, the Rio Environment Secretariat and the oil company Petrobras to set up a water treatment plant in the Irajá River.¹⁰⁸ In both the *Petrobras* and *Chevron* cases, the parties had reached an agreement on an amount of money to repair the ecological damage in kind and for the repair of the biodiversity of the coast, fish resources and environmental education, following a schedule of obligations and annual monitoring of compliance.

- 59 The TAC was considered by the English courts in assessing the public civil action arising from the 2015 Fundão Dam collapse. Counsel acted on behalf of 202,600 Brazilian claimants, comprising individuals, businesses, municipalities, utility companies, indigenous communities and churches.¹⁰⁹ The Court acknowledged that when part of a settlement, a TAC is subject to homologation (ratification) by the court, ‘which is designed to ensure court approval the appropriateness of the TAC terms’.¹¹⁰ In 2016, the parties to a first federal public civil action agreed a ‘Transaction and Conduct Adjustment Term’ (creating the Renova foundation to mitigate the environmental consequences of

¹⁰⁵ Case 2012.02.01.004075-2, (*Tribunal Regional Federal da 2 Região* (Federal Regional Court of the 2nd Region), Brazil), Decision 27 November 2012.

¹⁰⁶ *Termo de Ajustamento de Conduta* (Conduct Adjustment Agreement) (TAC) Chevron (and other actors) www.prrj.mpf.br/frontpage/noticias/mpf-assina-tac-com-chevron-nessa-sexta-feira accessed 11 June 2023.

¹⁰⁷ C Costa de Oliveira (n 83).

¹⁰⁸ On the other hand, the agreement may provide for the settlement of monetary obligations to compensate for ecological damage in kind. This is illustrated by the agreement reached with Petrobras and Chevron, the latter specifying that the amount would be used to repair coastal biodiversity, fish stocks and environmental education. It should be noted that in this case there was even provision for a schedule of obligations and annual monitoring of compliance.

¹⁰⁹ *Município de Mariana v BHP Group (UK) Ltd (formerly BHP Group Plc)* (Court of Appeal (Civil Division), England, UK), Judgment 8 July 2022 [EWCA Civ 951] (*Município de Mariana v BHP Group (UK)*). Cf S Tavares Gil, ‘Litigating Elsewhere: Learning from Mariana Dam environmental disaster in Brazil’ (2023) International Law Blog <https://internationallaw.blog/2023/07/03/litigating-elsewhere-learning-from-mariana-dam-environmental-disaster-in-brazil/> accessed 8 October 2024. The cost of remediation and compensation for the environmental disaster was estimated to be GBP 25 billion at the least.

¹¹⁰ *Município de Mariana v BHP Group (UK)* (n 109) para 25.

the dam disaster and a funding arrangement to compensate victims but excluding monetary redress for some claimants). This was judicially homologated, but later suspended and annulled. The parties to a second action filed by the Federal Public Prosecutor then reached a 'Preliminary Terms of Adjustment Agreement' in 2017, and a more exhaustive interim 'Governance and Conduct Adjustment Agreement' in 2018 which stayed the proceedings and brought the first action to an end. The latter settlement agreement recognized that *full redress* would not be available to victims until either: negotiations concluded, or the civil action resumed and was decided. The level of redress offered under the Renova initiative in the meantime was argued to be inadequate. In overturning the first instance decision that the claims constituted an abuse of process, the Court of Appeal held that neither the procedural complexities of parallel proceedings in Brazil nor the availability of redress through the compensation scheme established there under the TAC, were enough to strike them out for 'irredeemable unmanageability' in England.¹¹¹

- 60 Portugal's regime is dual. On the one hand, the civil liability regime provides both for subjective and objective grounds under which the polluter-operators are obliged to compensate the injured individuals for damage suffered by an environmental component. On the other hand, the administrative liability regime aims at repairing the damage caused to the environment before that caused to the community as a whole.¹¹² Therefore, in Portugal, damage to the integrity of natural environmental components obeys its own regime and has a combined idea of liability for personal injury or damage to property caused by the degradation of the quality of natural environmental components.¹¹³

3.1.3 General Procedural Mechanisms Frequently Used to Bring Environmental Lawsuits

- 61 In the *French legal system*, environmental law is still perceived as a special law with *administrative law* as its backbone,¹¹⁴ instead of an autonomous law with original rules.¹¹⁵ The lawmaker had transposed into it the solutions implemented in the field of

¹¹¹ Ibid cf para 181–186.

¹¹² *Decreto-Lei* (Decree-Law) No 147/2008 of 29 July 2008 (RPRDE) (Portugal); MA Bühring, 'Reparação do dano ambiental: o quantum indenizatório e o dano moral extrapatrimonial' in MA Bühring (ed), *Direito do Ambiente Estudos em Homenagem ao Prof. Doutor Vasco Pereira da Silva* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2021); part of the postdoctoral thesis 'Environmental/ecological civil responsibility: Some points and counterpoints in the "green transiting" between distinct contexts A compared study between Portugal and Brazil' (Defence online 2020).

¹¹³ For example, 'the contraction of pulmonary infection due to the inhalation of atmospheric pollution'. In this case, 'it is a question of civil liability in the classic terms, which is resolved by resorting to the Civil law rules (Art 483 ff and 562 ff of the Civil Code)': C Amado Gomes, *Tutela Contenciosa do Ambiente: uma amostragem da jurisprudência nacional* (ICJP/CIDP 2019); and C Amado Gomes, *Direito do Ambiente – Anotações jurisprudenciais dispersas* (Lisboa, 2nd edn, ICJP revista e ampliada 2017) 57 ff.

¹¹⁴ Y Jégouzo, 'Le juge administratif et l'ordonnancement du droit de l'environnement' (2004) Special issue *Revue Juridique de l'Environnement* 21.

¹¹⁵ M Prieur, *Droit de l'environnement* (7th edn, Dalloz, Précis 2016) 10-12.

urban planning litigation. Despite having been rather reluctant with regard to the Charter of the Environment in the past, more recently, the administrative judge has, on these grounds, annulled an authorisation to market phytopharmaceutical products on the basis of the precautionary principle.¹¹⁶ Among the recent proposals for reforming environmental litigation,¹¹⁷ some of them envisage allowing challenges to the legality of impact studies, public enquiries or environmental assessments required for the issue of an environmental permit, without waiting for the decision to be taken, in order to ensure better prevention of damage to the environment.¹¹⁸

- 62 Environmental issues appear to be a recurring source of *tension between the state and local authorities*. A symbol of this is to be found in the case opposing the municipality of Grande-Synthe to the State; the former has requested damages regarding the State's inability to manage the nitrate polluting the beaches of Brittany, France.¹¹⁹ Another landmark case opposed the same municipality (Grande-Synthe) and its former mayor, Damien Carême, to the French President, the Prime Minister and the Minister of Ecological and Solidarity Transition, on the basis of an action for *excès de pouvoir* (*ultra vires* act). Following the administrative rules, the plaintiffs had previously asked the latter to take all useful measures to curb the curve of national GHG emissions in order to respect France's national and supranational objectives. In face of the silence kept by the addressees of the request, which generated an implicit decision of rejection, the applicants demanded the *Conseil d'Etat* (Council of State), which has first and last resort in France, to annul it. In July 2021, the latter noted the need to step up efforts to achieve the objectives set for 2030 and the impossibility, with the measures thus far adopted, of

¹¹⁶ Case 1704067 (Regional Administrative Court, Lyon, France), Judgment 15 January 2019; *Association Générations Futures and others*, Case 1704687 (Regional Administrative Court, Nice, France), Judgment 29 November 2019: cancellation of a marketing authorization for plant protection products on the grounds of the precautionary principle; Charter of the Environment R 181-50; and ICPE (classified installation for environmental protection), Charter of the Environment R 514-3-1.

¹¹⁷ Hautereau-Boutonnet and Truilhé (n 55).

¹¹⁸ In this sense, cf F Melleray, *Essai sur la structure du contentieux administratif français. Pour un renouvellement de la classification des principales voies de droit ouvertes devant les juridictions à compétence générale* (LGDJ 2001); J Waline, 'Plein contentieux et excès de pouvoir' (2012) 6 RD publ 1551.

¹¹⁹ Concerning environmental policy and administrative cases against the State, and between public persons, see Moliner-Dubost (n 28); A Duranthon, 'Les litiges entre personnes publiques en matière de police administrative' (2017) 8-9 Dossier: Les litiges entre personnes publiques, Dr adm, Art 12; A S Denolle, 'Pesticides: dangerosité avérée, réglementation controversée! Quelle marge de manoeuvre pour les maires?' (2020) AJCT 109; *Sté Bayer Seeds K*, Case 19LY01017 (Regional Administrative Court of Appeal, Lyon, France), Judgment 29 June 2021 (2021) AJDA 2563: cancellation of the marketing authorisation for Round up pro 360 for failure to apply the precautionary principle; *Revue Juridique de l'Environnement*, 837, Conclusions of S Deliancourt; Note M Moliner-Dubost (2021) (3) *Revue de jurisprudence d'Alyoda* (online); *Collectif des maires anti-pesticides*, Case 437815 (Council of State, France), Judgment 26 July 2021 [ECLI:FR:CECHR:2021:437815.20210726] (2021) Lebon AJDA 1590, Note C Rouillier; (2021) AJCT 600, Obs M Moliner-Dubost; No 2102294 (Regional Administrative Court, Nantes, France), Order 5 March 2021; Prefect of Loire-Atlantique and Regional Administrative Court, Nantes, 9 April 2021; Case 2102877, Prefect of Loire-Atlantique (2021) AJCT 321, Obs M Moliner-Dubost; B Faure, 'Les litiges contentieux entre l'État et les collectivités territoriales' (2017) 8-9 Dossier: Les litiges entre personnes publiques, Dr adm, Art 4.

achieving them.¹²⁰ It therefore annulled the contested implicit refusal and ordered the executive to take the necessary additional measures before 31 March 2022, on the basis of international commitments.¹²¹ Indeed, the refusal by the regulatory authority is incompatible with the trajectory set to achieve the GHG emission reduction targets set out in Art L 100-4 of the Energy Code (reduction of minus 40% by 2030 compared to 1990 and carbon neutrality by 2050) and by European Union law.¹²²

- 63 The judgment of November 2020 (*Grande-Synthe*) is also important for the acknowledgement of the municipality of Grande-Synthe's *interest to act* and the interests of the municipalities of Paris and Grenoble to intervene. Indeed, doctrine had expressed doubts about the admissibility of such an action, which could appear to be an *actio popularis*, as the consequences of climate change do not specifically affect one individual or a public authority but the national community; their effects reach beyond the international community as a whole.¹²³ In his defence, the Minister for Ecological Transition had thus rejected the case, arguing that climate change would not particularly affect the territory of the municipality of Grande-Synthe. However, the *Conseil d'État* followed the plaintiff's argument according to which the municipality of Grande-Synthe

is exposed in the medium term to increased and high risks of flooding and episodes of severe drought with the effect not only of a reduction and degradation of fresh water resources but also of significant damage to built-up areas, given the geological characteristics of the soil.¹²⁴

- 64 On the contrary, the Council of State denied Damien Carême such an interest, noting that he 'merely sustained that his current residence is located in an area likely to be subject to flooding by 2040, and that he was a citizen'. According to the judges, not only is this status not sufficient to give him an interest in acting, but it is also not certain that

¹²⁰ *Cne de Grande-Synthe*, Case 427301 (Council of State, France), Judgment 1 July 2021 [ECLI:FR:CECHR:2021:427301.20210701] [Lebon 2021; AJDA 1413]; Note H Delzangles; (2021) Dalloz 1287, and Obs; (2021) RFDA 777, Conclusions of S Hoynck.

¹²¹ This judgment was preceded by a supplementary investigation ordered by a preliminary ruling of 19 November 2020, which was a pioneering decision for having admitted the invocability of the interpretation of international commitments, the Framework Convention on Climate Change and the Paris Agreement, which has no direct effect, thus conferring a normative scope to a programmatic objective; *Cne de Grande-Synthe*, Case 427301 (Council of State, France), Judgment 19 November 2020 [ECLI:FR:CECHR:2020:427301.20201119] [Lebon 2021; AJDA 217]; Note H Delzangles; (2020) Dalloz 2292, and Obs; Ibid (2021) 923, Obs S Clavel and F Jault-Seseke; Ibid 1004, Obs G Leray and V Monteillet; (2021) RFDA 747; (2021) RTD eur 484, Obs D Ritleng; (2020) Dr envir 392, Conclusions of S Hoynck; S Cassella, 'L'effet indirect du droit international: l'arrêt Commune de Grande-Synthe' (2021) AJDA 226.

¹²² Regulation on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, Annex I, 2018/842 of 30 May 2018 (EU).

¹²³ M Moliner-Dubost (n 28).

¹²⁴ *Cne de Grande-Synthe*, Case 427301 (Council of State, France), Judgment 1 July 2021 [ECLI:FR:CECHR:2021:427301.20210701]; [Lebon 2021; AJDA 1413] pt 3. Cf also the second ruling, *Grande Synthe 2*, Case 427301 (Council of State), Decision 1 July 2021 [JCP G 2021, Act 795] [Aperçu rapide] B Parance and J Rochfeld; and *Commune de Grande-Synthe and others*, Case 467982 (Council of State), Decision 10 May 2023 (*Grande-Synthe 3*).

his current residence, even supposing that it is effectively exposed, will still be his in the years to come.¹²⁵

- 65 By an application based on Articles 2 and 8 ECHR, the *Carême* matter came before the ECtHR.¹²⁶ The aspects of the applicant's complaint which fell within the scope of the case were declared inadmissible 'as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3'. On the basis that he did not have victim status within the meaning of Article 34 of the ECHR, the Court declared the application inadmissible. The applicant had not shown to the requisite standard that he was personally and directly affected by the alleged failings of France, and therefore he lacked standing as a 'victim'.
- 66 Another way for local authorities to confront the State on climate issues is through the litigation called 'plein contentieux' allowing claims seeking compensation for the ecological damage caused by the State's climate policy, provided that the applicant can establish a causal link between it and the damage claimed. The French *Affaire du siècle* case has shown that such an action is possible and can be successful.¹²⁷ In this case, the court characterized the existence of pure ecological damage based in particular on the latest special reports of the Intergovernmental Panel on Climate Change (IPCC), establishing the anthropogenic force of the greenhouse effect and its consequences for the environment, activities and human health. This is supported in the case of France by the National Observatory on the Effects of Global Warming (ONERC) (confirming the melting of glaciers, worsening of coastal erosion, risks of flooding and an increase in extreme climatic phenomena, for example).
- 67 Before the *judiciary*, two mechanisms aim at ensuring better protection of the environment: the action for the compensation for ecological damage, enshrined in the

¹²⁵ *Commissariat général au développement durable* (General Council for the Environment and Sustainable Development) (CGEDD), 'La vulnérabilité des communes aux risques climatiques: note de méthode pour le calcul et la classification typologique' (2020); V Antoni and others, 'Risques climatiques: six Français sur dix sont d'ores et déjà concernés' (Datalab 2020).

¹²⁶ *Carême v France*, App no 7189/21 (ECtHR), Judgment 9 April 2024 [ECLI:CE:ECHR:2024:0409DEC 000718921].

¹²⁷ *Assoc Oxfam France, Assoc Notre affaire à tous, Assoc Greenpeace France, Fondation pour la nature et l'homme*, Case 1904967 (Regional Administrative Court, Paris), Judgment 3 February 2021 [2021 AJDA 239; 2115; 2228; 2115], Note H Delzangles and Note J Bétaille; (2021) Dalloz 240, Obs JM Pastor; Ibid 709, Chronicle H Gali; Obs G Leray and V Monteillet; (2021) AJCT 255, Obs M Moliner-Dubost; (2021) RFDA 747; *Assoc Oxfam France, Assoc Notre affaire à tous, Fondation pour la nature et l'homme, Assoc Greenpeace France*, Case 1904967 (Regional Administrative Court, Paris, France), Judgment 14 October 2021 [2021 AJDA 2063; 2021 Dalloz 1924], Obs JM Pastor.

rules of the Civil Code;¹²⁸ and the group action in environmental matters, enshrined in the French Environmental Code and Code of Civil Procedure (FCCP).¹²⁹

- 68 The French *Convention judiciaire d'intérêt public* (Judicial Convention of Public Interest, hereinafter CJIP) created a specific mechanism, through Art 41-1-3 of the Code of Criminal Procedure, for offences falling under the Environmental Code and related offences.¹³⁰ It serves as an alternative to prosecution, allowing the Public Prosecutor to propose to a legal person accused of the aforesaid offences, with the notable exception of offences under Title II of the Criminal Code, to benefit from an agreement that extinguishes public proceedings in exchange for the discharge of certain obligations. Limited and *proportionate* public interest fines and methodic, long-term environmental compliance measures may form part of such an agreement, as confirmed against a Lactalis group company in June 2023.¹³¹ Mabile considers that the CJIP¹³² would ultimately be the most appropriate legal tool for reparation in kind of ecological damage because it allows time for negotiation, exchanges, preparation, and reflection with the help of experts.¹³³ It is said that it 'makes up for the lack of a transactional mechanism for the efficient and rapid handling of proceedings for serious environmental offences'.¹³⁴
- 69 In the case of environmental offences, the Environmental Code itself is limited in that measures apply only to offences punishable by less than two years' imprisonment.¹³⁵ The law benefits judicial handling of environmental cases by creating a regional centre specializing in environmental offences and, in terms of procedure, a new potential legal tool: the judicial environmental public interest *agreement*. Rather than the traditional

¹²⁸ *Loi pour la reconquête de la biodiversité, de la nature et des paysages* (Law for the reconquest of biodiversity, nature and landscapes) No 2016-1087 of 8 August 2016 (France), Art 4. It introduced a new Title into the Civil Code: 'De la réparation du préjudice écologique' (on compensation for ecological damage).

¹²⁹ *Loi No 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* (Law No 2016-1691 on transparency, the fight against corruption and the modernization of economic life of 9 December 2016) (France), Art 89; Azar-Baud (n 39).

¹³⁰ Resulting from Loi No 2016-1691 (n 129) known as the 'Sapin II law'.

¹³¹ An example of the operation of the Convention in practice may be seen in *Monsieur le procureur de la République près le tribunal judiciaire de Besançon v Société fromagère de Vercel, Groupe LACTALIS*, Case 22269000130 (Judicial District Court, Grenoble, France), Order 1 June 2023, in which the Court President validated a Judicial Public Interest Agreement (CJIP) between the public prosecutor and a company belonging to the Lactalis group in respect of polluting factory discharge; commentary in M Recotillet, 'CJIP environnementale à l'encontre d'une société du groupe Lactalis' (2023) Dalloz actualité.

¹³² Law No 2020-1672 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice of 24 December 2020 (France).

¹³³ L Ribier, 'Cour de Cassation: Cycle 2022 - Les grandes Notions de la responsabilité civile à l'aune Des Mutations Environnementales. Conférence 5: Comment rendre effective la réparation en nature du préjudice écologique et selon quelle nomenclature (réparation et affectation des indemnités)?' (2022) 18 Gazette de Droit de L'Environnement 1, 16.

¹³⁴ *Circulaire du 4 mai 2021 visant à consolider le rôle de la justice en matière environnementale* (Circular of 4 May 2021 aimed at consolidating the role of justice in environmental matters) No CRIM 2021-02/G3-11/05/2021, 15.

¹³⁵ Art L 173-12 of Environmental Code.

punitive and dissuasive aims of criminal law sanctions, the *Convention* instead allows promotion of the values of reparation and restoration for victims of environmental offences.¹³⁶

- 70 The above paragraphs show that environmental litigation is generally deemed to be of overriding *public interest*. For the same reason, the protection of the environment is an obligation for the states but also for citizens,¹³⁷ as stated in the Aarhus Convention, in Art 7 of the French Charter of the Environment¹³⁸ and in Art L 110-2 of the Environmental Code.¹³⁹
- 71 According to Anant and Singh, various forms of *judicial activism* exist and show the role courts engaged in public interest litigation should have in promoting social welfare.¹⁴⁰ The reason why the courts, and not the legislation or administrative agencies, set environmental standards in the public interest could be related to the independence of the court, which guarantees that it will act in the public interest.¹⁴¹
- 72 Therefore, the incentives the litigant(s) who initiate the public litigation have to outweigh the costs they incur are likely to be explained differently. In countries like India and elsewhere, wherein the procedures for initiating a lawsuit through public interest litigation have been simple, flexible and inexpensive, this is not as large an issue.¹⁴² In one of the leading environmental cases, *S.P. Gupta v Union of India*, Justice Bhagwati relaxed the rules of locus standi and allowed standing for public-spirited citizens, both for those wishing to expose the cause of the poor and oppressed (ie, representative standing) and for those wishing to enforce performance of public duties (ie, citizen standing).¹⁴³ Because plaintiffs are able to initiate a case by merely sending a letter, the costs of initiating a procedure can be relatively low, which could increase deterrence of

¹³⁶ Cf for its recent use, *Editions Legislatives, Livre blanc: Justice environnementale: le point sur les CJIP en 2022* (Lefebvre Dalloz 2022).

¹³⁷ This is the primary purpose of the Aarhus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters.

¹³⁸ This states that 'everyone has the right, under the conditions and within the limits defined by law, to have access to information relating to the environment held by public authorities and to participate in the preparation of public decisions affecting the environment'.

¹³⁹ Which states that 'it is the duty of everyone to ensure the safeguarding of, and contribute to, the protection of the environment'. Various interested stakeholders, such as local authorities or their groupings, public establishments, public interest groups, environmental protection associations (without reference to their approval), professional unions, foundations, and owners of property affected by damage or their associations also contribute to this purpose. Art L 162-10 of the Environmental Code offers them various initiatives ranging from simply informing the prefect to taking material responsibility for measures to prevent and repair environmental damage.

¹⁴⁰ TCA Anant and J Singh, 'An Economic Analysis of Judicial Activism' (2002) *Econ and Pol Weekly* 4433.

¹⁴¹ Cf M Ramseyer, 'The Puzzling (In)dependence of Courts: A Comparative Approach' (1994) 23 *J Legal Stud* 721.

¹⁴² MG Faure and AV Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2001) 21(2) *Fordham Environmental Law Review* 23.

¹⁴³ L Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) *Journal of Environmental Law* 293.

environmental violations.¹⁴⁴ Some report that there may even be too many cases because plaintiffs now have few barriers to litigation, and the greatly inflated litigant pool can also have a positive environmental effect, since these potential litigants act as a strong deterrent to potential polluters.

- 73 For the enforcement of *EU environmental law*, as in all other matters, the *European Commission* has the task of ensuring that the provisions of primary and secondary legislation¹⁴⁵ are applied, and the task of bringing actions for failures to fulfil obligations against the Member States before the Court of Justice.¹⁴⁶ Since environmental directives have so far predominated over the very few regulations, Member States are allowed to take the necessary measures to ensure that certain objectives are met, with a margin of discretion as to the nature of the measures to be taken. There are some exceptions relating to the protection of wild birds, habitats and wild flora and fauna, which need to be transposed in a more formal way because, since the latter constitute a common heritage of the Member States, each is entrusted with their management, on behalf of all. These specifics of EU law entail a particular responsibility for the Member States.
- 74 In an *ordonnance de référé* (interim order) of the Grand Chamber of the Court of Justice of 20 November 2017, the Court ordered the immediate cessation of active forest management operations in one hundred-year-old forest habitats and stands, and of the removal and felling of trees in the Natura 2000 site of Puszcza Bialowieska. The prohibition applies until the judgment on the merits is delivered in the proceedings pending before the Court of Justice for failure to comply with the provisions of the two most important pieces of secondary legislation aimed at protecting natural environments: Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the 'Habitats Directive')¹⁴⁷ and Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds (the 'Birds Directive').¹⁴⁸ On 25 March 2016, the Minister for the Environment approved the increase in timber harvesting in the Bialowieza forest district, as well as sanitary felling, reforestation and rejuvenation felling, on the grounds of the spread of the *Ips typographus* (bark beetle), whose habitat consists of moribund and dead spruce trees.
- 75 The injunction ordered by the Court of Justice in the said case is remarkable in several respects.¹⁴⁹ Firstly, in terms of procedural law, because it was issued as an interim

¹⁴⁴ S P Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 Wash UJL and Policy 29.

¹⁴⁵ Art 211 EC Treaty, deleted by the Treaty of Lisbon; Art 17 Sec 1 TEU as amended by the Treaty of Lisbon.

¹⁴⁶ Art 226 EC Treaty; Art 258 TFEU.

¹⁴⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (EU).

¹⁴⁸ Council Directive 2009/147/CE of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7 (EU).

¹⁴⁹ P Thieffry, 'La Cour enjoint la cessation d'atteintes à un site Natura 2000 sous peine d'astreinte' (2018) RTD eur Chronique Droit européen de l'environnement (Note *Commission v Poland*, Case C-441/17 (CJEU), Order 20 November 2017 [ECLI:EU:C:2017:877] 418).

measure against a Member State, and because it was adopted by the Grand Chamber. Secondly, because of its rigour, since the Court added that Poland could only continue its operations ‘exceptionally’ if they were ‘strictly necessary, and insofar as they are proportionate, to ensure, directly and immediately, the public safety of persons, provided that other less radical measures are not possible for objective reasons’. Finally, without immediately attaching a penalty payment to its injunction, the Court added in its final recital (No 118) that if the infringement were to be found, it ‘will impose a penalty payment of at least EUR 100 000 per day’.¹⁵⁰

- 76 Seriousness of financial consequences is easier to assess than environmental consequences, since it remains very complex to quantify this damage despite proposed nomenclatures.¹⁵¹ The courts have shown initiative in dealing with the particularities of environmental consequences.
- 77 When urgency can be proven, the French regime employs the *référé-suspension*. In case law, through interim relief, judges were able to suspend acts entailing serious harm to the environment, such as the ‘risks of degradation of the site’.¹⁵² The interim relief judge needs to balance ‘the urgency to suspend invoked by the applicant and the urgency of executing the decision usually sustained by the administrative authority in defence’.¹⁵³ Corsini affirms, despite the existence of the proportionality check, that there is a restrictive definition of urgency and it is strictly assessed. On this basis, it is suggested that: ‘initially designed to overcome it, the summary suspension procedure struggles to free itself from the enforceability of administrative decisions, which is manifested in the urgency to execute them’.¹⁵⁴

¹⁵⁰ Commission, ‘EU actions to improve environmental compliance and governance’ (Communication, 18 January 2018) COM(2018) 10 final; Commission, ‘The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results’ (Communication, 3 February 2017) COM(2017) 63 final; and the commentary in *Chronique de droit européen de l’environnement* (2017) RTD eur 275.

¹⁵¹ L Neyret and G Martin, *Nomenclature des préjudices environnementaux* (Lextenso 2012).

¹⁵² Case 0403366 (Regional Administrative court, Marseille, France), Order 14 May 2004.

¹⁵³ Cf *Préfet des Alpes-Maritimes v Société Sud-Est assainissement*, Case 229562, 229563 and 229721 (Council of State, Sect, France), Judgment 28 February 2001, which introduced an objective assessment of urgency; cf also Case 1307739 (Regional Administrative court, Marseille), Order 11 December 2013.

¹⁵⁴ C Corsini, ‘La condition d’urgence du référé-suspension en matière d’ICPE’ (2023) 20 *Gazette de Droit de L’Environnement* 4.

3.1.4 Environmental, Social and Governance (ESG) Class Actions

- 78 More and more frequently, environmental litigation is brought through ESG class actions, meaning Environmental, Social, and Governance related. Literature on this matter is abundant.¹⁵⁵
- 79 In Canada, the class action regime is trans-substantive, meaning they can relate to any topic whereby a representative plaintiff files a legal proceeding on behalf of a defined class of persons. The representative applies to the Court for an order certifying that the proceeding meets the statutory requirements to move forward. As such, on 26 November 2018, ENJEU filed in the Superior Court of Quebec (the common law court of first instance in that province) an application for authorization to institute a class action against the Attorney General of Canada (who acted in this case as representative of the Government of Canada) on behalf of all Quebec residents aged 35 and under as of the date of the application.¹⁵⁶ On the merits, ENJEU alleged that by failing to adopt adequate measures to limit global warming to 1.5°C, Canada is failing to respect several rights guaranteed by the Canadian Charter of Rights and Freedoms¹⁵⁷ (which is an integral part of the Canadian Constitution) and the Charter of Human Rights and Freedoms with respect to Quebec residents aged 35 and under (a Quebec law with quasi-constitutional value).
- 80 In France, different types of collective actions can be brought, and they depend on the type of right at stake, and also on the grounds. The *collective environmental interest* is mentioned in Art L 142-2 of the Environmental Code and even if it is not precisely defined by positive law, nor by doctrine, the Code allows its defence by *agrées* (approved) environmental protection associations.¹⁵⁸ Thus, French case law allows specially

¹⁵⁵ Eg, Z Kortvelyesi, 'Transcending the individual/collective minority rights divide: a procedural solution' (2022) 71(1) International & Comparative Law Quarterly 73; European Law Institute (with input from the EU Agency for Fundamental Rights), 'Business and Human Rights: Access to Justice and Effective Remedies' (Report 2022); S Moore, 'Product liability: more David, less Goliath?' (2022) 172 New Law Journal 11; K Brimsted, 'All I want for Christmas is not to be sued (by you and you and you...)' (2020) 21(2) Privacy & Data Protection 6; D Greene, 'Litigating for the future' (2022) New Law Journal 6; M Lazarenko, 'Access to Justice in Times of Armed Conflict and the Potential of Collective Redress Mechanisms' Jean Monnet Module Series of Webinars on Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe (27 April 2023); and C Ribot, 'Les potentialités de l'action collective en matière de contentieux environnemental' (2022) Revue Juridique de l'Environnement 703.

¹⁵⁶ G de Lassus St-Geniès, 'ENvironnement JEUnesse c. Procureur général du Canada (2019)' in C Cournil (ed), *Les grandes affaires climatiques* (Aix-en-Provence, Droits International, Comparé et Européen, Confluence des droits 2020).

¹⁵⁷ Constitution Act 1982, Sch B to the Canada Act 1982 (UK), Ch 11.

¹⁵⁸ Cf MJ Azar-Baud, 'L'action de groupe, une valeur ajoutée pour l'environnement?' (2015) 22 Hors-série VertigO and MJ Azar-Baud, 'Renforcement de la protection judiciaire de l'environnement par l'action de groupe' (2021) Revue Justice Actualités: La justice pénale environnementale 145; L Neyret, 'Le préjudice collectif né du dommage environnemental' in L Neyret and GJ Martin (ed), *Nomenclature des préjudices environnementaux* (LGDJ 2011) 198; and MP Camproux Duffrène and D Guihal, 'De l'audace, encore de l'audace, toujours de l'audace et l'environnement sera sauvé' (2013) 3 Revue Juridique de l'Environnement 457 (Commentary on the *Erika* decision of the Court of Cassation, Criminal Chamber of 25 September 2012).

authorized associations to defend collective interests, particularly in terms of the environment.¹⁵⁹

The trend in civil procedure is towards more flexible control [...] both in the presence and absence of a criminal offence. Associations can indeed exercise the rights granted to civil parties with regard to acts that directly or indirectly harm the collective interests that they are intended to defend and that constitute an infringement of the legislative provisions relating to the protection of nature and the environment [...].¹⁶⁰

- 81 On the basis of that provision, the French Criminal Chamber of the Court of Cassation had firstly admitted compensation for ecological damage, as requested by nature protection associations in the *Erika* case on 25 September 2012.¹⁶¹ Later, the Law on the reconquest of biodiversity established an action for compensation for *ecological damage*¹⁶² and recognized the possibility of preventing or repairing ecological damage, defined, according to Art 1247 of the Civil Code, as ‘non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by man from the environment’.
- 82 Likewise, litigation against corporations is often based on the quality of an entity’s *plan de vigilance* (diligence plan), whether in a class action or otherwise. The 2017 Corporate Duty of Vigilance Law requires, among other aspects, the largest French companies to produce and publish such plans annually. Specific *preventive actions* are brought. They aim to enjoin a company to produce a vigilance plan ‘that complies with the requirements of the law’ or aim towards actions for compensation once damage has occurred (but should have been avoided). In either case, the courts have produced no

¹⁵⁹ For example, Case 10-15500 (Court of Cassation, Civil Chamber 3, France), Judgment 8 June 2011 [Dalloz 2011, 1691] *Obs G Forest* (action admissible despite the cessation of the offence that may result in a major risk to the environment). It seems that in applying the same texts, the civil judge is ‘moins rigoureux que le juge répressif’ (less rigorous than the criminal judge). The latter is indeed anxious to preserve the powers of the ministère public (public prosecutor).

S Guinchard, *Droit et pratique de la procédure civile* (Dalloz action 2009-2010) No 102.152 and 102.153.

¹⁶⁰ In France, collective interest also has another meaning and relates to the interests of members of a profession. The interest is therefore transindividual and conveys a closed (or semi-open), identified and organized community. Legislation and case law allow this collective interest to be represented in court by approved organizations, such as unions; Azar-Baud (n 158).

¹⁶¹ Case 10-82.938 (Court of Cassation, Criminal Chamber, France), Judgment 25 September 2012.

¹⁶² For the developments in the types of actions possible, Azar-Baud (n 158); FG Trébulle, ‘La consécration de l’accueil du préjudice écologique dans le Code civil’ (2016) 11 *Energie - Environnement – Infrastructures*, Étude 20; B Parance, ‘Préjudice écologique’ in M Cornu, F Orsi and J Rochfeld (ed), *Dictionnaire des biens communs* (Presses Universitaires de France 2017).

established standard for the level of vigilance expected, and there is no precision through a supplementary decree, for example.¹⁶³

- 83 Against this backdrop, several actions have been initiated based on the Duty of Vigilance Law, where claimants have targeted ESG considerations encompassing energy, water, plastic and transport sectors. This highlights a key area where judicial guidance appears lacking and may have implications when there are large classes of victims bringing a collective suit, ie, the question of what plans should be exercised when harm is potentially class wide.
- 84 It was in 2016 that the ‘French-style class action’, called ‘group action’ extended to damages that are environmental in nature.¹⁶⁴ Regarding corporate and ESG, matters, there is a prominent lack of cases. At the end of 2022, a mission of information had found that no class actions had resulted in the liability of a professional. There has since been one non-final class action judgment in the health field holding a company liable,¹⁶⁵ and, of greater relevance for the environmental cause, the Paris Judicial Court ‘ruled for the first time on the application’ of the corporate Duty of Vigilance Law in an ‘emblematic’ case involving NGOs against TotalEnergies.¹⁶⁶ This made TotalEnergies one of the first corporates to be the subject of an action on behalf of the environment and local populations, on the basis of the 2017 Law, first initiated via the fast-track *référé* procedure.
- 85 In 2019, a *mise en demeure* (formal notice), followed by a judicial writ of summons was served on TotalEnergies by a group of six NGOs, requesting the (civil) Paris First Instance Judicial Court to order TotalEnergies to suspend its work on oil projects and, positively, to adopt more thorough vigilance plans.¹⁶⁷ Amid extensive disputes on jurisdiction, the case progressed to the Cour de Cassation (Supreme Court) on this question. In 2021, the

¹⁶³ BCLP Paris, ‘French Law on Corporate Duty of Care: the Impact of The First Two Decisions on the Subject’ (2023) 2 Paris Litigation Gazette; N Cusacq (2018) RTD com, 471; Official Gazette of France of 28 March; S Schiller, ‘Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d’ordre’ (2017) JCP G, Doctrine 622; P Abadie, ‘Le devoir de vigilance des sociétés mères: responsabilisation actuelle, responsabilités à venir’ (2016) Hors-série, Actes du Colloque de Deauville, Gaz Pal: Les devoirs des actionnaires 55; B Parance, ‘La consécration législative du devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’ (2017) 15 Gaz Pal 16; G Viney and A Danis-Fâtome, ‘La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’ (2017) Dalloz 1610; B Parance and E Groulx, ‘La déclaration de performance extra-financière. Nouvelle ambition du reporting extra-financier’ (2018) JCP E 1128.

¹⁶⁴ MJ Azar-Baud, ‘Renforcement de la protection judiciaire de l’environnement par l’action de groupe’ (2021) Revue Justice Actualités: La justice pénale environnementale 145.

¹⁶⁵ Case against *Sanofi* in *Depakine* (Judicial Court, Paris) non-final Judgment of 5 January 2022.

¹⁶⁶ Case RG 22/53942 (First Instance Civil Court, Paris, France), Judgment/Referral Order 28 February 2023 <https://lpscdn.linklaters.com/-/media/files/document-store/pdf/uk/2023/tribunaljudiciairerfrs28fvrier2023rg-n2253942and2253943.ashx?rev=b28a285e-03fe-4408-ad8b-e302efb31051&extension=pdf> accessed 16 May 2023.

¹⁶⁷ *L’Association ‘Les Amis De La Terre France’ and others v La Société TotalEnergies SE (Friends of the Earth and others v TotalEnergies) (East Africa Oil Project)* (Judicial Court of Paris, France), Judgment 28 February 2023.

Supreme Court confirmed, following the Nanterre Civil Court's 2020 ruling that the matter belonged in the commercial court jurisdiction and, thus, that the civil court was the correct forum.¹⁶⁸ On 28 February 2023, the French Court, specifically an interim judge, dismissed the case on the procedural basis that it was inadmissible. Namely, the Court held that the plaintiffs had not complied with the necessary formal notice requirements, considering that the claim was held to be substantially different to that first pleaded in 2019. Secondly, the matter fell under the jurisdiction of the Paris Court ruling on the merits, rather than the court ruling on interim proceedings. Therefore, there was no opportunity for the case to become the first of its kind, in which the merits and adequacies of a duty of vigilance plan would be assessed, and in which an anticipated precedent could be set. The Court expressed some indicative points, such as the need for co-operation between parties when drafting vigilance plans prior to legal proceedings (a requirement demonstrated by the legislature's intention), and the Court invited *amicus curiae* briefs covering the 2017 Vigilance Law; the vigilance requirements for companies were described as 'monumental goals' to be attained.¹⁶⁹ In principle, having standing themselves, if the plaintiffs' case was brought before a court having jurisdiction, they could pursue the arguments and merits in full.¹⁷⁰ On 6 July 2023, the judge of the Paris first instance court considered that 'the lack of strict identity between the demands'¹⁷¹ of the preventive lawsuit against *TotalEnergies* meant the request for an injunction was inadmissible.¹⁷² Further, the worldwide nature of the climate change issue meant the plaintiff had no standing. In the action, proposed voluntary interventions by a number of parties was also dismissed.¹⁷³

- 86 In the first case of its kind, the commercial bank *BNP Paribas* was sued, by a collection of French environmental NGOs, for its support of the development of fossil fuels. The NGOs in question requested injunctive relief, in order for the corporation to comply with its duties under the Vigilance Law; specifically, the implementation of a sufficient vigilance plan to uphold human rights and environmental standards. With summons filed in Paris in February 2023, the NGOs set out alleged contravention of the 2017 Duty of Vigilance Law, apparent insufficiencies in *BNP Paribas'* due diligence plan, and that BNP Paribas misled consumers. A further example concerns *ClientEarth*, together with the

¹⁶⁸ Case 893 FS-B 15 (Court of Cassation, France), Decision 15 December 2021 [ECLI:FR:CCASS:2021:COO 0893].

¹⁶⁹ MA Frison-Roche (*amici curiae*), *Les buts monumentaux de la Compliance* (Dalloz 2022).

¹⁷⁰ For example, Case 893 FS-B 15 (n 168) para 19: 'Where a company which has been given formal notice to comply with the obligations set out in I fails to do so within three months of the date of the formal notice, the competent court may, at the request of any person with an interest in bringing proceedings, order the company to comply with these obligations, where appropriate subject to a fine'.

¹⁷¹ M Barry and MA Tigre, 'Litigation Updates' Sabin Centre for Climate Change Law (13 September 2023).

¹⁷² Case No RG 22/03403 (Paris Judicial Tribunal, France), Order 6 July 2023: 'requests made in the formal notice must be the same as those mentioned in the summons, insofar as each of those should be discussed between the parties before the proceedings is started'. In the same sense, *Suez*, Case No 22/07100 (Paris Civil Court, France), Decision 1 June 2023.

¹⁷³ The City of Paris, the municipality of New York, Amnesty International France and the municipality of Poitiers.

environmental activists Surfrider and Zero Waste France, which brought an action before the Paris *Tribunal Judiciaire*.¹⁷⁴ The campaign group alleges Danone ‘is trudging ahead without a serious plan to deal with plastics, despite clear concern from climate and health experts and consumers, and a legal obligation to face up to the issue’.¹⁷⁵ The first hearing took place on 11 May 2023. *Deutsche Umwelthilfe* (though unsuccessfully) filed a suit against *BMW* before the Munich Higher Regional Court contending unlawful interferences with fundamental rights due to its business practices and requesting that *BMW* cease selling petrol and diesel cars from 2030.¹⁷⁶ And, similarly regarding corporate practices, several NGOs brought a case against *Danone* for its allegedly harmful use of plastics, and failure to meet the demands of the duty of vigilance law on companies.¹⁷⁷

- 87 It is also the case in the US that local governments have turned to bringing suits against private companies, namely oil companies, such as in the case of *City of New York v Chevron et al.*¹⁷⁸ In that case, seeking from damages for effects on climate change based on private nuisance and trespass, it was held that state tort law could not be used to find liability for such damage by those multinationals. Case was thus dismissed by the Court of Appeal, casting doubt on the viability of similar legal challenges. Further, a 2023 UK derivative action, the first claim internationally seeking to hold company directors liable for climate risk mismanagement, *ClientEarth v Board of Directors of Shell plc*¹⁷⁹ came to an end when the Court of Appeal refused permission to appeal.¹⁸⁰ The High Court, in a judgment true to English common law principles, had showed deference to business judgements made by directors in good faith. This would be the case until there is a ‘universally accepted methodology’ with which to measure climate change action.¹⁸¹

¹⁷⁴ R Harkavy, ‘Mmm Danone! Dairy giant taken to task over plastic pollution’ (2023) Commercial Dispute Resolution <https://www.cdr-news.com/categories/litigation/18472-mmm-danone-dairy-giant-taken-to-task-over-plastic-pollution> accessed 16 May 2023.

¹⁷⁵ R Pritchard (*ClientEarth* Plastics lawyer).

¹⁷⁶ *Deutsche Umwelthilfe v BMW*, Case 32 U 936/23 (Higher Regional Court, Munich, Germany), Judgment 12 October 2023.

¹⁷⁷ The plaintiffs called for ‘actions adapted to the reality on the ground to reduce the risk and the establishment of a deplastification trajectory’. Cf M Brochier, ‘Entreprise - La responsabilité civile climatique de l'entreprise et des dirigeants: panorama 2023 en France et à l'étranger’ (2023) 46 La Semaine Juridique Entreprise et Affaires 1321. On 18 September 2023, the associations that had filed suit against *Danone* on 9 January 2023 announced that they would participate in the mediation proposed by the judge.

¹⁷⁸ *City of New York v Chevron et al*, Case 18-2188 (Court of Appeals for the 2nd Circuit, US), Judgment 1 April 2021.

¹⁷⁹ *ClientEarth v Board of Directors of Shell plc* (High Court of Justice, UK) [2023] EWHC 1137 (Ch), Judgment 12 May 2023; [2023] EWHC 1897 (Ch), Judgment 24 July 2023.

¹⁸⁰ Similarly, in the same year, it rejected an appeal by academics seeking permission to bring a derivative claim against university directors for their failure to divest from using fossil fuels: *McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors* (Court of Appeal Civil Division, England and Wales, UK), Judgment 21 July 2023 [2023] EWCA Civ 87.

¹⁸¹ *ClientEarth v Board of Directors of Shell plc* (n 179) [41].

- 88 Such cases demonstrate that, in addition to the purely environmental (particularly climate) lawsuits, health and human rights impacts are now being addressed by representative groups, and the wider ESG harms of corporate activities on certain populations is gaining focus in their legal strategies.
- 89 The EU Directive 2020/1828 on Representative Actions resulted in a proposed French Bill which eliminates the ‘procedural step of a mandatory formal notice in environmental, discrimination and data protection matters’.¹⁸² These matters relate to ESG principles and this relaxation in the procedure may lead to an increase in the number of actions brought once the Bill is fully implemented. The obligation of vigilance is also being reinforced by the European Commission’s proposal for a Directive on corporate sustainability due diligence; some consider that ‘efforts remain to be made to achieve real judicial control’.¹⁸³
- 90 Although in class actions generally, the initiative to bring proceedings is reserved to a number of associations, in the field of duty of vigilance, the category of persons with an interest in bringing proceedings (with notice, seeking an injunction or bringing an action for damages) before the judge ‘could be particularly widened’.¹⁸⁴ However, the Constitutional Council, when considering the texts established by the Duty of Vigilance Law, confirmed that it ‘cannot allow a person to bring an action on behalf of the victim, who has the sole interest in acting’.¹⁸⁵ This means that admissibility and standing requirements for NGOs, associations, or trade unions, for example, on behalf of a class remain unclear. There is lack of clarity about the circumstances in which these bodies can initiate a class action based on the duty of vigilance or with reference to (a lack of) vigilance standards.
- 91 Intimately linked to the types of actions, the question arises as to who the *holders* of the right to bring an action are.

3.2 Standing to Sue

- 92 The specifics of the subject matter in environmental proceedings transpire through the *holders of the right* to bring the action. Indeed, whereas litigation generally concerns a party who seeks the enforcement of her rights, environmental litigation is about the protection of *nature*.
- 93 The motivations to grant legal personhood status to nature may vary, depending on whether that ecosystem is conceived as a living being or as a protectable patrimony, as

¹⁸² Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1 (EU).

¹⁸³ C Huglo, ‘Climate change litigation: efficiency’ in J-B Auby and others (ed), *French Yearbook of Public Law* (1st issue, 2023).

¹⁸⁴ P Métais and E Valette, ‘Stratégie contentieuse et devoir de vigilance’ (2020) *Dalloz Avocats* 235, para 5.

¹⁸⁵ *Ibid.*

witnessed by cases in Latin America, North America, Oceania and Asia. When such recognition is not granted, national systems enlarge the scope of persons having standing to sue.

- 94 Oversimplified, the issue of the subject matter relates to considering nature either as a subject of law, a holder of rights itself, or as an interest to be protected.¹⁸⁶ In general, national laws operate a *summa divisio* between persons and things. The former are *subjects* of law, that is to say, 'beings who enjoy legal personality' which confers on them 'the ability to be holders of rights'. The latter, things, are *objects* of law, be they a living thing, vegetable or animal, or not. Therefore, regimes face the problem of the way in which to bring the interests of nature into trial, so that the judge can protect it in the most effective way.
- 95 Insofar as policies do not tackle the degradation of nature efficiently, judiciaries appear to be the receptacle of social and ecological claims and face requests that were, even recently, inconceivable before the praetorium. Therein, the question arises as to protecting *nature as an object*, leading towards the enlargement of the persons having standing to sue (2) or to the acknowledgement of nature as a holder of rights, thus *as a subject of law* (1).

3.2.1 Nature as a Subject Having Standing to Sue

- 96 Granting standing to *nature* as a subject of law allows it to act in justice in the name of its personal interest.¹⁸⁷ But the personification of these various natural elements may be surprising for countries such as France, since they would fall into the category of 'objects' of law and not 'subjects' of law.¹⁸⁸ The point of this recognition is to allow nature to take legal action to defend and restore its rights, as demonstrated in 1972 by the question posed in the famous article 'Should Trees have Standing?'.
- 97 In 1982, the *Charter of Nature* stated that 'the human species are part of nature and life depends on the uninterrupted functioning of natural systems' and seems to have triggered a series of changes around the world, not only in the academic world but also increasingly in positive law. In 2006, the Tamaqua Borough of *Pennsylvania, US*, adopted an ordinance recognizing the rights of nature. Aside from the said case, the Grant Township's Home Rule Charter, which operates as a sort of local constitution and was approved in 2015, contains a 'Bill of Rights of the Community' which recognizes, among others, the rights of nature (natural communities), the defence of which must be carried

¹⁸⁶ S Dupouy, 'La défense de la nature, sujet de droit ou intérêt à protéger?' in M Hautereau-Boutonnet and E Truilhe (ed), *Procès et environnement: quelles actions en justice pour l'environnement?* (Aix-en-Provence, Droits International, Comparé et européen 2020).

¹⁸⁷ MA Hermitte, 'La nature, sujet de droit?' (2011) 1 *Annales. Histoire, Sciences Sociales* 173.

¹⁸⁸ Cf Azar-Baud (n 158).

out by all residents of the municipality.¹⁸⁹ Last, there is the example of the local regulations of the City of Santa Monica (California), where the Ordinance of the City established Sustainability Rights.¹⁹⁰

- 98 Two years later, *Ecuador* began to discuss the recognition of the rights of nature, an idea that has always existed in the indigenous traditions of that country. Its inclusion in positive law—especially in norms of a *constitutional rank*—had a great impact.¹⁹¹ As early as 2008, its Constitution acknowledged nature, Mother Earth, as a subject of rights, which entails subjective rights: ‘Nature or Pacha Mama, where life reproduces and is realised, has the right to full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes’. A year later, the *Bolivian Constitution* recognized a right to a healthy environment for ‘individuals and groups of present and future generations, as well as for other living beings, so that they can develop in a normal way’.¹⁹² It also mentioned the *Pacha Mama*, established the bases for future legislation and was a tacit recognition of *Pacha Mama* as a subject of law. The Bolivian Mother Earth Framework¹⁹³, in line with the principles of the Bolivian legal system, is centred on the concept of *Sumac Kawsay*, usually translated as ‘living well’ or ‘living in accordance and harmony with nature’.¹⁹⁴ Its environmental policy is based on the intrinsic value of the environment, in the cult of nature and the diversity of life and its population. The well-known *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* (Act on Mother Earth and Integral Development for Living Well) (Law No 300 of 2012) brought a legal-biocentric approach and inextricably linked the natural and human elements, enshrining the so-called ‘rights

¹⁸⁹ The text can be consulted in full at <https://celdf.org/wp-content/uploads/2016/02/Grant-Township-Community-Rights-Home-Rule-Charter.pdf> accessed 5 June 2023. The Charter was invalidated by a 2022 order of the Commonwealth Court of Pennsylvania due to violation of corporate constitutional rights, but on appeal the invalidating decision was set aside: *DEP v Grant Twp of Indiana Co., et al*, Case 35 (Supreme Court of Pennsylvania, US), Judgment 12 July 2022.

¹⁹⁰ Provided for in its Sec 4.75.040, letter b. The full text of the Ordinance can be found at https://www.smgov.net/departments/Council/agendas/2013/20130409/s20130409_07A1.htm accessed 8 June 2023.

¹⁹¹ The second paragraph of Art 10 of the Constitution (Ecuador) establishes that nature shall be the subject of those rights recognized by the Constitution. Later, in Chapter Seven (Art 71–74), the following rights are enshrined, which B Garzón (2016) summarizes as follows: the right to integral conservation, the right to restoration, precaution of species extinction and non-introduction of genetically modified organisms; and finally, the non-appropriation of environmental services.

¹⁹² In the Preamble of the Constitution, we can read, ‘we populated this sacred Mother Earth with different faces, and we understood since then the prevailing plurality of all things and our diversity as beings and cultures. This is how we formed our peoples, and we never understood racism until we suffered it since the disastrous times of the colony’.

¹⁹³ Namely, *La Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* (Act on Mother Earth and Integral Development for Living Well) No 300 of 15 October 2012 and *Ley de Derechos de la Madre Tierra* (Act of the Rights of Mother Earth) No 71 of 21 December 2010 (Bolivia).

¹⁹⁴ Full text of the 2010 Law available at <https://www.bivica.org/file/view/id/2370> accessed 20 September 2021. This Law establishes a series of principles in line with the provisions of Law No 71, among which are: (5) the guarantee of restoration of Mother Earth; (6) guarantee of regeneration of Mother Earth; (12) harmonious relationship between the Bolivian people and Mother Earth; and (16) complementarity and balance of living beings in Mother Earth in order to live well.

of nature and living well'. However, while Bolivian law proposes new outlines of understanding that could advance if the norms of public international law are given prestige, a similar *Brazilian* law, Law No 6.938, of 198121, which institutes the National Environmental Policy, is more proceduralist and instrumental in defending the environment.¹⁹⁵

- 99 The model has been echoed at the *United Nations* under the impetus of indigenous peoples. In 2009, the *UN General Assembly* proclaimed 22 April as International *Mother Earth Day*. At the same event, member countries recognized that the Earth and its ecosystems are our common home and expressed their resolve to promote harmony with nature to achieve a balance between the economic, social and environmental needs of present and future generations.¹⁹⁶ Through a Resolution in 2015, the *General Assembly* also created the 'Harmony with Nature' network to promote the rights of nature.
- 100 Furthermore, the Preamble of the *Paris Climate Agreement* states that 'it is important to ensure the integrity of all ecosystems, including the oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth'.¹⁹⁷
- 101 In 2016, the *Colombian Constitutional Court* endowed the Rio Atrato with legal personality,¹⁹⁸ and the Supreme Court has also done so for the Colombian Amazon, in order to intensify the government's obligation to implement measures against deforestation that causes climate change.¹⁹⁹ The President and the government, as well as the municipalities, were ordered to carry out and implement an action plan against the deforestation of the Amazon forest.²⁰⁰
- 102 Other examples of legal provisions granting personhood to nature can be found in *New Zealand*, wherein land ownership has been at the centre of public debate because land acquisition has become unaffordable due to speculation. An Act enacted on 27 July 2014 states in regard to the Te Urewera—a mountainous, mostly forested and sparsely populated area of the North Island of New Zealand— that it 'is a legal entity and has all

¹⁹⁵ J Miranda and C Amado Gomes, *Diálogo Ambiental, Constitucional e Internacional. Volume 8* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2019) 381-386.

¹⁹⁶ UNGA Res 63/278 (22 April 2009) UN Doc A/RES/63/278.

¹⁹⁷ Authors see behind this the recognition of the notion of Pacha Mama in recital 13 of the Paris Climate Agreement: Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79; T Deleuil, 'La protection de la terre nourricière, un progrès pour la protection de l'environnement?' (2017) 42(2) *Revue Juridique de l'Environnement* 255.

¹⁹⁸ Case T-622 (Corte Constitucional (Constitutional Court)), Judgment 10 November 2016. The text of the judgment can be found at <<https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm>> accessed 22 September 2021.

¹⁹⁹ Case STC- 4360-2018 (Supreme Court, Colombia), Judgment 5 April 2018.

²⁰⁰ Full text of which is available at <<https://cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>> accessed 23 January 2025.

the rights, powers, duties and responsibilities of a legal person'.²⁰¹ The same goes for the *Te Awa Tupua* (Whanganui River Claims Settlement) Act 2017. Following negotiations with Maori tribes in 2017, the legislature granted legal status to the Whanganui River²⁰² as a *Te Awa Tupua* (a legal entity), having addressed the largest claim in New Zealand's history concerning Maori land.²⁰³ The settlement resolved historic restitution claims for alleged infractions by the Crown of the principles enshrined in the Treaty of Waitangi, by which that territory was annexed to the British Crown in 1840.²⁰⁴

- 103 In *Australia*, beginning with the Victorian Water Act of 1989, the water market was state-regulated and water rights were established to allow for the trading of water. In 2010, the Victorian Parliament passed legislation to establish the new Victorian Environmental Water Holder.²⁰⁵
- 104 In *Brazil*, the municipalities of *Bonito*, *Paudalho* and *Florianópolis* have also drafted regulations recognizing the rights of nature to exist, prosper and evolve, in a balanced relationship with human beings. The municipalities and communities also have the obligation to defend and preserve it.²⁰⁶
- 105 Further, Spain has now granted legal status to an ecosystem, the Mar Menor Lagoon, in a pivotal new Spanish Act, certain to have far-reaching influence beyond the country's borders. Principally, it recalls that 'for [the reasons given], the time has come to make a qualitative leap and adopt a new legal-political model, in line with the international legal

²⁰¹ Text available at <https://www.environmentguide.org.nz/regional/te-urewera-act/> accessed 8 June 2023; <https://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183601.html> accessed 12 June 2023.

²⁰² *Te Awa Tupua* (Whanganui River Claims Settlement) Bill No 129-2 of 20 March 2017 (New Zealand).

²⁰³ F Taylan, 'Droits des peuples autochtones et communs environnementaux: le cas du fleuve Whanganui en Nouvelle-Zélande' (2018) 92 *Responsabilité & Environnement, Annales des Mines* 21 in addition to his radio interview at <https://www.radiofrance.fr/franceculture/milieus-communs-1097424> accessed 12 June 2023.

²⁰⁴ The full text is available at <https://www.legislation.govt.nz/act/public/1975/0114/latest/whole.html> accessed 12 June 2023.

²⁰⁵ The full text is available at <https://www.legislation.vic.gov.au/as-made/acts/water-amendment-victorian-environmental-water-holder-act-2010> accessed 12 June 2023.

²⁰⁶ In the case of Bonito, State of Pernambuco, the local norm was modified in 2017 to include the following provision:

Art 1 of Organic Law 1/2017 amending Art 236 of the Organic Law of the Municipality of Bonito.

In 2018, the Municipal Chamber of Paudalho, Pernambuco, amended Art 181 of the Organic Law of that Municipality in identical terms as the aforementioned norm (Law 3/2018). Finally, in the case of Florianópolis, the normative modification occurred in 2019 and the new text varies in some elements from the previous texts:

Art 1 of Organic Law 47/2019.16 which amends Art 133 of the Organic Law of the Municipality of Florianópolis.

vanguard and the global movement for the recognition of the rights of nature', thus recognizing the need for a complete change in focus regarding personhood.²⁰⁷

- 106 *Case law awarding personhood to nature has also been rich.* An example can be found in the *Sierra Club v Morton* ruling of 1972, whereby the plaintiff sought to stop the approval of a project authorizing the establishment of a ski resort in the Mineral King Valley of *Sequoia* National Park, since the project would negatively affect the aesthetics and ecosystem of the area. The District Court granted and issued a preliminary injunction, which was overturned by the Court of Appeal. Although the Supreme Court upheld the latter decision, the dissenting votes of Justices Douglas, Blackmun and Brennan expressed are of great interest.²⁰⁸ Also in *India*, a judge in the Himalayan State granted legal status to the Ganges and its main tributary, and a court in northern India made the same decision for some Himalayan glaciers, lakes and forests in the Himalayas.²⁰⁹
- 107 The number of cases in which elements of nature are granted legal personality is increasing. Some authors see this as a 'new wave of rights of nature'.²¹⁰ However, the fact remains that a large majority of states do not themselves recognize the concept of nature as a holder of rights itself in any way. For instance, although there is strong support in France for this movement in some international law forums, French law remains opposed to this, 'and the classic anthropocentric model is preserved by means of the provisions admitting derogations to the requirement of a personal interest in acting to defend interests other than individual interests in the environmental field'.²¹¹

²⁰⁷ *Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca* (Law 19/2022 for the recognition of legal personality of the Mar Menor lagoon and its basin) of 30 September (Spain). Cf in particular its Preamble; original text: 'Por todo ello, ha llegado el momento de dar un salto cualitativo y adoptar un nuevo modelo jurídico-político, en línea con la vanguardia jurídica internacional y el movimiento global de reconocimiento de los derechos de la naturaleza' ('For all these reasons, the time has come to make a qualitative leap and adopt a new legal-political model, in line with the international legal vanguard and the global movement for the recognition of the rights of nature').

²⁰⁸ *Sierra Club v Morton, Secretary of Interior, et al* (Certiorari to the United States Court of Appeals for the Ninth Circuit, US), Judgment 19 April 1972 [405 US 727]; Justia (Supreme Court, US) available at <https://supreme.justia.com/cases/federal/us/405/727/> accessed 1 July 2021.

²⁰⁹ *Lalit Miglani v State of Uttarakhand*, PIL No 140 of 2015 (Uttarakhand High Court, India), Order 30 March 2017.

²¹⁰ V David, 'La nouvelle vague des droits de la nature, La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna' (2017) 42(3) *Revue Juridique de l'Environnement* 409; 'While the New Zealand legislator came to offer legal personality to the Whanganui River in New Zealand, through a law of 14 March 2017 ratifying an agreement concluded between the government and the representatives of the Maori tribes bordering the river, the Uttarakhand High Court in India's northern Himalayas granted legal personality to the Ganges and its main tributary, the Yamuna (before the Supreme Court overturned the decision on 7 July 2018)'.

²¹¹ Cf Hautereau-Boutonnet and Truilhé (n 55); Rochfeld, Cornu and Martin (n 42); M Hautereau-Boutonnet, 'Responsabilité civile environnementale' in *Répertoire de droit civil* (Dalloz update of January 2023).

3.2.2 *Enlargement of Persons Having Standing to Sue For the Protection of the Environment*

- 108 The more flexible the conditions for access to the courts, the more likely it is that environmental law will be applied. Providing comprehensive access to justice can help to strengthen the effectiveness of environmental law. Indeed, it is well known that *granting a right of action* to many claimants can reinforce the enforcement of environmental law. But in principle, any person wishing to be heard by the judge must demonstrate a *personal interest* in acting. Thus, some systems appear to be more supple than others and derogate from the need for a personal interest.
- 109 A closer look at regimes in comparative law suggests that the situation varies from one legal order to another. Despite certain nuances, and, namely thanks to the additional support of the Aarhus Convention (Art 9) according to which the signatory parties are committed to ensuring broad access to the courts in this area, a large number of persons can access justice, both public and private.²¹²
- 110 In the *international and european orders*, however, it is well known that, while the European Court of Human Rights (ECtHR) opens its doors to private individuals, the International Court of Justice (ICJ)²¹³ reserves the right of action to states and, before the Court of Justice of the European Union (CJEU), remedies that are effectively open to private applicants are rare.²¹⁴ Hence, there is a need to consider extending the holders of the right of action, in order to make environmental law more effective and potentially extend the right to bring cases before international courts to ‘certain categories of non-governmental actors’.²¹⁵ On 14 June 2023, the ICJ authorized the International Union for Conservation of Nature (‘IUCN’) to participate in the proceedings on the Advisory Opinion on the Obligations of States in respect of Climate Change (‘climate change AO’). As is usual in such requests by international organizations, no reasoning was given by the Court for its decision. However, due to certain specificities of the IUCN, this authorization could imply an expansion of the concept of international organizations (IOs) under Article 66 of the Statute of the Court, as well as under international law.²¹⁶
- 111 As previously stated, rights and interest at stake in environmental disputes can ‘transcend the human sphere’. Thus, the courts’ ‘non-anthropocentric vision’ when analysing environmental rights is essential. Further, the consensus is that protection of the environment is now ‘intrinsically linked to the protection *of human rights*’. An

²¹² S Guinchard, C Chainais and F Ferrand, *Procédure civile* (33rd edn, Dalloz 2016) No 196; 497 ff.

²¹³ Cf Art 34 Sec 1 Statute of the ICJ.

²¹⁴ K Lenaerts, ‘Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union’ (2009) CDE 711; È Truilhé, *Droit de l’environnement de l’Union européenne* (Brussels, Larcier 2015) 124-132.

²¹⁵ In France, cf Club des juristes, ‘Renforcer l’effectivité du droit international de l’environnement’ (Report 2015) Proposals 14-15 and Azar-Baud (n 158).

²¹⁶ DB Garrido Alves, ‘The Concept of International Organization in the practice of the International Court of Justice’ (2023) EJIL: Talk!.

‘integrated vision’ is necessary because protection of the environment is ‘a *sine qua non* for the protection of human rights’ and they must complement each other.²¹⁷

- 112 The Inter-American Court of Human Rights (IACtHR) demonstrates a tendency to integrate the rights contained in the American Convention on Human Rights (ACHR) with the right to a healthy environment as a human right, for instance with the ‘evolutionary interpretation’ (from at least 12 cases) of collective/communal property in, for example, *Mayagna Community*²¹⁸, *Yakye Axa, Sawhoyamaya and Xákmok Kásek*²¹⁹ and *Kaliña and Lokono v Suriname* (2015).²²⁰ This has resulted in an expansion of jurisdiction of the Court.²²¹ The latter, in addition, has relevance for enforcement and regulation.²²²
- 113 The Court also laid down the basis of the plaintiffs’ scope to assert rights. In *Kaliña*, the *Kaliña* and *Lokono* Peoples were confirmed as having the right to request, in domestic law, the possible claim to the parts corresponding to their traditional territory within the reserves that are adjacent to the territory they currently possess, in the face of which the State must weigh the rights at stake, which in this case would be the protection of the collective rights of the *Kaliña* and *Lokono* Peoples and the protection of the environment as part of the general interest.²²³
- 114 Under a comparative law perspective, the different systems which are not exclusive, range from granting standing to sue to *citizens* and/or *NGOs* or to *nature* itself.²²⁴
- 115 Some countries, like *Portugal*, recognize the *actio popularis* and thus grant a right of action to *every citizen*.²²⁵ However, such a model, able to promote a genuine ‘right to environmental democracy’,²²⁶ is not generalized within the European Union²²⁷ or

²¹⁷ Cf *Gabcikovo/Nagymaros case (Hungary v Slovakia)* (ICJ), Judgment 25 September 1997; Separate Opinion of Vice-President Weeramantry (1997) Recueil des Arrêts 91.

²¹⁸ *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Case Series C No 79 (IACtHR), Judgment 31 August 2001 (Merits, Reparation, and Costs) para 148.

²¹⁹ *Xákmok Kásek Indigenous Community v Paraguay*, Case Series C No 214 (IACtHR), Judgment 24 August 2010 (Merits, Reparation, and Costs) para 215, 275.

²²⁰ *Peoples of Kaliña and Lokonos v Suriname*, Case Series C No 309 (IACtHR), Judgment 25 November 2015 (Merits, Reparation, and Costs) para 130.

²²¹ J Calderón Gamboa, ‘Medio ambiente frente a la Corte Interamericana de Derechos Humanos: una ventana de protección’ (2017) *Derechos humanos y medio ambiente* 103.

²²² *Ibid.*

²²³ *Ibid* para 168.

²²⁴ M Hautereau-Boutonnet, ‘Faut-il accorder la personnalité juridique à la nature?’ (2017) *Recueil Dalloz* 1040; Azar-Baud (n 158).

²²⁵ Cf for Portuguese-speaking and African countries, author A Aragão, and for Ecuador and Costa Rica, E Fernandez Fernandez.

²²⁶ E Naim-Gesbert, *Droit général de l’environnement* (LexisNexis 2011) 110.

²²⁷ *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, Case C-263/08 (CJEU), Judgment 15 October 2009 [ECLI:EU:C:2009:631] [Rec CJCE I-9967; *Dalloz* 2010, 2468] Obs FG Trébulle; (2009) *AJDA* 2276, Chronicle M Aubert, E Broussy and F Donnat; *RTD eur* 2010, 403, Chronicle P Thieffry; *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV*, Case C-115/09 (CJEU), Judgment 12 May 2011 [ECLI:EU:C:2011:289] [*Dalloz* 2011, 2694]

abroad.²²⁸ Furthermore, Portuguese law grants environmental NGOs the right to issue their opinion before the Council of Ministers approves a major environmental legal regime, to access information regarding administrative procedures and to *initiate judicial proceedings* regarding environmental matters. They are increasingly active, having played significant roles in the discussion of sensitive issues, namely Portuguese NGOs have had significant impact resulting in the cancellation of projects, and influence on enforcement and policies.²²⁹

- 116 In Canada, Boyd notes that in British Columbia, while some tribunals limit standing to the person or entity that is the holder of an order or permit and owners of land, some limit standing to aggrieved persons and others to interested persons²³⁰; However, whether narrowly or widely interpreted, in Canada, the principle of standing applies to people, and not nature or the environment.²³¹

At the same time, according to Boyd, the Supreme Court of Canada within the last 15 years has recognized ‘that environmental protection is an important value for Canadians’, making it more of a guardian of the prevailing consensus of the population.²³²

- 117 Other systems grant a right of action to *specific organs*, such as the state, via the prosecutor in *Brazil*,²³³ or, more broadly, to certain legal entities under public or private law, in particular NGOs.²³⁴ That is also the case in *Mexico*, *Chile* and *France*.²³⁵ In the US, the US Supreme Court denied the petition for writ of certiorari filed by Missouri and 10 other states seeking review of the Eighth Circuit’s determination that they lacked standing to challenge the Biden administration’s interim social costs of greenhouse gases

Obs FG Trébulle; AJDA 2011, 1614, Chronicle M Aubert, E Broussy and F Donnat; RFDA 2011, 1225, Chronicle L Clément-Wilz, F Martucci and C Mayeur-Carpentier; RTD eur 819, Obs L Coutron and (2012) 469, Obs P Thieffry; more recently, an injunction against Germany, whose overly restrictive legislation is deemed contrary to EU law: *European Commission v Federal Republic of Germany*, Case C-137/14 (CJEU) Judgment 15 October 2015 [ECLI:EU:C:2015:683].

²²⁸ For Japan, N Okubo, ‘Greenaccess Project; Principle 10 and Developments in Asia’ (UNECE 2014); for Chile, P Moraga, ‘La réparation du dommage environnemental en droit chilien’ (2016) 8-9 *Energie - Environnement - Infrastructures*, Dossier 15.

²²⁹ M Gouveia Pereira, ‘Environmental law and practice in Portugal. Overview’ (Thomson Reuters Practical Law: Country Q&A 2021).

²³⁰ DR Boyd, ‘Elements of an Effective Environmental Bill of Rights’ (2015) 27(3) *Journal of Environmental Law and Practice* 201, 240; Alberta Civil Liberties Research Centre, ‘Procedural Issues’ <https://www.aclrc.com/procedural-issues> accessed 27 March 2023.

²³¹ *Ibid.*

²³² Boyd (n 230) 202.

²³³ Costa de Oliveira (n 83).

²³⁴ The system favoured by French law in particular: cf Art L 142-1 and L 142-2 Charter of the Environment.

²³⁵ Cf the example of American law with the CERCLA Act, or Mexican or Chilean law: M Hautereau-Bouttonnet, ‘Les enjeux d’une loi sur le préjudice écologique, les enseignements des droits étrangers’ (2014) (special edn) *Envir*; from a French and comparative perspective, Azar-Baud (n 158).

and President Biden's executive order requiring the publication of the interim social costs of greenhouse gases and other related actions.²³⁶

- 118 In *Argentina*, according to the General Law regarding the environment, standing is granted differently according to the object of the lawsuit. It states that once the collective environmental damage has occurred, the affected party, the ombudsman and the non-governmental associations of environmental defence, as provided for in Sec 43 of the National Constitution, and the national, provincial or municipal State shall have standing to obtain the recomposition of the damaged environment; likewise, the person directly injured by the damaging event that occurred in their jurisdiction shall have standing to bring the action of recomposition or pertinent indemnification. Once a claim for collective environmental damage has been filed by any of the above-mentioned holders, the remaining ones will not be able to file it, which does not prevent their right to intervene as third parties. Without prejudice to the foregoing, any person may request, by means of an action of protection, the cessation of activities generating collective environmental damage.²³⁷
- 119 A draft *Bill to Reform Law 25.675* (General Environmental Law (LGA)) has been drafted by the Institute of Procedural Law of the National University of La Plata and the Argentine Association of Procedural Law. Its procedural aspects have been subject to extensive scrutiny in recent times, academically but also jurisprudentially.²³⁸ Giannini notes that study into collective actions has occurred simultaneously at 'the same intensity', suggesting an overarching 'generic' approach and 'desire for systematisation' regardless of the subject matter, so applying equally to environmental law.²³⁹

²³⁶ *Missouri v Biden*, Case 22-1248 (Supreme Court, US), Petition for Writ of Certiorari 28 June 2023.

²³⁷ Art 30, *Ley general del ambiente* (General Environmental Law) No 25.675 of 2002 (Argentina) <https://www.argentina.gob.ar/normativa/nacional/ley-25675-79980/texto> accessed 12 June 2023.

²³⁸ Some of the most recent pronouncements of the country's highest court (Supreme Court of Justice, Argentina, CSJN): *Asociación Superficiares de la Patagonia*, Case 327:2967 (Supreme Court of Justice, Argentina), Judgment 13 July 2004; Case 329:3493, Judgment 29 August 2006; Case A.1274. XXXIX, Judgment 26 August 2008; cf also *Municipality of Magdalena v Shell*, Case 330:2017, Judgment 3 May 2007; *Altube*, Case A.2117.XLII, Sentence 28 May 2008; *Werneke*, Case W.140.XLII, Sentence 14 October 2008; *Salas*, Case S.1144.XLIV, Sentence 29-XII-2008; *Municipality of Magdalena v Shell*, Case 29-XII-2008, Sentence 29 December 2008; as well as the numerous decisions handed down in the well-known case of *Mendoza* on the sanitation of the Matanza-Riachuelo basin (*Mendoza, Beatriz Silvia y otros v Estado Nacional y otros s/ daños y daños (daños derivados de la contaminación ambiental del río Matanza Riachuelo)*, Case M. 1569.XL; Case 329:2316, Judgment 20 June 2006; Case 329:3445, Judgment 24 August 2006; Case 329:3528, Judgment 30 August 2006; Case 330:22, Judgment 6 February 2007; Case 330:1158, Judgment 20 February 2007; Judgment 20 March 2007; Case 330:2746, Judgment 22 August 2007, etc, until the final judgment handed down on 8 July 2008, No M.1569.XL). Likewise, in the Supreme Court of the Province of Buenos Aires, *Almada*, Case Ac 60.094, Sentence 19 May 1998; *Sociedad de Fomentó Cariló*, Case Ac 73.996, Sentence 29 May 2002; *Granda*, Case Ac 93.412, Resolution 2 November 2005; *Sociedad de Fomentó Cariló*, Case Ac 90.941, Sentence of 8 March 2006; *Yane*, Case C. 90.020, Sentence of 14 November 2007; *Spagnolo*, Case C. 91.806, Judgment 19 March 2008; *Sagarduy*, Case C. 98.377, Judgment 17 December 2008, among others.

²³⁹ Giannini (n 40).

- 120 Giannini points out that ‘the main focus of all collective proceedings is on the validity of the principle of procedural economy, the effectiveness of access to jurisdiction.’²⁴⁰ This means that these procedural areas have the greatest impact on environmental class actions. They are fundamental goals that must be integrated into the LGA.
- 121 Amongst the proposals, according to Giannini, to define the adequacy/legitimacy of an environmental representative action, the situation of certain institutional bodies (National Ombudsman’s Office, national or provincial Public Prosecutor’s Office, ecological ombudsman’s offices, etc.) or private ones (NGOs or associations that are recognized as being in favour of the defence of the environment), in which it can be presumed (*iuris tantum*) should be considered.²⁴¹ The ‘strong’ presumption is mainly based on the body’s institutional purpose and the existence of this aptitude should be expressly included in the text, it is suggested. But there should be the possibility to review this representativeness *ex officio*. It does not give rise to standing in itself.²⁴² Instead, a presumption of representativeness to be granted according to the rights at stake has also been proposed. The presumption would be *iure et de iure* when it comes to diffuse interests, and *iuris tantum* when it comes to pluri-individual homogeneous rights.²⁴³
- 122 More generally, under the processes of unifying the Civil and Commercial Code in Argentina, the Draft Unified Civil and Commercial Code for the Republic of Argentina, originally drafted by a Commission made up of prominent jurists such as Ricardo Lorenzetti, Elena Highton de Nolasco and Aída Kemelmajer de Carlucci,²⁴⁴ had incorporated significant provisions on the matter.²⁴⁵

²⁴⁰ Ibid, ‘Art 18, National Constitution; 8 and 25, American Convention on Human Rights; 15, Constitution of the Province of Buenos Aires, and the deterrence of infractions that would otherwise remain unpunished (which obviously stimulates recidivism)’.

²⁴¹ For the foundations and limits of this presumption, L Giannini, ‘La representatividad adecuada en los procesos colectivos’ in E Oteiza (ed), *Procesos Colectivos* (Rubinzal Culzoni 2006) IV.3, 179-214; ‘Legitimación en las acciones de clase’ Ch IV, 2(b).

²⁴² The proposed Art 30 reads as follows: ‘Once collective environmental damage has occurred, the affected party, the Ombudsman and non-governmental environmental defence associations, as provided for in section 43 of the National Constitution, and the national, provincial or municipal State shall have standing to obtain the recomposition of the damaged environment; likewise, the person directly affected by the harmful event occurring in their jurisdiction shall have standing to bring an action for the relevant recomposition or compensation. Once a claim for collective environmental damage has been brought by one of the above-mentioned owners, this does not preclude their right to intervene as third parties. Without prejudice to the foregoing, any person may request, by means of an action of cessation of activities generating collective environmental damage [...]’.

²⁴³ MJ Azar-Baud, *Les actions collectives en droit de la consommation: Etude de droit français et argentin à la lumière du droit comparé* (Preface L Cadiet, Nouvelle Bibliothèque de Thèses, Dalloz 2013) Ch 2, Pt II.

²⁴⁴ V Giannini, ‘Los derechos de incidencia colectiva en el proyecto de Código Civil y Comercial (aportes para su redefinición)’ in *Doctrina Judicial* (Buenos Aires, La Ley 2012) 89; F Verbic, ‘Derechos de incidencia colectiva y tutela colectiva de derechos en el Proyecto de Código Civil y Comercial para la República Argentina’ (2014) Erreius online.

²⁴⁵ Art 1746 ff of the Civil Code of Argentina.

- 123 The original version of the Draft incorporated in Art 14 a tripartite classification of rights, including collective rights, which are indivisible and of common use. The draft bill provided that the affected party, the Ombudsman, registered associations and other subjects provided for by special laws, 'have standing to exercise rights that protect the environment, competition, users and consumers, as well as rights of collective incidence in general'. It also explicitly incorporated the homogeneous individual rights within the scope of collective proceedings. But when it was submitted by the Executive Power to the National Congress, the latter were removed, so that the situation referred to in Sec 1 of this paper remains unchanged to date.²⁴⁶ Therefore, only the diffuse interests are encompassed, leaving individual rights in an unclear situation.
- 124 France also grants standing to certain associations who can defend environmental-related interests. First, they can bring lawsuits to defend collective environmental interests before administrative and judicial judges. Compensation can be allowed for the plaintiff who 'represents' the collective (indivisible) interest. Second, they can bring an action for the compensation of an ecological harm before the judiciary.²⁴⁷ Art 1248 of the Civil Code provides that private individuals with an interest in to sue can also claim compensation for the damage caused to the ecological good. Hence, companies, farmers, indigenous communities and, more generally, all professionals working in connection with the environment could have an interest in acting for compensation for ecological damage. They could be numerous since this could include any person claiming infringement of the 'right to live in a balanced environment respectful of one's health' recognized in Art 1 of the Constitutional Charter of the Environment. Indeed, the letter of the text does not prohibit it, and the Conseil d'Etat has already admitted that private individuals can directly invoke Art 1 of the Charter of the Environment, which reinforces this position.²⁴⁸ For the said reasons, some authors see the emergence of an *actio popularis* therein.²⁴⁹ Third and last, associations can engage an environmental group action seeking compensation for material and physical damage resulting from an unlawful attack on the environment. Technically, there is nothing to prevent this model from being universalized.²⁵⁰

²⁴⁶ Cf MJ Azar-Baud, 'Los derechos de incidencia colectiva en el Proyecto de Unificación de los Códigos civil y comercial de la Nación Argentina' (2021) 1(2) Revista de Derecho Privado del Ministerio de Justicia y Derechos Humanos de la Nación 241.

²⁴⁷ Cf since the *Loi pour la reconquête de la biodiversité, de la nature et des paysages* (Law for the reconquest of biodiversity, nature and landscapes) No 2016-1087 of 8 August 2016 (France), its recognition in Art 1246 Civil Code of France; Azar-Baud (n 158).

²⁴⁸ G Viney, P Jourdain and S Carval (ed), *Les régimes spéciaux et l'assurance de responsabilité* (4th edn, LGDJ 2017) No 237.

²⁴⁹ MP Camproux Duffrène, 'Le rôle du droit dans la protection de l'environnement' (CSR Platform seminar 2018) https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/fs-actes-role-droit-protection-environnement-14-09-2018_0.pdf accessed 7 April 2023.

²⁵⁰ These countries are lobbying for this in certain international law forums: T Deleuil, 'La protection de la terre nourricière, un progrès pour la protection de l'environnement?' (2017) 2 Revue Juridique de l'Environnement 255; Azar-Baud (n 158).

- 125 Exceptionally, under Art 31 of the FCCP, the legislator may ‘qualify’, that is, grant the right to initiate actions to persons with no personal interest in defending interests determined by law.²⁵¹ These are known as ‘designated actions’ and the action is not intended to improve the situation of the plaintiff, but the situation of interest to all those concerned by the cause defended, be it a large number of people or not. Thus, Art 31 leaves room for the NGO’s actions in defence of the environment.²⁵²
- 126 If, in general, the right of action is guaranteed based on Art 6 Sec 1 of the ECHR,²⁵³ the right of access to justice constitutes an element of the procedural aspect of the human right to a healthy environment, which would otherwise remain ‘theoretical and illusory’, in the words of the ECtHR.²⁵⁴
- 127 Moreover, there is a crucial nexus between the right to participate and sustainable development. In this sense, civil society actors, such as the *Peruvian Society of Environmental Law* and many others, put forward that lack of participation and information about the environmental impacts of extractive and infrastructure projects are at the heart of much of the region’s many socio-environmental conflicts.²⁵⁵ Hence, the said actors were heavily involved in formulating the Escazú Agreement.²⁵⁶
- 128 The Escazú Agreement ‘goes beyond the good practices of the Aarhus Convention and Bali Guidelines’ in the sense that it does not allow state parties to restrict the participatory right of organizations that are subject to their jurisdiction.²⁵⁷ It does so whilst ‘demonstrating sensitivity to the social, economic, geographical, and cultural character and needs of the region’.²⁵⁸
- 129 Unlike the Aarhus Convention, the Escazú Agreement does not differentiate between ‘the public’ and ‘the public concerned’. Instead, it guarantees certain rights to ‘persons or groups in vulnerable situations’ and indigenous peoples.²⁵⁹ Depending on its circumstances, each party shall have competent entities with access to expertise in

²⁵¹ Guinchard, Chainais and Ferrand (n 212); cf L Cadet and E Jeuland, *Droit judiciaire privé* (10th edn, LexisNexis 2017); Azar-Baud (n 158).

²⁵² Cf SA Mekki, ‘Responsabilité civile et environnement, vers un droit spécial de la responsabilité environnementale?’ (2017) 5 RCA 4.

²⁵³ Cf L Cadet, J Normand and S A Mekki, *Théorie générale du procès* (2nd edn, Thémis, Presses Universitaires de France 2013) No 149.

²⁵⁴ *Airey v Ireland*, Case 6289/73 (ECtHR), Judgment 9 October 1979 [Series A No 41] [ECLI:CE:ECHR:1979:1009JUD000628973], sec 26; *Artico v Italy*, Case 6694/74 (ECtHR), Judgment 13 May 1980 [Series A No 37] [ECLI:CE:ECHR:1980:0513JUD000669474], sec 33.

²⁵⁵ Ibid.

²⁵⁶ Civicus, ‘ESCAZÚ: The Work of Civil Society Made a Huge Difference’ (2019) <https://www.civics.org/index.php/media-resources/news/interviews/3728-escazu-the-work-of-civil-society-made-a-huge-difference> accessed 4 April 2023.

²⁵⁷ UN Environment Programme, ‘Bali Guideline Implementation Guide’ (2015) <https://www.unep.org/resources/publication/bali-guideline-implementation-guide> accessed 7 June 2023.

²⁵⁸ U Etemire, ‘Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective’ (2023) 12(1) Transnational Environmental Law 175.

²⁵⁹ See Sec 4(d) Escazú Agreement.

environmental matters; effective, timely, public, transparent and impartial procedures that are not prohibitively expensive; broad active legal standing in defence of the environment in accordance with domestic legislation and mechanisms to facilitate the production of evidence and for redress. The use of alternative dispute resolution mechanisms is also foreseen.²⁶⁰ Another difference relies on the fact that Escazú does not give special consideration to environmental NGOs except within the context of ‘human rights defenders’²⁶¹ and in the capacity-building provisions, whereas the Aarhus Convention relies for much of its effectiveness upon guarantees of standing for environmental NGOs.²⁶² These regional variations may stem from the different circumstances in which both instruments operate.²⁶³

- 130 Hence, in countries wherein nature has been acknowledged as having the status of a *subject of law*, environmental litigation will develop according to general and specific procedural rules, whereby representation will play a major role. In countries wherein nature has not been granted standing by the lawmaker, nor has its standing been acknowledged in case law, environmental litigation will rely on more classic procedural provisions and would need an enlargement of the class of those entitled to bring a lawsuit.
- 131 Regarding passive legitimacy, most Canadian jurisdictions have adopted a ‘*joint and several*’ approach concerning contaminated land. A party considered responsible under legislation may be held *responsible for the full remediation costs, ‘irrespective of its role in causing the contamination*. Such a party must then turn to the civil courts to recover any amount exceeding its contribution’. Some jurisdictions have adopted statutory mechanisms for allocating out this liability.²⁶⁴

²⁶⁰ Art 8 para 7 Escazú Agreement; United Nations Economic Commission for Latin America and the Caribbean, ‘Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean: Implementation Guide’ (6 April 2022) LC/TS.2021/221.

²⁶¹ The guide was drafted by a group of international and environmental law experts with the support of ECLAC as secretariat of the Escazú Agreement. To provide the analysis, drafters relied primarily on the authentic texts and the ordinary meaning of terms in their context and in light of the object and purpose of the treaty, in accordance with the Vienna Convention on the Law of Treaties; Actors: (iv) Human rights defenders in environmental matters. The Escazú Agreement is unique in its specific protection of human rights defenders in environmental matters. Article 9 contains a preventive and a reactive approach to protect these groups of persons. Each party shall therefore guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.

²⁶² S Stec, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) 31(3) *Journal of Environmental Law* 533.

²⁶³ E Barritt, ‘Global Values, Transnational Expression: From Aarhus to Escazú’ (2019) 11 *Transnational Environmental Law Institute Research Paper* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371093 accessed 4 April 2023.

²⁶⁴ J Kahn and AC Boucher, ‘Canada’ (2023) *Environment and Climate Change Laws and Regulations* <https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/canada> accessed 25 April 2023.

- 132 Although one may argue the said traits are not *unique* to environmental proceedings, they entail special consequences which witness that the subject-matter drives proceedings.
- 133 This section has shown the elasticity of legal constructs such as rights and interests at stake, the types of substantive actions that drive proceedings and legitimacy for the opening of environmental proceedings. The next section will discuss the fairly assertive way in which judges cope with the course of environmental proceedings, from a comparative perspective.

4 AN ASSERTIVE DEVELOPMENT OF ENVIRONMENTAL PROCEEDINGS

- 134 To illustrate the challenges environmental litigation poses to common rules of civil procedure during the course of proceedings, Section 4 deals, firstly, with jurisdiction and venue. A comparative outlook shows environmental matters are handled by ordinary (judicial, administrative or constitutional courts) or by specialized jurisdictions depending on the national legal system. Likewise, a debate regarding the necessity of having 'green tribunals', whether they are environmental courts or specialized sections, is live. Some countries have chosen to set up environmental commissions, such as independent authorities. Furthermore, since environmental disputes can have a planetary or a transboundary nature, such as global warming, the question of specialization has even arisen in the international order, notably with the idea of creating a specialized court, based on the model of the WTO (4.1). Second, this section tackles the proactive role of civil society, which has also changed the role of the parties during the proceedings. Coalitions of action or mock trials also contribute to a 'metamorphose' of the role of judges because of the increasing pressure on them. Judges become the new guarantors of environmental justice. Judges endorse special powers through public hearings, and control of the execution of interim and protective measures, in a rationalized way (4.2). Secondly, the standard and burden of *proof*, *evidentiary means* including scientific and technical data and the capacity of the judges to handle those, concurrent evidence, the standard of 'state of scientific knowledge', presumptions and the reversal of the burden of proof, are discussed (4.3). Fourth and last, *remedies* also present specifics in environmental litigation that both positive and case law struggle with. They are often completed by the implementation of different types of measures, whether those put forward are interim or preventive (4.4).

4.1 Jurisdiction: Ordinary or Specialized Tribunals/Courts

- 135 The nature of the jurisdiction handling the environmental litigation seems to play an important role in the course and development of the environmental proceedings. As of the time of writing, there is not a single trend in positive law. Firstly, depending on the country and the legal system therein, environmental matters are handled by *ordinary* or *specialized jurisdictions* (1). Secondly, the branch to which jurisdictions belong can be constitutional, judicial, or administrative (2). Thirdly, within the judiciary, environmental

cases are dealt with by civil or criminal judges (3). Fourthly, the choice of venue and the question of the institution of new court bodies arises (4).

4.1.1 Ordinary or Specialized Jurisdictions

- 136 It would be difficult to tell whether there is a majority of countries wherein environmental litigation takes place before ordinary jurisdictions or of countries wherein environment litigation takes place before specialized jurisdictions. On the contrary, it can be stated that where no *specialized jurisdictions* are available, there seems to be at least a debate regarding their necessity.
- 137 From a comparative law perspective, some countries have made progress in the line of specialization of environmental justice and have 'green tribunals'.²⁶⁵ These can be environmental courts or specialized sections which have jurisdiction over civil, criminal, and administrative law. *Thailand, the Philippines, India and Australia* are amongst the countries having instituted *environmental courts*.²⁶⁶ In *Brazil*, many federal and state courts have environmental law chambers with jurisdiction over administrative, civil and criminal law. In *Chile*, scientific experts may take on the role of judge and thus make it possible to adapt the judicial solution and its follow-up to the technical issues.²⁶⁷ In France, a special chamber for 'contentieux émergents', including litigation on duty of vigilance and environmental liability, was created in January 2024.²⁶⁸
- 138 Other countries have chosen to set up *environmental commissions*, such as independent authorities. *Japan*, for instance, has the tendency to favour settlement of conflicts via alternative dispute resolution in environmental matters.²⁶⁹
- 139 Public prosecutors can also play an important role. For instance in *Spain*, there is a national Public Prosecutor's Office for the environment and urban planning.²⁷⁰ Based on this model, a French author and judge, Rivaud, has proposed the creation of a national prosecutor's office for the environment, public health and urban planning.²⁷¹ Hautereau-Boutonnet believes that specialization of the public prosecutor's office would make it

²⁶⁵ R Pring and CK Pring, 'Greening Justice: creating and improving environmental courts and tribunals' (The Access Initiative 2009).

²⁶⁶ Okubo (n 228); for Chile, P Moraga, 'La réparation du dommage environnemental en droit chilien' (2016) 8-9 *Energie - Environnement - Infrastructures* 15.

²⁶⁷ Cf S Valdès de Ferari, 'The role of a non-lawyer in an environmental Court' (2016) *Energie - Environnement - Infrastructures*, Dossier 18; and R Asenjo, 'L'action en réparation du préjudice écologique et l'expérience du Tribunal environnemental de Santiago' (2016) *Energie - Environnement - Infrastructures*, Dossier 17.

²⁶⁸ 'Ordonnance de roulement', 5 January 2024, Chamber 5-12 (France).

²⁶⁹ K Yamamoto, 'Le mode alternatif de résolution des conflits environnementaux au Japon: un exemple de contractualisation des litiges environnementaux' in M Hautereau-Boutonnet (ed), *Le contrat et l'environnement, Étude de droit comparé* (Bruylant 2015) 282.

²⁷⁰ Ministerio Fiscal home page accessible at www.fiscal.es accessed 19 June 2023.

²⁷¹ Art 705 ff *Code de procédure pénale* (Code of Criminal Procedure) (France); JP Rivaud, 'Réquisitions en faveur d'une justice environnementale' (2017) *AJ Pénal* 520.

possible to prosecute offences more effectively and better address the difficulties resulting from the complexity of the facts of the case, in particular, regarding ecological damage and causality, in order to conduct the course of the public action throughout the preliminary investigation and the enquiry. Thus, the specialization of the public prosecutor's office could contribute to the better effectiveness of environmental law, by favouring prosecutions and improving the investigation and the enquiry.²⁷² The specialization of certain judges in environmental litigation had been strongly supported by part of the doctrine.²⁷³

140 In Belgium there are no *défenseurs de droit* (Ombudsman) specialized in the environment, but *défenseurs de droit* do have the competence to deal with environmental issues. A French law proposal, registered at the Presidency of the National Assembly on 13 December 2022, aims to create another 'Defender', a special Ombudsman who would be specialized in the environment.²⁷⁴ The primary motivation is 'to extend the scope of environmental law, which is currently too limited', and according to which several public or private actors remain unpunished for environmental misdeeds. Following the proposal, the *Défenseur* would operate alongside the judge as a guarantor of environmental rights and would have the status of *Autorité Administrative indépendante* (independent administrative authority). It also proposes the creation of a newly formed venue (merging several institutions), promoting a new level of co-operation between the *Commission Nationale du Débat Public* (National Commission for Public Debate) (CNDP), a portion of the *Commission d'accès aux documents administratifs, concernant la documentation environnementale* (Commission for Access to Administrative Documents) (CADA), the *Médiateur de l'énergie* and *Médiateur de l'eau* (Energy Ombudsman and Water Ombudsman), and the *Haut conseil du climat* (The High Council on Climate) (HCC).²⁷⁵ In terms of its powers, *le Défenseur de l'environnement* would have a defined field of competence, with the authority to issue sanctions.²⁷⁶

141 The role of the lawyer is also set to evolve, through the drawing up of audits and reports, the implementation of new Corporate Social Responsibility (CSR) instruments and support for companies in complying with new standards. In this regard, in a resolution

²⁷² Hautereau-Boutonnet and Truilhé (n 2).

²⁷³ Y Jegouzo, 'Pour la réparation du préjudice écologique' (*Ministère de la justice* (Ministry of Justice) Report, 2013).

²⁷⁴ See exposition des motifs <https://www.assemblee-nationale.fr/dyn/opendata/PIONANR5L16B0608.html>; The idea of creating an Environmental Defender has given rise to several symposia and conferences, including that of April 2021 entitled 'Ombudsman for Future Generations future generations - Mediation and environmental defence', organized by the Normandy Chair of Excellence for Peace.

²⁷⁵ T Le Bouter-Ropars, 'Proposition de loi constitutionnelle visant à créer un défenseur de l'environnement' (2023) 20 *Gazette de Droit de L'Environnement* 9.

²⁷⁶ Its field of expertise would be based on the planetary limits. These were defined in 2009 by an international team of 26 researchers and scientists from the Stockholm Resilience Centre, correspond to the thresholds that humanity should not exceed in order not to jeopardise the favourable conditions under which humanity has been able to develop in order to live sustainably in a safe ecosystem.

published on 11 May 2023, the French Conseil national des barreaux called for lawyers to be designated as independent assurance service providers (accredited compliance assessment bodies) as part of the transposition of the CSR Directive.²⁷⁷

- 142 In Canada, the Competition Bureau has initiated its first investigations for allegations of greenwashing related to net-zero claims in relation to investment portfolios and sustainability claims.²⁷⁸ The European Union, with its Proposal for a Directive on substantiation and communication of explicit environmental claims is moving forward in the direction of protecting consumers to combat greenwashing and misleading environmental claims.²⁷⁹
- 143 For some years now, climate-related appeals have been multiplying at the international, regional and especially national levels.²⁸⁰ Therefore, the question of specialization has even arisen in the *international order*.²⁸¹ The idea of creating a specialized court, notably based on the model of the WTO, is a longstanding one.²⁸² It could also be of interest for the construction of an environmental trial capable of articulating its 'local and global' levels, given the global nature of certain disputes.²⁸³
- 144 Instead, in countries *without a specialized jurisdiction*, environmental litigation relies on *administrative, judicial and/or constitutional* jurisdictions depending on the type of breach underlying the litigation.

4.1.2 Branch of Jurisdiction: Administrative, Constitutional and Judicial Courts

- 145 The courts seem to have become the best weapon for forcing states to respect their obligations.²⁸⁴ In jurisdictions with a division between *judicial and administrative courts*, the handling of environmental law disputes can be an obstacle to the effectiveness of environmental law in general, and for the victims of global warming in particular.

²⁷⁷ On 10 March 2023, the General Assembly of the *Conseil national des barreaux* adopted a resolution on the promotion of the role of lawyers in the law of future generations, containing various commitments to promote the rights of future generations (<https://www.cnb.avocat.fr/fr/actualites/retour-sur-lassemblee-generale-des-11-et-12-mai-2023>). In addition, there are guides to assist lawyers in dealing with issues of social and environmental responsibility for their clients, but also for their own firms, such as the one published by the London Law Society on 13 October 2023. The impact of climate change on solicitors, The Law Society, 19 April 2023. - Climate risk governance and greenwashing risks, The Law Society, 13 October 2023.

²⁷⁸ Kahn and Boucher (n 264).

²⁷⁹ Green Claims Directive of 22 March 2023 COM(2023) 166 final (EU).

²⁸⁰ Cf C Huglo, *Le contentieux climatique: une révolution judiciaire mondiale* (Bruylant, Droit(s) et développement durable 2018).

²⁸¹ Hautereau-Boutonnet and Truilhé (n 2).

²⁸² P M Dupuy and J E Vinuales, *Introduction au droit international de l'environnement* (Bruylant 2015) 330.

²⁸³ Hautereau-Boutonnet and Truilhé (n 2).

²⁸⁴ JC Rotoullié, 'Le contentieux de la légalité' (2019) RFDA 644.

146 In France, the *administrative jurisdiction*²⁸⁵ was first to recognize ecological damage.²⁸⁶ Administrative proceedings have an inquisitorial character, as it is accepted that the judge directs the investigation and has many tools available, such as the setting of a timetable for the investigation.²⁸⁷ Drawing on foreign precedents²⁸⁸ and the *Friends of the Earth* case law²⁸⁹ relating to the crossing of thresholds in the event of air pollution, the municipality of *Grande-Synthe* and its mayor, have brought an action before the administrative courts.²⁹⁰ Based on administrative failure to achieve legal objectives, the municipality also lodged an appeal against a second national plan regarding climate change, with the aim of

effectively challenging the extreme weakness of this document, which does not include any quantified measures, nor any legal or financial means of really allowing citizens to adapt to the considerable changes linked to climate change that they will have to experience.²⁹¹

147 However, *administrative failure* is not the only argument raised by the parties in the context of climate litigation on legality. *Administrative authorizations* described as ‘climate-damaging’ are also *regularly challenged*. In this respect, two appeals based, among other things, on the inadequacy of the project’s impact study regarding the estimation of its greenhouse gas emissions can be cited. On the one hand, the Cergy-Pontoise Administrative Court’s judgment of March 2018 annulled the decision of the Val-d’Oise prefect authorizing the creation of the ‘Gonesse triangle’ development

²⁸⁵ O Le Bot, ‘Le contentieux administratif au service de l’environnement?’ in M Hautereau-Boutonnet and È Truilhé (ed), *Le procès environnemental* (Preface L Cadiet, Dalloz, Thèmes et commentaires 2021); O Le Bot, ‘Un procès administratif adapté à la protection de l’environnement?’ in M Hautereau-Boutonnet and È Truilhé (ed), *Le process environnemental - Du procès sur l’environnement au procès pour l’environnement. Rapport pour la mission Droit et Justice* (HAL Id:hal-03194063, 2019) 41 ff <https://hal.archives-ouvertes.fr/hal-03194063> accessed 20 June 2023; J C Rotoullié, ‘Les contentieux spéciaux, un laboratoire du procès administratif?’ (2020) *Le contentieux environnemental*, AJDA, 204 ff; M Lei, ‘Le juge administratif préventif, introuvable?’ (2021) JCP/17 La Semaine Juridique, edn Administrations et collectivités territoriales 2142.

²⁸⁶ *Assoc Oxfam France and others*, Case 1904967 and others (Regional Administrative court, Paris, France), Judgment 3 February 2021 [JCP A 2021, 2088].

²⁸⁷ *Préfet des Pyrénées-Orientales v M Abounkhila*, Case 252988 (Council of State, France), Judgment 27 February 2004; (2004) JCP G 1898.

²⁸⁸ Cf for example the case *VZW Klimaatzaak v Kingdom of Belgium, et al* (Court of First Instance, Brussels, Belgium), Judgment 17 June 2021 (*Klimaatzaak*).

²⁸⁹ *Association Les Amis de la Terre France*, Case 394254 (Council of State, France), Judgment 12 July 2017; Lebon 229 [AJDA 2018, 167] Note A Perrin and M Deffairi; Dalloz 2017, 1474 and Obs; [2017] RFDA 2017, 1135] Note A Van Lang [RTD eur 392] Obs A Bouveresse.

²⁹⁰ C Huglo and T Bégel, ‘Le recours de la commune de Grande-Synthe et de son maire contre l’insuffisance des actions mises en œuvre par l’État pour lutter contre le changement climatique’ (2019) *Energie - Environnement - Infrastructures*, File 19; F X Fort and C Ribot, ‘“Commune de Grande-Synthe”: tsunami juridique ou décision de circonstance?’ (2021) 36 *La Semaine juridique - administrations et collectivités territoriales* 31.

²⁹¹ See eg, L Radisson, ‘La commune de Grande-Synthe attaque le Plan national d’adaptation au changement climatique’ (2019) *Actu-Environnement* <https://www.actu-environnement.com/ae/news/Grande-Synthe-attaque-Plan-national-adaptation-changement-climatique-33002.php4> accessed 10 October 2024.

zone.²⁹² On the other hand, on 1 February 2019, the same court rejected the summary suspension of the 'Guyane Maritime' permit authorizing the drilling of five exploration wells in Total in Guyana.²⁹³

- 148 Despite the course of environmental cases, both the administrative and judicial French courts have rejected *actio popularis* in environmental matters. The *Conseil d'État* (Council of State) the highest administrative court, has confirmed that Art 2 of the Charter 'cannot, by itself, confer on any person who invokes it an interest in bringing an action for misuse of power against any administrative decision that the victim intends to challenge'.²⁹⁴ More specifically, in the case of climate litigation, Art 1248 of the Civil Code only lists legal entities and not private individuals who can bring an action for compensation for ecological damage. Hence, the Council of State is 'far from having radically opened the doors of the courtroom' in the *Grande-Synthe* case²⁹⁵ and is far from being on par with the Colombian public action of unconstitutionality.²⁹⁶
- 149 Argentina also lacks at the federal level specialized courts for environmental disputes. These are generally, but not exclusively, heard before the administrative courts. The reason is mainly because the State (at any level: local, provincial or national) is sued in the vast majority of cases.²⁹⁷
- 150 In countries with *constitutional courts* or courts dealing with constitutional issues, environmental litigation is tackled therein. Notably, the *Dutch and Belgian* courts have ruled on the cases *Urgenda* and *Klimaatzaak* respectively, imposing a positive obligation on the state to protect its citizens from climatic hazards on the basis of the rights to life and to private and family life under Art 2 and 8 ECHR.²⁹⁸ Likewise, the *Urgenda*

²⁹² *Collectif pour le triangle de Gonesse et autres*, Case 1610910, 1702621 (Administrative Court of First Instance, Cergy-Pontoise, France), Judgment 6 March 2018.

²⁹³ *Association Greenpeace France et autres*, Case 1813215 (Administrative Court of First Instance, Cergy-Pontoise, France), Judgment 1 February 2019; cf L Monnier, 'Quel rôle pour la justice administrative dans la lutte contre les projets "climaticides"? Le cas de "Guyane Maritime"' (2019) *Energie - Environnement - Infrastructures*, File 18.

²⁹⁴ *Mme Buguet and others*, Case 330566 (Council of State, France), Judgment 3 August 2011 [Lebon T; AJDA 2011. 1600]; *Mamère*, Case 389095 (Council of State, France), Judgment 1 June 2016 [AJDA 2016. 2023]; [Constitutions 2016. 470] Chronicle L Domingo.

²⁹⁵ T Rombauts-Chabrol, 'Justice climatique et excès de pouvoir: quel accès au juge pour l'Humanité?' (2021) 2207 JCP Adm.

²⁹⁶ R Radiguet, 'Affaire[s] du siècle? Ne vendons pas la peau du caribou' (2021) *Revue Juridique de l'Environnement* 407; M Fatin-Rouge Stefanini and L Gay, 'L'accès au juge constitutionnel en matière environnementale: un Panorama Comparatif' in A Le Quinio (ed), *La protection de l'environnement par les juges constitutionnels* (Paris, L'Harmattan 2021) 65.

²⁹⁷ F Verbic 'Procesos colectivos para la tutela del medio ambiente y de los consumidores y usuarios en la república Argentina' (2013) (special edn) 4 Civil Procedure Review.

²⁹⁸ The *Urgenda* case in which a court (the Court of Appeal of The Hague) established, on the basis of Art 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the existence of a duty of care on the part of the State in relation to climate change. While this case played a key role in promoting climate justice, subsequent climate cases have not been as successful as expected.

decision²⁹⁹ has inspired several actions around the world, including the French one known as the '*Affaire du siècle*'.³⁰⁰ In the same sense, the *German Constitutional Court* deduced, from Art 2 of the Basic Law, the 'duty to protect' which is incumbent on the State, in particular to protect human life and health against the dangers associated with climate change for both present and future generations.³⁰¹

- 151 The said cases witness to the importance of the type of jurisdiction dealing with the environmental litigation for effective protection. Indeed, in *France*, for instance, despite the fact that 'future generations' are enshrined in the Preamble of the Charter of the Environment, the French Constitutional Council could not have done the same as the Dutch or the Belgian courts, because of the self-restraint doctrine according to which, following its *IVG* jurisprudence, the Constitutional Court refuses to control the compliance of a law with international treaties, referring those to the *Conseil d'État* or *Cour de cassation*, as long as this jurisprudence is maintained.³⁰² In contrast with the case law of the Karlsruhe Court,³⁰³ the French Constitutional Council does not consider the preservation of the environment to be a condition for the exercise of rights and freedoms.³⁰⁴ This entails that restraint in climate litigation would encourage parliamentary inertia, as the legislator is not encouraged to raise the targets for reducing greenhouse gas emissions, as the German and Dutch governments did immediately following the decisions of their courts.³⁰⁵

²⁹⁹ *The State of The Netherlands v Urgenda*, Case 200 178 245/01 (Regional Court of Appeal civil law division, The Hague, The Netherlands), Judgment 9 October 2018 [273 Dr envir. 2018, No 273] 424-430, Note M Torre-Schaub.

³⁰⁰ C Baldon, "'L'Affaire du siècle": une action juridique inédite pour contraindre l'État à lutter efficacement contre le changement climatique' (2019) 5 *Energie - Environnement - Infrastructures*, File 20; C Cournil, "'L'affaire du siècle" devant le juge administratif' (2019) *AJDA* 437; FX Fort, 'L'affaire du siècle: réponse timorée du TA de Paris' (2022) 2 *La Semaine juridique - administrations et collectivités territoriales*; C Lepage and C Huglo, 'Commentaire iconoclaste (?) de "l'Accord de Paris"' (2016) 1 *Revue Juridique de l'Environnement* 10; JC Rotoullié, 'Le contentieux de la légalité' (2019) *RFDA* 644; M Deguergue, 'Les imperfections de la responsabilité administrative environnementale' (2018) *AJDA* 2077.

³⁰¹ *Neubauer et al v Germany*, Case 1 BvR 2656/18 (Federal Constitutional Court, First Senate, Germany), Order 24 March 2021 [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618]; L J Kotzé, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2021) 22 *German Law Journal* 1423; P Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34(1) *Journal of Environmental Law* 135.

³⁰² Case 74-54 DC (Constitutional Council, France), Decision 15 January 1975 IVG [JORF 16 January 1975, 671; ECLI:FR:CC:1975:74.54.DC] (Decision relating to the Law on Voluntary Termination of Pregnancy). In this decision, the Constitutional Council refused to review the conformity of a law with international treaties and delegated this power to the Council of State and the Court of Cassation; Case 2021-833 DC (Constitutional Council, France), Decision 28 December 2021 [JORF No 0304, 31 December 2021].

³⁰³ Eg, Case 1 BvR 2656/18 (Federal Constitutional Court, First Senate, Germany) Order 24 March 2021 [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618].

³⁰⁴ Senate (France), 'Report on the draft constitutional law adopted by the National Assembly, supplementing Art 1 of the Constitution and relating to the preservation of the environment' No 554 (5 May 2021) 40.

³⁰⁵ Cournil (n 11); Cournil (n 156) 34; Savonitto (n 29).

- 152 Notwithstanding, Ms Parance and Rochfeld put forward advantages of the French Constitutional Council. Firstly, on the basis of Art 54, 61 and 61-1 of the Constitution, it can be seized, within the framework of *a priori* and *a posteriori* controls, of legislative provisions and treaty stipulations participating in the definition of climate policy or concerning the climate issue.³⁰⁶ Secondly, there is no longer any doubt that the climate has become a 'political object'.³⁰⁷ As early as 2000, the Constitutional Council recognized 'the objective [...] of reinforcing the fight against the "greenhouse effect" pursued by the legislator' and censured the carbon tax intended to encourage companies to control their consumption of energy products. Thereafter, numerous opportunities arose to develop a climate jurisprudence. Twenty decisions can be counted in which the Court has ruled on legislative provisions that have a more or less direct impact on climate change and against which the climate argument has been used.³⁰⁸ Thirdly, the Constitutional Council is the only constitutional court that has a constitutional declaration of rights and duties devoted exclusively to the environment.³⁰⁹
- 153 Thus, the French Constitutional Council acts in environmental matters via the *control of legislative norms*,³¹⁰ and in particular the quantified objectives for combatting climate change. At the end of 2019, the Constitutional Council 'abandoned its previous jurisprudence and the renewal of the reference standards for constitutionality review benefits climate litigation, and has followed two paths'.³¹¹
- 154 Firstly, the Constitutional Council has consolidated the control of the right to a balanced environment that respects health, combining Art 1 and 2 of the Charter to derive a constitutional obligation according to which everyone has a duty of care with regard to environmental damage that may result from their activity.³¹² It had, until then, been draped in rather dull constitutional case law, like the Italian constitutional court before it.³¹³ This 'obligation of means' (Communication of the aforementioned decision),

³⁰⁶ L Gay and M Fatin-Rouge Stefanini, 'L'utilisation de la Constitution dans les contentieux climatiques en Europe et en Amérique du Sud' (2018) 12 *Energie - Environnement - Infrastructures* 27, Comm 43.

³⁰⁷ S Mouton, 'Les enjeux constitutionnels du climat: réflexions sur un nouvel objet politique' (2018) 12 *Energie - Environnement - Infrastructures*, Comm 41.

³⁰⁸ F Savonitto, 'Le contentieux constitutionnel des politiques climatiques à l'aube de son envol' (2021) 2210 *JCP Adm.*

³⁰⁹ L Gay and A Vidal-Naquet, 'Constitution et environnement. France' (2019) 35 *AJIC* 2019 311; E Gaillard, 'L'historique déclinaison transgénérationnelle des devoirs fondamentaux envers les générations futures par le tribunal fédéral constitutionnel allemand' (2021) *Energie - Environnement - Infrastructures*, Comm 61.

³¹⁰ Loi d'orientation des mobilités, Case 2019-794 DC (Constitutional Council, France), Decision 20 December 2019 [AJDA 9; Dalloz 1012] Obs V Monteillet and G Leray; Ibid, 1588, Obs JC Galloux and P Kamina; [AJCT 2020. 5] Obs D Necib; [RDT 2020. 42] Obs B Gomes; [Constitutions 2019. 533] Chronicle M Kamal-Girard.

³¹¹ Savonitto (n 29).

³¹² Case 2011-116 QPC (Constitutional Council, France), Decision 8 April 2011; [AJDA 1158] Note K Foucher; [Dalloz 2011. 1258] Note V Rebeyrol;

M Fatin-Rouge Stefanini and L Gay, 'L'accès au juge constitutionnel en matière environnementale. Un panorama comparatif' and MP Elie, 'La protection constitutionnelle de l'environnement en Italie, une oeuvre jurisprudentielle' in V Chiu and A Le Quinio (ed), *La protection de l'environnement par les juges constitutionnels* (L'Harmattan 2021) 53, 147.

modelled on the international model of 'due diligence' extended to all persons³¹⁴ both public and private, has shown its usefulness in foreign climate litigation, as demonstrated by the Dutch *Urgenda* cases in 2015,³¹⁵ *Shell* in 2021³¹⁶ and the Belgian *Klimaatzaak*, also in 2021.³¹⁷ Afterwards, the Constitutional Council relied on the Preamble of the Charter, 15 years after its promulgation, to raise the protection of the environment to the rank of an '*objective with constitutional value*'.³¹⁸

- 155 Secondly, the Constitutional Council's self-restraint does not raise all constitutional norms, including the 2004 Charter, to the 'level of the climate emergency'.³¹⁹ This constant restraint is manifested, in the first place, by the *a minima* interpretation of the Constitution. First of all, the Constitutional Council has not drawn any new climate-specific requirements from the Charter. This contrasts with the position of the *German court*, which based itself on Art 20 of the Fundamental Law to impose obligations on the State.³²⁰
- 156 In Argentina, the Supreme Court was called upon under its original and exclusive jurisdiction, Art 117 of the *Constitución Nacional* (National Constitution). It thus affirmed its jurisdiction over the collective interest claim to put an end to pollution.³²¹ As stated

³¹⁴ MA Cohendet, 'Le droit à l'environnement et le devoir de protection de l'environnement' in C Cerdas-Guzman and F Savonitto (ed), *Les 10 ans de la Charte de l'environnement 2005-2015* (Institut universitaire Varenne 2016) 96; Ibid, Case 2011-116 QPC.

³¹⁵ M Torre-Schaub, 'La justice climatique. A propos du jugement de Cour de district de La Haye du 24 juin 2015' (2016) 68(3) RIDC, 722.

³¹⁶ F G Trébulle, 'La responsabilité des entreprises de diminuer leurs émissions de gaz à effet de serre: réflexions à propos d'une décision du tribunal de district de La Haye' (2021) *Energie - Environnement - Infrastructures*, Comm 86.

³¹⁷ *Klimaatzaak* (n 288). On November 30, 2023, the Brussels Court of Appeal handed down its ruling in the *Klimaatzaak* case. Partially reversing the first instance judgment, the Court of Appeal not only found in favor of the plaintiffs but also imposed binding minimum greenhouse gas (GHG) emissions reduction targets to be achieved by 2030, 'thereby following in the footsteps of the Dutch *Urgenda* case' [...] Cf A Briegleb and A De Spiegeleir, 'From *Urgenda* to *Klimaatzaak*: A New Chapter in Climate Litigation' (2023) *Verfassungsblog* <https://verfassungsblog.de/from-urgenda-to-klimaatzaak/> accessed 4 September 2024; *VZW Klimaatzaak v Kingdom of Belgium & Others*, Case 2021/AR/1589 (Brussels Court of Appeal, Belgium), Judgment 30 November 2023. Adde: M Petel and N Vander Putten, 'The Belgian Climate Case: Navigating the Tensions Between Climate Justice and Separation of Powers' (2023) *Verfassungsblog*, <https://verfassungsblog.de/the-belgian-climate-case/> accessed 4 September 2024.

³¹⁸ *Union des industries de la protection des plantes*, Case 2019-823 QPC (Constitutional Council, France), Decision 31 January 2020 [AJDA 2020. 1126] Note F Savonitto; 425, Tribune V Goesel-Le Bihan; [Dalloz 1159] and Obs, Note B Parance and S Mabile; L Gay, 'Défendre l'environnement devant le Conseil constitutionnel. Quelle procédure pour servir la Charte de l'environnement?' in Hautereau-Boutonnet and Truilhe (n 186) 119 ff; In its Decision of 31 January 2020, the French Constitutional Council confirmed the existence of a public health CVO available to the legislator. What is more, it enshrined 'the protection of the environment, the common heritage of human beings' as a CVO: (Constitutional Council, France), Decision 2019-823 QPC of 31 January 2020 [JORF No 0027, 1 February 2020].

³¹⁹ C Cournil, 'Enjeux et limites de la Charte de l'environnement face à l'urgence climatique' (2020) 122(2) RFDC 345, 363.

³²⁰ Cournil (n 11).

³²¹ Verbic (n 297).

by the Court in the *Saavedra* case regarding the protection of collective environmental damage:

*[I]t is the responsibility of the Judiciary to seek ways to guarantee the effectiveness of rights and prevent them from being violated, as a fundamental and guiding objective when it comes to administering justice and making decisions in the proceedings before it. This should not be seen as undue interference by the Judiciary when all it does is tend to protect rights, or to make up for omissions to the extent that such rights may be infringed.*³²²

- 157 The claim had been filed under the 2002 *Ley General del Ambiente*³²³ (General Environmental Law) (LGA) and Section 43 of the Constitution, granting standing to sue to the damaged party, the Ombudsman, and environmental NGOs. Other affected parties may join such a lawsuit as third parties.³²⁴ The proceedings (*amparo*) give judges broad discretion to request evidence to determine actual damage, enabling them to even go beyond the requests of the parties.³²⁵ 'The LGA was the legal basis for what was later described as judicial activism by the Supreme Court in both the 2006 and 2008 *Mendoza* decisions'.³²⁶
- 158 Nonetheless, in some countries such as the US, in the famous case *Juliana*, courts make clear that 'it is not the role of the judiciary to remedy climate change problems by substituting for the other two branches of government'.³²⁷
- 159 On the contrary, in Brazil, acknowledging that maintenance of the environment is essential to economic development, it is considered that the preservation of life has to be prioritized over the preservation of monetary amounts and the Constitution itself explicitly manifests this preference by configuring, in items IV and V of Sec 1 of Art 225 duties-powers of direct intervention on private economic activity of high intensity, common to all federative entities.³²⁸ This 'operates within the scope of Financial Law, whose main focus involves essentially rules that establish requirements and procedures

³²² *Saavedra, Silvia Graciela and another v National Administration of National Parks, National State and others under Environmental Protection*, Case FSA 18805/2014 (CSJN, Argentina), Judgment 6 February 2018, 16; Law 02/21/2018, AR/JUR/8/2018, Recital 3, cited in MA Sucunza and F Verbic, 'La CSJN y el art. 32 de la ley general del ambiente: una práctica arbitraria que se consolida' (2018) 118 *Revista de Derecho Administrativo*.

³²³ Law No 25675, *Ley General del Ambiente* (General Environmental Law) (Argentina) of 27 November 2002 [30036] B.O. 2.

³²⁴ *Ibid* Art 30.

³²⁵ *Ibid* Art 32.

³²⁶ S Frydman, 'The Matanza-Riachuelo Basin Case: Lessons in Environmental Activism from the Argentine Supreme Court and Civil Society Organizations' (2022) 28(1) *Southwestern Journal of International Law* 47, 53.

³²⁷ Cournil (n 156) 32.

³²⁸ *Competência do sistema único de saúde, do qual fazem parte todos os entes federativos* (competence of the single health system, of which all the federative entities are part).

for authorizing public spending'.³²⁹ A central premise is that whenever the obligation to repair environmental damage is not imposed on the private parties responsible for it, or when it is ineffective, this situation will imply that the only way to restore the environment will be through the public budget itself, which means, on the other hand, socializing the damage of the harmful action to the common good.³³⁰

- 160 Also, in a move towards objectivity, the Supreme Court of *Costa Rica* has established 'an obligation for the legislator to carry out an environmental impact assessment of any human activity that may affect the environment'.³³¹
- 161 One may conclude that in countries with a *constitutional jurisdiction*, the constitutionalization of climate litigation seems to contribute to the development of its jurisprudence, provided that the constitution includes the protection of the environment within its provisions. For instance, the French Constitutional Council cannot be considered a leading court on climate protection, especially when compared to the German Constitutional Court because of the lack of constitutionalization of climate protection.³³² The latter would require including it in the Constitution, and would serve as an explicit basis for the Constitutional Council to rule against legislative provisions that are insufficiently protective of the climate, and provide the necessary spark. Nonetheless, the preservation of the environment has become a constitutional requirement since the integration of the 2004 Charter of the Environment into the preamble of the 1958 Constitution following the Constitutional Law of 1 March 2005.³³³
- 162 At an international level, and almost simultaneous to the adoption of the Escazú Agreement, the Inter-American Court of Human Rights issued an advisory opinion on the environment and human rights affirming that a right to a healthy environment exists under the American Convention on Human Rights,³³⁴ and clarifying that the obligation

³²⁹ CA Birnfeld, 'Compromissos constitucionais do Poder Público brasileiro com a proteção do meio ambiente sob a perspectiva dos deveres-poderes de um Estado a serviço da cidadania e da proteção ambiental' in J Miranda and C Amado Gomes (ed), *Diálogo Ambiental, Constitucional e Internacional. Volume 3. Tomo I* (Lumen Juris 2015) 42.

³³⁰ Ibid.

³³¹ C Cerda-Guzman, 'Costa Rica: le paradis de la jurisprudence verte?' in V Chiu and A Le Quinio (ed), *La protection de l'environnement par les juges constitutionnels* (Paris, L'Harmattan, Coll Droit comparé 2021) 230.

³³² M Torre-Schaub, 'Bilan et perspectives pour la justice climatique' (2021) 10 *Energie - Environnement - Infrastructures*; N Lenoir, 'La décision n° 2021-825 DC du 13 août 2021 sur la loi portant lutte contre le dérèglement climatique et renforcement de la résilience à l'aune du droit constitutionnel européen' (2021) 1036 *JCP*; H Delzangles, 'Le premier "recours climatique" en France: une affaire à suivre!' (2017) *AJDA* 217; M Verpeaux, 'La lutte contre le dérèglement climatique devant le juge constitutionnel. Les espoirs déçus' (2021) *AJDA* 2526.

³³³ *Loi constitutionnelle No 2005-205 relative à la Charte de l'environnement* (Constitutional Law No 2005-205 relating to the Charter of the Environment) of 1 March 2005 (France) which states that 'the preservation of the environment must be sought in the same way as the other fundamental interests of the Nation': Official Gazette of France of 2 March 2005; C Huglo, 'La Constitution, la loi, le juge et le nouveau droit de l'environnement' (2021) *Energie - Environnement - Infrastructures*, point 4.

³³⁴ *The Environment and Human Rights*, Advisory Opinion OC-23/17, IACtHR Series A No 23 (15 November 2017).

of states to prevent transboundary environmental harm *is a matter of human rights protection*.³³⁵

- 163 According to R McMenamin, there are mechanisms by which the ICJ can and should consider human-rights-based climate litigation in its opinion. In particular, the Court should give “great weight” to the treaty bodies’ findings on the rights to life, home life, and culture, and the extraterritorial reach of (at least some) human rights treaties.³³⁶
- 164 ‘The Inter-American Human Rights System is *now presented as a regional alternative for the analysis* of particularly important cases’ or circumstance in the region, and the IACtHR is a body contributing to the development of the eminent interrelation between human rights and traditional environmental law, in particular through the interpretation of the right to a *healthy environment*, as recognized in the Additional Protocol to the American Convention on Economic, Social and Cultural Rights (‘Protocol of San Salvador’).³³⁷
- 165 Applications concerning the climate field are currently being lodged with the *European Court of Human Rights*. Therefore, the Strasbourg case law should be positively influential in Member States’ case law.³³⁸ Nonetheless, a new additional protocol to the Convention to enshrine the right to a healthy environment would be welcome, as recommended by the National Consultative Commission on Human Rights (CNCDH) and the Parliamentary Assembly of the Council of Europe.³³⁹

4.1.3 Criminal and Civil Judges

- 166 According to a report by the United Nations Environment Programme (UNEP) and the International Criminal Police Organization (INTERPOL), environmental crime is the fourth most combatted criminal activity in the world after drug smuggling, counterfeiting and trafficking in human beings.³⁴⁰ These lucrative traffics are well documented by the

³³⁵ S Stec, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) 31(3) *Journal of Environmental Law* 533. There have recently been three requests for advisory opinions from international courts, filed before ITLOS, the IACtHR and the ICJ. One of these was heavily influenced by standing rules. On 29 March 2023 (still pending) the ICJ was asked by the UN General Assembly to clarify the duties owed by states.

³³⁶ R McMenamin, ‘Advisory Opinion on Obligations of States in Respect of Climate Change: Potential Contribution of Human Rights Bodies’ (2023) 13(3-4) *Climate Law* 213.

³³⁷ Calderón Gamboa (n 221).

³³⁸ D Rousseau, P Y Gahdoun and J Bonnet, *Droit du contentieux constitutionnel* (12th edn, LGDJ 2020).

³³⁹ *Commission nationale consultative des droits de l’homme Commission nationale consultative des droits de l’homme* (National Consultative Commission on Human Rights) (CNCDH), ‘Urgence climatique et les droits de l’homme’ (Opinion) 27 May 2021; Parliamentary Assembly of the Council of Europe (PACE), ‘Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment’ (2009) Recommendation 1885, Sec 10.

³⁴⁰ INTERPOL, ‘INTERPOL marks a decade of tackling serious organized environmental crime’ (2020) <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-marks-a-decade-of-tackling-serious-organized-environmental-crime> accessed 22 June 2023.

analyses of ICPO-INTERPOL³⁴¹ or European Union Agency for Law Enforcement Cooperation (EUROPOL), which consider environmental crime to be a key area of organized crime.³⁴² Taking these developments into account, for the repression of trafficking in protected species, waste and phytopharmaceutical products, the French legislator has established the aggravating circumstance of an organized gang.³⁴³

- 167 In many countries, the victim of an offence has a procedural option to seize either the civil or the criminal justice system. The said choice is related to the best strategy for environmental legal action. In *France*,³⁴⁴ the victim of the offence and the holders of the right have that choice,³⁴⁵ on the basis of Art 1231 (and following) for contractual liability and 1240 (and following) for extra-contractual liability under ordinary law. The victim of the offence can either seize the *Tribunal judiciaire* (civil court) or become a civil party and bring a case before the criminal court on the basis of Art 2 (and following) of the Code of Criminal Procedure. The latter can be done by *direct summons*,³⁴⁶ wherein he or she brings the case before the trial court, or by complaint with *constitution de partie civile* (civil action), wherein he or she brings the case before the investigating judge.³⁴⁷ At the European Union level, the directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC, adopted in 2024, constitutes a move to

³⁴¹ C Nellemann and others, 'The Rise of Environmental Crime: A Growing Threat to Natural Resources Peace, Development and Security' (UNEP 2016).

³⁴² Serious and Organised Crime Threat Assessment (SOCTA) Report (2017) 41, <https://www.europol.europa.eu/publications-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017> accessed 21 June 2023.

³⁴³ Charter of the Environment, Art L 541-46, I and VII; Code Rural (Rural and Maritime Fishing Code) (France), Art L 253-15 and L 253-16.

³⁴⁴ The victim of a harmful act has the right to be heard on the merits of his or her claim, so that the civil judge can decide whether it is well-founded or not, according to Art 30 of the Code of Civil Procedure. But the victim of the offence constituting the harmful act may also seize the criminal court to obtain compensation for the damage directly caused by the offence and from which he or she suffers personally, according to Art 2 of the Code of Criminal Procedure. This is the alternative available to the victims of an offence, and therefore also to the victims of an environmental offence, who can act before the criminal court, when the damage results from the offence, and before the civil court. The procedural option available to the victim of an environmental crime is provided for in Art 3 and 4 of the Code of Criminal Procedure. According to the first of these, 'the civil action may be brought at the same time as the public action and before the same court', ie, before the criminal court. Art 4 states that 'a civil action for compensation for the damage caused by the offence provided for in Art 2 may be brought before a civil court, separately from the public action'.

³⁴⁵ This applies in particular to environmental protection associations, authorized to exercise the rights conferred on civil parties by Art L 142-2 of the Environmental Code. The principle of compensation for ecological damage by the criminal courts was established in the *Erika* case: Case 10-82.938 (Court of Cassation (Criminal Division), France), Judgment 25 September 2012 [Bulletin criminal 2012, No 198]. In this case, the Criminal Division of the Court of Cassation considered that the Court of Appeal had 'justified the allocation of compensation for ecological damage, consisting of direct or indirect damage to the environment resulting from the offence'. This principle was reiterated on 22 March 2016 (No 13-87.650) and clarified on 28 May 2019, No 18-83.290). The harm caused by environmental damage can therefore be repaired by the civil court, which is the natural judge of compensation; it can also be repaired by the criminal court.

³⁴⁶ Art 392 *Code de procédure pénale* (Code of Criminal Procedure) (France).

³⁴⁷ *Ibid*, 3 May 2017, No 16-80.351, Art 85.

strengthen the penalization of environmental damage, after the proliferation of initiatives in the Member States.³⁴⁸

- 168 Whenever civil and criminal remedies are available to be pursued all together, plaintiffs can generally choose the type of jurisdiction based on considerations such as the role of the judge, the burden of proof and the speed of the proceedings. That is the case in France, in which environmental damage is often linked to the commission of an offence, and victims tend to attach their *constitution de partie civile* (civil action) to the public action to benefit from the evidence produced by the prosecutor. Hence, many actions for compensation for damage resulting from environmental damage are brought before the *criminal courts*.
- 169 One *argument for guiding the choice* is the proactive role of the civil judge and the inquisitorial role of the criminal judge.³⁴⁹ The criminal court must assess the ecological damage, if necessary, by using an expert. The civil court may order an investigation, provided it is not replacing a question of a party's failure to act. Thus, the choice of the criminal court seems more reassuring. Admittedly, the procedure is longer, and the criminal route is not always open, but it can be more effective, whilst allowing plaintiffs to seek the criminal responsibility of the defendant. To reach a decision, the objective pursued by the applicant is conclusive. If it is solely to obtain financial compensation for the damage, the plaintiff has a choice, and the more proactive role of the criminal court may have an influence on it. Instead, if the objective is reparation and punishment for the wrongdoing, then the criminal route will be preferred. The said choice for the victim of environmental damage to act before the criminal court or before the civil court exists provided that the public action has not been extinguished, either by the statute of limitations or by a transaction.
- 170 Indeed, sometimes the public action, and therefore the civil action before the criminal court, is time-barred, whereas the civil action before the civil court is still possible.³⁵⁰

³⁴⁸ European Commission, 'Proposal for a directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC' (COM(2021) 851 final) [2024] OJ L 2024/1203/1; F Baab and V Filhol, 'Criminalité environnementale et nouvelle directive UE: vers une nouvelle politique pénale européenne?' (2023) Dalloz.

³⁴⁹ JB Perrier, 'Le choix du juge civil ou du juge pénal en France?' in Hautereau-Boutonnet and Truilhé (n 186).

³⁵⁰ According to Art 2224 of the Civil Code, the prescription of common law for the action for reparation before the civil judge is five years and according to Art 2226-1 of the Civil Code, the action for liability for reparation of ecological damage (which is more specific) is prescribed as 10 years from the day when the holder of the action knew or should have known of the manifestation of the ecological damage; five years, if the action is personal, and 10 years if it is this specific action.

However, according to Art 8 of the Code of Criminal Procedure, the statute of limitations for public action is six years for the prosecution of offences and according to Art 9, public action for contraventions is prescribed as one year. And before the criminal judge, these time limits apply and not those of civil law (Art 10 Code of Criminal Procedure).

Moreover, if the victim is free to choose, once a choice is made, in principle, it is irrevocable: this is the *una via electa* rule.³⁵¹

- 171 In response to society's growing concern about environmental protection issues, the legislator has, over the past 15 years, modernized and strengthened the *repressive measures* in this area, in order to ensure that the rules of law are applied in practice.³⁵² Moreover, the *technicality and complexity* of environmental litigation³⁵³ led to the adoption of the Law on the European Public Prosecutor's Office, Environmental Justice and Specialized Justice, on 24 December 2020.³⁵⁴ It has specialized criminal justice at both European and national level,³⁵⁵ and provided for an improved criminal response to environmental offences by designating, within the jurisdiction of each court of appeal, a judicial court for offences under the Environmental Code, the Forestry and Mining Code and the Rural and Maritime Fishing Code, in order to deal with complex cases, those with significant damage or those that extend over a vast geographical area.³⁵⁶ It entails a gradation of the criminal response at several levels, depending in particular on the seriousness of the offence. The specialized regional centres are thus a new intermediate level.
- 172 For decades, the *ordinary civil courts* have been dealing with environmental issues, in particular through neighbourhood disturbances, liability law, property law

³⁵¹ However, we know that this rule is less far-reaching than it seems. Firstly, the victim who has acted before the criminal court can always withdraw and bring his or her action before the civil court; the choice of the criminal court is therefore not irrevocable. Secondly, if the victim who has acted before the civil court can no longer seize the criminal court, he or she can join in any proceedings that may be instituted. They can still seize the criminal court if they were unaware that an offence had been committed. The *electa una via* rule is, as can be seen, much less far-reaching than it appears.

³⁵² G Lhuillier and B Parance, 'Justice environnementale: le défi de l'effectivité' (2022) JCP G, Doct 36.

³⁵³ Cinotti and others (n 18), prepared by D Agoguet, D Atzenhoffer et V Delbos (IGJ), and B Cinotti, JF Landel (CGEDD); Rivaud (n 271).

³⁵⁴ Law No 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice of 24 December 2020 (France); J Lagoutte, 'Joyeux Noël? Regard sur le chapitre V de la loi du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée' (2021) 2 Droit pénal, Étude 5; P Beauvais, 'De nouvelles avancées vers une justice pénale environnementale autonome' (2021) 12 Energie - Environnement - Infrastructures 25, Étude 22.

³⁵⁵ H Christodoulou, 'Spécialisation de la justice ou montée en puissance des procureurs?' (2021) Dalloz actualité 7; K Haeri, V Munoz-Pons and M Touansa, 'spécialisation de la justice pénale environnementale: retour sur la loi du 24 décembre 2020' (2021) Dalloz actualité.

³⁵⁶ For the most serious offences, such as industrial disasters, the two specialized inter-regional centres in Paris and Marseille with jurisdiction over public health and mass casualties accidents will remain as such (Art 706-2 and 706-176 Code of Criminal Procedure). The same applies to the JULIS, specialized coastal jurisdictions that will remain competent to deal with maritime pollution cases, while the JIRS, specialized inter-regional courts, will retain jurisdiction in cases of organized crime with both a high degree of environmental complexity and an environmental dimension (Art 706-75 Code of Criminal Procedure). With regard to the less serious local offences, such as illegal dumping, the judicial courts will continue to deal locally with these offences, which do not meet any criteria of seriousness or complexity; JL Cioffi, 'La justice civile environnementale, après les lois des 24 décembre 2020 et du 22 août 2021, vers une nouvelle avancée?' (2022) 3 Energie - Environnement - Infrastructures, Étude 6; Cinotti and others (n 18).

infringements, building permit litigation, commercial leases, competition law, private international law and international trade law, etc. Nevertheless, the vast majority of the decisions handed down by the courts when these areas relate to the environment are handed down by *criminal courts* rather than the civil courts. This is due, in particular, to the lower cost of civil action in criminal cases and to the fact that representation through a lawyer is not mandatory. Besides, whilst before the civil order the claimant bears the burden of proof and, namely, the costs of expert appraisals, which can be particularly high in environmental litigation, in the case of a complaint with civil action before criminal judges, the Treasury advances such costs.

173 Regarding the *French civil courts*, only one article in the Law No 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice concerns the civil aspect. It imposes, within the jurisdiction of each court of appeal, a specially designated judicial court that shall hear: a) actions relating to ecological damage³⁵⁷ based on Art 1246 and 1252 of the Civil Code 24; ii) civil liability actions provided for by the Environmental Code; and iii) civil liability actions based on the special liability regimes applicable to environmental matters resulting from European regulations, international conventions and laws adopted for the protection of the environment'.³⁵⁸

174 In January 2020,³⁵⁹ within the context of an action brought by several NGOs and associations in October 2019,³⁶⁰ the French Tribunal de Grande Instance of Nanterre declared itself incompetent to assess the consequences of the Total project in Uganda,³⁶¹ and the appropriateness of the development and of the oil group's due diligence plan, referring the case back to the commercial court. The Versailles Court of Appeal confirmed this lack of jurisdiction in December 2020,³⁶² but the Court of Cassation overturned the decision later on, considering that the *vigilance plan was a*

³⁵⁷ MP Camproux Duffrène, 'Le préjudice écologique et sa réparabilité en droit civil français de la responsabilité ou les premiers pas dans un sentier menant à un changement des rapports homme-nature' (2021) 46(3) *Revue Juridique de l'Environnement* 457.

³⁵⁸ Art L 211-20 and Art D 211-10-4-1 of the Code of Judicial Organisation, issued from Décret n° 2021-286 du 16 mars 2021 *désignant les pôles régionaux spécialisés en matière d'atteintes à l'environnement* (Decree No 2021-286 of 16 March 2021 designating the regional centres specialising in environmental offences) [JORF No 0065 of 17 March 2021, Text No 15] (France) which lists the courts having jurisdiction over ecological damage.

³⁵⁹ Case 19/02833 (Judicial District Court, Nanterre, France), Decision 30 January 2020 [JurisData No 2020-007310].

³⁶⁰ Les Amis de la Terre, Survie, Afiege, Cred, Nape and Navoda.

³⁶¹ The Tilenga project in Uganda, worth nearly EUR 3 billion, under which Total wanted to exploit oil deposits in the Lake Albert region (419 oil wells to be created) and transport the liquid to a Tanzanian port via a pipeline over 1,400 km long.

³⁶² *Assoc Africa Institute for Energy governance v SA Total*, Case 20/01692 (regional Court of Appeal, Versailles, France), Judgment 10 December 2020; *Assoc Civic Response on Environment and Development (CRED) v SA Total*, Case 20/01693 (regional Court of Appeal, Versailles, France), Judgment 10 December 2020; AM Ilcheva, 'L'épineuse question de la compétence juridictionnelle en matière de plan de vigilance' (2021) *Energie - Environnement - Infrastructures* 2021, File 28.

commercial act.³⁶³ It therefore declared the Nanterre judicial court competent and referred the case to it.³⁶⁴ This is not the first time that the *Cour de cassation* has made this assertion, unconditionally admitting the right of a non-trading plaintiff to choose between the civil and the consular court to decide a dispute relating to a commercial company.³⁶⁵ Law 2021-1729 of 22 December 2021 on trust in the judiciary now gives exclusive jurisdiction to the Paris judicial court to hear actions relating to the duty of care based on Art L 225-102-4 and L 225-102-5 of the Commercial Code (COJ, Art L 211-21).³⁶⁶

- 175 Before the judiciary in France, plaintiffs have the possibility of seizing the civil judge through the protective summary proceedings provided for in Art 835 of the Code of Civil Procedure, in order to prevent imminent damage or to stop a manifestly unlawful disturbance. But, since the notion of ‘imminent damage’ is not always adapted to environmental law, some authors have proposed opening the civil summary procedure in the event of ‘serious or lasting’ damage.³⁶⁷
- 176 Furthermore, based on Art 145 of the Code of Civil Procedure, known as the summary procedure *in futurum*, plaintiffs have filed lawsuits regarding ecological damage that occurred abroad. Two French environmental protection associations intended to bring a civil liability action before the French courts against Total on the basis of faults resulting from involvement in the activities in the Democratic Republic of Congo, and, in particular, the lack of vigilance and the negligence in the defendant's environmental policy, which allegedly caused significant environmental damage. The plaintiff associations requested interim measures before a court in Paris. They were dismissed by an order issued on 22 October 2019. The Paris Court of Appeal overturned this decision

³⁶³ The Court of Cassation, citing Art L 211-3 of the Code of Judicial Organization and Art L 721-3 and L 225-102-4 from the Commercial Code, quashed and partially annulled a decision of the Versailles Court of Appeal. It held that the due diligence plan incumbent on a company does not constitute a commercial act and that, although the establishment and implementation of such a plan has a direct link with the management of the company, thereby justifying the jurisdiction of the consular courts, the non-trading plaintiff who intends to act to this end has, in this case, the choice of seizing either the civil court or the commercial court.

³⁶⁴ Case 21-11.882 (Court of Cassation, Commercial Chamber, France), Decision 15 December 2021 [Dalloz 2022, 7].

³⁶⁵ Case 19-19.463 (Court of Cassation, Commercial Chamber, France), Decision 18 November 2020 [Dalloz 2342; (2021) *Rev sociétés* 165] Note A Reygrobellet; BRDA 24/20, information bulletin 5.

³⁶⁶ A Lecourt, ‘Compétence exclusive du tribunal judiciaire de Paris pour connaître du devoir de vigilance des grandes sociétés: une issue critiquable?’ (2022) 1 *Revue trimestrielle de droit commercial et de droit économique* 65 (L No 2021-1729 of 22 December 2021); Case 19/02833 (Judicial District Court, Nanterre), Referral Order 30 January 2020 [Dalloz 2020, 970] Note N Cuzacq; (regional Court of Appeal, Versailles, France), Judgment 10 December 2020 [*Rev sociétés* 2021. 297] Note G Leray [RTD com 2021, 135] Obs A Lecourt.

³⁶⁷ V Delbos, D Agoguet and D Atzenhoffer, ‘Le droit de l’environnement est trop éclaté’ (2020) 20 *Gaz Pal* 11; P Januel, ‘Loi Climat: les députés veulent ouvrir les référés environnementaux’ (2021) *Dalloz actualité*; National Assembly, ‘Mission flash sur le référé spécial environnemental: communication de Mmes Naïma Moutchou et Cécile Untermaier’ (Communication) 10 March 2021; ‘Proposition de loi visant à adapter la procédure des référés aux enjeux environnementaux’, No 1973, 5 December 2023 and referred to the Committee on Constitutional Law, Legislation and the General Administration of the Republic.

on 17 September 2020, considering that the associations lacked standing under the foreign law applicable to the merits.³⁶⁸

- 177 Aside from summary proceedings, plaintiffs may follow the classic route of taking legal action in civil matters, seizing the civil court on the merits, depending on the nature of the claim, either in written or in oral proceedings. For this purpose, the duty of vigilance as part of *Corporate Social Responsibility*, has been applicable since the enactment of Law No 2017-399 of 27 March 2017,³⁶⁹ and aims at preventing serious violations of human rights, fundamental freedoms, the health and safety of persons and the environment caused by parent companies and contractors or by their subsidiaries.³⁷⁰ A new legal tool that could play an important role in environmental civil justice is the *duty of conscience* towards others, formalized in Art 1100 of the Civil Code.³⁷¹
- 178 A more recent ruling by the Paris Civil Court on 28 February 2023 concluded that the demands of NGOs seeking the suspension of the TotalEnergies megaproject in Uganda and Tanzania for environmental reasons were ‘inadmissible’. This judgment is the first rendered based on the 2017 Due Vigilance Law.³⁷² In its decision, the Paris Court considered that the ‘vigilance measures’ introduced by this law are ‘general and without precise contours’, due to the lack of publication of an anticipated decree. However, the judgment established that nothing prevented France from enforcing laws governing the overseas activities of companies present in France; a promising precedent pronounced by the court under the new diligence law. In the UK, Appeal judges have dismissed an attempt by one of two mining giants involved in the largest group litigation in British history to escape potential liability in the upcoming trial and refused Brazilian iron ore mining company Vale permission to appeal a jurisdiction ruling. Indeed, there are

³⁶⁸ Case 19/20669 (Court of Appeal, Paris), Judgment 17 September 2020 [JurisData No 2020-019769]; *Energie – Environnement – Infrastructures* 2021, Comm 12, Note O Boskovic.

³⁶⁹ Law No 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (Act on the duty of vigilance of parent companies and contracting companies) of 27 March 2017 [Official Gazette of France of 28 March 2017] (France). On 22 December 2022, the Versailles Court of Appeal ordered two foreign companies to produce various documents requested by Cameroonian citizens, to establish the link of control exercised by Bolloré, in the context of an ‘in futurum’ action announced on the duty of vigilance. Case 22/00643 (CA Versailles, 14th ch, France), 1 December 2022.

³⁷⁰ J Thibord and E Daoud, ‘Devoir de vigilance européen: la commission des affaires européennes de l’Assemblée nationale demande une législation ambitieuse et effective’ (2022) *Dalloz actualité*; A Lecourt, ‘Compétence exclusive du tribunal judiciaire de Paris pour connaître du devoir de vigilance des grandes sociétés: une issue critiquable?’ (L No 2021-1729 of 22 December 2021) (2022) 1 *Revue trimestrielle de droit commercial et de droit économique* 65.

³⁷¹ Cioffi (n 27) 3.

³⁷² Law No 2017-399 (n 369). This law adopts a comprehensive approach, in that its scope encompasses risks and potential serious violations and harm to the environment caused by a company’s activities, those of its subsidiaries, controlled companies, subcontractors or suppliers.

different sets of civil proceedings in Brazil, both individual claims and class actions rising out of this disaster which have been brought against Samarco, Vale and BHP Brasil.³⁷³

- 179 The importance of the substantial regime appears also before the Canadian courts' approach to corporate breaches and lifting the corporate veil. In an appellate-level decision in Ontario, judges held a principal of a corporation liable along with the corporation on a joint-and-several basis. For the court, a corporate principal, director or officer '*could also be considered a "person having control of a pollutant" based on fact-specific assessment. Future claimants could rely on this decision, thereby increasing the spectre of individual liability*'.³⁷⁴
- 180 One cannot deny the role the parties play in deciding the legal bases and forum by which to bring an action.³⁷⁵ It constitutes a 'crucial element of strategic litigation' and leads to the question of filing either vertical or horizontal actions.³⁷⁶ In this regard, 'forum shopping' operates in several directions. Plaintiffs and their supporters may opt for international or domestic fora. Potential international fora are human rights courts and other international bodies for the protection of human rights, as discussed before. The same can be said regarding the venue.

4.1.4 Venue

- 181 Some environmental disputes, such as global warming, are inherently complex because of their global nature and may have harmful consequences for humanity. Other environmental disputes, such as pollution, can be transboundary when the activities causing them are carried out by economic actors dispersed throughout the world; in particular, transnational companies.³⁷⁷ Relevantly, in a report published on 27 July 2023, the United Nations Environment Programme points out that climate-related lawsuits against companies have increased fivefold since 2017 and doubled in 2021. The multiplication of rules on civil liability claims against companies has been accompanied by a multiplication of grounds (claims based on both recent rules stemming from special law and traditional rules stemming from civil law), claimants (associations involved in the fight against climate disruption, local authorities and even States) and even

³⁷³ For a recent approach to jurisdiction in the UK, Court of Appeal of England and Wales, *Vale S.A. v BHP Group (UK) Ltd and BHP Group Ltd* (Court of Appeal, Civil Division, England, UK), Judgment 24 November 2023 [EWCA Civ 1388]. The number of claimants amounted to approximately 732,000, and all claims were advanced under Brazilian law.

³⁷⁴ Kahn and Boucher (n 264).

³⁷⁵ Hess (n 13).

³⁷⁶ Ibid, citing Duffy, *Strategic Human Rights Litigation* (Hart 2018) 254 ff on the strategic use of fora.

³⁷⁷ V Gaillot-Mercier, 'Le dommage écologique transfrontière' (thesis, University of Rennes 1, 1992); C Thibierge, 'Libres propos sur l'évolution du droit de la responsabilité civile (vers un élargissement de la fonction de la responsabilité civile)' (1999) RTD civ 561.

governments. This demonstrates the attention paid by civil society to the actions of commercial companies on climate issues.³⁷⁸

182 In the absence of global jurisdictions, in order to extend and reinforce the extraterritorial and universal jurisdiction of courts,³⁷⁹ some authors advocated the institution of an *International Criminal Court for the environment* or the extension of the jurisdiction of the International Criminal Court to environmental crimes committed by transnational corporations.³⁸⁰ With the same perspective, others launched the 'Charter of Brussels' on 30 January 2014, which also advocates the creation of a *European and international environmental criminal court*.³⁸¹ The International Court of Justice established a Chamber for Environmental Matters in 1993 (after the signing of the UN Convention on Climate Change) and on the legal basis of Art 26.1 of the Statute of the Court.³⁸² The Special Chamber of the ICJ seems to have been set up to monitor the implementation and enforcement of the UN Framework Convention on Climate Change. Although the International Criminal Court has taken an interest in the issue of ecocide and the environment, no proceedings have ever been opened before it on this subject.³⁸³ Since the Special Chamber never resolved any issues, it was dissolved in 2006 and has not been reconstituted to date. Reconstituting it would be an added value to the environmental venue's landscape.

183 In all the cases whereby plaintiffs seek a sort of universal jurisdiction, case law imposes strict conditions, namely in American law since the *Kiobel* decision, which also faces the challenge of the invocation of the *forum non conveniens* rule by the American judge in the *Chevron* case.³⁸⁴ 'Yet, the regional approach also entails risks, as demonstrated by

³⁷⁸ United Nations Environment Programme, Global Climate Litigation Report, 2023 Status Review, July 2023. Thus, the question arises whether proceedings can tackle this cross-border, or even planetary, nature.

³⁷⁹ Hautereau-Boutonnet and Truilhé (n 2).

³⁸⁰ Among the 35 proposals 'to better punish crimes against the environment', 'paving the way for comprehensive environmental criminal justice': cf I Fouchard and L Neyret, '35 propositions pour mieux sanctionner les crimes contre l'environnement. Rapport de synthèse' in L Neyret (ed), *Des écocrimes à l'écocide: Le droit pénal au secours de l'environnement* (Bruylant 2015) pt III, 423 ff; L Neyret, *Des écocrimes à l'écocide* (Bruylant/Larcier 2015).

³⁸¹ Cf the project led by civil society and the NGO End Ecocide on Earth and Eradicating Ecocide.

³⁸² ICJ, 'Chambers and Committees' <https://www.icj-cij.org/chambers-and-committees> accessed 6 June 2023. A Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in WCG Burns and HM Osofsky (ed), *Adjudicating Climate Change: State, National, and International Approaches* (New-York, Cambridge University Press 2009) 334; C Voigt, 'The potential role of the International Court of Justice' in DA Farber and M Peeters (ed), *Elgar Encyclopedia of Environmental Law: Climate Change Law* (vol 1, Cheltenham, Elgar 2016) 52166. Cf C Huglo and C Ivala Plaine, 'Panorama du contentieux climatique 2020-2021' (2021) Journal spécial des Sociétés, special issue of 15 December 2021.

³⁸³ C Huglo, 'Climate change litigation: efficiency' in J-B Auby and others (ed), *French Yearbook of Public Law* (issue 1, 2023).

³⁸⁴ *Kiobel v Royal Dutch Petroleum* (Supreme Court, US), Judgment 17 April 2013 [569 US 108; 133 S C 1659]; cf G Lhuillier, *Le droit transnational* (Dalloz 2016) 228 ff; K Martin-Chenut and C Perruso, 'La contribution des systèmes régionaux de protection des droits de l'homme à la pénalisation des atteintes à l'environnement' in L Neyret (ed), *Des écocrimes à l'écocide. Le droit pénal au secours de l'environnement* (Brussels, Bruylant 2015) 72.

the limitation of the scope of rights for nationals of the country where specific activities are planned or occurring’.

- 184 Domestic courts should ‘spearhead’ climate change cases,³⁸⁵ according to the ECtHR, which has ‘stressed that national authorities have direct democratic legitimation and are in principle *better placed than an international court* to evaluate the relevant needs and conditions’ of environmental policy-making.³⁸⁶ However, the Court retains competence when state policy affects convention rights and has a ‘bearing on the interpretation and application of the Convention [...] albeit with substantial deference’.³⁸⁷ Moreover, the Court’s competence in the climate change field cannot, in principle, be excluded. Its role is not in doubt: ‘the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights’.³⁸⁸
- 185 In the Escazú Agreement, the international community has settled upon the regional level as the appropriate means for implementing standards related to access to information, public participation, and access to justice in environmental matters. The appropriateness of the regional level is demonstrated by the differences and innovations found in the Escazú Agreement, in its scope and definitions, background principles, burden of proof and protection of environmental defenders and vulnerable populations.³⁸⁹
- 186 *Articulation through politics* has been put forward, raising the question of *a governance of the ‘global commons’*³⁹⁰ in cases such as *Urgenda*³⁹¹ and *Leghari*,³⁹² as they put at stake the liability of both states and large companies.³⁹³ Litigation is thus seen as

³⁸⁵ M Milanovic, ‘A Quick Take on the European Court’s Climate Change Judgments’ (2024) EJIL:Talk!.

³⁸⁶ *Verein KlimaSeniorinnen*, para 449, emphasis added.

³⁸⁷ *Ibid*, para 450.

³⁸⁸ *Ibid*, para 451.

³⁸⁹ S Stec, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) 31(3) *Journal of Environmental Law* 533.

³⁹⁰ Cf for example, H Xue, *Transboundary Damage in International Law* (Cambridge UP 2009).

³⁹¹ Some very emblematic cases (against states) have struck a chord, in particular the famous *Urgenda* case in which the Supreme Court of the Netherlands ruled on 20 December 2019, in the name of a duty of care on the shoulders of the Dutch government to actively contribute to the fight against climate change, that the Dutch government must take the necessary steps to implement an emission reduction target of 25% below 1990 GHG emission levels before the year 2021.

³⁹² In the same vein, the Leghari case in Pakistan is instructive: the judge ruled in favour of a farmer who was pursuing a public interest remedy against the inaction of the federal and regional governments in dealing with risks faced by the population. The judge ordered, in the name of the fundamental rights of citizens, the creation of a climate change commission to ensure that the government adopts effective climate measures.

³⁹³ While these disputes are most often brought against States, which are accused of ineffective action, they also affect large companies, as illustrated by the resounding decision handed down by the Court of First Instance of The Hague against the Shell group on 26 May 2021. The Court ordered the oil company to reduce its net GHG emissions by 45% by 2030. Shell filed a Statement of Appeal in March 2022 (which did not suspend its obligations), and this is due to be heard in April 2024. An overly punitive and unfeasible order by the Court is the basis of Shell’s objections.

leverage to put pressure on the government to greatly accelerate their commitments to fight against climate change, as the ‘affair of the century’ also illustrates in France.³⁹⁴

- 187 In other cases, local jurisdictions within a federal country can be a source of effectiveness where the national jurisdictions cannot act. Thus, in the case *Our Children’s Trust*, a decision of the Washington State Superior Court on 19 November 2015, the Court condemned the local State, while the US could have not done the same towards the federal State.³⁹⁵
- 188 The whole idea is to build a ‘*global environmental justice*’,³⁹⁶ which corresponds to what ‘moral tribunals’ tend to deal with.³⁹⁷
- 189 In federal countries, the question of interjurisdictional competence arises within the frontiers. In Argentina, a preliminary draft of the *Anteproyecto de Ley de Procesos Colectivos del Ministerio de Justicia de la Nación* (Preliminary draft Law on Collective Proceedings of the Ministry of Justice of the Nation) initially distinguished between ‘local’ collective proceedings and interjurisdictional or national collective proceedings.³⁹⁸
- 190 What is not understood is the reason for the notable difference in treatment given to interjurisdictional or national cases, which the draft – unlike what happens with local cases – determines to be processed before the courts of the defendant’s real domicile or registered head office. This exclusive nexus places the alleged agent producing the massive damage in an unjustified position of privilege, affecting the right of access to justice for example, a group of affected persons claiming against a company with headquarters in the Federal Capital for the environmental damage produced in an inland region would necessarily have to claim before the courts in the Buenos Aires courts, even if the source of the damage and the members of the group are located in Patagonia, Cuyo or the Chaqueña region.³⁹⁹ In this type of case, in which a homogenous wrongful

³⁹⁴ The ‘affair of the century’ is the best illustration of this: on the judicial level, the four associations behind the project (Oxfam, Our Common Business, Foundation for Nature and Man and Greenpeace) filed a summary application with the Administrative Court of Paris on 14 March 2019 and a supplementary brief on 20 May, attacking the State for climate inaction.

³⁹⁵ *Zoe and Stella Foster, et al. v Washington Department of Ecology*, Case 14-2-25295-1 SEA (Superior Court of the State of Washington for King County, US), Order 19 November 2015 (affirming the Department of Ecology’s denial of petition for rulemaking).

³⁹⁶ Fouchard and Neyret (n 380) 423; M Delmas-Marty, ‘À crime global, justice globale’ (Le Monde, 30 January 2002).

³⁹⁷ In the words of C Sotis, ‘Juger des crimes environnementaux internationaux: approche juridictionnelle et institutionnelle’ in L Neyret (ed), *Des écocrimes à l’écocide: Le droit pénal au secours de l’environnement* (Bruylant 2015), 216: notably, Permanent Peoples’ Tribunal, International Tribunal of Conscience on Crimes against Nature, International Monsanto Tribunal, and International Rights of Nature Tribunal; According to the Charter creating the International Tribunal for the Punishment of Crimes against Nature www.tribunal-nature.org accessed 21 June 2023; Lhuillier (n 384) 189.

³⁹⁸ L J Giannini, ‘Análisis crítico del Anteproyecto de Ley de Procesos Colectivos del Ministerio de Justicia de la Nación’ (2018) 1 La Ley (AR/DOC/1425/2018); Commentary on the 17/05/2018 Ministry of Justice and Human Rights of the Nation Preliminary Draft Law on Collective Proceedings.

³⁹⁹ Giannini (n 398).

source produces damages spread over several provinces, the determination of territorial jurisdiction should also be pursued (as it is done with 'local' cases) with the balancing of values such as the access to justice of the members of the group, who have the right to claim collectively, and the efficiency of the justice system (in order to reduce time, costs and efforts of the judiciary and the parties). For this reason, the sovereignty of the agent, the alleged mass tortfeasor, choosing the place where he will be sued by simply defining his registered office is a solution that unreasonably infringes the principle of equality, the guarantee of access to justice and effective judicial protection to the detriment of those who claim as victims of acts of this nature.

4.2 Role of the Parties and of the Judges

- 191 Because of the specifics of environmental litigation, the role of the parties and that of judges departs from the traditional role they are called to play within the proceedings.⁴⁰⁰ In the Latin American region, the guiding *pro persona* principle has relevance for the role of the judge, namely in their function to interpret the law. It also expresses a tradition of judicial activism that incorporates the Inter-American human rights system into Latin American constitutionalism, and which has had special resonance in cases involving the rights of indigenous peoples.⁴⁰¹
- 192 Moreover, the proactive role of civil society in bringing new claimants to green tribunals or to mock trials has contributed to a 'metamorphose' of the role of judges, namely with respect to evidence, and of the parties.⁴⁰² Indeed, NGOs and ordinary citizens are putting increasing pressure on judges before all levels of jurisdiction, whilst conducting *strategic litigation* on a global scale on major issues such as climate and biodiversity (1).⁴⁰³ This is reinforced by the fact that environmental litigation is often transnational, that is, national judges come to offer answers to global questions, in the absence of a competent international judge on the subject. Judges then become the new guarantors of environmental justice, boldly mobilizing all possible mechanisms to innovate (2).

⁴⁰⁰ J Rochfeld, 'L'environnement: les citoyens, le droit, les juges – Regards croisés du Conseil d'Etat et de la Cour de cassation' intervention' (21 May 2021) Doc fr. Published and viewable on the website of the Court of cassation <https://www.courdecassation.fr/toutes-les-actualites/2021/05/21/lenvironnement-les-citoyens-le-droit-les-juges-regards-croises-du> accessed 10 July 2023; C Lepage, 'Le renouvellement des acteurs et de l'activisme judiciaire' Conf intervention, Minister's address (12 February 2021) 37 Études Dossier 64; Lexisnexis SA (2022) 1 La Semaine Juridique - Édition Générale.

⁴⁰¹ A Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in HP Aust and G Nolte (ed), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford UP 2016).

⁴⁰² B Parance, 'Les métamorphoses de la RSE' in *Mélanges en l'honneur de Jacques Mestre* (LGDJ Lextenso 2019); B Lasserre, 'L'environnement: les citoyens, le droit, les juges – Regards croisés Cour de cassation et Conseil d'Etat Propos introductifs' (21 May 2021) Doc fr.

⁴⁰³ Hess (n 13).

193 Cases such as *Vattenfall*⁴⁰⁴

are examples of a 'turn to courts', they are just as much a challenge and chance for courts – and judges – to define, redefine or strengthen their role in the national and global international order in the global, urgent, and most important fight against dangerous climate change.⁴⁰⁵

4.2.1 Role of the Parties

- 194 Environmental disputes have revealed a change in the representation of *citizens alongside NGOs*, giving place to 'coalitions of action'; citizens are taking their place alongside the organizations to step up the fight against climate change. In *Urgenda*, 886 Dutch citizens joined the Foundation and, in *Shell*, the association *Milieudefensie*, six other associations and 17,379 citizens led the action.⁴⁰⁶ They defend their individual fundamental rights to live in a sustainable climate, as well as the rights of future generations, whose living conditions will be greatly affected by climate change.⁴⁰⁷
- 195 Plaintiffs have, recently, had recourse to the horizontal application of human rights, such as Art 2 and 8 ECHR. Two main categories of action exist in climate change litigation. The first has a public focus – actions can be brought vertically against governments and regulatory bodies 'under administrative and constitutional courts'; alternatively, the second, horizontal, option is where claimants target private businesses.⁴⁰⁸
- 196 In private litigation, there is a further distinction between more traditional tort-based actions and actions 'filed as shareholder actions within listed companies (based on compliance of the boards)'.

⁴⁰⁴ Case 1 BvR 2821/11, 1 BvR 321/12 1, BvR 1456/12 (Constitutional Court, Germany), Judgment 6 December 2016.

⁴⁰⁵ W Kahl and MC Weller, *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021) para 85, 18.

⁴⁰⁶ The same was done with the application made by the six young Portuguese citizens against 33 states for inadequate climate policy. Cf the case of Global Legal Action Network (GLAN): *Claudia Duarte Agostinho and others v Portugal and 32 Other States*, Case 39371/20 (ECtHR), Judgment 30 November 2020; Judgment 9 April 2024 [ECLI:CE:ECHR:2024:0409DEC003937120].

⁴⁰⁷ Criticizing the role that associations seek to play in these strategies, cf T Le Bars, 'Les associations, sujets de droit de l'environnement' in Association H Capitant (ed), *Le droit de l'environnement: Journées nationales* (t XI: Caen, Dalloz, Thèmes et commentaires 2010) 117, 119, 223; S Guinchard, 'Les moralistes au prétoire' in J Foyer (ed), *Auteur et législateur leges tulit jura docuit écrits en hommage à Jean Foyer* (Paris, Presses Universitaires de France 1997) 477 ff.

⁴⁰⁸ As was the case in *Milieudefensie v Shell*, Case HA ZA 19-379 (District Court, The Hague, the Netherlands), Judgment 26 May 2021 [ECLI:NL:RBDHA:2021:5339]; (2021) Zeitschrift für Umweltrecht 632 (*Milieudefensie*).

- 197 In any case, the role of supranational and international instances should not be overlooked: ‘there is a clear tendency’ for plaintiffs to seek their involvement when pursuing litigation’.⁴⁰⁹
- 198 ‘The most powerful’ direction taken in *strategic litigation* is ‘to contest insufficient governmental or legislative action and to seek an injunction by the court ordering the government (or subordinate authorities) to take appropriate action’. Dutch case-law is argued to be ‘more permissive than the practice of other EU member states with specialized constitutional courts’.⁴¹⁰
- 199 The decision of the *Landgericht* (district court) Dortmund might demonstrate the political and societal implications mentioned when it comes to the proper powers to be attributed to the court.⁴¹¹ We can ask, ‘are courts the right fora to decide about (future) climate change policy [...]?’ The answer primarily depends on the position of the court addressed’.⁴¹² According to Hess, ‘when it comes to long- and mid-term policies (regarding climate change) one might wonder whether these debates belong primarily to the parliaments and governments and, therefore, to broader political debate in civil society’.⁴¹³
- 200 *Justiciability* includes the court’s role relative to that of the government’s other branches. For example, in *Urgenda*, the separation of powers principle was addressed by the Hague District Court, which held that Dutch law ‘actually requires the judiciary to assess the actions of political bodies when the rights of citizens are at stake, even if the resolution of the case has political outcomes’. The legal protection of rights, as confirmed by the court, was the essence of *Urgenda*’s claim. Questions of the sources of climate obligations and the limits of the standard of care (eg, guidance of the ‘bottoms-up’ approach of the Paris Agreement to inform legal actions) also arose. There are various legal authorities to draw upon: constitutional provisions, common law, international law frameworks etc. If the claimants bring a combination to support their case, judges must sometimes analyse them in tandem.⁴¹⁴

⁴⁰⁹ For example, on 22 June 2023, 23 consumer associations (including CLCV and UFC-Que Choisir in France) from 19 different European countries referred the matter to the European Commission for a Europe-wide investigation into carbon offsetting by 17 airlines, including Air France, on the basis of the external alert mechanism arising out of the Unfair Commercial Practices Directive. At the same time, the associations have also referred the matter to their national consumer protection authorities (France’s Directorate-General for Competition, Consumer Affairs and Fraud Control (DGCCRF)).

⁴¹⁰ Hess (n 13) 29.

⁴¹¹ *Milieudefensie v Shell* (n 408).

⁴¹² Hess (n 13) 31-32.

⁴¹³ *Ibid* 32.

⁴¹⁴ Kahl and Weller (n 405) para 15 ff.

4.2.2 Role of the of the Judge in Environmental Justice

- 201 The last few years have been full of major judicial decisions that, until recently, no one would ever have thought would one day be adopted. Judges have been very bold and have drawn on all the resources of their imagination to make some very innovative decisions. Thus, judges appear to be very committed to the effectiveness of environmental justice from the opening to *de denouement* of the proceedings. Decisions seem bolder even though judicial acts and duties arise out of general rules. The fundamental cradle and the importance given to principles might contribute to the understanding of the proactive role some judges are taking.
- 202 As discussed in a previous section, judges in many decisions support a very broad view of standing, and allow new types of applicants (citizens, municipalities, NGOs or nature itself).
- 203 The recognition of specific duty of care legislation in France, Norway, and Germany, developed by the role of the judges in the European countries, is also noteworthy.⁴¹⁵ While the French and German laws make reference to the environment, the Norwegian law seems to exclude climate matters from the scope of duty of care, dealing only with human rights and social rights. For the French duty of care, developments are beginning to take shape in regard to the environmental context. In particular, there are attempts to clarify judges' competences. There were doubts as to jurisdiction in the *Total Climat* case, the first climate dispute directed against a private company.⁴¹⁶ This has only recently been resolved by the Cour de Cassation.⁴¹⁷ The purpose of that law, which includes respect for the environment, goes beyond purely commercial dimensions and the debate on the question of jurisdiction can be compared with the Netherlands. 'L'audace' (boldness) with which the Dutch judge ordered Royal Dutch Shell to reduce emissions is something that is 'envied'.⁴¹⁸
- 204 Furthermore, when reviewing the German Federal Climate Law of 12 December 2019, the German Federal Constitutional Court emphasized the importance of climate

⁴¹⁵ Law No 2017-399 (n 369); N Lenoir, 'Devoir de vigilance: des choix politiques et juridiques contrastés entre France et Allemagne' in l'Opinion (16 June 2021).

⁴¹⁶ Case RG 19/02833 (Judicial District Court, Nanterre, France), Referral Order 30 January 2020; Case RG 20/00915 (Judicial District Court, Nanterre, France), Order 11 February 2021 [25 JCP E 2021, 34] Comm S Schiller, JM Leprêtre and P Bignebat; Case RG 20/01692 (regional Court of Appeal, Versailles, France), Judgment 10 December 2020 [Dalloz news, 11 January 2021] Obs P Métais and E Valette; [Rev companies 2021, 297] Note G Leray; [RTD com 2021, 135] Obs A Lecourt; Case RG 21/01661 (regional Court of Appeal, Versailles, France), Judgment 18 November 2021.

⁴¹⁷ Case 21-11.882 (Court of Cassation, Commercial Chamber, France), Decision 15 December 2021 [Dalloz actualité, 17 January 2022], Obs Q Chatelier; [1 Bulletin Joly Travail 2022, 3] Obs A Casado.

⁴¹⁸ A Ilcheva, 'La compétence du juge judiciaire dans les contentieux relatifs au devoir de vigilance' (2022) 47 Revue Juridique de l'Environnement' 139.

protection policies.⁴¹⁹ In that landmark decision issued in March 2021, the *German Constitutional Court* of Karlsruhe invalidated many of the legal provisions based on a constitutional duty to protect human life and health from the dangers of climate change, which is an objective duty of protection also towards future generations.⁴²⁰ It stated that, by adopting too weak emission-reduction measures, the legislator would have placed an ‘overwhelming burden’ on future generations, with a ‘crushing burden’ that will confront them with vast loss of their freedom, thus breaking a principle of equality. Accordingly, although the legislature had not violated its duty to protect plaintiffs from climate change risks through the Federal Climate Protection Act, the Act itself was deemed unconstitutional.⁴²¹ The Court construed it as violating ‘the fundamental rights of the (mostly young) plaintiffs in their so-called “intertemporal dimension”’. Since this decision and *Royal Dutch Shell*, ‘climate change lawsuits against private companies have been filed in German Courts’, all supported by NGOs and aim to quicken these companies’ reduction in emissions.

- 205 Regarding the enforcement of court decisions, the *French Council of State* has taken very interesting initiatives in litigation concerning the fight against air pollution. On 10 July 2020, it sentenced the French State to the highest fine ever pronounced against it: EUR 10 million per six-month period, due to the inadequacy of government policy, as evidenced by the fact that thresholds were exceeded.⁴²² A year later, the judge liquidated the penalty and decided the destination of the fine, which was to be awarded to pay various public and private non-profit organizations and associations.⁴²³
- 206 The role of the judge varies widely according to the *nature of the jurisdiction*, administrative, judicial, or constitutional. Environmental proceedings are no exception.
- 207 In France, the active role of the administrative judge is put forward regarding the techniques the magistrate can use and the control that can be exerted. The Lyon

⁴¹⁹ Case 1 BvR 2656/18 (Federal Constitutional Court, First Senate, Germany), Order 24 March 2021 [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618] on the *Klimaschutzgesetz* (Federal Climate Change Act). Cf www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/ accessed 26 June 2023; W Friedrich Spieth and others, ‘Germany’ (2023) ICLG Environment and Climate Change Laws and Regulations <https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/germany> accessed 16 May 2023.

⁴²⁰ *Neubauer et al v Germany*, Case 1 BvR 2656/18 (German Constitutional Court, First Senate, Germany), Order 24 March 2021 [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618].

⁴²¹ Also, recently, *Re Federal Climate Protection Act Austria*, Case G 139/2021-11 (Constitutional Court, Austria), Decision 27 June 2023 regarding the same Federal Law but against the State of Austria.

⁴²² *Les Amis de la terre*, Case 394254 (Council of State, France), Decision 12 July 2017 [JurisData No 2017-014183; JCP G 2017; Act 871] Obs F Tesson; *Energie - Environnement - Infrastructures* (2017) Comm 60, Comm FG Trébulle; Dalloz 2017, 1474; AJDA 2018, 167, Note A Perrin and M Deffairi; AJDA 2017, 1426; RFDA 2017, 1135, Note A Van Lang; RTD eur 2018, 392, Obs A Bouveresse.

⁴²³ *Les Amis de la terre*, Case 428409 (Council of State, 6th and 5th Chambers combined, France), Decision 4 August 2021 [ECLI:FR:CECHR:2021:428409.20210804; Lebon]; *Les Amis de la terre*, Case 394254 (Council of State, France), Decision 12 July 2017; G Hannotin, ‘L’affaire de la pollution de l’air devant le Conseil d’Etat. Une liquidation d’astreinte toute en retenue’ (2021) JCP G Act 925, Libres propos.

Administrative Court of Appeal has ruled that the administration is obliged to provide the investigating commissioner with any documents that the latter deems useful for properly informing the public in connection with the adoption of a technological risk prevention plan (PPRT). If necessary and useful, the judge exercises normal control over the reasons for refusal.⁴²⁴ Besides, when deciding for the annulment of an administrative act which would result in a breach of the precautionary principle, the judge uses the jurisprudence to postpone the effects of the annulment.⁴²⁵

- 208 Within the judicial sphere, whether the judges belong to civil or criminal jurisdictions also plays an important role. In France, criminal judges exert more powers *ex officio*.⁴²⁶
- 209 In New Zealand, the Supreme Court permitted a breakthrough in climate tort law, within the context of an injunctive action (also seeking a declaration of unlawful contribution to climate change). Such a decision may provide judges with new tools in private law cases. The first instance and appeal courts were unwilling to uphold the tort law claim, deeming it 'quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination',⁴²⁷ while the Supreme Court made a preliminary finding in February 2024 that the common law claims (public nuisance, negligence and a proposed novel climate duty) engaged relevant rights and 'special' interests, were not displaced by statute and were justified.⁴²⁸ It was 'not convinced [...] that the common law is incapable of addressing tortious aspects of climate change',⁴²⁹ drawing upon the heritage of nuisance claims across common law jurisdictions, and reinforcing the judge's role in addressing regulatory failures, rather than leaving this to regulators.
- 210 The several above national decisions convey the debate *in a global arena of discussion* and have an echo that is global in scope. The question of governance of the judges arises. Parance sees there the construction of a form of global ecosystem, constituting a first draft of governance of these global issues in the absence of global regulatory bodies.⁴³⁰

⁴²⁴ *Ministère de la transition écologique et solidaire*, inédit, Case 17LY02681 (Regional Administrative Court of Appeal, Lyon, France), Judgment 10 April 2018; R Fraisse, 'Les acteurs de l'environnementalisation: le juge administratif' in C Roux (ed), *L'environnementalisation du droit. Etudes en l'honneur de Sylvie Caudal* (IFJD 2020).

⁴²⁵ *Assoc ACI* (Council of State, Assembly, France), Judgment 11 May 2004 [Leb 197, RFDA 2004 454] Conclusions of C Devys.

⁴²⁶ Perrier (n 349) 31 ff.

⁴²⁷ *Smith v Fonterra et al* [2021] NZCA 552 (Court of Appeal, New Zealand), Judgment 21 October 2021 [16].

⁴²⁸ *Smith v Fonterra et al* [2024] NZSC 5 (Supreme Court, New Zealand), Judgment 7 February 2024.

⁴²⁹ *Ibid* [154].

⁴³⁰ Court of Cassation, cycle of conferences organized in 2020/2021 under the direction of B Parance and G Lhuillier; all the conferences can be viewed on the Cour de cassation website at <https://www.fmsj.fr/actualites/replay-justice-environnementale-le-defi-de-leffectivite> accessed 26 June 2023; cf also in this issue G Lhuillier, JCP G (2022) Doct 38 <https://www.courdecassation.fr/agenda-evenementiel/l'environnement-les-citoyens-le-droit-les-juges> accessed 26 June 2023.

211 Further, in judicial environmental practice,

*by learning from each other, courts can establish a global discourse 'language' and influence – and, eventually a cross-fertilisation of legal arguments and reasoning which may help to overcome barriers and make the judiciary fit for purpose' [...] Moreover, national and international courts can and should play an important complementary role by using these parameters as supporting legal arguments or as a tool for statutory interpretation [even] as a [legal] standard for assessing the adequacy of national laws and policies.*⁴³¹ [emphasis added]

The trend in litigation in this area is likely to continue as the Paris Agreement, by putting national laws and policies into a global context, 'enables litigants to construe governments' commitments and actions' as adequate or inadequate. The already 'rising tide' of climate litigation is further prompted by the possibility for 'cross-fertilisation' and legal globalization where 'courts might refer to each other, across state borders and jurisdictions'.⁴³² Judges talk to each other and watch 'very carefully' legal developments in other countries, 'learning from and being inspired' by the reasoning used there, evidenced in the *Gloucester Resources v Minister for Planning* case (NSWLEC 7, 08/02/2019). The judge used *Urgenda* to support a causal relationship.⁴³³

212 There is particular potential for the role of judges, and the standards applied by them. There has been a proposal for a legal standard of the twin 'highest possible ambition' and 'progressions' principles to assess the adequacy of government action; it is not impossible for the plaintiff to establish a state's failure to act with due diligence. But it is the court that must place this heavy burden on states, as the Hague District Court did in *Urgenda* (Decision para 4.86), or the Oslo District Court and Court of Appeal in *Greenpeace v Norway* when they denied there was a violation of a constitutional provision.⁴³⁴

213 *The role of the judge excels in the effectiveness of an environmental decision.* In the Argentinean case *Mendoza*, more than indicating every activity to be carried out, the judgment indicates the results that the execution should produce and, in any event, the general criteria to be respected for this purpose. By doing so, the court left to the discretion of the body operating on behalf of the acting court, and in the place of the officers of the court, the decision on the ways of achieving the purpose specified in the decision.

214 Moreover, in the same case, the question whether the case represented a structural reform has arisen. Indeed, for the decision to achieve its purposes of the regeneration of the affected areas, the decision would be specifically future-oriented, but with generic

⁴³¹ Kahl and Weller (n 405) para 80, 84.

⁴³² Ibid para 90.

⁴³³ Ibid.

⁴³⁴ Kahl and Weller (n 405).

criteria.⁴³⁵ Throughout the execution phase, questions were asked regarding the competence of the Supreme Court, with respect to the issue of the separation of powers, to deal with the adoption of measures by various administrative bodies. To resolve this matter, the Court restricted the scope of its ruling, leaving the precise steps to be taken to the relevant management authorities.⁴³⁶

- 215 Verbic suggests that the political and the procedural difficulties in the Argentinian structural proceedings led to difficulties in finalizing the *Mendoza* cause. Mechanisms such as the delegation of enforcement to a first-instance court, and the establishment of control/supervision committees were adopted. However, these were made possible by the status of the CSJN, a court of last resort in the Argentinian judiciary, having strong political influence and power regarding public administration bodies. It could be concluded that the role of a court in introducing environmental protection measures fundamentally differs, therefore, depending on its hierarchical position.⁴³⁷
- 216 Also, the Brazilian collective procedural system gives Broad powers to judges to choose 'how best to achieve compliance with the decisions issued in environmental matters'; magistrates have broad powers,⁴³⁸ giving effect to s 5, XXXV of the Federal Constitution'.⁴³⁹
- 217 But there seems to be room for improvement when it comes to the powers granted to judges, as very few systems have enshrined specific provisions in that regard. The Model Code of Collective Proceedings for Ibero-American countries contains proposals which deserve to be regarded when drafting procedural provisions on the course of proceedings.

⁴³⁵ L Duarte, 'Aspectos determinantes dos processos estruturais: uma análise sobre as características do caso Mendoza' (2021) <https://classactionsargentina.com/2021/06/30/aspectos-determinantes-dos-processos-estruturais-uma-analise-sobre-as-caracteristicas-do-caso-mendoza-doct/> accessed 16 September 2024.

⁴³⁶ 'El objeto decisorio se orienta hacia el futuro y fija los criterios generales para que se cumpla efectivamente con la finalidad indicada, pero respetando el modo en que se concreta, lo que corresponde al ámbito de discrecionalidad de la administración' ('The purpose of the decision is forward-looking and sets out the general criteria for the effective achievement of the stated aim, while respecting the manner in which it is achieved, which is a matter for the administration's discretion'): *Mendoza, Beatriz Silvia et al v Estado Nacional y otros s/daños y perjuicios*, Case 331:1622 (regarding damages and prejudices/losses) (CSJN, Argentina), Judgment 8 July 2008.

⁴³⁷ F Verbic, 'El remedio estructural de la causa "Mendoza". Antecedentes, principales características y algunas cuestiones planteadas durante los primeros três años de su implementación' (2013) 10 Anales de la Facultad de Ciencias Jurídicas y Sociales, No 43 and 'Ejecución de sentencias en litigios de reforma estructural en la República Argentina dificultades políticas y procedimentales que inciden sobre la eficacia de estas decisiones' in SC Arenhart and MF Jobim (ed), *Processos Estruturais* (Salvador, Juspodivm 2021) 67-89; 'El caso "Mendoza" y la implementación de la sentencia colectiva' (2008) Lexis No 0003/014097, JA 2008-IV-336.

⁴³⁸ Conferred by Sec 461 BRCCP and 84, Consumer Defence Code, Federal Law No 8.078/1990 (Brazil).

⁴³⁹ For an assessment of the Brazilian framework, see E Vitorelli, *Processo Civil Estrutural: Teoria e Prática* (Salvador, Juspodivm 2020) 53; E Vitorelli, 'Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças' (2018) 284 Revista de Processo 333.

4.2.2.1 *Lis Pendens* and Connexion

- 218 The massive nature of the injuries involved in environmental litigation makes the coexistence of various lawsuits dealing with the same issue, or which have relevant elements of connection that would make their accumulation appropriate, highly probable. This increases the need to contemplate appropriate mechanisms in this area. Some relate to the *lis pendens* hypothesis applied in the field of collective environmental proceedings, and to the relationship between the class action and the various individual actions brought based on common questions of fact and law.⁴⁴⁰
- 219 Giannini and Azar-Baud have put forward the importance of adequate information tools so that both the parties and the judge can be aware of the coexistence of similar parties or cases. The main tool, at national and regional levels, could be the creation of a register of class action proceedings (in this case, environmental ones), to which operators could resort to verify (prior, concomitantly or after the initiation of a group litigation), the pre-existence of an identical or related pending case.⁴⁴¹
- 220 Furthermore, a problem arises when a class action is brought for the protection of a diffuse or a common good (eg, cessation and restoration of a polluted watercourse) and, at the same time, several individual lawsuits are brought in parallel seeking financial reparation out of the same infringement or illegal act.
- 221 In Argentina, the phenomenon struck in the well-known case of the remediation of the Matanza-Riachuelo water basin, which gave rise to the precedent of the CSJN in *Re Mendoza* and to various individual claims. Since the beginning of those proceedings, the High Court ordered the ordinary courts to process the individual claims.⁴⁴² In such conditions, technically, there is no relation of *lis pendens* between the collective claim

⁴⁴⁰ ie, it must be analyzed what solution should be given in cases where there is coexistence of two or more group claims on the same issue (*lis pendens* by identity), or cases of connection between them (*lis pendens* by connection or accumulation of claims).

⁴⁴¹ Cf the defence of this information mechanism formulated by C Euguren, 'La cosa juzgada colectiva y los mecanismos complementarios protectivos de la garantía de defensa en juicio. La creación de un sistema de registración de los procesos colectivos' (2005) paper presented at the XXIII Congreso Nacional de Derecho Procesal, Mendoza; C Euguren, 'La cosa juzgada en el proceso colectivo' in E Oteiza (ed), *Procesos colectivos* (Rubinzal Culzoni 2006) 429-434; Azar-Baud (n 243); MJ Azar-Baud, 'En attendant un registre d'actions de groupe et autres actions collectives. Revue de presse' (2018) 50 JCP E 1637, 30.

⁴⁴² *Re Mendoza*, Case M.1569.XL (CSJN, Argentina) Sentence 20 June 2006; Case 329:2316 [LL 2006-D-281] with Note by D Sabsay, 'La Corte Suprema de Justicia de la Nación y la sustentabilidad de la cuenca Matanza Riachuelo'; cf also commentary by A Gil Domínguez, 'El caso "Mendoza": hacia la construcción pretoriana de una teoría de los derechos colectivos' in *LL Suplemento Constitucional* (August 2006) 31; JA, 2006-II-304, with Note by AM Morello, 'Aperturas y contenciones de la Corte Suprema de Justicia de la Nación' (2016) 1918-2016 *Jurisprudencia Argentina* 304; cf also L Giannini, *La tutela colectiva de derechos individuales homogéneos* (Platense 2007) 295, 301.

and the individual claims.⁴⁴³ In many cases, neither the object of protection, nor the cause are identical. Notwithstanding this, and without prejudice to this absence of classic *lis pendens*, it is certain that the legislator could in any case envisage a different solution, concentrating in the jurisdiction of a single court all the claims that have to do with a specific problem and even preventing the continuation of the individual proceedings until the collective proceedings have been brought to an end.⁴⁴⁴

- 222 But it is also 'desirable to introduce a tool to prevent the unnecessary multiplication of cases, without undermining the right of each affected person to have his or her day in court. This mechanism is close to the American opt out'. Therefore, 'any reform in this area would need to incorporate the access of each affected party to claim for the damage suffered in their own sphere of interest' (eg, treatment costs for health problems, damage to property, moral damage due to the alteration of tranquility and spiritual wellbeing, etc).⁴⁴⁵
- 223 Chapter III of the Model Code for Collective Proceedings for Ibero-America contains interesting provisions, insofar as the topics treated therein properly find application in environmental litigation.⁴⁴⁶ They are related namely to jurisdiction (Art 9), preliminary hearings, evidence, anticipation of the final decision, charges and legal fees, priority of social-related collective proceedings, interruption of the statute of limitations, appeals, and executions (Art 11–19). The same can be said of Chapter IV for litigation related to individual homogeneous rights and of Chapter V regarding connexity, *lis pendens*, the relationship between collective and individual actions and also the conversion from individual actions into a collective one (Art 29–34).
- 224 Chapter III deals with procedural rules applicable, in general, to class actions: jurisdiction, the request and causes of action, the attempt at conciliation and other forms of self- and hetero-composition, preserving the unavailability of the collective legal right. The process is conducted through hearings, with the judge exercising various powers of control and direction, including the power to decide the claim on the merits when there is no need for proof. Rules follow on the distribution of the burden of proof, on costs, emoluments and fees, both of the expert and of the attorneys, providing incentives for individuals, unions and plaintiff associations, on the interruption of the statute of limitations for individual claims as a consequence of the proposal of a class action, etc. Finally, the effects of the appeal, in principle merely devolutive, and of the provisional

⁴⁴³ Cf A Gidi, 'Litispendencia en acciones colectivas' in A Gidi and E Ferrer Mac Gregor (ed), *La tutela de los derechos difusos, colectivos e individuales homogéneos. Hacia un código modelo para Iberoamérica* (México, Porrúa 2003) 315.

⁴⁴⁴ Giannini (n 40) 105-169.

⁴⁴⁵ Ibid.

⁴⁴⁶ Proposal of the Ibero-American Institute of Procedural Law, *Código Modelo de Procesos Colectivos para Iberoamerica* (Model Code for Collective Proceedings for Ibero-America) (28 October 2004). It is a project to complete, harmonize and regulate existing collective action rules in the countries of the Ibero-American community. However, it envisions an original system, distinct from the North American and Brazilian regimes.

enforcement, matters in which some Latin American legal systems are omitted, are dealt with here.

- 225 Chapter IV deals with class actions in defence of homogeneous individual interests or rights and, in particular, with the class action for the reparation of individually suffered damages (the American class action for damages), brought by the plaintiffs without the need to indicate the identity of the victims.
- 226 Potential interested parties in the action are informed of the prosecution, so that they can intervene in the process, if they so wish, as assistants or interveners, and are therefore forbidden to discuss their individual claims in the class action. Special care was taken with notifications. If the request is accepted, the judgment may be generic, declaring the existence of the general damage and condemning the defendant to the obligation to compensate all the victims and their successors (not yet identified). It will be up to them, individually or by the collective entitled parties, to prove in the settlement of the judgment their personal damage, the causal link with the global damage recognized by the judgment, and to quantify the damage individually suffered. But the Code also foresees the possibility that the judge, in the condemnatory sentence, fixes each individual compensation, when this is possible. Care is also taken in the case of insolvency proceedings, and it is stipulated that, after one year has elapsed without the appearance of interested parties in a number compatible with the seriousness of the damage, there will be collective enforcement of the compensation due for damage caused, ensuring that it is paid into the Fund. Here, the Code adopts the solution of the fluid recovery of the North American system.
- 227 The Model Code also provides for a Fund of Diffuse and Homogeneous Individual Rights and for specific rules on its management to be controlled by the judge.
- 228 Chapter V deals with the connection, *lis pendens* and *res judicata*. The connection and *lis pendens* have clear rules, including the relationship between class actions or between a class action and individual actions. The possibility of transforming several individual actions into a class action is also foreseen. For diffuse interests or rights, the regime of *res judicata* is always the efficacy of the judgment *erga omnes* (or *ultra partes*), in case the claim is admissible or inadmissible, except when the inadmissibility is due to insufficient evidence; a hypothesis in which the claim may be repeated, with new evidence. This solution is already traditional in Latin American countries, but the Code advances, admitting a new action, based on new evidence, within two years counted from the date of knowledge of the new evidence supervening the class action (*res judicata secundum probationem*, as a special derivation of the *rebus sic stantibus* clause). In relation to individual homogeneous interests or rights, the option of the Brazilian legislation, maintained in the Code, is *res judicata secundum eventum litis*: that is, the positive *res judicata acts erga omnes*, benefiting all members of the group; but the negative *res judicata* only reaches those entitled to collective actions, with each individual harmed by the judgment being able to oppose the *res judicata*, promoting his

individual action, in the personal sphere. Other rules take care of the extension, *in utilibus*, of the positive *res judicata* resulting from an action in defence of diffuse or collective interests or rights, for the benefit of the individual victims of the same harmful event. The connection and *lis pendens* between collective actions or between a collective action and individual actions are also regulated.

4.2.2.2 Bifurcation

229 To avoid collective proceedings being hindered by claims that relate to individual situations, explicit provisions, establishing for instance ‘the possibility of splitting the group sentencing into phases are needed.’⁴⁴⁷ This separation is aimed at the progressive advancement of the trial in solidly established stages, closing the debate about the determination of the *an debeat* from the issuing of a first decision (generic conviction), in order to then be able to enter into the nuances of each particular situation (scope of the damages suffered and their causal relationship with the unlawful act described in the initial ruling).⁴⁴⁸

230 This is what happened in the *Mendoza* case in Argentina, whereby the Supreme Court accepted its ability to cope with the collective pretension and rejected the individual ones. Not only did it not have jurisdiction over the latter, but it also would have rendered the case much more complex than it was already: ‘given the frequent territorial dispersion of the damage caused in this area, it is advisable to authorise the determination of the individual scope of the damage produced to take place before the judge of the place where the damage occurs. In this way, the (often considerable) obstacle of the distance between the place where the main trial took place and the place where the repercussions of the reproached act were felt is removed’ thus enabling access to justice.

4.2.2.3 Public Hearings

231 The Argentinean Supreme Court, in the case *Mendoza, Beatriz et al v National Government et al*, after maintaining that individual and collective interests should be distinguished, and that the former were not within its ‘original competence’, affirmed its competence in the matter of the collective good. Hence, the ‘sole purpose’ of that claim

⁴⁴⁷ There are other tools based on the same theory (to avoid contamination of the collective process by incidents on particular aspects of each interested party), to which the judges could resort in the exercise of their powers to direct the proceedings (Art 32, Law 25.675; 34, inclusive 5 and 36, Código Procesal Civil y Comercial de la Nación (National Code of Civil and Commercial Procedure) (Argentina) such as, for example, that of redefining the group or groups included in the claim in order to facilitate the debate by categories of affected parties (see the analysis of the operation of this tool in the United States in L Giannini, *La tutela colectiva de los derechos individuales homogéneos* (Platense 2007) 105-106) or that of preventing third parties intervening in the collective proceedings from incorporating individual claims in their presentation.

⁴⁴⁸ Giannini (n 40).

was ‘the protection of the common good’, with ‘prevention’ taking priority (followed by restitution and, lastly, compensation if completely necessary).

- 232 Following Art 35 of the Argentinean Law 25 675, the court convened public hearings. Several took place, and publicly accessible information played a central role. The defendant was ordered to report ‘in a manner that is condensed, clear and accessible to the public in general’, thereby entrusting the more general population with great public oversight and influence the final decision taken. The court also made use of the powers conferred on it to oblige the companies in question to report on certain points.⁴⁴⁹
- 233 Recent (public) hearings in environmental Federal-level proceedings have demonstrated cross-border influence. They include the promotion of a collective *amparo* requesting the CSJN to declare the Paraná Delta as a ‘subject of law’, employing conventional, constitutional, legislative and jurisprudential sources on the rights of nature. On 2 July 2020, a collective *amparo* was promoted in the original instance of the CSJN, commencing the case *Civil Association for Environmental Justice and others v Entre Ríos, Province of and others s / Amparo Environmental* (File No 542/2020).⁴⁵⁰
- 234 The Civil Association for Environmental Justice and the Foto Ecologista of Paraná, together with various affected parties, directed their claims against the Province of Entre Ríos and the Municipality of the City of Victoria for omissions and breaches in relation to the duty to preserve the integrity of the wetlands of the Paraná Delta and against the Province of Santa Fe and the Province of Buenos Aires by virtue of the Principle of Cooperation in relation to the joint treatment of mitigation and environmental emergencies of transboundary effects.⁴⁵¹ Given that the aforementioned ecosystem has an interjurisdictional nature that knows no legal-political limits, its management must be of a joint, coordinated nature and always in order to guarantee the protection of the ecosystem as a whole.
- 235 Various constitutional, legislative and jurisprudential precedents of comparative law were invoked to support the proposition.⁴⁵²

⁴⁴⁹ R Lorenzetti and P Lorenzetti, *Global Environmental Law* (Environmental Law Institute 2020) 397 ff.

⁴⁵⁰ Also, *Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v União Federal* (CSJN, Argentina), Judgment 7 January 2022. Procedurally, the case provides several legal innovations, including the possibility of having political parties as plaintiffs and the court holding a public hearing to inform the justices on the science and facts of climate change.

⁴⁵¹ *Civil Association for Environmental Justice and others v Entre Ríos, Province of and others s / Amparo Environmental*, File No 542/2020 (CSJN, Argentina), Order 28 December 2021.

⁴⁵² Such as *Bolivian Ley No 71 de derechos de la madre tierra* (Law No 71 on the rights of Mother Earth), where it is defined as follows: ‘Mother Earth is the dynamic living system made up of the indivisible community of all life systems and living beings, interrelated, interdependent and complementary, sharing a common destiny’; and Colombian Case T - 622 (Constitutional Court, Colombia), issued 10 November 2016 <https://classactionsargentina.com/category/medio-ambiente/>; <https://classaction>

4.2.2.4 Scope of *Res Judicata*

236 In environmental collective proceedings, the plaintiff (a public or private, legal or natural person) acts in defence of prerogatives that do not belong exclusively to him (eg, in environmental matters, the action for cessation of the polluting activity and recomposition of the altered ecosystem, promoted by an inhabitant of the area) or that are directly alien to him (eg, the collective claim for compensation for the individual homogeneous damage caused by the illicit conduct, brought by the Ombudsman or by an environmental association, for the benefit of the affected group).

237 The outcome of the proceedings, by nature, will have repercussions for the group directly or indirectly affected, without its members taking part in the litigation or even not knowing that it exists. This is where the question of the subjective scope of *res judicata* in collective proceedings appears.⁴⁵³ Indeed, there are two objectives that are traditionally in conflict in this type of litigation and that the regulation of *res judicata* seeks to harmonise:

on the one hand, the need to concentrate the prosecution of serial lawsuits through the binding extension of the judgment to the group affected by the same problem; and, on the other hand, the need to preserve the guarantee of due process, recognizing—in certain circumstances—the possibility of debating the matter again.

238 To cope with these objectives, in Argentina, the General Environmental Law states that once a collective environmental action is brought by someone withstanding to sue, other persons with standing to sue cannot bring the same action but can intervene in the proceedings (Art 30 para 2).

239 In the Ibero-American Model Code instrument, the provision on *res judicata* creates a distinction between diffuse interests or rights and homogeneous individual interests or rights. In the former, the rule is that of *res judicata erga omnes* (or *ultra partes*) in case of the merits or inadmissibility of the request, except when the inadmissibility is due to insufficiency of evidence; in this case, the claim may be repeated, with new evidence. This solution is already traditional in Latin American countries, but the Code moves forward by admitting a new action, based on new evidence, within a period of two years, counted from the date of knowledge of the new evidence supervening the collective proceedings (*res judicata secundum probationem*, as a special derivation of the *rebus sic stantibus* clause).

sargentina.files.wordpress.com/2020/07/2020-07-02-csjn_asoc-civ-x-la-justicia-ambiental-c.-entre-rc3ados-contaminacic3b3n-paranc3a1-generaciones-futuras-demanda.pdf accessed 13 March 2023.

⁴⁵³ Azar-Baud (n 243) para 415 ff; AM Morello, 'Los procesos colectivos (el Anteproyecto para Iberoamérica de los colegas brasileños)' in A Gidi and E Ferrer Mac Gregor (ed), *La tutela de los derechos difusos, colectivos e individuales homogéneos. Hacia un código modelo para Iberoamérica* (México, Porrúa 2003) 336.

240 In relation to homogeneous individual interests or rights, the Brazilian rule of *res judicata secundum eventum litis* is adopted: in other words, there is a favourable *res judicata* act *erga omnes*, benefiting all members of the group, but the unfavourable *res judicata* only reaches those entitled to bring a collective action. Each individual harmed by the judgment can oppose the *res judicata* by promoting his individual action at the personal level.

4.2.2.5 Costs and Professional Fees

241 No special provisions regarding costs and fees have been found for environmental proceedings.

242 From a prospective perspective, following the Model Code of Collective proceedings for Ibero-America (Art 15), the judgment shall condemn the defendant who loses to pay the costs, emoluments, expert fees and any other expenses, as well as the fees of the plaintiff's attorneys.

243 It is also stated that 'for the calculation of the fees, the judge will take into consideration the advantage for the group, category or class, the quantity and quality of the work performed by the plaintiff's attorney and the complexity of the case'.

244 When the plaintiff is a natural person, union or association, the judge may fix a financial bonus when his performance has been relevant in the conduct and success of the collective proceedings.

245 Plaintiffs in collective proceedings shall not advance costs, emoluments, expert fees and any other expenses, nor shall they be condemned, except in case of proven bad faith, in attorneys' fees, costs and procedural expenses.

246 Last, the litigant in bad faith and those responsible for the respective acts will be jointly and severally condemned to pay the expenses of the process, the fees of the lawyers of the opposing party and ten times the costs, without prejudice to the liability for damages.

247 Some doctrine proposals in Argentina call for the benefit of 'free justice' for all judicial and extrajudicial actions carried out by collective legitimated parties representing groups of users and consumers, in defence of the environment, or disadvantaged groups of people who automatically enjoy the benefit of free justice. This benefit includes all the costs of the process and may be cancelled in case of proven bad faith or abuse of process.⁴⁵⁴

⁴⁵⁴ LJ Giannini, JM Salgado and F Verbic, 'Anteproyecto de ley de procesos colectivos' (2017) 1 Revista de Derecho Procesal.

248 Evidence and remedies sought and awarded are also areas wherein the role of the judges excels.

4.3 Evidence

249 When making rulings, courts can 'be compelled to make findings with respect to environmental harm showing how they calculated it and how heavily it was weighed'.⁴⁵⁵

250 However, because of the long-range and/or long-term effects of the threats to the environment, or because of the combination of several sources of damage and their cumulative effect, it may be difficult to identify precisely the event giving rise to the damage, and to establish the causal link between the act in question and the damage.

251 The topic is inextricably related to the way in which liability standards are regulated. For instance, when German administrative courts apply national laws transposing the EU Environmental Liability Directive, they 'in principle require *direct causation*'.⁴⁵⁶ '*Indirect originators* are only responsible where their action or inaction of necessity leads to environmental damage'.⁴⁵⁷ By way of contrast, the *US Comprehensive Environmental Response, Compensation and Liability Act* 'extends responsibility to the waste generator, transporter and operator' of a disposal facility.⁴⁵⁸ Liability for damage caused 'at the end of the chain' reflects 'EU waste law preceding the Environmental Liability Directive'.⁴⁵⁹

252 We will now address the standard and burden of *proof, evidentiary means* including scientific and technical data and the capacity of the judges to handle those, concurrent evidence, the standard of 'state of scientific knowledge' (2), presumptions and the reversal of the burden of proof (1).

4.3.1 Burden of Proof and Presumptions

253 Climate change is probably the most emblematic manifestation of the evidentiary difficulties. In the face of them, most courts do not have grounds and are thus reluctant

⁴⁵⁵ C Stone, 'Should Trees Have Standing? - Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450, 485.

⁴⁵⁶ E Rehinder, 'Climate damages and the "Polluter Pays" Principle' in W Kahl and MC Weller (ed), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021) 56.

⁴⁵⁷ Case 22 CS 18.566 (Administrative Court of Appeal, Munich, Germany), Decision 15 May 2018 [Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport 2019, 10mn].

⁴⁵⁸ Act of 1980 [42 USC 9601 ff] (US) Sec 106, as amended by the Superfund Amendments and Reauthorization Act.

⁴⁵⁹ *Futura Immobiliare*, Case C-2554/08 (CJEU), Judgment 16 July 2009 [ECLI: EU:C:2009:479].

to admit that the precautionary principle imposes *a reversal of the burden of proof*.⁴⁶⁰ On the other hand, some laws allow for adjustments to the burden of proof.⁴⁶¹

- 254 Some national legal systems such as that of Argentina lay down a strict liability rule for environmental damage. The exemption of liability only works by proving that, in spite of having adopted all the measures destined to avoid the damage and without the concurrent fault of the responsible party, the damage was produced by the exclusive fault of the victim or of a third party for whom he is not liable (Art 28 and 29).
- 255 The Brazilian system also recognizes the principle of *no-fault environmental* civil liability. This form of liability may involve making those who have contributed directly or indirectly to the occurrence of environmental damage jointly and severally liable.⁴⁶²
- 256 Furthermore, according to the Brazilian Code of Civil Procedure (BRCCP), there is a principle according to which the judge is free to interpret the evidence presented during the trial (Art 371 BRCCP): it is up to him to know whether he is sufficiently convinced of the evidence presented to make his decision. Likewise, while in principle it is up to the plaintiff to provide the evidence (Art 373 BRCCP), there is an exception: the BRCCP allows the judge to reverse the burden of proof in specific cases (Art 373 Sec 1 BRCCP), as was further confirmed by the *Superior Tribunal de Justiça* in environmental matters.⁴⁶³ All in all, three possibilities seem to govern the matter. First, the judge may consider that proof of damage does not have to be provided and there is then a presumption of damage *en re ipsa* to the environment. Secondly, there are situations in which proof is also not required, this time because of the existence of a simple risk of damage. Thirdly, cases in which proof and expert appraisal remain essential to demonstrate the existence of damage and obtain some type of compensation. Thus, Brazilian environmental civil

⁴⁶⁰ Case 10-17.645 (Court of Cassation, Civil Chamber 3, France), Decision 18 May 2011 [Dalloz 2011, 1483].

⁴⁶¹ Cf for example, G Lima Moraes and A Giuriatto Ferraço, 'La preuve en matière de responsabilité civile environnementale dans le système judiciaire brésilien: cas des pollutions de l'air et de l'eau' (2022) 47 *Revue Juridique de l'Environnement* 559.

⁴⁶² There is no-fault liability under Art 14, Sec 1° of the *Dispõe sobre a Política Nacional do Meio Ambiente* (Law No 6.938/81 of 1981) (Brazil) (Art 3, IV of Law No 6.938/1981); G Lima Moraes and A Giuriatto Ferraço, 'La preuve en matière de responsabilité civile environnementale dans le système judiciaire brésilien: cas des pollutions de l'air et de l'eau' (2022) 47 *Revue Juridique de l'Environnement* 559. Cf also J Morato Leite and P de Araújo Ayala, *Dano ambiental: Do individual ao coletivo extrapatrimonial: Teoria e prática* (São Paulo, 3rd edn, Editora Revista dos Tribunais 2010) 93; A Monteiro Steigleder, *Responsabilidade Civil Ambiental: As dimensões do dano ambiental no direito brasileiro* (Porto Alegre, 3rd edn, Livraria do Advogado Editora 2017) 99; F Jean-François, 'Responsabilité civile et dommage à l'environnement' (doctoral thesis in Law, University of the Antilles 2018) 54.

⁴⁶³ 'A inversão do ônus da prova aplica-se às ações de degradação ambiental', Precedent 618: Case N 883.656-RS (2006/0145139-9) (Superior Court of Justice, Brazil), Judgment 30 October 2018 <https://www.stj.jus.br/publicacaoainstitucional/index.php/sumstj/article/download/5047/5174> accessed 26 June 2023.

liability can be incurred despite the absence of proof of environmental damage: this is the case when the *behaviour is illegal and is the source of a risk of damage*.⁴⁶⁴

257 The Supreme Court of Canada in *R v Wholesale Travel Group Inc* recalled that in the case of an environmental polluter, it is reasonable to expect a defendant to adduce *some* evidence they exercised due diligence.⁴⁶⁵ In this case, the burden of the proof falls upon the defendant who would need to prove that all due care has been taken.⁴⁶⁶

258 The use of *presumptions* can facilitate proof of environmental damage. The European Union judge thus accepts that a state may provide for a presumption of liability in respect of operators with 'sensitive installations' close to a polluted area.⁴⁶⁷ Similarly, the French Court of Cassation has established the principle that the demonstration of a causal link, 'without requiring scientific proof, could result from serious, precise, reliable and concordant presumptions'.⁴⁶⁸ The ECtHR judge now proceeds

by taking it as a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it.⁴⁶⁹

259 Furthermore, the outcome of the dispute also depends on the way in which the *judge assesses the quality* of the evidence provided and its probative value. This evaluation of scientific data depends on the content of the *rules of evidence*, particularly those relating to the use of experts, and on the judge's skills. Two models regarding the establishment of facts are frequently opposed: *the inquisitorial model*, which grants an active role to the judge in the search for evidence, and *the adversarial model*, which entrusts this task to the parties.

260 Under German law, regulators shall obtain the relevant facts *ex officio*, including the determination of the nature and scope of an investigation. Accordingly, they are entitled to conduct site inspections, obtain documents, take samples or impose monitoring

⁴⁶⁴ For the difficulties with Brazil's structure on scientific evidence for the marine environment, cf F Castelo Branco Araujo and others, 'La preuve et la biodiversité marine au Brésil: l'interaction entre le droit et la connaissance scientifique dans le litige relatif au coral-sol' (2022) 47 *Revue Juridique de l'Environnement* 541.

⁴⁶⁵ Case 67 CCC 193 (Supreme Court, Canada), Judgment 24 October 1991.

⁴⁶⁶ R Cotton, 'Canadian Environmental Law. An Overview' (1992) 18 *Canada-United States Law Journal* 63.

⁴⁶⁷ *Raffinerie Mediterranée (ERG) SpA*, Case C-378/08 (CJEU), Judgment 9 March 2010 [ECLI:EU:C:2010:127].

⁴⁶⁸ Case 10-17.645 (Court of Cassation, Civil Chamber 3, France), Decision 18 May 2011 [Dalloz 2011, 1483] Obs I Gallmeister, 2089; Note M Hautereau-Boutonnet, 2679; *Chronicle AC Monge*, 2694; Obs FG Trébulle, 2891; Obs JD Bretzner and Obs P Brun (2012) 47; [RTD civ 2011, 540] Obs P Jourdain.

⁴⁶⁹ *Verein KlimaSeniorinnen* (n 62) para 436.

duties. Operators and site owners are *under an obligation to assist in finding facts and evidence*'.⁴⁷⁰

4.3.2 Experts and Scientific and Technical Evidence: An Assumed Reference

- 261 Climate attribution science involves estimating how much more probable an extreme weather event was made by anthropogenic climate change.⁴⁷¹ *Recourse to expertise* is a key element of the various evidential systems and a determining factor in the outcome of environmental disputes, as witnessed by the cases concerning hormone-treated cattle decided by the World Trade Organisation (WTO) judge.⁴⁷² The same can be said of the way in which the Dutch judge relied on the reports of the Intergovernmental Panel on Climate Change (IPCC) to impose a duty of due diligence on the state in the *Urgenda* case, condemning the Dutch State for its failure to combat climate change.⁴⁷³
- 262 In the *common law* evidentiary system, some countries provide for a pre-trial phase of the discovery of evidence⁴⁷⁴ or cross-examination, during which both the witness and the expert are questioned successively by the lawyers of the two parties.⁴⁷⁵ Devoting a pre-trial phase to the evidence is seen as more effective in the search for the truth.

⁴⁷⁰ W Friedrich Spieth and others, 'Germany' (2023) ICLG Environment and Climate Change Laws and Regulations, Role and powers of environmental regulators – evidence <https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/germany> accessed 16 May 2023.

⁴⁷¹ P Minnerop and F Otto, 'Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic' (2020) 27(1) Buffalo Environmental Law Journal 49; S Marjanac and L Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Casual Chain?' (2018) 36(3) Journal of Energy & Natural Resources Law 265.

⁴⁷² European Communities — Measures Concerning Meat and Meat Products (EC — Hormones) WT/DS26/AB/R, WT/DS48/AB/R and WT/DS26/R/USA, WT/DS26/AB/R, WT/DS48/AB/R; United States — Continued Suspension of Obligations in the EC — Hormones Dispute, WT/DS320/R (31 March 2008); E Truilhé, 'L'OMC et les risques sanitaires: réflexions autour du rapport de l'organe d'appel dans l'affaire Hormones II' (2010) Revue Juridique de l'Environnement 241.

⁴⁷³ *Urgenda v State of the Netherlands* (The Hague District Court, The Netherlands), Judgment 24 June 2015 [ECLI:NL:RBDHA:2015:7196].

Litigants have relied on, and courts have accepted, the IPCC reports and the Paris Agreement's temperature goal, which is captured by the carbon budget approach, as authoritative sources of evidence in climate litigation. Courts have endorsed the IPCC reports as clear scientific evidence that humans are responsible for climate change. The IPCC reports further support the link between human-induced climate change and extreme weather events. As the emerging area of climate attribution science develops, future findings could be made, and endorsed by the IPCC, to support arguments raised in litigation that a climate change-induced event caused specific loss or damage to a particular plaintiff. The Paris Agreement's temperature goal, which is based on the findings of the IPCC Fifth Assessment Report, also continues to be deployed by litigants, and accepted by courts [as authoritative fact], as a benchmark for evaluating a country's climate performance'.

⁴⁷⁴ H Muir Watt, 'Discovery'/'Disclosure' in *Dictionnaire de la justice* (Presses universitaires de France 1994) 337-340.

⁴⁷⁵ Eg, P Roberts, 'Witness Testimony and the Principle of Orality' in P Roberts and A Zuckerman (ed), *Roberts & Zuckerman's Criminal Evidence* (3rd edn, Oxford UP 2022); J H Wigmore, *Wigmore on Evidence (Evidence in Trials at Common Law)* (vol 5, J H Chadbourn revised edn, Little, Brown & Co 1974).

- 263 A comparative study of the rules governing the *choice of experts*, those aimed at guaranteeing their competence as well as their independence, and those relating to the distribution of the costs of the expertise, can undoubtedly make it possible to define a model for jurisdictional expertise. Some foreign solutions seem particularly interesting and deserve to be disseminated and studied. The gradual spread of '*concurrent evidence*', introduced in certain Australian provinces and extended to other legal systems (Great Britain, Hong Kong and Japan), could serve as a *model for particularly sensitive or highly technical disputes*.⁴⁷⁶ The points of agreement and disagreement between the appointed experts are recorded in a joint *report discussed* by the experts themselves at a meeting chaired by the judge, during which both the judge and the lawyers may question them. A consensus must be reached on the points of agreement and disagreement, and it is based on this consensus that the judge decides. By *proceduralizing the dialogue* between the scientists, this procedure undoubtedly enables the judge to form a more precise idea of the scientific validity of the data put forward.⁴⁷⁷ The question that arose before the courts was how could a 'global damage' be assessed. This raised the problem of the definition, qualification and evaluation of the damage caused by climate change. Although the judge had the last word on these three questions, at the end of the day it was the scientific experts who informed the judges in their decision. It is therefore necessary to consider the importance of the assistance of scientific experts in such cases as the *Massachusetts v EPA*.⁴⁷⁸ Close collaboration between judges and experts revealed to be crucial for the decision.⁴⁷⁹
- 264 Moreover, whilst proof of statistical causality is sometimes permitted, like in the US, it is sometimes prohibited, as before the German courts.⁴⁸⁰
- 265 A central question is whether the basis of scientific knowledge is sufficient to assume a *cause-and-effect relationship*. Indeed, causality does not simply exist but is a factual matter from the point of view of civil procedure, which must be presented and, if necessary, proven by the party burdened with the allegation.⁴⁸¹
- 266 One of the major legal issues important (mainly) to climate change litigation is *reliance on scientific evidence of causality and effects* (eg, accumulated emissions caused by

⁴⁷⁶ Eg, L García-Álvarez, 'Las acciones colectivas en los litigios internacionales por daños ambientales' (2015) 30 Revista Electrónica de Estudios Internacionales 1, 36 ff.

⁴⁷⁷ M Hautereau-Boutonnet and È Truilhe, 'Le procès environnemental - Du procès sur l'environnement au procès pour l'environnement: Rapport pour la mission Droit et Justice' (Research report 2019), hal-03194063.

⁴⁷⁸ Case 05–1120 (Supreme Court, US), Decision 7 April 2007 [549 US 497].

⁴⁷⁹ S Jasanoff, 'Making order: law and science in action' in EJ Hackett and others (ed), *The handbook of sciences and technology studies* (Cambridge, MIT Press 2008) 779.

⁴⁸⁰ W Kahl and A Voßkuhle, *Grundkurs Umweltrecht: Einführung für Naturwissenschaftler und Ökonomen* (2nd edn, Heidelberg, Spektrum 1998) 362.

⁴⁸¹ J E Schirmer, 'Klimahaftung und Kausalität - und es geht doch!' (2021) 22 JuristenZeitung (JZ) 1099.

many) and *translation of complex technical data into a medium accessible to judges*. Environmental judicial practices show that this has been approached differently.⁴⁸²

- 267 In the various legal orders, expertise can help the judge upstream to evaluate, scientifically or monetarily, the importance of the degradation. Expertise can also have a role to play downstream, to enlighten them as to the choice of measures likely to restore nature. However, the apprehension of the *scientific and technical data* of the dispute, for instance in determining whether bee mortality is linked to the use of neonicotinoids, adds complexity to the environmental proceedings. Judges may not always be trained to handle this type of data, which plays an important role, despite it often being subject to *scientific uncertainty*. The question arises as to whether the judge is well equipped or helped to be so.⁴⁸³
- 268 The French administrative judges no longer hesitate to refer to '*scientific knowledge*' in their decisions.⁴⁸⁴ They use it differently depending on whether it is proven or uncertain, used directly for their own decisions or to assess the consequences drawn from it by the public authority in various situations. In all cases, this rhetoric is part of a process of legitimizing the judge, his decisions and, more broadly, the public authority.
- 269 The relationship between the administrative judge and scientific knowledge seems to have evolved over time, whether it is a question of highlighting an underlying phenomenon, or a real paradigm shift, linked to scientific progress and the dissemination of research results. The appeal to science is, first of all, a matter of rational legitimization. The invocation of figures and the reference to 'recognized' journals (in particular *Nature*) and the best-known research bodies (primarily the *Centre national de la recherche scientifique* (French National Centre for Scientific Research) (CNRS)), including those of the general public, give considerable weight to the basis of the legal decision and an appearance of objectivity. The scientific knowledge mentioned relates almost exclusively to the so-called 'hard' or exact sciences and the medical sciences.
- 270 The question obviously extends to the field of legal science. It echoes recurrent debates on the relationship between *academics and doctrines*. As is well known, contrary to the

⁴⁸² Kahl and Weller (n 405) 15.

⁴⁸³ Cf Ibid; S Gonzalez Meriner and MA Tigre, 'Understanding Unsuccessful Climate Litigation: The Spanish Greenpeace Case' 11 September 2023 Climate Law (Sabin Centre), concerning Greenpeace Spain, Oxfam Intermón, Ecologistas en Acción, and *Coordinadora de ONG para el Desarrollo v Spain II*, Case 1079/2023 (Supreme Court, Spain), Judgment 24 July 2023 [ECLI:ES:TS:2023:3556], 'the trial for climate ("el juicio por el clima")'. The Court failed to analyze the merits of Spain's mitigation commitments substantially, instead dismissing the case on purely formal grounds. Furthermore, the Court missed an opportunity to analyze the vast climate science that is now available or engage with similar cases across Europe'.

⁴⁸⁴ A Jacquemet-Gauché, 'Le juge administratif face aux connaissances scientifiques' (2022) AJDA 443; CMH (UPR 4232).

practice of other legal systems, the French judge does not explicitly refer to doctrinal analyses in his decisions—which does not mean that he does not take note of them.

- 271 The French judge does not go so far as to assess the quality of the author or the publication in his decision, just as the public rapporteurs do not explain the methodological choices that guided their research, nor refer to scientific journals. In a health-related case, the judgment specified that the studies referred to were ‘each imperfect in their methodology’,⁴⁸⁵ as well as in a case in which a judgment was based on the methodology of the French Food Safety Agency responsible for issuing marketing authorisations for Roundup—but is it a scientific or administrative authority?⁴⁸⁶ The CJEU has, however, taken steps in this regard.⁴⁸⁷
- 272 The administrative judge is probably not the best equipped to assess the relevance of scientific work, which is produced by specialists in the subject, but this trust (by default or by adherence) in scientific production is not insignificant. Reference to *sources external to the public entity*, ie, conducted by *bodies independent of the government* (and not by administrative bodies), also provides additional guarantees of the objectivity and reliability of the results put forward and, consequently, of the soundness of the decision.
- 273 The reference to ‘*the state of scientific knowledge*’ is found in various cases, although it should be noted that the study here touches on one of its methodological limits, since, by definition, cases in which such a reference is not explicitly mentioned are ignored—which is nevertheless also the point, since we are trying to understand the reasons for such an occurrence. By way of illustration, in view of the state of scientific knowledge at the time, the unforeseeable nature of force majeure could not be retained in the case of the *Xynthia storm*.⁴⁸⁸
- 274 The administrative judge then refers to ‘the current state of scientific knowledge’ mainly to justify the *absence of consensus or established truthfulness of the statement and, consequently*, to allow the public entity to continue to carry out the activity in question, directly or through the authorizations it issues to private individuals. However, the applicants were not mistaken in frequently referring to the provision—the *precautionary*

⁴⁸⁵ Case 704275, 1704392, 1704394 (Regional Administrative Court, Montreuil, France), Judgment 2 July 2020 [AJDA 2020, 2102] Note S Brimo.

⁴⁸⁶ *Mouvement pour les droits et le respect des générations futures*, Case 332804 (Council of State, France), Judgment 7 March 2012 [Maret, Lebon T]; cf also, M Lucas, ‘L’usage par les juges français des connaissances scientifiques sur la dangerosité des pesticides’ (2016) 27 Hors-série Vertigo - la revue électronique en sciences de l’environnement (online).

⁴⁸⁷ Cf in particular, *Bayer CropScience AG*, Case C-499/18 P (CJEU), Judgment 6 May 2021 [ECLI:EU:C:2021:367]. Other legal systems have also laid down explicit criteria (cf in this respect, the Daubert decision of the Supreme Court of the United States of 28 June 1993, *Daubert v Merrell Dow Pharmaceuticals* (Supreme Court, US) [509 KB; 509 US 579], and its analysis, in S Jasanoff, ‘Le droit et la science en action’ (2013) Dalloz, 2013; tr O Leclerc, *Le juge et l’expert* (2005) LGDJ 386.

⁴⁸⁸ *Association syndicale autorisée de la Vallée du Lay (ASVL)*, Case 434733 (Council of State, France), Judgment 31 May 2021 [Lebon T; AJDA 2021, 2473] Note J Travard.

principle, which now has constitutional value, could justify greater caution on the part of the judge. This principle applies, by virtue of Art 5 of the Charter of the Environment, *precisely in cases where the occurrence of damage is 'uncertain in the light of current scientific knowledge'* (emphasis added). However, the principle of action prevails as a general rule, with the administrative judge confining himself to a review of 'the reality of the risk assessment procedures implemented and the absence of a manifest error of assessment in the choice of precautionary measures'.⁴⁸⁹ Several series of disputes, involving excess of power, illustrate this state of mind.

- 275 The judge also confined himself to a minimum control concerning the evaluation of the cost of radioactive waste management, specifying that 'if the uncertainty is necessarily greater for the subsequent phases, it does not emerge from the documents in the file, given the scientific data available, that the evaluation would be vitiated by a manifest error of assessment'.⁴⁹⁰ Additionally, very recently, *5G has not been slowed down* by the invocation of the precautionary principle either. Thus:

*It does not appear, despite the uncertainties and scientific studies on this subject, which are not the subject of any consensus with regard to the current state of available scientific knowledge, that compliance with the precautionary principle would require additional protective measures against a risk linked to the use of 5G technology.*⁴⁹¹ [emphasis added]

- 276 In other environmental disputes, the judge notes the *absence of sufficiently established scientific studies*. This was the case for the *GMO cultivation trials carried out by Monsanto*, in which the farmers near the plots pointed out the risk of dissemination onto their own crops without providing 'precise elements of a scientific or technical nature likely to establish the reality of the risks invoked', which is similar to a David versus Goliath battle.⁴⁹²
- 277 The *relationship between scientific and legal causality* seems to be gradually reversing: scientific causality is now proven between climate change and GHG emissions but the difficulty lies in establishing legal causality.⁴⁹³ The 'hummingbird judge'⁴⁹⁴ will probably

⁴⁸⁹ Cf for example, Case 363005 (Council of State, France), Judgment 14 November 2014 [CLI:FR:CESJS:2014:363005.20141114] (unpublished).

⁴⁹⁰ *Association Mirabel-LNE*, Case 397627 (Council of State, France), Judgment 11 April 2018 [T Lebon; AJDA 2018, 826]; or the installation of telephone antennas, Case 284237 (Council of State, France), Judgment 13 December 2006, M Caitucoli and T Lebon.

⁴⁹¹ *Syndicat CFE CGC Orange*, Case 438240 (Council of State, France), Judgment 31 December 2020 [Lebon T, AJDA 2021, 1003] (emphasis added).

⁴⁹² *Ministre de l'agriculture et de la pêche v Confédération paysanne du Gers*, Case 295918 (Council of State, France), Judgment 9 February 2007 [Lebon T; AJDA 2007, 444].

⁴⁹³ Cf also Y Aguila, 'Petite typologie des actions climatiques contre l'Etat' (2019) AJDA 1853.

⁴⁹⁴ H Belrhali, 'Le juge colibri' (2021) 13 Actualité juridique Droit administratif, Dalloz 705.

have to go even further, as the effort to be made is not ‘insurmountable’.⁴⁹⁵ The invocation of the state of scientific knowledge could help the administrative judge in this sense, by contributing to the legitimization of future jurisprudential innovations.

- 278 Causality is therefore the largest obstacle for claimants bringing private environmental claims, even seen as ‘insurmountable’. However, recent scientific findings on climate change have begun to change this. Commentators conclude that *causality* is not only now ‘fully demonstrable’, but large energy producers can easily be considered the cause of climate damage. This is shown through the example of a case before the *Oberlandesgericht* (Higher Regional Court) Hamm.⁴⁹⁶
- 279 There is generally positive progress noted from the side of the courts, which have assisted claimants in environmental matters, namely the German Federal Constitutional Court and the Dutch District Court (*Shell* case).⁴⁹⁷ However, the focus here is the more niche area of ‘climate liability’, defined as ‘the private-law liability of energy producers for climate damage’, and causality specifically. The Regional Hamm Court (regarding the *Lliuya v RWE* case) exemplifies how the Court considers evidence on questions of causality, which is ‘always relevant’ and ‘many of the remarks are likely to be transferable to comparable cases’.⁴⁹⁸
- 280 Further to discussion of causal connection in the US *EPA* case, in terms of evidence through causality, this is highlighted by the Colombian Supreme Court of Justice, which relied ‘on opinions from research conducted by the Institute of Hydrology, Meteorology and Environmental Studies and the Ministry of Environment and Development [to establish] [...] the causal link between the violation of the fundamental rights’ of petitioners, the country’s residents and the generated climate change. The violation of the criterion of intergenerational equity was deemed ‘obvious’ based on the forecasted temperature increase.⁴⁹⁹
- 281 In *Lliuya*, the claim was made on a legal basis previously recognized by the German Federal Court; the claimant pleaded compensation for the costs of the preventive protective measures on his property, either because *Lliuya* was carrying out these measures for *RWE* who was the actor responsible, or because *RWE* was otherwise

⁴⁹⁵ A Van Lang, ‘L’hypothèse d’une action en responsabilité contre l’Etat’ (2019) RFDA.652; J Bétaille, ‘Le préjudice écologique à l’épreuve de l’Affaire du siècle. Un succès théorique mais des difficultés pratiques’, AJDA 2021. 2228.

⁴⁹⁶ JE Schirmer, ‘Klimahaftung und Kausalität - und es geht doch!’ (2021) 22 JuristenZeitung (JZ) 1099.

⁴⁹⁷ Case 1 BvR 2656/18 et al (Federal Constitutional Court, Germany), Decision 24 March 2021 [NJW 2021, 1723] obliging the legislator to ‘take more concrete climate protection measures’.

⁴⁹⁸ *Lliuya v RWE AG*, Case I-5 U 15/17 (Higher Regional Court Hamm, Germany), Judgment 30 November 2017. For the history of the case, see the compilation of court documents at <https://germanwatch.org/en/14198> accessed 30 June 2023. Taking of evidence in this case is ongoing at the time of writing, with an oral hearing scheduled for 2024 at the Hamm Higher Regional Court.

⁴⁹⁹ Case STC- 4360-2018 (Supreme Court, Columbia), Decision 5 April 2018; R Lorenzetti and P Lorenzetti, *Global Environmental Law* (Environmental Law Institute 2020) 339.

enriched at *Lliuya*'s expense.⁵⁰⁰ Without causality 'as a minimum' to adequately establish that *RWE* caused the flooding, the claim would not succeed. It is an issue widely discussed by academics and was the deciding point in the (first instance) Essen Regional Court's rejection of the claim.⁵⁰¹ Four aspects that must be analysed separately (by parties and the courts) have been proposed: the *existence of a scientific causal link between GHG emissions and flood risk*; *the question of whether it can be legally proven*; *the question whether a single causal factor can be isolated from the sources of emissions?*; and *whether this causal contribution is sufficient to meet an 'adequacy' threshold*. Regarding the second question, 'in the famous *Anastasia* decision, the Federal Supreme Court ruled that '[e]vidence free of all doubts' is not necessary for this. 'The judge may and must be content with a degree of certainty that is useful for practical life in cases that are actually doubtful, which silences doubts without excluding them completely'. Most of the literature agrees with the Federal Supreme Court and concretizes the formula to the effect that a 'very high degree of probability must speak in favour of the alleged fact'. The Federal Court has not yet recognized this relatively low standard of proof.⁵⁰²

- 282 In the *absence of scientific proof and established facts*, the judge is content with various clues to overcome the uncertainty and establish an element of liability, namely the cause. This 'infernal couple' of legal and scientific causality has already been the subject of numerous studies.⁵⁰³ Let us simply recall that the Law of 4 March 2002 introduced a specific compensation regime in the event of contamination by transfusion for hepatitis C: the imputability of the contamination to the transfusion is presumed. Similarly, the 2010 Law on the recognition and compensation of victims of French nuclear tests establishes, under certain conditions, a presumption of causality between exposure to ionizing radiation and a radiation-induced disease.⁵⁰⁴ This does not mean that the judge intends to substitute himself for the scientists, but simply that his mission is different. As Katz points out, 'the judge's mission is solely to implement a compensation system intended by the legislator, and therefore by society, and not to demonstrate a relationship between two events'.⁵⁰⁵ Finally, a presumption of imputability of congenital malformations to sodium valproate (Depakine) was instituted by a Law of 28 December 2019, codified in Art L 1142-24-12 of the Public Health Code, but it is only binding on the panel of experts in the context of the out-of-court compensation procedure, and not on the judge when he has to rule on the failings of the state by virtue of its health policing

⁵⁰⁰ Crucially, Sec 1004 para 1 sentence 2 German Civil Code (BGB). Despite the cross-border element, *Lliuya* was able to invoke German law due to Art 7 Rome II Reg.

⁵⁰¹ Schirmer (n 498).

⁵⁰² Ibid 1101.

⁵⁰³ P Brun, 'Causalité juridique et causalité scientifique' (2007) suppl No 2628, 40 RLDC 15.

⁵⁰⁴ Cf T Leleu, 'Victimes des essais nucléaires: dernier épisode autour de la présomption de causalité?' (2021) 10 AJDA 578.

⁵⁰⁵ D Katz, 'Le contentieux de l'indemnisation des victimes d'essais nucléaires' (2015) 14BX01469 AJDA 645.

powers.⁵⁰⁶ However, following its public rapporteur,⁵⁰⁷ the administrative court considered that facial, skeletal and extremity morphological anomalies, malformations, cognitive and/or behavioural disorders, and variable organic damage should be presumed to be attributable to in utero exposure to sodium valproate, provided that they are not attributable to any other cause and that the treatment with sodium valproate continued during the pregnancy.⁵⁰⁸

283 Similar developments are taking place in air pollution litigation. Although the causal link between the adoption of an air protection plan and the health problems (respiratory pathologies) of certain claimants is 'tenuous, even distended'. According to the public rapporteur, it is no longer considered 'indirect since the inadequacy of the plan has adverse consequences on air quality'.⁵⁰⁹

284 However, caution is called for: beyond the 'general scientific data', it is recommended that an expert opinion be obtained to establish imputability.⁵¹⁰ The fact that the court orders an expert opinion is already a step forward.⁵¹¹

285 Related to this, 'regulators are generally granted wide powers to order investigations, preventive measures or remediation, contributing to a 'fact-specific assessment'.⁵¹² Certain provinces, for example, have adopted certain regulator triggers that require investigation of the condition of land.

286 Whilst establishing evidence for causation, a dimension of risk has become more evident in the marine environment. However, there is the 'uncertainty and unpredictability of the effects of human action on the environment'.⁵¹³ The said unpredictability can be broken down into three variables:

(i) unpredictability of the quantum of these effects; (ii) unpredictability of the moment when these effects will be produced; and, finally, (iii) the unpredictability of the place where these effects will manifest themselves. In the marine environment, this triple unpredictability seems to be more accentuated due to this environment's specific

⁵⁰⁶ Cf Case 704275, 1704392, 1704394 (n 487).

⁵⁰⁷ R Felsenheld, 'La responsabilité du fait de la police des médicaments - L'affaire de la Depakine' (2020) RFDA 1131.

⁵⁰⁸ Case 704275, 1704392, 1704394 (n 487).

⁵⁰⁹ R Felsenheld, 'Pollution de l'air: l'Etat fautif, mais pas condamné' (2019) AJDA 1885.

⁵¹⁰ Ibid.

⁵¹¹ Cf S Brimo, 'Changer d'air?' Note on Case 19PA02868 (Regional Administrative Court of Appeal, Paris, France), Decision 11 March 2021 [AJDA 2021, 1104].

⁵¹² Kahn and Boucher (n 264): 'A breach of environmental law or of a permit may, for instance, lead to a warning, a directive to comply, stop or control orders, or civil penalties'.

⁵¹³ U Beck, *Risk Society: Towards a New Modernity* (London, reprinted, Sage Publications 2013) 21-22.

*nature—which may even include harmful effects in the terrestrial space itself (out of sight, but not out of mind).*⁵¹⁴ [emphasis added]

- 287 The maritime space is governed by the *principle of connectivity and consequent natural unity*.⁵¹⁵ It implies that a polluting factor introduced in a certain place can move to another location quite far away by the mere effect of sea currents.
- 288 Also, under the *Loi sur les espèces en péril* (Species at Risk Act), the listing of a species as being at risk provides important legal protection measures. The law reduces the executive's discretionary power by basing the decision-making process on scientific expertise and imperative obligations that have the effect of limiting its margin of discretion, since to be reasonable its decisions must be justified in the light of scientific expertise.⁵¹⁶
- 289 In the same vein, specific criteria are used in the Canadian Environmental Protection Act (CEPA 1999) which enhances the importance of reducing toxic substances from fuel combustion. It points out that, in the absence of judicial expertise, these standards help the courts to conclude that 'there are sufficient indications to conclude that greenhouse gases constitute or may constitute a danger to the environment on which life depends, and therefore meet the criterion [...] of section 64 of CEPA 1999'.⁵¹⁷ However, according to doctrine, parties seem unwilling to have extensive recourse to Canadian experts at all.⁵¹⁸
- 290 *Specific environmental* cases might also call for specific means of evidence. The IACtHR had developed particular means of evidence to better understand the complex nature of territorial and environmental resource issues.⁵¹⁹ This has been done through at least three types of evidentiary procedures.

⁵¹⁴ C Amado Gomes and H Oliveira, *Tratado de Direito do Ambiente Vol: II* (Lisbon Public Law Editions, Centro de Investigação de Direito Público/Instituto de Ciências Jurídico-Políticas 2022) 'A "redenção global": a emergência da questão ambiental marinha' 323 ff.

⁵¹⁵ G Gidel, *Le droit international public de la mer* (Vaduz, reprinted, Topos Verlag 1981) I, Introduction: La haute mer, 40; J P Pancrácio, *Droit de la mer* (Paris, 1st edn, Dalloz 2010) 4.

⁵¹⁶ P Halley, 'Le contentieux canadien des espèces en péril' (2022) 47(3) *Revue Juridique de l'Environnement* 529.

⁵¹⁷ E Agossou, 'La preuve et l'expertise dans les procès relatifs au climat: le cas canadien' (2022) 47(3) *Revue Juridique de l'Environnement* 515. Under Pt 5 Sec 64 Canadian Environmental Protection Act (1999) [SC 1999, c 33], states: 'a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that [...] (b) constitute or may constitute a danger to the environment on which life depends'.

For a comparative study of evidence (through the application of environmental principles) in nuclear power cases following Fukushima: T Otsuka, 'Evidence and Expertise in Compensation Litigation regarding the Fukushima Nuclear Power Plant Accident - Focusing on the Precautionary Principle and the Proportionality Principle' (2022) 47(3) *Revue Juridique de l'Environnement* 465.

And in France: M Léger, 'Preuve et expertise dans les procès environnementaux - Le cas de l'énergie nucléaire en France' (2022) 47(3) *Revue Juridique de l'Environnement* 443.

⁵¹⁸ Ibid.

⁵¹⁹ Calderón Gamboa (n 221).

- 291 First, *documentary and testimonial evidence* are the two key modalities of the Court which have emerged for testimonies. It has heard in open court and by means of affidavits, not only the testimony of declarants and experts in legal matters, but also of UN special rapporteurs, anthropologists, sociologists, historians, leaders of the *Pueblos Indígenas y Tribales*, shamans, environmental experts, all rendered in various (including indigenous) languages. The documentary evidence received has also been extensive in proving de facto issues that exist in social realities. The Court's reception of *amicus curiae* suggests their input has been important, not only to highlight relevant points to the Court for consideration to resolve an environmental matter, but also for the benefit of civil society and the interested public.
- 292 Second, *satellite images* by the American Association for the Advancement of Science have been required by the Court, namely in the case Punta Piedra Garifuna Community. The Association's report gave the Court the possibility to 'study with greater attention the evolution' of occupation in the territory by third parties and the specific environmental impact of alleged deforestation in that environment. Thus, the court was able to base its findings on clear proof of deforestation in the territory in question.
- 293 Third, *on-site visits or proceedings* have been carried out by the IACtHR and its delegations in at least seven *in situ* visits to indigenous territory, to gain an understanding of the case circumstances and gather information in the field. This allowed the Court to gain an important indigenous 'worldview'. Also, at the stage of monitoring compliance, this practice has enabled the Court to understand the realities of peoples affected and this is 'reflected in the interpretation of the ECHR and the way in which the cases are resolved'.⁵²⁰
- 294 In *Kaliña and Lokono*, the Court delegation could prove environmental degradation of mining exploitations, and that rehabilitation efforts, which were part of the consideration for reparation measures, were 'deficient'.⁵²¹
- 295 In *Four Ngöbe Indigenous Communities and their members regarding Panama*, the Court took various steps to *request information from the parties*. Among these, it requested a report from the Ombudsman's Office of Panama for a report analyzing the possible impact that the advances had on the rights of the communities in the construction of a hydroelectric dam, as well as its institutional assessment of the consultation procedures that would have been carried out.⁵²² [emphasis added]

⁵²⁰ Ibid 129, citing cases *Kuna de Madungandí and Emberá de Bayano v Panama*, and *Río Negro v Guatemala* (2017).

⁵²¹ *Kaliña and Lokono* (n 220) para 220, 14.

⁵²² *Four Ngöbe Indigenous Communities and their Members regarding Panama* (IACtHR), Order 28 May 2010, Citation 6.

- 296 Once the judge is convinced, it is in *deciding* the dispute that he may be confronted with its scientific and technical difficulties. Dealing with water pollution that has caused damage to fauna and flora requires prescribing measures to repair the damage in kind, but also to stop or prevent it.
- 297 Difficulties may remain as to the precision, implementation and monitoring of these highly technical measures. In a French case, in the context of a system that is used to 'processual agreements',⁵²³ an administrative judge has accepted the validity of a 'compensation and execution protocol' for 'the follow-up of compensation and support measures following the shipwreck' of a vessel that damaged the public domain.⁵²⁴ Brazilian law goes further and gives an important role to the 'conduct adjustment agreement' in the environmental civil liability regime. This allows the prosecutor to contractualize the reparation measures with the polluter, subject to their *environmental effectiveness*.⁵²⁵

⁵²³ L Cadiet, J Normand and S A Mekki, *Théorie générale du procès* (2nd edn, Thémis, Presses Universitaires de France 2013) No 149.

⁵²⁴ Case 1403557 (Regional Administrative Court, Rennes, France), Judgment 30 April 2015.

⁵²⁵ Costa de Oliveira (n 83).

A Comte-Sponville, 'Justice et vérité, in *XVIIe congrès national des experts judiciaires, Expert du juge, expert de partie, vérité scientifique et vérité judiciaire* (2008), 90; *Artegoda GmbH et al v Commission*, Case T-74/00 (Court of First Instance, EU), Judgment 26 November 2002 [Rec CJCE II-4945, pt 191]; *Tatar v Romania*, Case 67021/01 (ECtHR), Judgment 27 January 2009, Sec 105 [Dalloz 2009, 2448] Obs FG Trébulle; AJDA 2009, 872, Chronicle J F Flauss; RTD eur 2010, 333, Étude A Pomade; *The MOX Plant Case (Ireland v United Kingdom (ITLOS))*, Order 3 December 2001 <www.itlos.org> accessed 30 June 2023; *Pulp Mills on the Uruguay River (Argentina v Uruguay)* (ICJ), Judgment 20 April 2010 [Rep 2010, 14] Sec 164; Case 10-17.645 (Court of Cassation, Civil Chamber 3), Decision 18 May 2011 [Dalloz 2011, 1483] Obs I Gallmeister, 2089, Note M Hautereau-Boutonnet, 2679, Chronicle AC Monge, 2694, Obs FG Trébulle, 2891, Obs JD Bretzner, and 2012, 47, Obs P Brun; RTD civ 2011, 540, Obs P Jourdain; E Vergès, G Vial and O Leclerc, *Droit de la preuve* (Presses universitaires de France, Thémis 2015) 229 ff; *Raffinerie Mediterranée (ERG) SpA*, Case C-378/08 (CJEU), Judgment 9 March 2010, [ECLI:EU:C:2010:127]; H Muir Watt, 'Discovery'/'Disclosure' in *Dictionnaire de la justice* (Presses universitaires de France 1994) 337-340; JH Wigmore, *Wigmore on Evidence (Evidence in Trials at Common Law)* (vol 5, JH Chadbourn rev edn, Little, Brown & Co 1974); E Truilhé, 'La relation juge expert dans les contentieux sanitaires et environnementaux' (2010) Doc fr, 400; O Leclerc, *Le juge et l'expert, Contribution à l'étude des rapports entre le droit et la science* (LGDJ, t 443, 2003); Communautés européennes - Mesures concernant les viandes et les produits carnés (CE - Hormones), WT/DS26/AB/R, WT/DS48/AB/R et WT/DS26/R/USA, WT/DS26/AB/R, WT/DS48/AB/R; États-Unis - Maintien de la suspension d'obligations dans le différend CE - Hormones, WT/DS320/R, 31 mars 2008. L'OMC et les risques sanitaires : réflexions autour du rapport de l'organe d'appel dans l'affaire Hormones II' *Revue Juridique de l'Environnement* 2010, 241; *Urgenda v State of the Netherlands* (The Hague District Court, The Netherlands), Judgment 24 June 2015; P McClellan, 'Medicine and Law Conference keynote address: Concurrent Expert Evidence' (2007) 19, www.lawlink.nsw.gov.au. Cf also <https://law.pace.edu/> accessed 30 June 2023; L Cadiet, J Normand and S Amrani-Mekki, *Théorie générale du procès* (2nd edn, Presses universitaires de France 2013) No 140; Case 1403557 (Regional Administrative Court, Rennes), Judgment 30 April 2015; Cf Costa de Oliveira (n 83); Y Jegouzo, 'Pour la réparation du préjudice écologique' Report (Ministère de la justice 2013); K Yamamoto, 'Le mode alternatif de résolution des conflits environnementaux au Japon: un exemple de contractualisation des litiges environnementaux' in M Hautereau-Boutonnet (ed), *Le contrat et l'environnement, Étude de droit comparé* (Bruylant 2015) 282; Okubo (n 226); S Valdès de Ferari, 'The role of a non-lawyer in an environmental Court' (2016) *Energie – Environnement* -

4.4 Remedies

298 While environmental proceedings can seek classic remedies (injunctions, orders-to-cessate, compensation of individual damages), generally speaking they target specific restoration, compensation of damage to the common goods per se, ecological damage, damage to the diffuse and/or the collective interest, namely through class, group, or popular actions.

4.4.1 Reparation

299 A natural recovery option, in which no direct human intervention in the recovery process would be taken, is often considered as a privileged remedy in environmental litigation. The Brazilian system provides primary, *on-site remediation*, which would correspond to the concept of restoration for complementary remediation.⁵²⁶ This exercises a compensatory function and for compensatory reparation—that is environmental lost profits—there is express reference to the need for restoration of the environmental damage.⁵²⁷ Additionally, Art 48, Item 3 of Law No 11/1987 provides that *if it is not possible to restore the situation prior to the damage, violators are obliged to pay special compensation*.

300 Similarly, in environmental matters in Portugal, for the reparation of ecological damage, the direct removal of the actual damage at the expense of the responsible party is considered ‘the most effective means of guaranteeing the fundamental interest of the integrity of persons, property or rights thereon’.⁵²⁸ The French Civil Code, (Art 1249) on compensation for ecological damage, favours compensation in kind. Similarly, if the perpetrator does not have the capacity to restore the affected environment, or if the damage is irreversible, alternatively the damage caused must be financially compensated.

301 In the European Union, Directive 2004/35/EC aims at *preventing and remedying* environmental damage.⁵²⁹ Since the prevention and remedying of environmental damage directly contributes to the pursuit of the Community’s environment policy,

Infrastructures, Dossier 18; PM Dupuy and JE Vinuales, Introduction au droit international de l’environnement (Bruylant 2015) 330; V Gaillot-Mercier, ‘Le dommage écologique transfrontière’ (doctoral thesis, University of Rennes 1 1992).

⁵²⁶ Lei No 9.985 de 18 de Julho de 2000 (Law No 9.985/00 the National System of Conservation Units) of 18 July 2000 (Brazil).

⁵²⁷ First item of Art 48 of the Environment Framework Law (Law No 11/1987), repealed by the New Framework Law of 2014.

⁵²⁸ A Varela, *Das obrigações em geral* (vol 1, Coimbra, 7th edn, Livraria Almedina 1991) 902.

⁵²⁹ Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56 (EU). The Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages. It does not affect rights of compensation for traditional damage granted under any relevant international agreement regulating civil liability.

public authorities should ensure the proper implementation and enforcement of the scheme provided for by the Directive.

302 Moreover, restoration of the environment should take place in an effective manner, ensuring that the relevant restoration objectives are achieved.⁵³⁰ Appropriate provision should be made for those situations in which several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that *all the necessary remedial measures are taken at the same time*. In such a case, the competent authority should be entitled to decide which instance of environmental damage is to be *remedied first*.

303 The Directive defines 'preventive measures' (Art 10) as 'any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage' and 'remedial measures' as any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II. The latter establishes *different forms of reparation* and sets out a common framework to be followed in order to choose the most appropriate measures to ensure the remedying of environmental damage.⁵³¹

304 After distinguishing primary, complementary and compensatory remediation, Annex II states that

where primary remediation does not result in the restoration of the environment to its baseline condition, then complementary remediation will be undertaken. In addition, compensatory remediation will be undertaken to compensate for the interim losses. Remedying of environmental damage, in terms of damage to water or protected species or natural habitats, also implies that any significant risk of human health being adversely affected be removed.⁵³²

⁵³⁰ Ibid, Recital 16.

⁵³¹ Directive 2004/35/EC 21 April 2004 (n 531) Annex II.

⁵³² Annex II, Art 1.1:

(a) 'Primary' remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;

(b) 'Complementary' remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;

(c) 'Compensatory' remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;

(d) 'Interim losses' means losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public.

- 305 Regarding the choice of the remedial options, guidance to the judges is to be found in Art 1.3.1. The reasonable remedial options should be evaluated, using best available technologies, based on the following criteria: the effect of each option on public health and safety; the cost of implementing the option; the likelihood of success of each option; the extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option; the extent to which each option benefits to each component of the natural resource and/or service; the extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality; the length of time it will take for the restoration of the environmental damage to be effective; the extent to which each option achieves the restoration of the site of the environmental damage; and the geographical linkage to the damaged site.
- 306 Regarding biodiversity (specifically non-compliance with the applicable regulations, resulting in possible administrative fines or site remediation), in a recent ruling, the French judge did not hesitate to impose total demolition of structures and site restoration within a year, at an estimated cost of EUR 40 million.⁵³³
- 307 Also, 'the Supreme Court of Canada has recognized in theory the right of the Crown to seek monetary damages for the loss of public resources caused by an environmental offender, which could include damage for aesthetic harms'.⁵³⁴ [emphasis added]

4.4.2 Damages

- 308 For a long time, the compensation provided for by the French Environmental Code was limited to compensation in kind, ie, *restoration* measures. Then, the *Erika* decision of 25 September 2012 allowed an *association to also obtain damages*, under Art 1249 of the French Civil Code.
- 309 When compensation is sought, parties claim compensation for *material and non-material damages*. In the latter case, reference is made to *moral prejudice*. Classically, moral prejudice means sadness, fear, anxiety, anguish, misfortune, helplessness, or suffering, for example. In French environmental law, moral prejudice in turn can relate to different types: objective and subjective. *The objective moral prejudice* conveys a punitive function of compensation and thus has a normative function and constitutes a means of dissuasion. Alternatively, the *subjective moral prejudices* have a compensatory function, and convey a different distribution, consisting, on the one hand, of non-material damage to existence (where compensation fulfils a compensatory function) and, on the other hand, a moral prejudice of enjoyment (for which compensation fulfils

⁵³³ Case 438403 (Council of State, France), Decision 29 June 2020. The case concerned a by-pass structure near Beynac; Y Martinet and P Savin, 'France' (2023) ICLG Environment and Climate Change Laws and Regulations <https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/france> accessed 16 May 2023.

⁵³⁴ Kahn and Boucher (n 264).

a satisfying function).⁵³⁵ The proliferation, notes Neyret, of compensated *moral damages* and their multiple functions results in a subversive heterogeneous notion.

- 310 Under civil liability in Brazil, '*moral damage* is, by its very nature and definition, extra-patrimonial or immaterial. Therefore, it is not possible to measure it. It does not prevent, however, the victim being compensated pecuniarily (or even in another means of his choice, obviously respecting the principles of reasonability and human dignity)'.⁵³⁶
- 311 The Supreme Court of Canada has recognized in theory the right of the Crown to seek *monetary damages* for the loss of public resources caused by an environmental offender, which could include damage for *aesthetic harms*.⁵³⁷
- 312 The same happened in Argentina, when a bus damaged a public statue in the city of Azul.⁵³⁸

4.4.3 Quantum

- 313 If the recognition of ecological damage to the environment, such as an oil spill or a leakage of waste into a river, does not pose specific issues, determining the quantum, thus the evaluation of ecological damage, is much more delicate. It seems difficult to put a figure on *damage* to the environment. The difficulty of determining the answer has led to a long-standing refusal to recognize ecological damage because, if it is recognized, it must be compensated. A decision of the Nouméa Court of Appeal on 25 February 2014 shows this difficulty and a rather approximate figure.⁵³⁹
- 314 When quantifying the damages resulting from the environmental damage in exact terms is too difficult or even impossible, there is a trend in case law of encouraging the award

⁵³⁵ L Neyret, 'Preface' in H Gali (ed), *Le préjudice moral: Étude de droit de la responsabilité civile* (Dalloz 2021).

⁵³⁶ AR Pinto Júnior, 'A função social dissuasória da indenização por dano moral coletivo e sua incompatibilidade com a responsabilidade civil objetiva' (2012) 56(86) Revista do Tribunal Regional do Trabalho da 3ª Região (3rd Region), Belo Horizonte 37, 48, 57 (emphasis added).

⁵³⁷ Kahn and Boucher (n 264); Ibid: 'A breach of environmental law or of a permit may, for instance, lead to a warning, a directive to comply, stop or control orders, or civil penalties'.

⁵³⁸ Cf for example, the well-known case decided by the Civil and Commercial Court, Chamber II, *Azul*, Case 37.899, Sentence 37.899, (Civil and Commercial Court, Chamber II, Argentina), Judgment No 22-X-1996 [DJBA 152-21; ED 171-378], with Note by F Trigo Represas, 'Un caso de daño moral colectivo; JA 1997-III-213, with Note by R Lorenzetti, 'Daño moral colectivo: su reconocimiento jurisprudencial'; LLBA 1997-273, with Note by M Zavala De González, 'Los daños morales colectivos y su resarcimiento dinerario; cf also A M Morello, 'Un caso de daño moral colectivo: su reconocimiento jurisprudencial'; A M Morello and G A Stiglitz, 'Daño moral colectivo' LL 1984-C-1197; J M Galdós, 'Derecho ambiental y daño moral colectivo: algunas aproximaciones' JA 1998-IV982; A M Morello and N Cafferatta, *Visión procesal de cuestiones ambientales* (Rubinzal - Culzoni 2004) 113-126). In this precedent, the Court ordered the creation of a patrimony of affectation in charge of the defendant (found responsible for the partial destruction of an important sculptural group in the city of Tandil), for the realization of health and sanitation works from the municipal budget.

⁵³⁹ Case 2010-556; 11-00187 (Court of Appeal of Nouméa, New Caledonia, France), Decision 25 February 2014 [Dalloz 2014, 669].

of compensation. Leitão highlights Art 562, CC/66 *Código Civil* (Portuguese Civil Code) with the example of the sentence given by the judge of Coruche on 23 February 1990:

*[...] the impossibility of quantifying in exact terms the damages caused by the environmental damage, does not prevent the courts from awarding pecuniary compensation for environmental damage, since Article 566, no 3 of CC/66 clearly admits that [...], the Court will judge [the exact amount] equitably within the limits of what has been proved.*⁵⁴⁰ [emphasis added]

- 315 Likewise, as stated by the French Court de cassation in a Decision of 22 March 2016, the judge must provide a precise figure to determine the extent of the damage, and is obliged to resort, if necessary, to an expert opinion to fulfil this new duty. On this occasion, the judge will have to distinguish the damage suffered by the environment from that suffered by the associations,⁵⁴¹ because the form cannot be reduced to the latter.⁵⁴² The decision reflects a strengthening of the criminal judge's duty, being more 'proactive' than the civil one.⁵⁴³ The Court also applies the reasoning according to which it is up to the criminal judge to seek the extent of the ecological damage, in order to

⁵⁴⁰ LM Leitão, *A responsabilidade civil por danos causados ao ambiente. Actas do Colóquio: A responsabilidade civil por dano ambiental* (2009) Organized by C Amado Gomes and T Antunes (Lisbon Law Faculty, Institute for Legal and Political Sciences 2009) 387 <www.icjp.pt> accessed 27 May 2010.

⁵⁴¹ Case 13-87.650 (Court of Cassation, Criminal Chamber, France), Decision 22 March 2016 [ECLI:FR:CCASS:2016:CR01648].

⁵⁴² Ibid: '[...] the civil party confuses its personal loss with the ecological loss, as its operating costs have no direct link with the damage caused to the environment'. Cf the regrets of M Hautereau-Boutonnet, 'L'Erika une vraie-fausse reconnaissance du préjudice écologique' (2013) 23 *Envir*, Étude 2; Case 17-26.180 (Court of Cassation, Civil Chamber, France), Decision 3, 8 November 2018 [ECLI:FR:CCASS:2018:C300973] (unpublished); in this case, a federation whose statutory purpose was to protect the aquatic environment was awarded the sum of EUR 8,000 as compensation for the damage caused by the consequent removal of red-legged frogs, a protected species. However, it did not prove that these sums had been used for any purpose whatsoever, in particular for a reintroduction operation, which the Court of Cassation considered to be irrelevant, as it held that the federation could also claim compensation for its non-material loss.

⁵⁴³ Art 146 FCCP, concerning investigative measures, provides that an investigative measure can only be ordered if the party alleging does not have sufficient elements to prove it; and the text goes on to indicate that no investigative measure can be ordered to make up for the failure of the parties to provide evidence. The tools offered by the civil procedure seem then to be less interesting than those given to the criminal judge by the criminal chamber. J Lagoutte, 'Voie civile ou voie pénale: quel poids pour l'argument économique dans le choix de la partie civile' in C Clavier Rousset (ed), *Analyse économique du droit et matière pénale* (LexisNexis 2018); Case 13-87.650 (n 543).

repair it in its entirety.⁵⁴⁴ Following Art 1249 of the French Civil Code, the assessment of ecological damage must take into account the reparation measures already taken.⁵⁴⁵

316 Moreover, ‘in the context of [...] environmental damage, it is also the genuine task of courts to decide on the compensation and assessment of damages [and, equally,] to decide on the *prevention of future losses*’.⁵⁴⁶ [emphasis added] A comparison can be drawn between Canada in the US, in that there is reliance in the former on orders from judges and quasi-judicial bodies to provide for the clean-up of environmental contamination. In *Northern Wood Preservers v Ministry of the Environment*, the Court defined the scope of an order to study the ‘potential remediation of the site in question’ and, more significantly, delimited the concept of ownership.⁵⁴⁷ In the US, this is dealt with through ‘Superfund-type’ legislation instead.⁵⁴⁸

317 In the European Union, the European Parliament in 2023 demonstrated its intention to bolster the sanctions available. Offences leading to *death or harm to health and substantial environmental damage* would be punishable by at least 10 years imprisonment. Regarding environmental crimes committed by companies, fines are to be toughened and are proposed to reach 10% of a business’s average worldwide turnover during the three previous years. *Criminal sanctions* are to be supplemented and work in conjunction with *measures* such as bans, and, with a view to following the spirit of the polluter pays principle, ‘offending businesses should work to restore the damaged environment, compensate victims and bear all the costs of court proceedings’.⁵⁴⁹

318 In Argentina, the *Mendoza, Beatriz et al v National Government et al, Mendoza II* (2008) Decision illustrates an exceptional measure with respect to remedies. The Supreme Court decided to respond only to the claims seeking the re-composition of the environment and the prevention of further damage in the

⁵⁴⁴ On the principle of full compensation, cf for example Case 13-81.572 (Court of Cassation, Criminal Chamber, France), Decision 10 December 2013. For an illustration of economic loss, cf also Case 12-85.130 (Court of Cassation, Criminal Chamber, France), Decision 13 November 2013. For an illustration of this distinction, cf Case 706/2014 (Criminal Court of Tarascon, France), Judgment 29 July 2014 [Dalloz 2014, 1694] Obs L Neyret; In the decision, the Criminal Division of the Court of Cassation Case 13-87.650 (n 543) held, when overturning the appeal decision that had rejected the valuation method proposed by the plaintiff (an association), based on the cost of replacing dead birds, without substituting another method, that the criminal judge was required to ‘quantify, if necessary by means of an expert opinion, the ecological damage that it had recognized as existing’.

⁵⁴⁵ Art 1429 French Civil Code.

⁵⁴⁶ Hess (n 13); *KIK* (Regional District Court, Dortmund), Judgment 10 January 2019 [BeckRS 2019, 388]; *Lluyia v RWE*, Case 2 O 285/15 (Regional District Court, Essen, Germany), Judgment 15 December 2016 [Zeitschrift für Umweltrecht 2017, 370].

⁵⁴⁷ *Northern Wood Preservers v Ministry of the Environment* (Divisional Court, Ontario, Canada), Judgment 3 May 1991 (unreported).

⁵⁴⁸ R Cotton, ‘Canadian Environmental Law. An Overview’ (1992) 18 Canada-United States Law Journal 63.

⁵⁴⁹ European Parliament, ‘MEPs support stricter sanctions for environmental crimes’ (2023) Press Release No 20230320IPR77894.

future.⁵⁵⁰ After maintaining that individual and collective interests should be distinguished, and that the damage suffered by individuals, either moral or monetary, were also individual and not within the competence of the Supreme Court 'in its original jurisdiction', it affirmed its competence in the collective good matter. The 'sole purpose' of that claim was 'the protection of the common good', with 'prevention' taking priority (followed by restitution and, lastly, compensation if completely necessary).⁵⁵¹

- 319 By way of comparison with the injunction in the US, the Argentinian Court recognises the primacy of compensation in environmental matters (Arts 41 and 28 *Ley General del Ambiente*) (General Environmental Law) (LGA), allowing the injured party to demand that the judiciary protects his or her right to environmental integrity. The faulty party is not sentenced to pay a sum of money, but instead becomes a debtor of an obligation to restore the pollution of the river through a program, called *Programa integral de saneamiento Ambiental* (Integral Plan of Environmental Sanitation).⁵⁵² The decision included remedies and general objectives to be achieved. It makes it clear that the Administration decides how to implement them. To some extent, the order in Mendoza 'implies interference in the functions that the defendant must carry out'.⁵⁵³ Later, the court put in place calendars as indicators of enforcement, amongst others. The defendants were the State, Province, City of Buenos Aires and 14 Municipalities, and between the 2006 and 2008 decisions, the interjurisdictional *Autoridad de Cuenca de Matanza Riachuelo* (Matanza-Riachuelo River Basin Authority) (ACUMAR) was created to reunite the three main defendants to coordinate the enforcement of the decision.
- 320 In America, this potential problem gave rise to 'specific equitable relief'.⁵⁵⁴ Fiss identified three types of injunctions: i) preventive, which aims to prevent certain events from occurring in the future; ii) reparative, which seeks to compel the defendant to assume certain conduct to correct the effects of wrongful acts that occurred in the past; and iii) structural, which aims to reorganize an active social institution (the *exceptional* cessation or initiation of conduct, in relation to the type of claim brought).
- 321 Verbic suggests that, although *Mendoza* did 'not intend to go' as far as the 'reparative and structural' mandates which took place in the context of civil rights in the 1960s (the

⁵⁵⁰ In Cafferatta's words, it was '[...] a managerial class measure. Or one of judicial administration. And it responds to operational reasons as well as judicial policy' (A N Cafferatta, 'Sentencia colectiva ambiental en el caso "Riachuelo"' Judgment Note, JA (20 August 2008)).

⁵⁵¹ R Lorenzetti and P Lorenzetti, *Global Environmental Law* (Environmental Law Institute 2020) 397 ff.

⁵⁵² L Gonçalves Tessler, *Tutelas jurisdicionais do meio ambiente* (San Pablo, Revista dos Tribunais 2004) 372.

⁵⁵³ Bergallo points out that in the legal tradition of [Argentina] there is no notion equivalent to what is understood by 'remedies' in the United States. In the latter scenario, the concept of 'remedy' refers to the various measures for securing rights that the courts may order once they are convinced of the merits of the claim (P Bergallo, 'The merits of the plaintiff's claim' in P Bergallo (ed), *Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina* (SELPA, SELA 2005) Panel 4, 'The Lawyer's Role').

⁵⁵⁴ O M Fiss, *The Civil Right Injunction* (Indiana UP, Bloomington & London 1978) 7.

historical roots of the remedy), the model proposed by the Argentinian Court reflects them,⁵⁵⁵ eg, judges ‘had to turn to experts for help, who acted as advisors to the judges in the development of implementation plans and the monitoring of their implementation and compliance’.⁵⁵⁶

- 322 When, in rare cases, the litigation can be successful, in favour of the claimant associations, the recognition of moral prejudice and the concomitant compensation that follows constitute a form of satisfaction. The recognition of the *moral prejudice of associations* in the context of climate litigation can be seen as a way of compensating for scientific uncertainty, which generally prevents any liability from being incurred, given the difficulty of establishing the responsibilities of greenhouse gas (GHG) emitters.⁵⁵⁷ Van Lang proposed a similar analysis in the context of the litigation relating to *green algae*, emphasising ‘the audacity of the court’.⁵⁵⁸ In that case, the Nantes Administrative Court of Appeal had overcome the difficulty in terms of causality, linked to the phenomenon of diffuse pollution, by acknowledging the causality between the State’s faulty failure to act and the proliferation of green algae, and the compensation for the associations’ moral prejudice.⁵⁵⁹ The various instruments designed to promote liability can thus be combined.
- 323 The rule of reparation in the case of environmental or ecological damage, both in Brazil and in Portugal, is natural restoration. But in new contexts of globalization and uncertainty, new damages arise every day. Even future damages, unthinkable before, are beginning to gain ground.
- 324 In Brazil, the consolidation of environmental civil liability has occurred within the jurisprudence of the states; mainly the judgments of superior courts of justice and the Federal Supreme Court (FSC), and throughout a control of constitutionality.⁵⁶⁰ It differs from Portugal, wherein doctrine has been productive, and the courts carry out the

⁵⁵⁵ F Verbic and MA Sucunza, ‘Acceso a la justicia y beneficio de gratuidad en materia de acciones de consumo y medio ambiente’ in AM Morello, LG Sosa and RO Berizonce (ed), *Códigos Procesales en lo Civil y Comercial de la Provincia de Buenos Aires y la Nación. Comentados y Anotados* (4th edn, Abeledo Perrot 2016) para 1.

⁵⁵⁶ MM Feeley and V Swearingen, ‘Los casos sobre condiciones carcelarias y la burocratización de los correccionales americanos: impacto, influencias e implicancias’ 24 Pace L Rev 433.

⁵⁵⁷ Cf Cournil (n 11).

⁵⁵⁸ A Van Lang, ‘Le juge administratif, l’Etat et les algues vertes’ (2010) AJDA 900; for references to various studies by the government commissioner at first instance, D Rémy, ‘La responsabilité de l’Etat en matière de “marées vertes”’ (2008) AJDA 470.

⁵⁵⁹ *Minister of State, Minister of Ecology, Energy, Sustainable Development and the Sea v Association Halte aux marées vertes*, Case 07NT03775 (Regional Administrative Court of Appeal, Nantes, France), Judgment 1 December 2009 [AJDA 2010, 900] Note A Van Lang; Dalloz 2010, 2468, Obs FG Trébulle.

⁵⁶⁰ Alexy explains that the law of weighting follows three stages: ‘In the first stage the intensity of the intervention must be determined. In the second stage, it is then a question of the importance of the reasons justifying the intervention. Only then, in the third stage, does the weighting take place in the strict and proper sense’. R Alexy, ‘Collision of Fundamental Rights and the Realization of Direitos Fundamentais no Estado de Direito Democrático’ (1999) 17 Revista da Faculdade de Direito da UFRGS, Rio Grande do Sul 27.

orientations in second place.⁵⁶¹ According to Freitas, every judge in the Brazilian system is, in a sense, a constitutional judge, and it is essential to preserve, as far as possible, the peaceful and harmonious coexistence of diffuse and concentrated controls of constitutionality. As stated by Freitas, the ‘jurist is one who, above all, *knows how to elect supreme guidelines*, notably those that make up the table of interpretative criteria suitable to preside over any work of application of the Law’ [emphasis added].⁵⁶² Moreover, when prudentially ranking the constitutional principles, norms and values, the principles *occupy the place of prominence*, at the same time placing them at the base and at the apex of the system.⁵⁶³ Thus, in the environmental field, whilst strict norms or rules increasingly lose their place, general principles’ relevance emerges.⁵⁶⁴ In this context, interpretation can take the ‘fundamentality’ of rights to its ultimate consequences, affirming the unity of the regime of rights of the various generations, as well as the presence of fundamental rights in any legal relationship.⁵⁶⁵ The effectiveness of the Constitution must represent ‘the search for efficacy and effectiveness of fundamental rights, otherwise it will be reduced to a mere rhetorical figure, empty of practical effects’, thus, the *active* position of the STF.⁵⁶⁶

- 325 It is well known that the operative nature of this affectation patrimony is of vital importance in cases in which the reparation in kind becomes technically impossible. In such circumstances, the existence of a fund of this type fulfils a composite objective, that is, to provide a dynamic and functional response to a complex problem and to be dissuasive.
- 326 In Argentina, the establishment of an *environmental compensation fund*, made up of various kinds of contributions for the promotion of environmental protection, as well as the prevention, mitigation and restoration of ecological damage, is a very important chapter in the environmental protection system (Art 28 LGA). In this way, the judges can order the creation of a special patrimony to be affected for the purposes enshrined in Art 34 of the LGA, but oriented according to the particularities of the case.⁵⁶⁷
- 327 On some occasions, case law has provided for the creation of an ad hoc compensatory fund, even in the absence of specific provisions by the legislator.⁵⁶⁸ That is namely the

⁵⁶¹ MA Bühring, ‘Reparação do dano ambiental: o quantum indenizatório e o dano moral extrapatrimonial’ in *Direito do Ambiente Estudos em Homenagem ao Prof. Doutor Vasco Pereira da Silva* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2021); part of the Postdoctoral Thesis ‘Environmental/ecological civil responsibility: Some points and counterpoints in the “green transiting” between distinct contexts A compared study between Portugal and Brazil’ (Defence online 2020).

⁵⁶² J Freitas, ‘O intérprete e o poder de dar vida à Constituição: preceitos de exegese constitucional’ (2000) 35(2) *Revista do Tribunal de Contas do Estado de Minas Gerais - R TCMG*, Belo Horizonte 15, 18.

⁵⁶³ *Ibid* 43-46.

⁵⁶⁴ *Ibid* 17.

⁵⁶⁵ *Ibid* 19.

⁵⁶⁶ I W Sarlet, I Wolfgang and R Vianna, ‘The protection of Fundamental Rights and the STF as “positive legislator”’ (2013) 13(2) (Master in Law, Fundamental Human Rights, Edifio: Osasco) 95-134.

⁵⁶⁷ Giannini (n 40) 105-169.

⁵⁶⁸ Felsenheld (n 507).

case with damages to homogeneous individual rights affected massively and in a dispersed way. Neither judgments nor settlements on an individual basis would correlate with the extension and seriousness of the damage. Hence, the explicit consecration of ad hoc funds in which the magistrates can resort to when defining a controversy is convenient.

- 328 Many decisions of American courts refer to the fact that ‘the impossibility of determining individual injured parties led the Court to determine the creation of a fund with the function of compensating the damages verified’.⁵⁶⁹ Also, in Brazil, there are some funds for the defence of the environment.⁵⁷⁰
- 329 Funds also exist in Portugal,⁵⁷¹ where the compensation awarded can only be used for the better protection and defence of the affected property, from which all those concerned will benefit.⁵⁷² In addition, the Lugano Convention suggests the creation of a special fund: ‘[...] destined to collect the compensation due for damages to the environment and which should be *destined to the recovery of the environment itself*’[emphasis added].⁵⁷³
- 330 By foreseeing the existence of a special patrimony in which the compensation not claimed within a reasonable period of time by the direct creditors must be deposited, it is guaranteed that in no case will the environmental damage go unpunished and, at the same time, the enrichment that is indirectly generated to the polluter by the lack of a timely claim is transferred, placing it at the disposal of the defence of natural resources. Therefore, Funds should be namely composed of non-recovered monies in proceedings for the defence of homogeneous individual rights, a sort of *fluid recovery*. Thus, the Fund would allow cases of protection of massive damage of low per capita value, so that the infringed damage does not go unpunished and that it reverts to benefit the community.

4.4.4 Measures

- 331 Plaintiffs in environmental litigation might seek provisional measures with the objective of preventing irreparable damage in situations of extreme gravity and urgency.⁵⁷⁴ Provisional measures for the protection of natural resources are common in IACtHR case

⁵⁶⁹ S Patti, *La tutela civile dell’ambiente* (Padova, Cedam 1979) 84.

⁵⁷⁰ ‘National Fund of the Environment’, established by Law 7.797/1989 and administered by the Federal Union and the Fund for the Defense of Diffuse and Collective Rights, established by Law 9.008/1995, ratified by Law 9.240/1995 and inspired by Law 7.347/1985.32, very important for the purposes of Environmental Civil Liability.

⁵⁷¹ Art 2º; Art 22º and Annex III of L 147/2008 (Law No 147/2008 of Procedural Participation and Popular Action) of 29 July 2008 (Portugal) which represents the general rule of subjective Environmental Civil Liability.

⁵⁷² B Martins da Cruz, ‘Responsabilidade civil pelo dano ecológico – alguns problemas’ (1996) (special edn) Lusíada Revista de ciência e cultura, Série de Direito 209.

⁵⁷³ M A Bühring, *Direito do Ambiente Estudos em Homenagem ao Prof. Doutor Vasco Pereira da Silva* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2021) 59; cf Martins da Cruz, *Ibid.*

⁵⁷⁴ Art 63.2 ACHR.

law, wherein litigation often relates to protection of the rights to life and personal integrity. However, the Court has used these measures to also serve ‘the protection of the traditional territory of the communities, [and] the preservation of natural resources’, among other related rights. In *Mayagna v Nicaragua*, the Court granted provisional measures ‘in favour of the community in order to protect the community’s territory, including from third parties (with respect to logging and agricultural activities) [this protection was] also monitored through the supervision of compliance’.⁵⁷⁵ Likewise, in *Jiguamendó and Curbaradó Communities regarding Colombia*, the Court granted provisional measures in favour of the communities and ordered the State to provide protection to the life and integrity of its members, and to ensure that they could continue living in their habitual residence, without any type of coercion or threat. It also ordered the State to guarantee that the displaced could return to their communities, as well as the provision of permanent communication and immediate reaction services.⁵⁷⁶

- 332 In the *Matter of the Sarayaku People regarding Ecuador*, provisional measures related to the alleged lack of protection of the Sarayaku Community’s territory from fuel exploitation concessions. The Court granted provisional measures (including against third parties) relating to the State’s duty to protect the right to life, integrity and free movement of the community members. The State was also placed under positive duties to remove explosives, carry out maintenance works and consult. In effect, the provisional measures were replaced (‘left without effect’ or annulled) by the Court’s specific orders to the State, and the subsequent supervision of compliance with them.⁵⁷⁷
- 333 In *Xákmok Kásek*, the IACtHR ordered the adoption of *immediate measures*. In its judgment, the Court ordered the State not to

‘carry out any act that would *further hinder the outcome of the Judgment*. Until such time as the traditional territory is handed over to the members of the of the Community, the State must ensure that this territory is not undermined by actions of the State itself or of private third parties’, so as to avoid irreparable damage to the area and the natural resources therein.⁵⁷⁸

- 334 Thus, adopting a prospective and *mitigation-based approach*, the Court specified that the State must guarantee that no concession is issued unless and until independent and technically capable entities, under the supervision of the State, carry out a *social and environmental impact assessment*.⁵⁷⁹ Further, these must be ‘carried out in accordance

⁵⁷⁵ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Mayagna) (IACtHR), Order (Provisional Measures), Resolutions 6 September 2002 and 26 November 2007; *Mayagna*, Fourth Resolutive Point.

⁵⁷⁶ *Jiguamendó and Curbaradó Communities v Colombia* (IACtHR), Judgment 15 March 2005, Resolutive Point 2e.

⁵⁷⁷ *Kichwa Indigenous People of Sarayaku v Ecuador* (IACtHR), Judgment 27 June 2012 (Merits and reparations) [Series C No 245] para 340.

⁵⁷⁸ *Xákmok Kásek* (n 219), para 291 (emphasis added).

⁵⁷⁹ *Calderón Gamboa* (n 221).

with international standards and good practices in this regard.⁵⁸⁰ The Court's order was necessary to ensure that a decree by private owners of a private nature reserve area on indigenous territory (within the contentious jurisdiction of the IACtHR) did not present an obstacle 'to the return of the traditional lands'.⁵⁸¹

- 335 The jurisprudence of the IACtHR, in comparison to any other international or even national court, is rich regarding comprehensive reparation measures for environmental protection, including *measures of satisfaction and rehabilitation*.⁵⁸² In *Kawas*, the Court ordered as a measure of commemoration the erection of a monument and the labelling of the national park at stake with his name. Further, in the *Luna López* case, the Court ordered that an acknowledgment of responsibility be made, alluding to the facts of the case, as well as reaffirming the importance of environmental defenders.⁵⁸³ Likewise, in terms of rehabilitation measures, it distinguished those that were immediate, periodic and permanent.⁵⁸⁴

4.4.5 Enforceability

- 336 Giannini, Salgado and Verbic, commenting on an Argentinean draft (*Anteproyecto de Ley de procesos colectivos*) (Preliminary Draft Law on collective proceedings) consider that 'the generic allusion to the judge's duty to 'adopt such measures as he deems appropriate to ensure the enforcement of the sentence', without further details in this respect is one of the most serious problems of collective proceedings aimed at the structural modification of behaviour. This is a recurrent deficit in class actions for the protection of human or environmental rights. In these cases, given the complex administrative, institutional and budgetary interaction that the implementation of final decisions often entails, it is common to be confronted with court orders that, despite being aimed at the operationalization of fundamental rights, encounter bureaucratic obstacles of all kinds that prevent their effective implementation.⁵⁸⁵

- 337 In order to manage this fundamental phase of collective proceedings more effectively, these academics consider it

advisable to incorporate more specific provisions to monitor compliance with a judgment, such as the structuring of a plan of activities with a timetable for implementation and provision for the corresponding funding, the designation of a trained judicial assistant to periodically supervise the progress of the tasks, the creation of working groups or administrative structures with the participation of the sectors involved that would allow for coordinated progress in the committed work,

⁵⁸⁰ *Saramaka People v Suriname* (IACtHR), Judgment 28 November 2007 (Preliminary Objections, Merits, Reparations, and Costs) [Series C No 172] para 129 ff.

⁵⁸¹ *Xákmok Kásek* (n 219) para 313.

⁵⁸² *Calderón Gamboa* (n 221) 137.

⁵⁸³ *Luna López v Honduras* (IACtHR), Judgment 10 October 2013 [Series C No 269] para 227.

⁵⁸⁴ *Calderón Gamboa* (n 221) 138-139.

⁵⁸⁵ *Ibid.*

coordinated action with judges from different jurisdictions, and the application of personal financial penalties to those responsible for inaction, etc.⁵⁸⁶ It should also be a matter of regulation at this point to consider the possibility of modifying the specific remediation order set out in a final judgment if the circumstances that gave rise to its issuance are altered or when more efficient or superior modalities to fulfil the purpose pursued in the ruling were subsequently presented.⁵⁸⁷

5 CONCLUSION

- 338 Protecting the environment *in se*, obtaining compensation for damage arising out of an environmental infringement, and deterring illegal behaviours towards the environment are amongst the reasons put forward in this chapter to show that substance drives proceedings and thus contributes to the flexibility of the rules governing them. The question that arises is whether substance will drive procedural law too.
- 339 The political ambition of plaintiffs in environmental litigation is far-reaching and, more and more, concerns human rights violations and ecological torts committed against local populations. There is a multitude of lawsuits aimed at convincing national and supranational lawmakers to implement protective legislation targeting multinationals and businesses engaged in global supply chains to impose on their contractual partners certain moral (and equally legal) standards. Such plaintiffs' role is more crucial, given that 'it is obvious that some multinational enterprises clearly profit from local legal situation[s] where environmental risks are not sufficiently regulated'.⁵⁸⁸
- 340 Furthermore, the *circulation of judgments and legal arguments* has effects on the effectiveness of environmental law at the global level.⁵⁸⁹ The said circulation can take place from one country to another. The local treatment of disputes by domestic courts is often a source of inspiration for future domestic decisions in other countries. For instance, after the Netherlands' and Pakistan's⁵⁹⁰ judges condemned their own state, other jurisdictions, such as France, took the same types of decisions (*Affaire du siècle* (case of the century)). These strategic disputes seem to globalize networks with the same or similar arguments to be presented before the various national jurisdictions. Following Bruno Latour's terms, we are witnessing a form of '*relocation of the global*'; in the

⁵⁸⁶ LJ Giannini, JM Salgado and F Verbic, 'Anteproyecto de ley de procesos colectivos' (2017) 1 Revista de Derecho Procesal.

⁵⁸⁷ Ibid.

⁵⁸⁸ Hess (n 13) 11.

⁵⁸⁹ J Morand-Deville and JC Bénichot, *Mondialisation et globalisation des concepts juridiques, l'exemple du droit de l'environnement* (t 22, IRJS 2010); MJ Azar-Baud, 'Plaidoyer pour le raisonnement comparatif dans les décisions de justice' in *Mélanges en l'honneur de M le Pr Loïc Cadiet* (Lexis Nexis 2023); MJ Azar-Baud, 'Comparative Reasoning in Court Rulings in the Aftermath of Dieselgate' (2024) 8 Emory Int'l L Rev 837.

⁵⁹⁰ AS Tabau and C Cournil, 'Nouvelles perspectives pour la justice climatique (Cour du district de La Haye, 24 juin 2015, Fondation Urgenda c/ Pays-Bas)' (2015) 4 Revue Juridique de l'Environnement 672. The Dutch judgment referred to is available at <https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> accessed 22 Jan 2025.

absence of an international jurisdiction on these subjects, citizens are forcing national judges to rule, on a national scale, on a global issue. By doing so, they would exercise a form of participation in the governance of the commons, such as climate or biodiversity.⁵⁹¹

341 An underlying idea in the chapter shows there is a *dialogue between judges at an international level*. *Cross-fertilization* is an on-going process, since comparative reasoning arises out of judgments.⁵⁹² Major creative and bold rulings have been rendered. Some have recognized new prejudices, overcoming difficulty in terms of causality. Others have allocated the mounting public fines to public and private NGOs that would previously have been allocated to the public Treasury. The question of governance of the judges arises. In this, authors see the construction of a form of global ecosystem, constituting a first draft of governance of these global issues in the absence of global regulatory bodies.

⁵⁹¹ Eg, B Parance and J de Saint-Victor, *Repenser les biens communs* (Paris, Editions du CNRS 2014).

⁵⁹² Azar-Baud (n 591).

ABBREVIATIONS AND ACRONYMS

AC	Aarhus Convention
ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Seas, Mediterranean and Contiguous Atlantic Area
ACCP	Code of Civil Procedure (Argentina)
ACHR	American Convention on Human Rights
ACUMAR	Autoridad de Cuenca de Matanza Riachuelo (Matanza-Riachuelo River Basin Authority)
ADR	Alternative Dispute Resolution
AEWA	African-Eurasian Migratory Waterbird Agreement
AJCT	<i>l'Actualité juridique Collectivités territoriales</i> (Legal news on local authorities)
AJDA	<i>Actualite Juridique: Droit Administratif</i> (Legal News: Administrative Law)
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
AO	Advisory Opinion
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BRCCP	Brazilian Code of Civil Procedure
CADA	<i>Commission d'accès aux documents administratifs, concernant la documentation environnementale</i> (Commission for Access to Administrative Documents)
CEPA	Environmental Protection Act (Canada)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
Cf	<i>confer</i> (compare)
CGEDD	General Council for the Environment and Sustainable Development
Ch	Chapter
Chron	<i>Chroniques</i> (chronicles)
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
CJEU	Court of Justice of the European Union
CJIP	<i>Convention judiciaire d'intérêt public</i> (Judicial Public Interest Agreement) (France)
CNCDH	<i>Commission Nationale du Débat Public</i> (National Commission for Public Debate)
CNDP	<i>Commission nationale consultative des droits de l'homme</i> (National Consultative Commission on Human Rights)

CNRS	<i>Centre national de la recherche scientifique</i> (National Centre for Scientific Research) (France)
Comm	Communication
CRC	International Convention on the Rights of the Child 1989
CSJN	<i>Corte Suprema de Justicia de la Nación</i> (Supreme Court of Justice of Argentina)
CSR	Corporate Social Responsibility
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
EJO	Environmental Justice Organizations
ELI	European Law Institute
ESG	Environmental, Social and Governance
etc	et cetera
EU	European Union
EUR	Euro
FCCP	French Code of Civil Procedure
ff	following
Fn	footnote (external, ie, in other chapters or in citations)
FSC	Federal Supreme Court
GDPR	General Data Protection Regulation (EU)
GHG	Greenhouse gas
HCC	Haut conseil du climat (The High Council on Climate)
IACtHR	Inter-American Court of Human Rights
IBAMA	Brazilian Institute of Environment and Renewable Natural Resources
ibid	<i>ibidem</i> (in the same place)
ICJ	International Court of Justice
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
JCP	<i>La Semaine Juridique: Juris Classeur Periodique</i>
LGA	<i>Ley General del Ambiente</i> (General Environmental Law)
n	footnote (internal, ie, within the same chapter)
NGO	Non-Governmental Organization
No	number/numbers
Obs	observations

ONERC	National Observatory on the Effects of Global Warming (France)
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
para	paragraph/paragraphs
PPRT	Technological Risk Prevention Plan
pt	Part
RPRDE	Decree-Law No 147/2008 of 29 July 2008 (Portugal)
RTD	<i>Revue trimestrielle de droit</i> (Quarterly law review)
Sec	Section/Sections
Supp	supplement/supplements
TAC	<i>Termo de Ajustamento de Conduta</i> (Conduct Adjustment Agreement) (Brazil)
trans/tr	translated, translation/translator
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UP	University Press
US	United States of America
v	versus
vol	volume/volumes
WTO	World Trade Organization

LEGISLATION

International/Supranational

1950 European Convention on Human Rights.

1966 International Covenant on Civil and Political Rights.

Aarhus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters.

American Convention on Human Rights (1969).

Charter of Brussels (30 January 2014).

Charter of Fundamental Rights of the European Union (2000) (EU).

Codigo Modelo de Procesos Colectivos para Iberoamerica (Model Code for Collective Proceedings for Ibero-America) (28 October 2004) (Ibero-American Institute of Procedural Law).

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (EU).

Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Area (adopted 24 March 1983, entered into force 11 October 1986).

Convention for the Protection of the Marine Environment of the North-East Atlantic (entered into force 1998).

Convention for the Protection of the Mediterranean Sea Against Pollution (adopted 16 February 1976, entered into force 1978).

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 28 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 1 June 1982) 1284 UNTS 209.

Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds (Codified version) [2009] OJ L 20/7 (EU).

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (EU).

CRC, *General Comment No 12 (2009): the right of the child to be heard*, CRC/C/GC/12 (20 July 2009).

CRC, *General comment No 15 (2013): on the right of the child to the enjoyment of the highest attainable standard of health*, CRC/C/GC/15 (17 April 2013).

Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56 (EU).

Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1.

EU actions to improve environmental compliance and governance (Communication, 18 January 2018) COM(2018) 10 final (EU).

First draft of a preliminary text of a declaration on ethical principles in relation to climate change (2016) SHS/YES/BIO-CC/2016/1, No CL/4178 (UNESCO Ad Hoc Expert Group).

International Convention on the Rights of the Child (1989).

Paris Climate Agreement (adopted 12 December 2015, entered into force 4 November 2016).

Proposal for a Directive on substantiation and communication of explicit environmental claims of 22 March 2023 COM(2023) 166 final (EU).

Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean: Implementation Guide (6 April 2022) LC/TS.2021/221 (United Nations Economic Commission for Latin America and the Caribbean).

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, UKTS 67.

The 'Rio Declaration on Environment and Development' 1992, UN Conference on Environment and Development, UN Doc A/CONF.151/26Rev. 1.

The Environment and Human Rights, Advisory Opinion OC-23/17, IACtHR Series A No 23 (15 November 2017).

The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results (Communication, 3 February 2017) COM(2017) 63 final (EU).

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information (1996) UN Doc E/CN.4/1996/39.

Treaty Establishing the European Community (Consolidated Version) (Rome Treaty) [1957] (EU).

Treaty on European Union (Consolidated Version), Treaty of Maastricht, Official Journal of the European Communities [2002] OJ C 325/5 (EU).

UNGA Res 63/278 (22 April 2009) UN Doc A/RES/63/278.

World Declaration on the Environmental Rule of Law in the Environment (2016) (IUCN World Commission on Environmental Law).

National

Arrêté du 19 novembre 2007 fixant les listes des amphibiens et des reptiles protégés sur l'ensemble du territoire et les modalités de leur protection (Order of 19 November 2007 establishing the lists of amphibians and reptiles protected throughout the country and the terms of their protection) (France).

Arrêté du 1er juillet 2011 fixant la liste des mammifères marins protégés sur le territoire national et les modalités de leur protection (Order of 1 July 2011 establishing the list of marine mammals protected on the national territory and the terms of their protection) (France).

Arrêté du 23 avril 2007 fixant la liste des mammifères terrestres protégés sur l'ensemble du territoire et les modalités de leur protection (Order of 23 April 2007 establishing the list of terrestrial mammals protected on the whole territory and the modalities of their protection) (France).

Arrêté du 23 avril 2007 fixant les listes des mollusques protégés sur l'ensemble du territoire et les modalités de leur protection (Order of 23 April 2007 establishing the lists of molluscs protected throughout the country and the terms of their protection) (France).

Arrêté du 29 octobre 2009 fixant la liste des oiseaux protégés sur l'ensemble du territoire et les modalités de leur protection (Order of 29 October 2009 establishing the list of birds protected on the whole territory and the modalities of their protection) (France).

Arrêté du 8 décembre 1988 fixant la liste des espèces de poissons protégées sur l'ensemble du territoire national (Order of 8 December 1988 establishing the list of fish species protected throughout the country) (France).

Bundesnaturschutzgesetz (Nature Protection Act) of 25 March 2002, Federal Law Gazette (BGBl) Part I, 1193 (2002) (Germany).

Bürgerliches Gesetzbuch (Civil Code) (Germany).

Burgerlijk Wetboek 1992 (Dutch Civil Code) (The Netherlands).

Charte de l'environnement (Charter of the Environment) (France).

Code civil (Civil Code) (France).

Code de l'environnement (Environmental Code) (France)

Code de la consommation (Consumer Code) (France).

Code de Procédure pénale (Code of Criminal Procedure) (France).

Code du travail (Labour Code) (France).

Code rural (Rural and Maritime Fishing Code) (France).

Código de Defesa do Consumidor (Consumer Defence Code), Federal Law No 8.078/1990 (Brazil).

Código Procesal Civil y Comercial de la Nación (National Code of Civil and Commercial Procedure) (Argentina).

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 USC 9601 et seq] (US).

Conseil national des barreaux AG (General Assembly of the French National Bar Council) AG, report and resolution, *Promotion du rôle de l'avocat dans le droit des générations futures* (on the promotion of the role of lawyers in the law of future generations) of 10 March 2023.

Constitution Act 1982, Sch B to the Canada Act 1982 (UK).

Constitution of Bolivia of 2009 (Bolivia).

Constitution of the Portuguese Republic (entered into force 25 April 1976).

Constitution of the Province of Buenos Aires (Argentina).

Constitution of the Republic of Ecuador of 20 October 2008 (Ecuador).

Décret n° 2021-286 du 16 mars 2021 désignant les pôles régionaux spécialisés en matière d'atteintes à l'environnement (Decree No 2021-286 of 16 March 2021 designating the regional centres specialising in environmental offences) [JORF No 0065 of 17 March 2021, Text No 15] (France).

Decreto-Lei (Decree-Law) No 147/2008 of 29 July 2008 (RPRDE) (Portugal).

Dispõe sobre a Política Nacional do Meio Ambiente (Law No 6.938/81 of 1981) (Brazil).

Environmental national politics, L 6.938 of 31 August 1981 (Brazil).

Environmental Protection Act (CEPA 1999) [SC 1999, c 33] (Canada).

Federal Constitution (Brazil).

Federal Decree No 99.274, 6 June 1990 (Brazil).

Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Law concerning supplementary provisions on the remedies available in environmental matters pursuant to Directive 2003/35/EC) (Germany).

Home Rule Charter of the Township of Grant, Indiana County, Pennsylvania of 2015 (USA).

La Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien (Act on Mother Earth and Integral Development for Living Well) No 300 of 15 October 2012 (Bolivia).

Law 02/21/2018, AR/JUR/8/2018 (Argentina)

Law 4.717/1965 (Brazil).

Law 6.938/1981 (Brazil).

Law 7.347 of 1985 (Brazil).

Law No 2017-399 *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Act on the duty of vigilance of parent companies and contracting companies) of 27 March 2017 [Official Gazette of France of 28 March 2017] (France).

Law No 71 of 2010 on the rights of Mother Earth (Bolivia).

Lei da Ação Popular (Class Action Law) No 83/95 of August 31, amended by Decree-law No 214-G/2015 of 2 October (Portugal).

Lei Orgânica (Organic Law) No 47/2019.16 amending Art 133 of the Organic Law of the Municipality of Florianópolis (Brazil).

Lei Orgânica No 1/2017, de 2 de maio Organic (Law No 1/2017 of 2 May) amending Art 236 of the Organic Law of the Municipality of Bonito (Brazil).

Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca (Law No 19/2022 for the recognition of legal personality of the Mar Menor lagoon and its basin) of 30 September (Spain).

Ley de Derechos de la Madre Tierra (Act of the Rights of Mother Earth) No 71 of 21 December 2010 (Bolivia).

Ley General del Ambiente (General Environmental Law) No 25675 of 27 November 2002 [30036 B.O. 2] (Argentina).

Loi constitutionnelle No 2005-205 *relative à la Charte de l'environnement* (Constitutional Law No 2005-205 relating to the Charter of the Environment) of 1 March 2005 (Official Gazette of France of 2 March 2005) (France).

Loi No 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Law No 2016-1691 on transparency, the fight against corruption and the modernization of economic life of 9 December 2016) (France).

Loi No 2020-1672 relative au parquet européen, à la justice environnementale et à la justice pénale spécialisée (Law No 2020-1672 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice) of 24 December 2020 [Official Gazette of France of 26 December 2020] (France).

Loi No 2021-1104 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (Law on Combating Climate Change and Strengthening Resilience to its Effects) of 22 August 2021 [Official Gazette of France of 24 August 2021] (France).

Loi pour la reconquête de la biodiversité, de la nature et des paysages (Law for the reconquest of biodiversity, nature and landscapes) No 2016-1087 of 8 August 2016 (France).

Loi sur les espèces en péril (Species at Risk Act) No LC 2002 of 2002 (Canada).

Ordinance of the City Council of the City of Santa Monica Establishing Sustainability Rights, Ord No 2421 CCS, Sec 1, of 9 April 2013 (California, US).

Popular Action Act No 83/95 of 31 August 1995 (Portugal).

Proposition de loi constitutionnelle (draft constitutional law) No 608 of 13 December 2022 (France).

Proposition de loi visant à adapter la procédure des référés aux enjeux environnementaux (Draft law No 1973, aimed at adapting the summary proceedings procedure to environmental issues), No 1973 of 5 December 2023 (France).

Proyecto de Código Civil y Comercial de la Nación (Draft Unified Civil and Commercial Code for the Republic of Argentina) 2012 (Argentina).

Strafgesetzbuch (Criminal Code) (Germany).

Strafgesetzbuch (Criminal Code) (Switzerland).

Súmula (precedent) 365 of the Federal Supreme Court (Brazil).

Te Awa Tupua (Whanganui River Claims Settlement) Bill No 129-2 of 20 March 2017 (New Zealand).

Te Urewera Act 2014 (adopted 27 July 2014, entered into force 28 July 2014) No 51 (New Zealand).

Treaty of Waitangi Act 1975 (adopted 10 October 1975, entered into force 10 October 1975) No 114 (New Zealand).

Verwaltungsverfahrensgesetz (Administrative Procedure Act) (Germany).

Water Amendment (Victorian Environmental Water Holder) Act No 50 of 2010 (Australia).

CASES

International/Supranational

Airey v Ireland, Case 6289/73 Series A No 41 (ECtHR), Judgment 9 October 1979 [Series A No 41] [ECLI:CE:ECHR:1979:1009JUD000628973].

Artegoda GmbH et al v Commission, Case T-74/00 (Court of First Instance, EU), Judgment 26 November 2002 [Rec CJCE II-4945, pt 191].

Artico v Italy, Case 6694/74 Series A No 37 (ECtHR), Judgment 13 May 1980 [Series A No 37] [ECLI:CE:ECHR:1980:0513JUD000669474].

Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV, Case C-115/09 (CJEU), Judgment 12 May 2011 [ECLI:EU:C:2011:289].

Carême v France, Case 7189/21 (ECtHR), Hearing 29 March 2023; Judgment 9 April 2024.

Commission v Netherlands, Case C-368/10 (CJEU), Judgment 10 May 2012 [ECLI:EU:C:2012:284].

Concordia Bus Finland, Case C-513/99 (CJEU), Judgment 17 September 2002 [ECLI:EU:C:2002:495].

Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, Case C-263/08 (CJEU), Judgment 15 October 2009 [ECLI:EU:C:2009:631].

European Commission v Federal Republic of Germany, Case C-137/14 (CJEU) Judgment 15 October 2015 [ECLI:EU:C:2015:683].

Fish Legal and Shirley, Case C-279/12 (CJEU), Judgment 19 December 2013 [ECLI:EU:C:2013:853].

Four Ngöbe Indigenous Communities and their Members regarding Panama (IACtHR), Order 28 May 2010.

Futura Immobiliare, Case C-2554/08 (CJEU), Judgment 16 July 2009 [ECLI:EU:C:2009:479].

Gabčíkovo-Nagymaros Project, *Hungary v Slovakia* [1997] ICJ Rep 3 (ICJ).

Greenpeace Nordic and Others v Norway, App No 34068/21 (ECtHR), filed 15 June 2021.

Gruber, Case C-570/13 (CJEU), Judgment 16 April 2015 [ECLI:EU:C:2015:231].

Jiguamiandó and Curbaradó Communities v Colombia (IACtHR), Judgment 15 March 2005.

Johnston v Chief Constable of the Royal Ulster Constabulary, Case C-222/84 (CJEU), Judgment 15 May 1986 [EU:C:1986:206].

Kichwa Indigenous People of Sarayaku v Ecuador (IACtHR), Judgment 27 June 2012 (Merits and reparations) [Series C No 245].

Luna López v Honduras (IACtHR), Judgment 10 October 2013 [Series C No 269].

Mayagna (Sumo) Awas Tingni Community v Nicaragua (Mayagna) (IACtHR), Order (Provisional Measures), Resolutions 6 September 2002 and 26 November 2007.

Mayagna (Sumo) Awas Tingni Community v Nicaragua, Case Series C No 79 (IACtHR), Judgment 31 August 2001 (Merits, Reparation, and Costs).

Peoples of Kaliña and Lokonos v Suriname, Case Series C No 309 (IACtHR), Judgment 25 November 2015 (Merits, Reparation, and Costs) para 130.

Raffinerie Mediterranée (ERG) SpA, Case C-378/08 (CJEU), Judgment 9 March 2010 [ECLI:EU:C:2010:127].

Saramaka People v Suriname (IACtHR), Judgment 28 November 2007 (Preliminary Objections, Merits, Reparations, and Costs) [Series C No 172].

Societatea Civilă Profesională de Avocați AB & CD v Consiliul Județean Suceava et al, Case C-252/22 (CJEU), Judgment 11 January 2024 [ECLI:EU:C:2024:13].

Tatar v Romania, Case 67021/01 (ECtHR), Judgment 27 January 2009, Sec 105 [Daloz 2009, 2448].

Verein KlimaSeniorinnen Schweiz and Others v Switzerland, App no 53600/20 (ECtHR), Judgment 9 April 2024.

Xákmok Kásek Indigenous Community v Paraguay, Case Series C No 214 (IACtHR), Judgment 24 August 2010 (Merits, Reparation, and Costs).

National

(Constitutional Council, France), Decision 2019-823 QPC of 31 January 2020 [JORF No 0027, 01 February 2020].

10 December 2013.

11 December 2013.

20 July 2000 *Lubbe and Others and Cape Plc and Related Appeals* (House of Lords, UK), Judgment 20 July 2000 [UKHL 41].

3 May 2007 *Municipality of Magdalena v Shell*, Case 330:2017, Judgment 3 May 2007.

Almada, Case Ac 60.094 (Supreme Court of the Province of Buenos Aires), Sentence 19 May 1998.

Altube, Fernanda Beatríz y otros c/Buenos Aires, Provincia de y otros, Case A.2117.XLII (CSJN, Argentina), Sentence 28 May 2008.

Ashgar Leghari v Federation of Pakistan, Case WP No 25501 (Lahore High Court, Pakistan), Judgments 4 and 14 September 2015.

Asociación Superficiarios de la Patagonia, Case 327:2967 (CSJN, Argentina), Judgment 13 July 2004.

Assignment NAAT and others v Total, S Mabile and F de Cambiaire; Judgment 28 January 2020

Assoc AC! (Council of State, Assembly, France), Judgment 11 May 2004 [Leb 197, RFDA 2004 454].

Assoc Africa Institute for Energy governance v SA Total, Case 20/01692 (regional Court of Appeal, Versailles, France), Judgment 10 December 2020.

Assoc Civic Response on Environment and Development (CRED) v SA Total, Case 20/01693 (regional Court of Appeal, Versailles, France), Judgment 10 December 2020.

Assoc Oxfam France, Assoc Notre affaire à tous, Assoc Greenpeace France, Fondation pour la nature et l'homme, Case 1904967 (Regional Administrative Court, Paris, France), Judgment 3 February 2021 [2021 AJDA 239; 2115; 2228; 2115; JCP A 2021, 2088].

Assoc Oxfam France, Assoc Notre affaire à tous, Fondation pour la nature et l'homme, Assoc Greenpeace France, Case 1904967 (Regional Administrative Court, Paris, France), Judgment 14 October 2021 [2021 AJDA 2063; 2021 Dalloz 1924].

Association Coordination Interrégionale Stop THT and others, Case 342409 (Council of State, Assembly, France), Judgment 12 April 2013 [ECLI:FR:CEASS:2013:342409.20130412].

Association générale des producteurs de maïs (AGPM), Case No 358103 (Council of State, France), Decision 1 August 2013 [ECLI:FR:XX:2013:358103.20130801].

Association Générations Futures and others, Case 1704687 (Regional Administrative Court, Nice), Judgment 29 November 2019.

Association Greenpeace France et autres, Case 1813215 (Administrative Court of First Instance, Cergy-Pontoise), Judgment 1 February 2019.

Association Les Amis de la Terre France, Case 394254 (Council of State, France), Judgment 12 July 2017; Lebon 229 [AJDA 2018, 167].

Association Meuse nature environnement et autres, Case No 2023-1066 QPC (Cons Const, France), Judgment 27 October 2023 [AJDA 2023. 1965; D. 2023. 1950].

Association Mirabel-LNE, Case 397627 (Council of State, France), Judgment 11 April 2018 [T Lebon; AJDA 2018, 826].

Association syndicale autorisée de la Vallée du Lay (ASVL), Case 434733 (Council of State, France), Judgment 31 May 2021 [Lebon T; AJDA 2021, 2473].

Azul, Case 37.899, Sentence 37.899, (Civil and Commercial Court, Chamber II, Argentina), Judgment No 22-X-1996 [DJBA 152-21; ED 171-378].

Case 0403366 (Regional Administrative court, Marseille), Order 14 May 2004.

Case 1 BvR 2656/18 (Federal Constitutional Court, First Senate, Germany) Order 24 March 2021 [ECLI:DE:BverfG:2021:rs20210324.1bvr265618].

Case 1 BvR 2821/11, 1 BvR 321/12 1, BvR 1456/12 (Constitutional Court, Germany), Judgment 6 December 2016.

Case 10-15500 (Court of Cassation, Civil Chamber 3, France), Judgment 8 June 2011 [Dalloz 2011, 1691].

Case 10-17.645 (Court of Cassation, Civil Chamber 3, France), Decision 18 May 2011 [Dalloz 2011, 1483].

Case 10-82.938 (Court of Cassation (Criminal Division), France), Judgment 25 September 2012 [Bulletin criminal 2012, No 198].

Case 12-85.130 (Court of Cassation, Criminal Chamber, France), Decision 13 November 2013.

Case 1307739 (Regional Administrative court, Marseille), Order 11 December 2013.

Case 13-81.572 (Court of Cassation, Criminal Chamber, France), Decision 10 December 2013.

Case 13-87.650 (Court of Cassation, Criminal Chamber, France), Decision 22 March 2016 [ECLI:FR:CCASS:2016:CR01648].

Case 1403557 (Regional Administrative Court, Rennes, France), Judgment 30 April 2015.

Case 1704067 (Regional Administrative Court, Lyon), Judgment 15 January 2019 [Juris-Data No 2019-000167].

Case 17-26.180 (Court of Cassation, Civil Chamber, France), Decision 3, 8 November 2018 [ECLI:FR:CCASS:2018:C300973] (unpublished).

Case 1802202 (Regional Administrative Court, Montreuil), Decision 25 June 2019 [AJDA 1315; Dalloz 1488].

Case 1802202 (Regional Administrative Court, Paris), Judgment 4 July 2019.

Case 1810251/4-3, *Calanques National Park (EPA)* (Judicial Court of Marseille, 6th Chamber), JU corr, 6 March 2020; Case 16253000274 [JurisData No 2020-004271; JCP G 2020, 825].

Case 18-2188 (US Court of Appeals for the 2nd Circuit), Judgment 1 April 2021.

Case 19/02833 (Judicial District Court, Nanterre, France), Referral Order 30 January 2020 [Dalloz 2020, 970].

Case 19/20669 (Court of Appeal, Paris), Judgment 17 September 2020 [JurisData No 2020-019769].

Case 19-19.463 (Court of Cassation, Commercial Chamber, France), Decision 18 November 2020 [Dalloz 2342; (2021) *Rev sociétés* 165].

Case 19PA02868 (Regional Administrative Court of Appeal, Paris), Decision 11 March 2021 [AJDA 2021, 1104].

Case 2011-116 QPC (Constitutional Council, France), Decision 8 April 2011 [AJDA 1158; Dalloz 2011. 1258].

Case 2019-794 DC (Constitutional Council, France), Decision 20 December 2019 [2019 AJDA 9; Dalloz 1012].

Case 2021-833 DC (Constitutional Council, France), Decision 28 December 2021 [JORF No 0304, 31 December 2021].

Case 2102294 (Regional Administrative Court, Nantes, France), Order 5 March 2021.

Case 2102877 (Prefect of Loire-Atlantique and Regional Administrative Court, Nantes, France), 9 April 2021 (2021) AJCT 321.

Case 21-11.882 (Court of Cassation, Commercial Chamber, France), Decision 15 December 2021 [Dalloz 2022, 7].

Case 22 CS 18.566 (Administrative Court of Appeal Munich, Germany), Decision 15 May 2018 [Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport 2019, 10mn].

Case 22/00643 (CA Versailles, 14th ch, France), 1 December 2022.

Case 284237 (Council of State, France), Judgment 13 December 2006.

Case 31.150/SP (Second Panel, Superior Court of Justice, Brazil), Judgment 20 May 1996.

Case 329:3445 (CSJN, Argentina), Judgment 24 August 2006.

Case 329:3493, Judgment 29 August 2006; Case A.1274. XXXIX, Judgment 26 August 2008.

Case 329:3528 (CSJN, Argentina), Judgment 30 August 2006.

Case 330:1158 (CSJN, Argentina), Judgment 20 February 2007; Judgment 20 March 2007.

Case 330:22 (CSJN, Argentina), Judgment 6 February 2007.

Case 330:2746 (CSJN, Argentina), Judgment 22 August 2007; final judgment 8 July 2008, No M.1569.XL.

Case 363005 (Council of State, France), Judgment 14 November 2014 [CLI:FR:CESJS:2014:363005.20141114] (unpublished).

Case 3665 (Cour de Cassation, France), Judgment 14 February 2011.

Case 3811 (Cour de Cassation, France), Judgment 16 February 2011.

Case 3938 (Cour de Cassation, France), Judgment 18 February 2011.

Case 428409 (Council of State, 6th and 5th Chambers combined, France), Decision 4 August 2021 [ECLI:FR:CECHR:2021:428409.20210804].

Case 438403 (Council of State, France), Decision 29 June 2020.

Case 67 CCC 193 (Supreme Court, Canada), Judgment 24 October 1991.

Case 704275, 1704392, 1704394 (Regional Administrative Court, Montreuil, France), Judgment 2 July 2020 [AJDA 2020, 2102].

Case 706/2014 (Criminal Court of Tarascon, France), Judgment 29 July 2014 [Dalloz 2014, 1694].

Case 74-54 DC (Constitutional Council, France), Decision 15 January 1975, IVG [JORF 16 January 1975, 671; ECLI:FR:CC:1975:74.54.DC].

Case 893 FS-B 15 (Court of Cassation), Decision 15 December 2021 [ECLI:FR:CCASS:2021:CO00893].

Case CDV-2020-307 (First Judicial District Court, Montana, US), Judgment 14 August 2023 (Findings of Fact, Conclusions of Law, and Order), first filed 13 March 2020.

Case N 883.656-RS (2006/0145139-9) (Superior Court of Justice, Brazil), Judgment 30 October 2018.

Case No RG 22/03403 (Paris Judicial Tribunal, France), Order 6 July 2023.

Case RG 19/02833 (Judicial District Court, Nanterre, France), Referral Order 30 January 2020.

Case RG 20/01692 (regional Court of Appeal, Versailles, France), Judgment 10 December 2020 [Dalloz news, 11 January 2021].

Case RG 21/01661 (regional Court of Appeal, Versailles, France), Judgment 18 November 2021.

Case RG 22/53942 (First Instance Civil Court, Paris), Judgment/Referral Order 28 February 2023.

Case STC- 4360-2018 (Colombian Supreme Court), Judgment 5 April 2018.

Case T – 622 (Constitutional Court of Colombia), issued 10 November 2016.

Case T-622 (Corte Constitucional (Constitutional Court), Colombia), Judgment 10 November 2016.

Cases 1904967, 1904968, 1904972 and 1904976/4-1 [JCP G 2021, Act 1195] (Regional Administrative Court, Montreuil, 8th Chamber), 25 June 2019

Chernaik v Kitzhaber, Case 16-11-09273 (Circuit Ct of the State of Oregon for Lane County), Complaint for Declaratory Judgment and Equitable Relief 19 May 2011.

Chernaik v Kitzhaber, Case A151856 (Oregon Court of Appeals), filed 11 June 2014.

City of Berkeley v Superior Court, Case 606 P.2d 362 (Supreme Court of California), Judgment 22 February 1980.

Civil Association for Environmental Justice and others v Entre Ríos, Province of and others s / Amparo Environmental, File No 542/2020 (CSJN, Argentina), Order 28 December 2021.

Claudia Duarte Agostinho and others v Portugal and 32 Other States, Case 39371/20 (EctHR), Judgment 30 November 2020.

Claudia Andrea Lozano Barragán, et al v Présidence de la République et al, STC- 4360-2018 (Supreme Court of Justice of Colombia), Judgment 5 April 2018.

Client Earth No3 (High Court, England), Judgment 21 February 2018 [EWHC 315 (Admin)].

ClientEarth v Board of Directors of Shell plc [2023] EWHC 1137 (Ch), Judgment 12 May 2023; [2023] EWHC 1897 (Ch) (High Court of Justice, England and Wales), Judgment 24 July 2023.

Climat ASBL (French-speaking Trib 1st Instance, Brussels, civil sect, 4th Chamber) affd civ, Judgment 17 June 2021.

Cne de Grande-Synthe, Case 427301 (Council of State, France), Judgment 19 November 2020 [ECLI:FR:CECHR:2020:427301.20201119] [Lebon 2021; AJDA 217].

Cne de Grande-Synthe, Case 427301 (Council of State, France), Judgment 1 July 2021 [ECLI:FR:CECHR:2021:427301.20210701]; [Lebon 2021; AJDA 1413; JCP G 2021, act 795].

Collectif des maires anti-pesticides, Case 437815 (Council of State, France), Judgment 26 July 2021 [ECLI:FR:CECHR:2021:437815.20210726] (2021) Lebon AJDA 1590.

Collectif pour le triangle de Gonesse et autres, Case 1610910, 1702621 (Administrative Court of First Instance, Cergy-Pontoise), Judgment 6 March 2018.

Commune de Grande-Synthe and others, Case 467982 (Council of State, France), Decision 10 May 2023 [ECLI:FR:CECHR:2023:467982.20230510].

Daubert v Merrell Dow Pharmaceuticals (US Supreme Court), Judgment 28 June 1993 [509 KB; 509 US 579].

Decision 27 November 2012 Case 2012.02.01.004075-2, (Tribunal Regional Federal da 2ª Região (Federal Regional Court of the 2nd Region, Brazil)), Decision 27 November 2012.

DEP v Grant Twp of Indiana Co., et al, Case 35 (Supreme Court of Pennsylvania, US), Judgment 12 July 2022.

Depakine (Judicial Court, Paris, France) non-final Judgment 5 January 2022.

Deutsche Umwelthilfe v BMW, Case 32 U 936/23 (Higher Regional Court, Munich), Judgment 12 October 2023.

Duda Salabert Rosa v estado de Minas Gerais e Taquaril Mineração AS, Case App 5020547-95.2022.8.13.0024 (Minais Gerais, Brazil) (5th Court of the Public Finance and Municipalities of the District of Belo Horizonte), Judgment 11 November 2022.

Fishermen and Friends of the Sea v Minister of Planning (Trinidad and Tobago) (Privy Council, UK), Judgment 27 November 2017 [UKPC 37].

Friends of the Irish Environment CLG v the Legal Aid Board (High Court, Ireland), Judgment [2020 IEHC 454]; (Irish Court of Appeal), Judgment 3 February 2023 [2023 IECA 19].

Granda, Case Ac 93.412 (Supreme Court of the Province of Buenos Aires), Resolution 2 November 2005.

Greenpeace Nordic and Nature & Youth v Ministry of Petroleum and Energy, Case 16-166674TVI-OTIR/06 (Oslo District Court), Judgment 4 January 2018.

Greenpeace Nordic and Nature & Youth v Ministry of Petroleum and Energy, Case 20-051052SIV-HRET (Norwegian Supreme Court), Judgment 22 December 2020.

Greenpeace Spain et al, Case 1079/2023 (Supreme Court of Spain), Judgment 24 July 2023 [ECLI:ES:TS:2023:3556].

Halabi, Ernesto v P.E.N. ley 25.873 dto 1563/04 s/ amparo ley 16.986 (CSJN, Argentina), Judgment 24 February 2009, H 270 XLII.

Kelsey Cascade Rose Juliana v the United States of America, Case 6:15-cv-01517-TC (United States District Court D Or), Opinion and Order 10 November 2016.

KIK (Regional District Court, Dortmund, Germany), Judgment 10 January 2019 [BeckRS 2019, 388].

Kiobel v Royal Dutch Petroleum (Supreme Court, US), Judgment 17 April 2013 [569 US 108; 133 S C 1659].

L'Association 'Les Amis De La Terre France' and others v La Société TotalEnergies SE (Friends of the Earth and others v TotalEnergies) (East Africa oil project) (Judicial Court of Paris, France), Judgment 28 February 2023.

Lalit Miglani v State of Uttarakhand, PIL No 140 of 2015 (Uttarakhand High Court, India), Order 30 March 2017.

Les Amis de la terre, Case 394254 (Council of State, France), Decision 12 July 2017 [JurisData No 2017-014183; JCP G 2017; Act 871].

Lliuya v RWE AG, Case I-5 U 15/17 (Higher Regional Court of Hamm), Judgment 30 November 2017.

Lluiya v RWE, Case 2 O 285/15 (Regional District Court, Essen, Germany), Judgment 15 December 2016 [Zeitschrift für Umweltrecht 2017, 370].

Mamère, Case 389095 (Council of State), Judgment 1 June 2016 [AJDA 2016. 2023]; [Constitutions 2016. 470].

Maple Leaf Cement Factory v EPA WP, Case 115949/2017 (Lahore High Court, Pakistan), Judgment 21 December 2017.

Massachusetts v EPA, Case 05–1120 (US Supreme Court), Decision 7 April 2007 [549 US 497].

Matthews v Bay Head Improvement Ass’n, Case No 471 A.2d 355 (Supreme Court of New Jersey), Judgment 2 February 1984.

McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors [2023] EWCA Civ 87 (Court of Appeal Civil Division, England and Wales), Judgment 21 July 2023.

Mendoza Beatriz Silva et al v State of Argentina et al on damages (damages resulting from environmental pollution of Matanza/Riachuelo river) (Supreme Court of Justice, Argentina), Decision 8 July 2008.

Mendoza Beatriz Silva et al v State of Argentina et al s/daños y perjuicios (regarding damages and prejudices/losses) (Supreme Court of Justice, Argentina), Sentence 20 June 2006, LL diario (29 June 2006).

Mendoza, Beatriz Silvia et al v Estado Nacional y otros s/daños y perjuicios, Case 331:1622 (regarding damages and prejudices/losses) (CSJN, Argentina), Judgment 8 July 2008.

Mendoza, Beatriz Silvia y otros v Estado Nacional y otros s/ daños y daños (daños derivados de la contaminación ambiental del río Matanza Riachuelo), Case M. 1569.XL; Case 329:2316 (CSJN, Argentina), Judgment 20 June 2006.

Milieudefensie v Shell, Case HA ZA 19-379 (The Hague District Court, the Netherlands), Judgment 26 May 2021 [ECLI:NL:RBDHA:2021:5339].

Minister of State, Minister of Ecology, Energy, Sustainable Development and the Sea v Association Halte aux marées vertes, Case 07NT03775 (Regional Administrative Court of Appeal, Nantes, France), Judgment 1 December 2009 [AJDA 2010, 900].

Ministère de la transition écologique et solidaire, inédit, Case 17LY02681 (Regional Administrative Court of Appeal, Lyon, France), Judgment 10 April 2018.

Ministre de l'agriculture et de la pêche v Confédération paysanne du Gers, Case 295918 (Council of State, France), Judgment 9 February 2007 [Lebon T; AJDA 2007. 444].

Ministre de l'agriculture et de la pêche v Confédération paysanne du Gers, Case 295918 (Council of State, France), Judgment 9 February 2007 [Lebon T; AJDA 2007. 444].

Minors Oposa v Secretary of the Department of Environmental and Natural Resources, Case 101083 (Supreme Court of the Philippines), Judgment 30 July 1993.

Missouri v Biden, Case 22-1248 (Supreme Court, US), Petition for Writ of Certiorari 28 June 2023.

Mme Buguet and others, Case 330566 (Council of State), Judgment 3 August 2011 [Lebon T; AJDA 2011. 1600].

Monsieur le procureur de la République près le tribunal judiciaire de Besançon v Société fromagère de Vercel, Groupe LACTALIS, Case 22269000130 (Judicial District Court, Grenoble), Order 1 June 2023.

Municipality of Magdalena v Shell, Case 29-XII-2008, Sentence 29 December 2008.

Municipio de Mariana v BHP Group (UK) Ltd (formerly BHP Group Plc) (Court of Appeal (Civil Division), England), Judgment 8 July 2022 [EWCA Civ 951].

Nat'l Audubon Soc'y v Superior Court, Case 658 P.2d 709 (Supreme Court of California), Judgment 17 February 1983.

Neubauer et al v Germany, Case 1 BvR 2656/18 (German Constitutional Court, First Senate), Order 24 March 2021 [ECLI:DE:BverfG:2021:rs20210324.1bvr265618].

Northern Wood Preservers v Ministry of the Environment (Divisional Court, Ontario, Canada), Judgment 3 May 1991 (unreported).

Notre Affaire à Tous and others v France, No 1904967, 1904968, 1904972 and 1904976/4-1 (Regional Administrative Court, Paris), Judgment 3 February 2021.

Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v União Federal (Federal Supreme Court of Brazil), Judgment 7 January 2022.

Préfet des Alpes-Maritimes v Société Sud-Est assainissement, Case 229562, 229563 and 229721 (Council of State, Sect, France), Judgment 28 February 2001.

Préfet des Pyrénées-Orientales v M Abounkhila, Case 252988 (Council of State, Sect, France), Judgment 27 February 2004; (2004) JCP G 1898.

R (oao) Friends of the Earth v Secretary of State for Business Energy and Industrial Strategy (High Court of England and Wales), Judgment 18 July 2022 [EWHC 1841 (Admin) (2022) Co/199/2022].

Rabab Ali v Federation of Pakistan & Another, Case I of 2016 (Supreme Court of Pakistan), Constitutional Petition filed 4 April 2016.

Re Federal Climate Protection Act Austria, Case G 139/2021-11 (Austrian Constitutional Court), Decision 27 June 2023.

Re Mendoza, Case M.1569.XL (CSJN, Argentina), Sentence 20 June 2006; Case 329:2316 [LL 2006-D-281].

Resp (Special Appeal) No 791653/RS (Superior Court of Justice, Brazil), 6 February 2007.

Resp 1.328.753-MG (Superior Court of Justice, Brazil), Judgment 28 May 2013.

Resp No 1.180.078 (Superior Court of Justice, Brazil), Judgment 2 December 2010.

Resp No 31.150/SP (Second Panel, Superior Court of Justice, Brazil), Judgment 20 May 1996.

Resp No 896.863-DF (Superior Court of Justice, Brazil), Judgment 19 May 2011.

Ridhima Pandey v Union of India, Case 187 of 2017 (National Green Tribunal, India), Judgment 15 January 2019.

Saavedra, Silvia Graciela and another v National Administration of National Parks, National State and others under Environmental Protection, Case FSA 18805/2014 (CSJN, Argentina), Judgment 6 February 2018.

Sagarduy, Case C. 98.377 (Supreme Court of the Province of Buenos Aires), Judgment 17 December 2008.

Salas, Dino y otros v Salta, Case S.1144.XLIV (CSJN, Argentina), Judgment 26 March 2009.

Sierra Club v Morton, Secretary of Interior, et al, Syllabus 405 US 727 (Certiorari to the United States Court of Appeals for the Ninth Circuit), Judgment 19 April 1972; Justia (US Supreme Court).

Smith v Fonterra et al [2021] NZCA 552 (Court of Appeal of New Zealand), Judgment 21 October 2021.

Smith v Fonterra et al [2024] NZSC 5 (Supreme Court of New Zealand), Judgment 7 February 2024.

Sociedad de Fomentó Cariló, Case Ac 73.996 (Supreme Court of the Province of Buenos Aires), Sentence 29 May 2002.

Sociedad de Fomentó Cariló, Case Ac 90.941 (Supreme Court of the Province of Buenos Aires), Sentence of 8 March 2006.

Spagnolo, Case C. 91.806 (Supreme Court of the Province of Buenos Aires), Judgment 19 March 2008.

Sté Bayer Seeds K, Case 19LY01017 (Regional Administrative Court of Appeal, Lyon, France), Judgment 29 June 2021 (2021) AJDA 2563.

Suez, Case No 22/07100 (Paris Civil Court, France), Decision 1 June 2023.

Syndicat CFE CGC Orange, Case 438240 (Council of State, France), Judgment 31 December 2020 [Lebon T, AJDA 2021, 1003].

The State of The Netherlands v Urgenda Foundation, Case 200 178 245/01 (Regional Court of Appeal, civil law division, The Hague, The Netherlands), Judgment 9 October 2018 [RGDIP 2018, 1086-1089; 273 Dr envir. 2018, No 273].

The State of The Netherlands v Urgenda Foundation, Case 19/00135 (Supreme Court of the Netherlands), Decision 20 December 2019 [ECLI:NL:HR:2019:2007].

Total 1: Case 10-82.938 (Court of Cassation, Criminal Chamber, France), Judgment 25 September 2012 [JurisData, No 2012-021445; Bull crim No 198].

Total 2: La Société TotalEnergies SE, Case RG 20/00915 (Judicial District Court, Nanterre, France), Order 11 February 2021 [25 JCP E 2021, 34].

Union des industries de la protection des plantes, Case 2019-823 QPC (Constitutional Council, France), Decision 31 January 2020 [AJDA 2020. 1126].

Urgenda Foundation v The State of the Netherlands, Case 200 178 245/01 (Court of Appeal, The Hague, The Netherlands), Judgment 9 October 2018 [ECLI:NL:GHDHA:2018:2610].

Urgenda v State of the Netherlands (The Hague District Court, The Netherlands), Judgment 24 June 2015 [ECLI:NL:RBDHA:2015:7196], affd C/09/456689/HA ZA 13-1396.

Vale S.A. v BHP Group (UK) Ltd and BHP Group Ltd (Court of Appeal, Civil Division, England), Judgment 24 Nov 2023 [EWCA Civ 1388] (UK).

VZW Klimaatzaak v Kingdom of Belgium & Others, Case 2021/AR/1589 (Brussels Court of Appeal, Belgium), Judgment 30 November 2023.

VZW Klimaatzaak v Kingdom of Belgium, et al (Court of First Instance, Brussels), Judgment 17 June 2021.

Werneke, Case W.140.XLII (CSJN, Argentina), Sentence 14 October 2008.

Yane, Case C. 90.020 (Supreme Court of the Province of Buenos Aires), Sentence of 14 November 2007.

Zoe and Stella Foster, et al. v Washington Department of Ecology, Case 14-2-25295-1 SEA (Superior Court of the State of Washington for King County, US), Order 19 November 2015.

BIBLIOGRAPHY

Books and theses

Abadie P, *Entreprise responsable et environnement: recherche d'une systématisation en droits français et américain* (Brussels, Bruylant 2013).

Aguila Y and Viñuales J E (ed), *A Global Pact for the Environment – Legal Foundations* (Cambridge, C-EENRG 2019).

Akoka F, 'Contrats de la commande publique et environnement' (doctoral thesis, Aix-Marseille University, No 71, Presses Universitaires d'Aix-Marseille 2020).

Albanese AO, *L'azione popolare da Roma a noi* (Roma 1955).

Alogna I, 'Increasing Climate Litigation: A Global Inventory' in Auby J-B and others (ed) *1 French Yearbook of Public Law* (issue 1, 2023).

Amado Gomes C and Oliveira H, *Tratado de Direito do Ambiente Vol: II* (Lisbon Public Law Editions, Centro de Investigação de Direito Público/Instituto de Ciências Jurídico-Políticas 2022).

Amado Gomes C, *Tutela Contenciosa do Ambiente: uma amostragem da jurisprudência nacional* (ICJP/CIDP 2019).

-----, *Direito do Ambiente – Anotações jurisprudenciais dispersas* (Lisboa, 2nd edn, ICJP revista e ampliada 2017).

Azar-Baud MJ, *Les actions collectives en droit de la consommation: Etude de droit français et argentin à la lumière du droit comparé* (Preface Cadiet L, Nouvelle Bibliothèque de Thèses, Dalloz 2013).

-----, 'Plaidoyer pour le raisonnement comparatif dans les décisions de justice' in *Mélanges en l'honneur de M le Pr Loïc Cadiet* (Lexis Nexis 2023).

-----, 'Les actions collectives en droit de la consommation: Etude de droit français et argentin à la lumière du droit comparé' (thesis, Nouvelle bibliothèque de thèses, vol 121, Dalloz 2013).

Barrau A, *Le plus grand défi de l'histoire de l'humanité* (Michel Lafon 2019).

Beck U, *Risk Society: Towards a New Modernity* (London, Sage Publications, reprinted 2013).

Bergallo P, 'The merits of the plaintiff's claim' in P Bergallo (ed), *Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina* (SELPA, SELA 2005).

Besalú Parkinson A, *Responsabilidad por daño Ambiental* (Hammurabi 2005).

Birnfeld CA, 'Compromissos constitucionais do Poder Público brasileiro com a proteção do meio ambiente sob a perspectiva dos deveres-poderes de um Estado a serviço da cidadania e da proteção ambiental' in J Miranda and C Amado Gomes (ed), *Diálogo Ambiental, Constitucional e Internacional. Volume 3. Tomo I* (Lumen Juris 2015).

Boisson de Chazournes L, 'La protection de l'environnement global et les visages de l'action normative internationale' in *Mél en l'honneur de M Prieur: Pour un droit commun de l'environnement* (Dalloz 2007).

Borges I, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge 2019).

Bourg D and Salerno G, *Les Scénarios de la durabilité* (Online publishing house bookboon.com 2015).

Broberg MP and Fenger N, *Preliminary References to the European Court of Justice* (Oxford UP 2010).

Bühning MA, 'Reparação do dano ambiental: o quantum indenizatório e o dano moral extrapatrimonial' in *Direito do Ambiente Estudos em Homenagem ao Prof. Doutor Vasco Pereira da Silva* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2021).

-----, *Direito do Ambiente Estudos em Homenagem ao Prof. Doutor Vasco Pereira da Silva* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2021).

C Cournil, 'Les prémisses de révolutions juridiques? Récents contentieux climatiques européens' (2021) RFDA 957.

Cabanes V, *Un nouveau droit pour la Terre. Pour en finir avec l'écocide* (Seuil 2016).

Cadiet L and Jeuland E, *Droit judiciaire privé* (10th edn, LexisNexis 2017).

- Cadiet L, Normand J and Amrani-Mekki S, *Théorie générale du procès* (2nd edn, Presses universitaires de France 2013).
- Calais-Auloy J, Depincé M and Temple H, *Droit de la consommation* (10th edn, Dalloz 2020).
- Camproux Duffrène M P, 'Propositions de réformes relatives à la chose commune – La biodiversité comme chose commune' in J Rochfeld, M Cornu and G Martin (ed), *L'échelle de communalité: Propositions de réforme pour intégrer les biens communs en droit*, Report No 17-34 for the Law and Justice Mission (2021).
- Cerda-Guzman C, 'Costa Rica: le paradis de la jurisprudence verte?' in V Chiu and A Le Quinio (ed), *La protection de l'environnement par les juges constitutionnels* (Paris, L'Harmattan, Coll Droit comparé 2021).
- Charbonnier P, *Culture écologique* (Presses de Sciences Po 2022).
- Chevallier J, 'Réflexions sur l'idéologie de l'intérêt général' in CURAPP, *Variations autour de l'idéologie de l'intérêt général: Volume 1* (Presses Universitaires de France 1978).
- Cohendet M A, 'Le droit à l'environnement et le devoir de protection de l'environnement' in C Cerda-Guzman and F Savonitto F (ed), *Les 10 ans de la Charte de l'environnement 2005-2015* (Institut universitaire Varenne 2016).
- Connolly WE, *Identity, Difference: Democratic Negotiations of Political Paradox* (University of Minnesota Press 2002).
- Costa de Oliveira C, Paixao Silva Oliveira L and Pereira de Andrade P, 'Environmental damages caused by oil exploitation in Brazil: the conduct adjustment agreement as means to circumvent civil liability ineffectiveness' in C Oliveira (ed), *Le droit brésilien: un modèle pour la réparation du préjudice écologique?* (forthcoming).
- Crisafulli V, *voce Azione popolare Il Nuovo dig it* (Torino 1937)
- Davies G, 'The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure' in NN Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar 2006).
- de Certeau M, *L'Invention du quotidien, 1: Arts de faire and 2: Habiter, cuisiner* (L Giard (ed), Paris, Gallimard 1990).
- de Lassus St-Geniès G, 'ENVironnement JEUnesse c. Procureur général du Canada (2019)' in C Cournil (ed), *Les grandes affaires climatiques* (Aix-en-Provence, Droits International, Comparé et Européen, Confluence des droits 2020).
- Delbos V, Agoguet D and Atzenhoffer D, 'Le droit de l'environnement est trop éclaté' (2020) 20 Gaz Pal 11.

Delmas-Marty M, 'Avant-propos la Cop 21, un pari sur l'avenir' in M Torre-Schaub (ed), *Bilan et perspectives de l'Accord de Paris (COP 21). Regards croisés* (IRJS 2017).

-----, *Aux quatre vents du monde, petit guide de navigation sur l'océan de la mondialisation* (Le Seuil Paris 2017).

-----, *Les forces imaginantes du droit- cours au collège de France notamment IV: Vers une communauté de valeurs* (Le Seuil Paris 2011).

Di Porto A, *Res in usu publico e 'beni comuni': Il nodo della tutela* (Torino, Giappichelli 2013).

Doubbé-Billé S, 'Le droit international de l'environnement et l'adaptation aux changements planétaires' in *Mél en l'honneur de M Prieur: Pour un droit commun de l'environnement* (Dalloz 2007).

Dumont R, *L'Afrique noire est mal partie* (Paris, Le Seuil 1962 (collection 'Esprit', reprinted 2012)).

-----, *Terres vivantes. Voyage d'un agronome autour du monde* (Plon, Paris, collection Terre 1961 (written between 1959 and 1961 on notes taken in the field since 1956)).

-----, *L'Utopie ou la mort* (Paris, Seuil 1973).

Dupouy S, 'La défense de la nature, sujet de droit ou intérêt à protéger?' in M Hautereau-Boutonnet and E Truilhe (ed), *Procès et environnement: quelles actions en justice pour l'environnement?* (Aix-en-Provence, Droits International, Comparé et européen 2020).

Dupré de Boulois X, *Droit des libertés fondamentales* (2nd edn, 501, Presses Universitaires de France 2020) 353;

Dupuy PM and Vinuales JE, *Introduction au droit international de l'environnement* (Bruylant 2015).

Dworkin R, *L'empire du droit* (Paris, Presses universitaires de France 1994).

Ebbesson J, *Access to Justice in Environmental Matters in the EU* (vol 3, Kluwer Law International 2002).

Elie MP, 'La protection constitutionnelle de l'environnement en Italie, une oeuvre jurisprudentielle' in V Chiu and A Le Quinio (ed), *La protection de l'environnement par les juges constitutionnels* (L'Harmattan 2021).

Euguren C, 'La cosa juzgada colectiva y los mecanismos complementarios protectivos de la garantía de defensa en juicio. La creación de un sistema de registración de los procesos colectivos' (2005) paper presented at the XXIII Congreso Nacional de Derecho Procesal, Mendoza.

Falbo AJ, *Derecho Ambiental* (Librería Editora Platense 2009).

- Fatin-Rouge Stefanini M and Gay L, 'L'accès au juge constitutionnel en matière environnementale: un Panorama Comparatif' in A Le Quinio (ed), *La protection de l'environnement par les juges constitutionnels* (Paris, L'Harmattan 2021).
- Favoreu L and others, *Droit des libertés fondamentales* (7th edn, Paris, Dalloz 2015).
- Fiorillo CAP, *Curso de direito ambiental brasileiro* (São Paulo, 14th ed, Saraiva 2013).
- Fiss OM, *The Civil Right Injunction* (Indiana UP, Bloomington & London 1978).
- Fouchard I and Neyret L, '35 propositions pour mieux sanctionner les crimes contre l'environnement. Rapport de synthèse' in L Neyret (ed), *Des écocrimes à l'écocide: Le droit pénal au secours de l'environnement* (Bruylant 2015).
- Fraisse R, 'Les acteurs de l'environnementalisation: le juge administratif' in C Roux (ed), *L'environnementalisation du droit. Etudes en l'honneur de Sylvie Caudal* (IFJD 2020).
- Frigerio V, 'Réception de la biodiversité en droit' (thesis, Faculty of Law and Criminal Sciences of the University of Lausanne under the direction of Prof A Papaux, 2018).
- Fritz JC, 'Participation et justice environnementale' in M Boutelet and J Olivier (ed), *La démocratie environnementale: participation du public aux décisions et politiques environnementales* (Coll 'Sociétés', Dijon, Éditions Universitaires de Dijon 2009).
- Gaillot-Mercier V, 'Le dommage écologique transfrontière' (doctoral thesis, University of Rennes 1, 1992).
- Gay L, 'Défendre l'environnement devant le Conseil constitutionnel. Quelle procédure pour servir la Charte de l'environnement?' in M Hautereau-Boutonnet and E Truilhe (ed), *Procès et environnement: quelles actions en justice pour l'environnement?* (Aix-en-Provence, Droits International, Comparé et européen 2020).
- Gébé, *l'an 01* (Paris, Folio Gallimard 1973).
- Giannini LJ, 'Los procesos colectivos en la Ley General Ambiental. Propuestas de reforma' in RO Berizonce (ed), *Aportes para una justicia más transparente* (La Plata, Platense 2009).
- , 'La representatividad adecuada en los procesos colectivos' and 'Legitimación en las acciones de clase' in E Oteiza (ed), *Procesos Colectivos* (Rubinzal Culzoni 2006).
- , *La tutela colectiva de derechos individuales homogéneos* (Platense 2007).
- Gidel G, *Le droit international public de la mer* (Vaduz, Topos Verlag, reprinted 1981).
- Gil Domínguez A, 'El caso "Mendoza": hacia la construcción pretoriana de una teoría de los derechos colectivos' in *LL Suplemento Constitucional* (August 2006).
- Gonçalves Tessler L, *Tutelas jurisdicionais do meio ambiente* (San Pablo, Revista dos Tribunais 2004).

Gould JL and Gould CF, *The Animal Mind* (Scientific American Library, WH Freeman & Co 1994).

Guinchard S, 'Les moralistes au prétoire' in J Foyer (ed), *Auteur et législateur leges tulit jura docuit écrits en hommage à Jean Foyer* (Paris, Presses Universitaires de France 1997).

-----, *Droit et pratique de la procédure civile* (Dalloz action 2009-2010).

Guinchard S, Chainais C and Ferrand F, *Procédure civile* (33rd edn, Dalloz 2016).

Habermas J, *Droit et démocratie: entre faits et normes* (Paris, Gallimard 1997).

Hautereau-Boutonnet M and Truilhé È, 'Quel modèle pour le procès environnemental?' (2017) 15 Recueil Dalloz 827.

-----, *Le procès environnemental, Du procès sur l'environnement au procès pour l'environnement* (Dalloz 2021).

Hautereau-Boutonnet M, 'Responsabilité civile environnementale' in *Répertoire de droit civil* (Dalloz 2023).

Honig B, *Political theory and the Displacement of Politics* (Cornell UP 1993).

Huglo C, 'Climate change litigation: efficiency' in Auby J-B and others (ed) *French Yearbook of Public Law* (issue 1, 2023).

-----, *Avocat pour l'environnement: mes grandes batailles judiciaires* (Paris, Lexisnexis 2013).

-----, Cournil C and Varison L, *Les procès climatiques. Entre le national et l'international* (Éditions A Pedone 2018).

-----, *Le contentieux climatique: une révolution judiciaire mondiale* (Brussels, Bruylant 2018).

Hugo V, *La Renaissance littéraire* (1872).

Januel P, 'Loi Climat: les députés veulent ouvrir les référés environnementaux' (2021) Dalloz actualité.

Jarrige F and Le Roux T, *La Contamination du monde: Une histoire des pollutions à l'âge industriel* (Le Seuil Paris 2017).

Jasanoff S, 'Making order: law and science in action', in EJ Hackett and others (ed), *The handbook of sciences and technology studies* (Cambridge, MIT Press 2008).

Jonas H, 'Nous sommes devenus un plus grand danger pour la nature que celle-ci ne l'était autrefois pour nous' in H Jonas (ed), *Une éthique pour la nature* (Desclée de Brouwer 2000).

Kahl W and Voßkuhle A, *Grundkurs Umweltrecht: Einführung für Naturwissenschaftler und Ökonomen* (2nd edn, Heidelberg, Spektrum 1998).

Kahl W and Weller MC, *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021).

Larrere C, 'La communauté biotique: l'héritage d'Aldo Léopold' in C Larrère (ed), *Les philosophies de l'environnement* (Presses Universitaires de France 1997).

Latour B, *Face à Gaïa* (Paris, La découverte 2015).

Le Bars T, 'Les associations, sujets de droit de l'environnement' in Association H Capitant (ed), *Le droit de l'environnement: Journées nationales* (t XI: Caen, Dalloz, Thèmes et commentaires 2010).

Le Bot O, 'Le contentieux administratif au service de l'environnement?' in M Hautereau-Boutonnet and E Truilhé (ed), *Le procès environnemental* (Dalloz, Thèmes et commentaires 2021).

-----, 'Un procès administratif adapté à la protection de l'environnement?' in M Hautereau-Boutonnet and E Truilhé (ed), *Le process environnemental - Du procès sur l'environnement au procès pour l'environnement. Rapport pour la mission Droit et Justice* (HAL Id:hal-03194063, 2019) 41 ff <<https://hal.archives-ouvertes.fr/hal-03194063>> accessed 20 June 2023.

Leclerc O, *Le juge et l'expert, Contribution à l'étude des rapports entre le droit et la science* (LGDJ, t 443, 2003).

Leitão LM, *A responsabilidade civil por danos causados ao ambiente. Actas do Colóquio: A responsabilidade civil por dano ambiental* (2009) (Lisbon Law Faculty, Institute for Legal and Political Sciences 2009).

Leite JRM and Ayala PA, *Dano ambiental: do individual ao coletivo extrapatrimonial. Teoria e prática* (São Paulo, 4th edn, Revista dos Tribunais 2011).

Lepage C and Huglo C, *Nos batailles pour l'environnement* (Paris 2021);

Lhuillier G, *Le droit transnational* (Dalloz 2016).

Lorenzetti R and Lorenzetti P, *Global Environmental Law* (Environmental Law Institute 2020).

Lugo A, voce 'Azione popolare' in *Enc dir* (IV, Milano 1959).

Machado P A L, *Direito ambiental brasileiro* (21st ed, São Paulo, Malheiros 2012).

Marcus RL, Sherman EF and Erichson HM, *Complex Litigation: Cases and Material on Advanced Civil Procedure* (6th edn, West Academic Publishing 2015).

Martin G, 'De la responsabilité civile pour faits de pollution au droit à l'environnement' (University of Nice 1976).

Martin-Chenut K and Perruso C, 'La contribution des systèmes régionaux de protection des droits de l'homme à la pénalisation des atteintes à l'environnement'

in L Neyret (ed), *Des écocrimes à l'écocide. Le droit pénal au secours de l'environnement* (Brussels, Bruylant 2015).

Martin-Ortega O and Methven O'Brien C (ed), *Public Procurement and Human Rights* (Edward Elgar 2019).

Melleray F, *Essai sur la structure du contentieux administratif français. Pour un renouvellement de la classification des principales voies de droit ouvertes devant les juridictions à compétence générale* (LGDJ 2001).

Merland G, *L'intérêt général dans la jurisprudence du Conseil constitutionnel* (Preface Rousseau D, LGDJ 2003).

Micklitz H, 'The Interest in Public Interest Litigation' in H Micklitz and N Reich (ed), *Public Interest Litigation Before European Courts* (vol 2, Nomos 1996).

Milaré E, *Direito do ambiente* (São Paulo, 9th ed, Revista dos Tribunais 2014) 1482.

Miranda J and Amado Gomes C, *Diálogo Ambiental, Constitucional e Internacional. Volume 3. Tomo I* (Lumen Juris 2015).

-----, *Diálogo Ambiental, Constitucional e Internacional. Volume 8* (digital, special edn, Instituto de Ciências Jurídico-Políticas 2019).

Monteiro Steigleder A, *Responsabilidade Civil Ambiental: As dimensões do dano ambiental no direito brasileiro* (Porto Alegre, 3rd edn, Livraria do Advogado Editora 2017).

Morand-Deville J and Bénichou JC, *Mondialisation et globalisation des concepts juridiques, l'exemple du droit de l'environnement* (t 22, IRJS 2010).

Morato Leite J and de Araújo Ayala P, *Dano ambiental: Do individual ao coletivo extrapatrimonial: Teoria e prática* (São Paulo, 3rd edn, Editora Revista dos Tribunais 2010).

Morello AM and Cafferatta N, *Visión procesal de cuestiones ambientales* (Rubinzal - Culzoni 2004).

-----, 'Los procesos colectivos (el Anteproyecto para Iberoamérica de los colegas brasileños)' in A Gidi and others (ed), *La tutela de los derechos difusos, colectivos e individuales homogéneos. Hacia un código modelo para Iberoamérica* (México, Porrúa 2003).

Morizot B, *Les Diplomates: Cohabiter avec les loups sur une nouvelle carte du vivant* (Marseille, Wildproject 2016).

Muir Watt H, 'Discovery' and 'Disclosure' in *Dictionnaire de la justice* (Presses universitaires de France 1994).

Naim-Gesbert E, *Droit général de l'environnement* (LexisNexis 2011).

Neyret L and Martin G, *Nomenclature des préjudices environnementaux* (Lextenso 2012; Paris, LGDJ 2012).

Neyret L, *Des écocrimes à l'écocide* (Bruylant/Larcier 2015).

-----, 'Le préjudice collectif né du dommage environnemental' in L Neyret and GJ Martin (ed), *Nomenclature des préjudices environnementaux* (LGDJ 2011).

-----, Preface in H Gali (ed), *Le préjudice moral: Étude de droit de la responsabilité civile* (Dalloz 2021).

Nicolino F, *Le crime est presque parfait: L'enquête choc sur les pesticides et les SDHI* (Paris, Les liens qui libèrent 2019).

Omarjee I and Sinopoli L, *Les actions en justice au-delà de l'intérêt personnel* (Dalloz, Actes 2014).

Ost F, 'Droits de la nature et droits de l'homme' in S Novella (ed), *Des droits pour la nature* (Utopia 2016).

Pancrazio JP, *Droit de la mer* (Paris, 1st edn, Dalloz 2010).

Parance B and de Saint-Victor J, *Repenser les biens communs* (Paris, Editions du CNRS 2014).

Parance B, 'Les métamorphoses de la RSE' in *Mélanges en l'honneur de Jacques Mestre* (LGDJ Lextenso 2019).

-----, 'Plaidoyer pour une réparation cohérente des dommages causés à l'environnement' in *Mél en l'honneur de G Martin: Pour un droit économique de l'environnement* (DC 2013).

-----, 'Préjudice écologique' in M Cornu, F Orsi and J Rochfeld (ed), *Dictionnaire des biens communs* (Presses Universitaires de France 2017).

-----, *La défense de l'intérêt général par les associations: Intérêt général versus intérêts collectifs* (LGDJ, coll Les grands colloques 2015).

Patti S, *La tutela civile dell'ambiente* (Padova, Cedam 1979).

Perrier J B, 'Le choix du juge civil ou du juge pénal en France?' in M Hautereau-Boutonnet and E Truilhé (ed), *Procès et environnement: quelles actions en justice pour l'environnement?* (Aix-en-Provence, Droits International, Comparé et européen 2020).

Prieur M and others, *Droit de l'environnement* (Paris, 7th edn, Précis Dalloz 2016).

Redgwell C, 'Access to Environmental Justice' in F Francioni (ed), *Access to Justice as a Human Right* (OUP 2007).

Rehbinder E, 'Climate damages and the "Polluter Pays" Principle' in W Kahl and MC Weller (ed), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos, 2021).

Richardson B and Razzaque J, 'Public Participation in Environmental Decision-Making' in B Richardson and S Wood (ed), *Environmental Law for Sustainability* (Hart Publishing 2006).

Roberts P, 'Witness Testimony and the Principle of Orality' in Roberts P and Zuckerman A (ed) *Roberts & Zuckerman's Criminal Evidence* (3rd edn, Oxford UP 2022).

Rochfeld J, 'Communauté positive', 'communauté négative' and 'communauté diffuse' in M Cornu, F Orsi and J Rochfeld (ed), *Dictionnaire des biens communs* (Presses Universitaires de France 2017).

-----, *Justice pour le climat!: les nouvelles formes de mobilisation citoyennes* (Paris, Odile Jacob 2019).

Rodiles A, 'The Law and Politics of the Pro Persona Principle in Latin America' in HP Aust and G Nolte (ed), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford UP 2016).

Roman D, *La cause des droits, Écologie, progrès social et droits humains* (Dalloz 2021).

Romi R, *Droit et administration de l'environnement* (Paris, 9th edn, Montchrestien 2016).

Rousseau D, Gahdoun PY and Bonnet J, *Droit du contentieux constitutionnel* (12th edn, LGDJ 2020).

Ryall Á, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Oxford, Hart Publishing 2009).

Sachs I, *Estratégias de transição para o século XXI: desenvolvimento e meio ambiente*, Prologue: MF Strong; M Lopes (tr) (São Paulo, Studio Nobel, Fundação do desenvolvimento administrativo (FUNDAP) 1993).

Sarlet IW, Wolfgang I and Vianna R, 'The protection of Fundamental Rights and the STF as "positive legislator"' (2013) 13(2) (Master in Law, Fundamental Human Rights, Edifio: Osasco).

Schmitt P, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar 2017).

Schoettl JE, 'Intérêt général et Constitution' in *Conseil d'État, Rapport public 1999. Jurisprudence et avis de 1998. L'intérêt général* (La Documentation française 1999).

Servigne P, Stevens R and Chapelle G, *Une autre fin du monde est possible* (Seuil 2018).

Shelton D, *Remedies in International Human Rights Law* (3rd edn, Oxford UP 2015).

Simon D, 'Droit au juge et contentieux de la légalité en droit communautaire: la clé du prétoire n'est pas un passe-partout' in G Wiederkehr (ed), *Libertés, justice, tolérance, Mélanges en hommage au doyen G Cohen-Jonathan* (Bruylant 2004).

Sotis C, 'Juger les crimes environnementaux internationaux: approche juridictionnelle et institutionnelle' in L Neyret (ed), *Des écocrimes à l'écocide. Le droit pénal au secours de l'environnement* (Brussels, Bruylant 2015).

Spano M, *Azioni collettive. Soggettivazione, governamentalità, neoliberalismo* (Naples, Editoriale Scientifica 2013).

Stone C, 'Should Trees Have Standing? - Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450.

Strauss A, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in WCG Burns and HM Osofsky (ed), *Adjudicating Climate Change: State, National, and International Approaches* (New-York, Cambridge University Press 2009).

Tassin J, *Penser comme un arbre* (Odile Jacob 2018).

Thieffry P, *Traité de droit européen de l'environnement* (3rd edn, Bruylant 2015).

Thomas Y, 'La valeur des choses: Le droit romain hors la religion' in *Annales: Histoire, Sciences Sociales* (57th year, No 6, 2002).

Thunberg G, *Rejoignez-nous #grevepourleclimat* (Paris, Calmann Levy 2019; Kero 2019).

Torre-Schaub M, 'La justice climatique, À propos du jugement de la Cour de district de La Haye du 24 juin 2015' (2016) 3 Revue internationale de droit comparé 699.

-----, *Les dynamiques du contentieux climatique: Usages et mobilisations du droit* (Paris, coll de l'Institut des sciences juridique et philosophique de la Sorbonne 2021).

Truchet D, 'L'intérêt général dans la jurisprudence du Conseil d'État: retour aux sources et équilibre' in *Conseil d'État, Rapport public (Public Report) 1999 Jurisprudence et avis de 1998: L'intérêt général* (La Documentation française 1999).

Truilhé È, *Droit de l'environnement de l'Union européenne* (Brussels, Larcier 2015).

UNICEF, *Droit de cité: La participation citoyenne des enfants et des jeunes* (Paris, Ivry-sur-Seine, Les Éditions de l'Atelier 2011).

Van Calster G and Reins L, *EU Environmental Law* (Edward Elgar 2017).

Van Lang A, *Droit de l'environnement* (4th edn, Presses universitaires de France 2016).

van Wolferen M and Elia Antonio M, 'Access to Justice in Environmental Matters: The EU's Difficult Road Towards Non-Compliance with the Aarhus Convention' in M

- Peeters and M Eliantonio (ed), *Research Handbook on EU Environmental Law* (Research Handbooks in European Law series, Edward Elgar 2020).
- van Zeven J and Rowell A, *A Guide to EU Environmental Law* (University of California Press 2020).
- Vanhala L, 'The comparative politics of courts and climate change' (2013) 22(3) *Environmental Politics* 447.
- Varela A, *Das obrigações em geral* (vol 1, Coimbra, 7th edn, Livraria Almedina 1991).
- Vargas F, *l'humanité en péril: virens de bord, toute!* (Paris, Flammarion 2019).
- Vedel G, *L'idéologie de l'intérêt général* (Rangeon, Economica 1986).
- Verbic F and Sucunza MA, 'Acceso a la justicia y beneficio de gratuidad en materia de acciones de consumo y medio ambiente' in NM Morello, LG Sosa and RO Berizonce (ed), *Códigos Procesales en lo Civil y Comercial de la Provincia de Buenos Aires y la Nación. Comentados y Anotados* (4th edn, Abeledo Perrot 2016).
- Verbic F, 'Ejecución de sentencias en litigios de reforma reestructural em la República Argentina dificultades políticas y procedimentales que inciden sobre la eficacia de estas decisiones' in SC Arenhart and MF Jobim (ed), *Processos Estruturais* (Salvador, Juspodivm 2021).
- Vergès E, Vial G and Leclerc O, *Droit de la preuve* (Presses universitaires de France, Thémis 2015).
- Vieira J, 'Eco-citoyenneté et démocratie environnementale' (thesis, Université de Bordeaux 2017).
- Viney G, Jourdain P and Carval S (ed), *Les régimes spéciaux et l'assurance de responsabilité* (4th edn, LGDJ 2017).
- Vitorelli E, *Processo Civil Estrutural: Teoria e Prática* (Salvador, Juspodivm 2020).
- Voefray F, *L'institution originelle: l'actio popularis dans la Rome antique, L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Geneva, Graduate Institute Publications 2004).
- Voigt C, 'The potential role of the International Court of Justice' in DA Farber and M Peeters (ed), *Elgar Encyclopedia of Environmental Law: Climate Change Law* (vol 1, Cheltenham, Elgar 2016).
- W Kahl and MC Weller, *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos, 2021).
- Wigmore JH, *Wigmore on Evidence (Evidence in Trials at Common Law)* (vol 5, JH Chadbourn rev edn, Little, Brown & Co 1974).
- Xue H, *Transboundary Damage in International Law* (Cambridge UP 2009).

Yamamoto K, 'Le mode alternatif de résolution des conflits environnementaux au Japon: un exemple de contractualisation des litiges environnementaux' in M Hautereau-Boutonnet (ed), *Le contrat et l'environnement, Étude de droit comparé* (Bruylant 2015).

Zürcher E, *Les arbres, entre visible et invisible* (Actes Sud 2016).

Articles

Abadie P, 'Le devoir de vigilance des sociétés mères: responsabilisation actuelle, responsabilités à venir' (2016) Hors-série, Actes du Colloque de Deauville, *Gaz Pal: Les devoirs des actionnaires* 55.

Agossou E, 'La preuve et l'expertise dans les procès relatifs au climat: le cas canadien' (2022) 47(3) *Revue Juridique de l'Environnement* 515.

Aguila Y, 'Petite typologie des actions climatiques contre l'Etat' (2019) *AJDA* 1853.

Albors-Llorens A, 'Locus Standi of Private Parties in Environmental Cases' (1999) 58 *The Cambridge Law Journal* 1.

Alexy R, 'Collision of Fundamental Rights and the Realization of Direitos Fundamentais no Estado de Direito Democrático' (1999) 17 *Revista da Faculdade de Direito da UFRGS, Rio Grande do Sul* 27.

Álvarez-Armas E, 'Le contentieux international privé en matière de changement climatique à l'épreuve de l'Art 17 du règlement Rome II: enjeux et perspectives' (2020) 3 *Revue de Droit International d'Assas* 109.

Anant TCA and Singh J, 'An Economic Analysis of Judicial Activism' (2002) *Econ & Pol Wkly* 4433.

Antoni V and others, 'Risques climatiques: six Français sur dix sont d'ores et déjà concernés' (Datalab 2020).

Aragão A and Celeste Carvalho A, 'Taking access to justice seriously: diffuse interests and actio popularis. Why not?' (2017) 2 *ELNI Review* 42.

Arnulf A, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 *European Law Review* 51.

Asenjo R, 'L'action en réparation du préjudice écologique et l'expérience du Tribunal environnemental de Santiago' (2016) *Energie – Environnement – Infrastructures*, Dossier 17.

Azar-Baud MJ, 'Comparative Reasoning in Court Rulings in the Aftermath of Dieselgate' (2024) 8 *Emory Int'l L Rev* 837.

----- , 'En attendant un registre d'actions de groupe et autres actions collectives. Revue de presse' (2018) 50 JCP E 1637.

----- , 'L'action de groupe, une valeur ajoutée pour l'environnement?' (2015) 22 Hors-série VertigO.

----- , 'Los derechos de incidencia colectiva en el Proyecto de Unificación de los Códigos civil y comercial de la Nación Argentina' (2021) 1(2) Revista de Derecho Privado del Ministerio de Justicia y Derechos Humanos de la Nación 241.

Baab F and Filhol V, 'Criminalité environnementale et nouvelle directive UE: vers une nouvelle politique pénale européenne?' (2023) Dalloz.

Bacache M, 'L'action de groupe en matière environnementale' (2017) Energie - Environnement - Infrastructures - Revue Mensuelle Lexisnexis Jurisclasseur.

----- , 'Quelle réparation pour le préjudice écologique?' (2013) Environnement et développement durable, Étude 10.

Baldon C, "'L'Affaire du siècle": une action juridique inédite pour contraindre l'État à lutter efficacement contre le changement climatique' (2019) 5 Energie - Environnement - Infrastructures, File 20.

Baratta R, 'National Courts as Guardians and Ordinary Courts of EU Law: Opinion 1/09 of the ECJ' (2011) 38 Legal Issues of Economic Integration 297.

Barav A, 'Some Aspects of the Preliminary Rulings Procedure in EEC Law' (1977) 2 European Law Review 3.

Barry M and Tigre MA, 'Litigation Updates' Sabin Centre for Climate Change Law (13 September 2023).

BCLP Paris, 'French Law on Corporate Duty of Care: the Impact of The First Two Decisions on the Subject' (2023) 2 Paris Litigation Gazette.

Beaussonie G, 'Sauver l'environnement par le droit pénal?' (2022) 4 Revue de Science Criminelle et de Droit Pénal Comparé 873.

Beauvais P, 'De nouvelles avancées vers une justice pénale environnementale autonome' (2021) 12 Energie - Environnement - Infrastructures 25, Étude 22.

Bobe P, 'Du bilan social au bilan écologique' (1994) 37 Droit et ville 59.

Bogojević S, 'Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary' (2017) 29 Journal of Environmental Law 263.

Bourg D, 'A quoi sert le droit de l'environnement? Plaidoyer pour les droits de la nature' (2019) 3 Les Cahiers de la justice 407.

Boyd DR, 'Elements of an Effective Environmental Bill of Rights' (2015) 27(3) Journal of Environmental Law and Practice 201.

Bréchet FX, 'Compétence nantaise en matière d'éolien en mer: autant en emporte le vent?' (2022) *L'Actualité juridique: Droit Administratif* 32.

Briegleb A and De Spiegeleir A, 'From Urgenda to Klimaatzaak: A New Chapter in Climate Litigation' (2023) *Verfassungsblog* <<https://verfassungsblog.de/from-urgenda-to-klimaatzaak/>> accessed 4 September 2024.

Brillat M, 'L'urgence climatique devant la Cour européenne des droits de l'homme: enjeux et perspectives à partir des audiences du 29 mars 2023' (2023) *Dalloz actualité*.

Brimsted K, 'All I want for Christmas is not to be sued (by you and you and you...!)' (2020) 21(2) *Privacy & Data Protection* 6.

Brun P, 'Causalité juridique et causalité scientifique' (2007) suppl No 2628, 40 *RLDC* 15.

Bugada A, 'L'influence du droit de l'environnement sur le droit du travail' (2005) 1232 *Semaine sociale Lamy*.

C Corsini, 'La condition d'urgence du référé-suspension en matière d'ICPE' (2023) 20 *Gazette de Droit de L'Environnement* 4.

C Lepage and C Huglo, 'Commentaire iconoclaste (?) de "l'Accord de Paris"' (2016) 1 *Revue Juridique de l'Environnement* 10.

Cafferatta AN, 'Sentencia colectiva ambiental en el caso "Riachuelo"' Judgment Note, JA (20 August 2008).

Calderón Gamboa J, 'Medio ambiente frente a la Corte Interamericana de Derechos Humanos: una ventana de protección' (2017) *Derechos humanos y medio ambiente* 103.

Camproux Duffrène MP and Guihal D, 'De l'audace, encore de l'audace, toujours de l'audace et l'environnement sera sauvé' (2013) 3 *Revue Juridique de l'Environnement* 457.

Camproux Duffrène MP and Sohnle J, 'La représentation de la nature devant le juge: approches comparative et prospective' (2015) 22 *Hors-série Vertigo*.

Camproux Duffrène MP, 'Le préjudice écologique et sa réparabilité en droit civil français de la responsabilité ou les premiers pas dans un sentier menant à un changement des rapports homme-nature' (2021) 46(3) *Revue Juridique de l'Environnement* 457.

-----, 'Les communs naturels comme expression de la solidarité écologique' (2020) 45(4) *Revue Juridique de l'Environnement* 689.

Cans C, 'Grande et petite histoire des principes généraux du droit de l'environnement dans la loi' du 2 févr. 1995' (1995) 2 *Revue Juridique de l'Environnement* 195.

Casado A, 'Le droit social à vocation environnementale' (2019) 44 Recueil Dalloz 2425.

Castelo Branco Araujo F and others, 'La preuve et la biodiversité marine au Brésil: l'interaction entre le droit et la connaissance scientifique dans le litige relatif au coral-sol' (2022) 47 Revue Juridique de l'Environnement 541.

Christodoulou H, 'Spécialisation de la justice ou montée en puissance des procureurs?' (2021) Dalloz actualité 7.

Cioffi JL, 'La justice civile environnementale, après les lois des 24 décembre 2020 et du 22 août 2021, vers une nouvelle avancée?' (2022) 3 Energie - Environnement - Infrastructures, Étude 6.

Clamour G, 'Acclimatation à la commande publique responsable' (2021) Contrats et marchés publics.

Cornu-Thenard E, 'Éléments sur l'apport de la doctrine américaine du public trust à la représentation de l'environnement devant le juge' (2015) 22 Hors-série VertigO.

Corsini C, 'La condition d'urgence du référé-suspension en matière d'ICPE' (2023) 20 Gazette de Droit de L'Environnement 4.

Costa de Oliveira C, 'Le cas brésilien: la procédure civile comme instrument par excellence de la responsabilité environnementale' (2016) Energie - Environnement – Infrastructures, Dossier 16; Revue Mensuelle Lexisnexis Jurisclasseur.

Cotton R, 'Canadian Environmental Law. An Overview' (1992) 18 Canada-United States Law Journal 63.

Cournil C and Perruso C, 'Réflexions sur "l'humanisation" des changements climatiques et la "climatisation" des droits de l'homme. Émergence et pertinence' (2018) La Revue des droits de l'homme; 14 Revue du Centre de recherches et d'études sur les droits fondamentaux.

Cournil C, 'Enjeux et limites de la Charte de l'environnement face à l'urgence climatique' (2020) 122(2) RFDC 345

-----, 'Les prémisses de révolutions juridiques? Récents contentieux climatiques européens' (2021) RFDA 957

-----, '"L'affaire du siècle" devant le juge administratif' (2019) AJDA 437.

d'Argoubet Raybaud A, 'Commande publique et droit de vivre dans un environnement sain' (2021) 40 L'Actualité juridique. Droit administratif 2332.

David V, 'La nouvelle vague des droits de la nature, La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna' (2017) 42(3) Revue Juridique de l'Environnement 409.

de Laforcade A, 'L'évolution du droit d'agir des associations de consommateurs: vers un détachement du droit pénal de leur action en justice' (2012) RTD com 711.

de Quenaudon R, 'Responsabilité sociale des entreprises (2017) Dalloz Répertoire de droit du travail.

Deguergue M, 'Les imperfections de la responsabilité administrative environnementale' (2018) AJDA 2077.

Deleuil T, 'La protection de la terre nourricière, un progrès pour la protection de l'environnement?' (2017) 2 Revue Juridique de l'Environnement 255.

Delzangles H, 'Le premier "recours climatique" en France: une affaire à suivre!' (2017) AJDA 217.

Denolle AS, 'Pesticides: dangerosité avérée, réglementation controversée! Quelle marge de manoeuvre pour les maires?' (2020) AJCT 109.

Despax M, 'Environnement et droit du travail' (1994) JurisClasseur Environnement, Fascicle 982.

-----, 'Propos introductifs' (1994) Droit du travail et droit de l'environnement: Droit et ville 12.

Deswarte MP, 'L'intérêt général dans la jurisprudence du Conseil constitutionnel' (1993) 13 RFD const 23.

Duarte L, 'Aspectos determinantes dos processos estruturais: uma análise sobre as características do caso Mendoza' (2021)

<https://classactionsargentina.com/2021/06/30/aspectos-determinantes-dos-processos-estruturais-uma-analise-sobre-as-caracteristicas-do-caso-mendoza-doct/> accessed 16 September 2024.

Dufourq P, 'Loi "Climat et résilience": aspect de droit pénal' (2021) Dalloz actualité; Law No 2021-1104.

Duranthon A, 'Les litiges entre personnes publiques en matière de police administrative' (2017) 8-9 Dossier: Les litiges entre personnes publiques, Dr adm, Art 12.

Dyukova Y, 'Le droit international des droits de l'Homme face à l'urgence environnementale' (2020) 3(3) Revue de droit international d'Assas 38.

Etemire U, 'Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective' (2023) 12(1) Transnational Environmental Law 175.

F Taylan, 'Droits des 160eoples autochtones et communs environnementaux: le cas du fleuve Whanganui en Nouvelle-Zélande' (2018) 92 Responsabilité & Environnement, Annales des Mines 21.

Faure B, 'Les litiges contentieux entre l'État et les collectivités territoriales' (2017) 8-9 Dossier: Les litiges entre personnes publiques, Dr adm, Art 4.

Faure MG and Raja AV, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2001) 21(2) Fordham Environmental Law Review 23.

Feeley MM and Swearingen V, 'Los casos sobre condiciones carcelarias y la burocratización de los correccionales americanos: impacto, influencias e implicancias' 24 Pace L Rev 433.

Felsenheld R, 'La responsabilité du fait de la police des médicaments - L'affaire de la Depakine' (2020) RFDA 1131.

-----, 'Pollution de l'air: l'Etat fautif, mais pas condamné' (2019) AJDA 1885.

Fonbaustier L, 'Climat, biodiversité...environnement: comprendre les actions contre l'Etat' (2019) JCP G, Doct 615.

Fort FX and Ribot C, "'Commune de Grande-Synthe": tsunami juridique ou décision de circonstance?' (2021) 36 La Semaine juridique - administrations et collectivités territoriales 31.

Fort FX, 'L'affaire du siècle: réponse timorée du TA de Paris' (2022) 2 La Semaine juridique - administrations et collectivités territoriales.

Freitas J, 'O intérprete e o poder de dar vida à Constituição: preceitos de exegese constitucional' (2000) 35(2) Revista do Tribunal de Contas do Estado de Minas Gerais - R TCMG, Belo Horizonte 15.

Friedrich Spieth W and others, 'Germany' (2023) ICLG Environment and Climate Change Laws and Regulations, Role and powers of environmental regulators – evidence <<https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/germany>> accessed 16 May 2023.

Frydman S, 'The Matanza-Riachuelo Basin Case: Lessons in Environmental Activism from the Argentine Supreme Court and Civil Society Organizations' (2022) 28(1) Southwestern Journal of International Law 47.

Gaillard E, 'L'historique déclinaison transgénérationnelle des devoirs fondamentaux envers les générations futures par le tribunal fédéral constitutionnel allemand' (2021) Energie - Environnement - Infrastructures, Comm 61.

Gaillet A and Grimm D, 'La décision Climat de Karlsruhe. Penser les droits fondamentaux sur le long terme: une réponse contentieuse à l'urgence climatique?' (2022) 3 Actualité juridique. Droit administratif 166.

Galdós JM, 'Derecho 161 ambiental y daño moral colectivo: algunas aproximaciones' (1998) 1998-IV982 Jurisprudencia Argentina.

- García-Álvarez L, 'Las acciones colectivas en los litigios internacionales por daños ambientales' (2015) 30 *Revista Electrónica de Estudios Internacionales* 1.
- Garrido Alves DB, 'The Concept of International Organization in the practice of the International Court of Justice' (2023) *EJIL: Talk!*
- Gay L and Fatin-Rouge Stefanini M, 'L'utilisation de la Constitution dans les contentieux climatiques en Europe et en Amérique du Sud' (2018) 12 *Energie - Environnement - Infrastructures* 27, Comm 43.
- Gay L and Vidal-Naquet A, 'Constitution et environnement. France' (2019) 35 *AJIC* 2019 311.
- Gerrard MB and MacDougald JA, 'An Introduction to Climate Change Liability and a View to the Future' (2013) 20 *Connecticut Insurance Law Journal* 153; <<http://columbiaclimatelaw.com>> accessed 10 November 2022.
- Giannini LJ, 'Análisis crítico del Anteproyecto de Ley de Procesos Colectivos del Ministerio de Justicia de la Nación' (2018) 1 *La Ley* (AR/DOC/1425/2018).
- , Salgado JM and Verbic F, 'Anteproyecto de ley de procesos colectivos' (2017) 1 *Revista de Derecho Procesal*.
- Giannini LJ, Salgado JM and Verbic F, 'Anteproyecto de ley de procesos colectivos' (2017) 1 *Revista de Derecho Procesal*.
- Giannini V, 'Los derechos de incidencia colectiva en el proyecto de Código Civil y Comercial (aportes para su redefinición)' in *Doctrina Judicial* (Buenos Aires, La Ley 2012).
- Gormley L, 'Public Interest Litigation in Community Law' (2001) 7 *Environmental Policy and Law* 51.
- Gouveia Pereira M, 'Environmental law and practice in Portugal. Overview' (Thomson Reuters Practical Law: Country Q&A 2021).
- Granet P, 'L'effectivité des droits passe par des procédures adaptées: Entretien Avec: Jean-Claude Magendie, premier Président de la cour d'appel de Paris' (2008) 22 *La semaine juridique – édition générale*.
- Greene D, 'Litigating for the future' (2022) *New Law Journal* 6.
- Haeri K, Munoz-Pons V and Touanssa M, 'spécialisation de la justice pénale environnementale: retour sur la loi du 24 décembre 2020' (2021) *Dalloz actualité*.
- Halley P, 'Le contentieux canadien des espèces en péril' (2022) 47(3) *Revue Juridique de l'Environnement* 529.
- Hamman E, 'Save The Reef! Civic Crowdfunding and Public Interest Environmental Litigation' (2015) 15(1) *QUT Law Review* 159.

Hamoudi L, 'Mettre en place le télétravail pour protéger l'environnement' (2019) 11 Bulletin Joly Travail 56.

Hannotin G, 'L'affaire de la pollution de l'air devant le Conseil d'Etat. Une liquidation d'astreinte toute en retenue' (2021) JCP G Act 925, Libres propos.

Harkavy R, 'Mmm Danone! Dairy giant taken to task over plastic pollution' (2023) Commercial Dispute Resolution <<https://www.cdr-news.com/categories/litigation/18472-mmm-danone-dairy-giant-taken-to-task-over-plastic-pollution>> accessed 16 May 2023.

Hautereau-Boutonnet M, 'L'Erika une vraie-fausse reconnaissance du préjudice écologique' (2013) 23 Envir, Étude 2.

-----, 'Les enjeux d'une loi sur le préjudice écologique, les enseignements des droits étrangers' (2014) (special edn) Envir.

-----, 'Faut-il accorder la personnalité juridique à la nature?' (2017) Recueil Dalloz 1040.

Héas F, 'La protection de l'environnement en droit du travail' (2009) Revue de Droit du Travail 565.

Hermitte MA, 'La nature, sujet de droit?' (2011) 1 Annales. Histoire, Sciences Sociales 173.

Hess B, 'Strategic Litigation: A New Phenomenon in Dispute Resolution?' (2022) 3 MPILux Research Paper Series 20.

Horta O, 'What is speciesism?' (2009) 23(3) Journal of Agricultural and Environmental Ethics 243.

Hoyneck S, Council of State, 6th and 5th joint Chambers, 10 February 2022, No 455465, 'Le défi d'intégrer les projets soumis à autorisation individuelle à la trajectoire de réduction des gaz à effet de serre', Premiers éléments de réponse; AJDA 753.

Huglo C and Bégel T, 'Le recours de la commune de Grande-Synthe et de son maire contre l'insuffisance des actions mises en oeuvre par l'État pour lutter contre le changement climatique' (2019) Energie - Environnement - Infrastructures, File 19.

Huglo C and Ivala Plaine C, 'Panorama du contentieux climatique 2020-2021' (2021) 88 Journal spécial des Sociétés, special issue of 15 December 2021.

Huglo C, 'La Constitution, la loi, le juge et le nouveau droit de l'environnement' (2021) Energie - Environnement – Infrastructures, point 4.

Ignacio Bachmann Fuentes R, 'Derechos de la naturaleza y personalidad jurídica de los ecosistemas: nuevo paradigma de protección medioambiental. un enfoque comparado' (2021) 16 Revista Internacional De Pensamiento Político - i ÉPoca 357.

Ilcheva A, 'La compétence du juge judiciaire dans les contentieux relatifs au devoir de vigilance' (2022) 47 *Revue Juridique de l'Environnement* 139.

-----, 'L'épineuse question de la compétence juridictionnelle en matière de plan de vigilance' (2021) *Energie - Environnement - Infrastructures* 2021, File 28.

Jacquemet-Gauché A, 'Le juge administratif face aux connaissances scientifiques' (2022) *AJDA* 443; *CMH* (UPR 4232).

Jasanoff S, 'Le droit et la science en action' (2013) *Dalloz*, 2013; (tr O Leclerc), *Le juge et l'expert* (LGDJ 2005) 386.

Jégouzo Y, 'Le juge administratif et l'ordonnancement du droit de l'environnement' (2004) *Special issue Revue Juridique de l'Environnement* 21.

Jendroska J, Reese M and Squintani L, 'Environmental Law in Transformation – Key Developments Under the European Green Deal' (2023) *Environment and Climate Change Laws and Regulations*.

Kahn J and Boucher AC, 'Canada' (2023) *Environment and Climate Change Laws and Regulations* <<https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/canada>> accessed 25 April 2023.

Karageorgou V, 'Access to Justice in Environmental Matters: The Current Situation in the Light of the Recent Developments at the International and Regional Level and the Implications at the National Level with Emphasis on the UNECE Region and the EU MS' (2018) 27(6) *European Energy and Environmental Law Review* 251.

Katz D, 'Le contentieux de l'indemnisation des victimes d'essais nucléaires' (2015) 14BX01469 *AJDA* 645.

Kiss A, 'Environnement, droit international, droits fondamentaux' (2004) 15 *Cahiers du Conseil constitutionnel*.

-----, 'Les origines du droit à l'environnement: le droit international' (2003) *special issue, Revue Juridique de l'Environnement* 13.

Kortvelyesi Z, 'Transcending the individual/collective minority rights divide: a procedural solution' (2022) 71(1) *International & Comparative Law Quarterly* 73.

Kotzé LJ, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2021) 22 *German Law Journal* 1423.

Krämer L, 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 *Journal of Environmental Law* 1.

Kutting G, 'Review Essay: Environmental Justice' (2004) 1 *Global Environmental Politics* 115.

Lagoutte J, 'Joyeux Noël? Regard sur le chapitre V de la loi du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée' (2021) 2 Droit pénal, Étude 5.

Lasserre B, 'L'environnement: les citoyens, le droit, les juges – Regards croisés Cour de cassation et Conseil d'Etat Propos introductifs' (21 May 2021) Doc fr.

Le Bouter–Ropars T, 'Proposition de loi constitutionnelle visant à créer un défenseur de l'environnement' (2023) 20 Gazette de Droit de L'Environnement 9.

Lecourt A, 'Compétence exclusive du tribunal judiciaire de Paris pour connaître du devoir de vigilance des grandes sociétés: une issue critiquable?' (2022) 1 Revue trimestrielle de droit commercial et de droit économique 65.

Léger M, 'Preuve et expertise dans les procès environnementaux - Le cas de l'énergie nucléaire en France' (2022) 47(3) Revue Juridique de l'Environnement 443.

Leleu T, 'Victimes des essais nucléaires: dernier épisode autour de la présomption de causalité?' (2021) 10 AJDA 578.

Lenaerts K, 'Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union' (2009) CDE 711.

Lenoir N, 'La décision n° 2021-825 DC du 13 août 2021 sur la loi portant lutte contre le dérèglement climatique et renforcement de la résilience à l'aune du droit constitutionnel européen' (2021) 1036 JCP.

Lepage C, 'Déclaration universelle des droits de l'humanité: Rapport à l'attention de Mr. le Président de la République' (2015) Doc fr.

-----, 'Le renouvellement des acteurs et de l'activisme judiciaire' Conf intervention, Minister's address (12 February 2021) 37 Études Dossier 64; Lexisnexis SA (2022) 1 La Semaine Juridique - Édition Générale.

Lhuillier G and Parance B, 'Justice environnementale: le défi de l'effectivité' (2022) JCP G, Doct 36.

Lhuillier G, 'Les règles de la justice environnementale' (2022) 1 La Semaine juridique: Édition Générale, Étude 38.

Lienhard A, 'Loi PACTE: consécration de l'intérêt social et des enjeux sociaux et environnementaux' (2019) Dalloz actualité.

Lima Moraes G and Giuriatto Ferraço A, 'La preuve en matière de responsabilité civile environnementale dans le système judiciaire brésilien: cas des pollutions de l'air et de l'eau' (2022) 47 Revue Juridique de l'Environnement 559.

Linditch F, 'Les mesures destinées à améliorer la prise en compte du développement durable dans la commande publique' (2021) JCP Adm, No 2275.

Llicheva AM, 'Condamnation de Shell aux Pays-Bas: la responsabilité climatique des entreprises pétrolières se dessine' (2021) *Dalloz* 968.

Lucas M, 'L'usage par les juges français des connaissances scientifiques sur la dangerosité des pesticides' (2016) 27 *Hors-série VertigO - la revue électronique en sciences de l'environnement* (online).

Marcantoni P, 'Les principes généraux du code de l'environnement' (2020) 11 *Revue de Droit Immobilier* 572.

Marjanac S and Patton L, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Casual Chain?' (2018) 36(3) *Journal of Energy & Natural Resources Law* 265.

Martinet Y and Savin P, 'France' (2023) *ICLG Environment and Climate Change Laws and Regulations* <<https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/france>> accessed 16 May 2023.

Martínez Capdevila C, 'The Action for Annulment, the Preliminary Reference on Validity and the Plea of Illegality: Complementary or Alternative Means?' (2006) 25 *Yearbook of European Law* 451.

Martinez-Alier J and others, 'Between activism and science: grassroots concepts for sustainability coined by Environmental Justice Organizations' (2014) 21 *Journal of Political Ecology* 19.

Martins da Cruz B, 'Responsabilidade civil pelo dano ecológico – alguns problemas' (1996) (special edn) *Lusíada Revista de ciência e cultura, Série de Direito* 209.

Mc Fadden J, 'Sommet de la jeunesse 2015: à la recherche de solutions pour le climat', <<http://blogs.worldbank.org/voices/fr/sommet-de-la-jeunesse-2015-la-recherche-de-solutions-pour-le-climat>> accessed 21 November 2022.

McMenamin R, 'Advisory Opinion on Obligations of States in Respect of Climate Change: Potential Contribution of Human Rights Bodies' (2023) 13(3-4) *Climate Law* 213.

Mekki SA, 'Responsabilité civile et environnement, vers un droit spécial de la responsabilité environnementale?' (2017) 5 *RCA* 4.

Métais P and Valette E, 'Stratégie contentieuse et devoir de vigilance' (2020) *Dalloz Avocats* 235.

Minnerop P and Otto F, 'Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic' (2020) 27(1) *Buffalo Environmental Law Journal* 49.

Minnerop P, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34(1) *Journal of Environmental Law* 135.

Moliner-Dubost M, 'Quand les collectivités se rebellent contre l'État: l'exemple de la politique environnementale' (2022) 2 AJ Collectivités Territoriales 84.

Monnier L, 'Quel rôle pour la justice administrative dans la lutte contre les projets "climaticides"? Le cas de "Guyane Maritime"' (2019) *Energie - Environnement – Infrastructures*, File 18.

Monteiro E, 'Les orientations de la politique criminelle actuelle en matière d'atteintes à l'environnement' (2014) 1 *Revue de Science Criminelle et de Droit Pénal Comparé* 49.

Moore S, 'Product liability: more David, less Goliath?' (2022) 172 *New Law Journal* 11.

Moraga P, 'La réparation du dommage environnemental en droit chilien' (2016) 8-9 *Energie - Environnement - Infrastructures* 15.

Morello AM and Stiglitz GA, 'Daño moral colectivo' LL 1984-C-1197.

-----, 'Un caso de daño moral colectivo: su reconocimiento jurisprudencial.

-----, 'Aperturas y contenciones de la Corte Suprema de Justicia de la Nación' (2016) 1918-2016 *Jurisprudencia Argentina* 304.

Mouton S, 'Les enjeux constitutionnels du climat: réflexions sur un nouvel objet politique' (2018) 12 *Energie - Environnement – Infrastructures*, Comm 41.

Okubo N, 'Greenaccess Project; Principle 10 and Developments in Asia' (UNECE 2014).

Otsuka T, 'Evidence and Expertise in Compensation Litigation regarding the Fukushima Nuclear Power Plant Accident - Focusing on the Precautionary Principle and the Proportionality Principle' (2022) 47(3) *Revue Juridique de l'Environnement* 465.

Parance B and Groulx E, 'La déclaration de performance extra-financière. Nouvelle ambition du reporting extra-financier' (2018) *JCP E* 1128.

Parance B and Rochfeld J, 'Tsunami juridique au Conseil d'Etat. Une première décision climatique historique' (2020) *JCP G Act* 1334.

-----, 'Aperçu rapide: Grande Synthe 2, Case 427301 (Council of State), Decision 1 July 2021' (2021) *JCP G* 2021, Act 795.

Parance B, 'La consécration législative du devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' (2017) 15 *Gaz Pal* 16.

-----, 'Les enjeux de santé Environnementale' (2017) *Energie - Environnement – Infrastructures*, Dossier 27.

-----, 'Les métamorphoses du rôle des acteurs de la justice environnementale' (2022) *JCP G*, Étude 37.

----- , 'Loi Climat et Résilience, beaucoup de bruit pour presque rien!' (2021) JCP G, Doctrine 1069, No 9.

Perrier JB, 'Le regard français sur la transaction environnementale' (2016) 8-9 Énergie - Environnement - Infrastructures, Dossier 20.

Perruso C, 'Protection des droits des générations futures par le Conseil constitutionnel: les apports de la QPC du 27 octobre 2023' (2023) Dalloz.

Petel M and Vander Putten N, 'The Belgian Climate Case: Navigating the Tensions Between Climate Justice and Separation of Powers' (2023) Verfassungsblog, <https://verfassungsblog.de/the-belgian-climate-case/> accessed 4 September 2024.

Pinto Júnior AR, 'A função social dissuasória da indenização por dano moral coletivo e sua incompatibilidade com a responsabilidade civil objetiva' (2012) 56(86) Revista do Tribunal Regional do Trabalho da 3ª Região (3rd Region), Belo Horizonte 37.

Poissonnier G, 'Tribunal Monsanto: vers une définition de l'écocide?' (2016) 42 Dalloz 2512.

Prieur M, 'Projet de Pacte international du CIDCE' (2017) 2 Revue Juridique de l'Environnement 380.

Radiguet R, 'Affaire[s] du siècle? Ne vendons pas la peau du caribou' (2021) Revue Juridique de l'Environnement 407.

Rajamani L, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) Journal of Environmental Law 293.

Ramseyer M, 'The Puzzling (In)dependence of Courts: A Comparative Approach' (1994) 23 J Legal Stud 721.

Recotillet M, 'CJIP environnementale à l'encontre d'une société du groupe Lactalis' (2023) Dalloz actualité.

Rémy D, 'La responsabilité de l'Etat en matière de "marées vertes"' (2008) AJDA 470.

Ribier L, 'Cour de Cassation: Cycle 2022 - Les grandes Notions de la responsabilité civile à l'aune Des Mutations Environnementales. Conférence 5: Comment rendre effective la réparation en nature du préjudice écologique et selon quelle nomenclature (réparation et affectation des indemnisations)?' (2022) 18 Gazette de Droit de L'Environnement 1.

Ribot C, 'Les potentialités de l'action collective en matière de contentieux environnemental' (2022) Revue Juridique de l'Environnement 703.

Rochfeld J, 'L'environnement: les citoyens, le droit, les juge – Regards croisés du Conseil d'Etat et de la Cour de cassation' intervention' (21 May 2021) Doc fr. Published and viewable on the website of the Court of cassation <<https://www.courdecassation.fr/toutes-les->

actualites/2021/05/21/lenvironnement-les-citoyens-le-droit-les-juges-regards-croises-du> accessed 10 July 2023.

Rombauts-Chabrol T, 'Justice climatique et excès de pouvoir: quel accès au juge pour l'Humanité?' (2021) 2207 JCP Adm.

Roque J, 'La prémajorité' (2009) 4 Revue trimestrielle de droit familial.

Rotoullié JC, 'Le contentieux de la légalité' (2019) RFDA 644.

-----, 'Les contentieux spéciaux, un laboratoire du procès administratif?' (2020) Le contentieux environnemental, AJDA.

Rousseau D, 'La démocratie continue: fondements constitutionnels et institutions d'une action continuelle des citoyens' (2020) 2 Confluence des droits_La revue.

Ryall Á, 'Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention', Jean Monnet (Working Paper 2016) available at <https://jeanmonnetprogram.org/paper/access-to-justice-in-environmental-matters-in-the-member-states-of-the-eu-the-impact-of-the-aarhus-convention/> accessed 14 November 2022.

Salas D, 'La cause environnementale: Droit, philosophie, arts' (2019) 3 Les cahiers de la justice 403.

Saldivia M, 'Access to justice: Costs of environmental litigation should not be prohibitively expensive (C-252/22)' (2024) EU Law Live, available at: <https://eulawlive.com/op-ed-access-to-justice-costs-of-environmental-litigation-should-not-be-prohibitively-expensive-c-252-22-by-miguel-saldivia/> accessed 7 March 2024.

Sathe SP, 'Judicial Activism: The Indian Experience' (2001) 6 Wash UJL & Pol'y 29.

Savonitto F, 'Le Conseil constitutionnel et le contentieux climatique, Un acteur au milieu du gué' (2022) 3 L'Actualité juridique: Droit administratif 152.

-----, 'Le contentieux constitutionnel des politiques climatiques à l'aube de son envol' (2021) 2210 JCP Adm.

Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Mich L Rev 471.

Schiller S, 'Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre' (2017) JCP G, Doctrine 622.

Schirmer JE, 'Klimahaftung und Kausalität - und es geht doch!' (2021) 22 JuristenZeitung (JZ) 1099.

Setzer J and Byrnes R, 'Global Trends in Climate Change Litigation: 2019 Snapshot' Grantham Research Institute on Climate Change and the Environment, 2019, Policy report.

Stec S, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31(3) *Journal of Environmental Law* 533.

Sucunza MA and Verbic F, 'La CSJN y el art. 32 de la ley general del ambiente: una práctica arbitraria que se consolida' (2018) 118 *Revista de Derecho Administrativo*.

Tabau AS and Cournil C, 'Nouvelles perspectives pour la justice climatique (Cour du district de La Haye, 24 juin 2015, Fondation Urgenda c/ Pays-Bas)' (2015) 4 *Revue Juridique de l'Environnement* 672.

Tavares Gil S, 'Litigating Elsewhere: Learning from Mariana Dam environmental disaster in Brazil' (2023) *International Law Blog*
<<https://internationallaw.blog/2023/07/03/litigating-elsewhere-learning-from-mariana-dam-environmental-disaster-in-brazil/>> accessed 8 October 2024.

Taylan F, 'La stratégie d'inséparabilité des collectifs humains et des milieux naturels: la loi Te Awa Tupua en Nouvelle-Zélande' (2019) *L'alternative en commun* 165.

-----, 'The commons environment: toward an ecological democracy' (2022) 6 *Esprit* 83.

Thibierge C, 'Libres propos sur l'évolution du droit de la responsabilité civile (vers un élargissement de la fonction de la responsabilité civile)' (1999) *RTD civ* 561.

Thibord J and Daoud E, 'Devoir de vigilance européen: la commission des affaires européennes de l'Assemblée nationale demande une législation ambitieuse et effective' (2022) *Dalloz actualité*.

Thieffry P, 'La Cour enjoint la cessation d'atteintes à un site Natura 2000 sous peine d'astreinte' (2018) *RTD eur Chronique Droit européen de l'environnement*.

Torre-Schaub M and Lormeteau B, 'Les recours climatiques en France: Influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du contentieux français' (2019) 5 *Énergie - Environnement – Infrastructures* 13.

Torre-Schaub M, 'Bilan et perspectives pour la justice climatique' (2021) 10 *Energie - Environnement – Infrastructures* —, 'La justice climatique. A propos du jugement de Cour de district de La Haye du 24 juin 2015' (2016) 68(3) *RIDC*.

-----, 'Le juge peut-il sauver le climat? Les dynamiques du contentieux pour répondre à l'urgence climatique' (2020) *Recueil Dalloz* 760.

Trébulle FG, 'La consécration de l'accueil du préjudice écologique dans le Code civil' (2016) 11 *Energie - Environnement – Infrastructures*, Étude 20.

-----, 'La responsabilité des entreprises de diminuer leurs émissions de gaz à effet de serre: réflexions à propos d'une décision du tribunal de district de La Haye' (2021) *Energie - Environnement - Infrastructures*, Comm 86.

----- , 'Responsabilité sociale des entreprises: entreprise et éthique environnementale (2018) Rép sociétés.

Truilhé È, 'Les procès fictifs en matière environnementale: faux-procès, vrais effets?' (LexisNexis 2019) 4 Énergie - Environnement - Infrastructures.

----- , 'L'OMC et les risques sanitaires: réflexions autour du rapport de l'organe d'appel dans l'affaire Hormones II' (2010) Revue Juridique de l'Environnement 241.

----- , 'La relation juge expert dans les contentieux sanitaires et environnementaux' (2010) Doc fr.

Valdès de Ferari S, 'The role of a non-lawyer in an environmental Court' (2016) Énergie – Environnement - Infrastructures, Dossier 18.

Van Lang A, 'L'hypothèse d'une action en responsabilité contre l'Etat' (2019) RFDA.652; J Bétaille, Le préjudice écologique à l'épreuve de l'Affaire du siècle. Un succès théorique mais des difficultés pratiques, AJDA 2021. 2228).

----- , 'Le droit de la transition écologique en devenir' (2022) L'Actualité juridique: Droit administratif 133.

----- , 'Le juge administratif, l'Etat et les algues vertes' (2010) AJDA 900.

Verbic F, 'Derechos de incidencia colectiva y tutela colectiva de derechos en el Proyecto de Código Civil y Comercial para la República Argentina' (2014) Erreius online.

----- , 'El caso "Mendoza" y la implementación de la sentencia colectiva' (2008) Lexis No 0003/014097, JA 2008-IV-336.

----- , 'El remedio estructural de la causa "Mendoza". Antecedentes, principales características y algunas cuestiones planteadas durante los primeros três años de su implementación' (2013) 10 Anales de la Facultad de Ciencias Jurídicas y Sociales, No 43.

----- , 'Procesos colectivos para la tutela del medio ambiente y de los consumidores y usuarios en la república Argentina' (2013) (special edn) 4 Civil Procedure Review.

Verpeaux M, 'La lutte contre le dérèglement climatique devant le juge constitutionnel. Les espoirs déçus' (2021) AJDA 2526.

Vieira J, 'L'émergence de l'activisme climatique et l'accès au juge' (2019) 4 RFDA 636.

Viney G and Danis-Fâtome A, 'La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' (2017) Dalloz 1610.

Vitorelli E, 'Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças' (2018) 284 Revista de Processo 333-369.

Wão A, 'Les intérêts diffus, instruments pour la justice et la démocratie environnementale' (2015) 22 VertigO.

Other

'Environmental justice: substantive decisions in science' (under the direction of G Lhuillier).

Barritt E, 'Global Values, Transnational Expression: From Aarhus to Escazú' (2019) 11 Transnational Environmental Law Institute Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371093> accessed 4 April 2023.

Brimo S, 'Changer d'air?' Note on Case 19PA02868 (Regional Administrative Court of Appeal, Paris), Decision 11 March 2021 [AJDA 2021, 1104].

Carnwarth Rt Hon Lord, 'Climate Justice and the Global Pact' Judicial Colloquium on Climate Change and the Law in Lahore, Pakistan (2018).

C Alvim, *Justiça: acesso e descenso* (2013) 1.

Cinotti B and others, 'Une justice pour l'environnement. Mission d'évaluation des relations entre justice et environnement' Report of the mission to assess the relationship between justice and the environment, CGEDD No 012671-01 and IGJ No 019-19 (2019).

Club des 172urists, 'Renforcer l'effectivité du droit international de l'environnement' (Report 2015).

Comte-Sponville A, 'Justice et vérité, in *XVIIe congrès national des experts judiciaires, Expert du juge, expert de partie, vérité scientifique et vérité judiciaire* (2008).

Costa de Oliveira C by Hautereau-Boutonnet M, 'Le droit brésilien: un modèle pour la réparation du préjudice écologique?' (2014) Environnement et développement durable, Interview 5.

Darpö J, access to justice studies (2012/2013) available online: <http://ec.europa.eu/environment/aarhus/access_studies.htm> accessed 14 November 2022.

Delmas-Marty M, 'À crime global, justice globale' (Le Monde, 30 January 2002).

Ebbeson J and others, The Aarhus Convention, An Implementation Guide (2nd edn, UNECE 2014) available online: <https://www.unece.org/env/pp/implementation_guide.html> accessed 14 November 2022.

EU Commission, 'The costs of not implementing the environmental acquis' ENV.G.1/FRA/2006/0073 (Report 2011) available online:

<http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_sept2011.pdf> accessed 14 November 2022.

European Law Institute (with input from the EU Agency for Fundamental Rights), 'Business and Human Rights: Access to Justice and Effective Remedies' (Report 2022).

Gonzalez Meriner S and Tigre MA, 'Understanding Unsuccessful Climate Litigation: The Spanish Greenpeace Case' 11/09/2023 Climate Law (Sabin Centre).

Hautereau-Boutonnet M and Truilhe È, 'Le procès environnemental - Du procès sur l'environnement au procès pour l'environnement: Rapport pour la mission Droit et Justice' (Research report 2019), hal-03194063.

Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), Report (6 May 2019): <www.ipbes.net/news/Media-Release-Global-Assessment-Fr> accessed 26 June 2023.

International Commission of Jurists, 'Acesso à Justiça: violações de Direitos Humanos por Empresas Brasil Um projeto da Comissão internacional de Juristas' (Geneva 2011) <<https://www.conectas.org/publicacao/violacoes-por-empresas/>> accessed 9 June 2023.

IPCC, 'Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty' (8 October 2018) <www.ipcc.ch/sr15> accessed 26 June 2023.

Jegouzo Y, 'Pour la réparation du préjudice écologique' Report (Ministère de la justice 2013).

Lazarenko M, 'Access to Justice in Times of Armed Conflict and the Potential of Collective Redress Mechanisms' Jean Monnet Module Series of Webinars on Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe (27 April 2023).

Lenoir N, 'Devoir de vigilance: des choix politiques et juridiques contrastés entre France et Allemagne' in l'Opinion (16 June 2021).

Lhuillier G, JCP G (2022) Doct 38 (Court of Cassation, cycle of conferences 2020/2021 under the direction of B Parance and G Lhuillier).

McClellan P, 'Medicine and Law Conference keynote address: Concurrent Expert Evidence' (2007) 19 <www.lawlink.nsw.gov.au> accessed 30 June 2023.

National Assembly, 'Mission flash sur le référé spécial environnemental: communication de Mmes Naïma Moutchou et Cécile Untermaier' (Communication) 10 March 2021.

Nellemann C and others, 'The Rise of Environmental Crime: a Growing Threat to Natural Resources Peace, Development and Security' (UNEP 2016).

Oskam AJ, EEA Glossary: Prevention Principle, European Environment Agency (2017), <<https://www.eea.europa.eu/help/glossary/eea-glossary/prevention-principle#:~:text=This%20principle%20allows%20action%20to,reachin%20as%20the%20precautionary%20principle.>> accessed 10 November 2022.

Pörtner HO and others, 'Climate Change 2022: Impacts, Adaptation, and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC) (2022).

Pring R and Pring CK, 'Greening Justice: creating and improving environmental courts and tribunals' (The Access Initiative 2009).

Setzer J and Higham C, 'Global trends in climate change litigation: 2022 snapshot', Grantham Research Institute on Climate Change and the Environment, 2022, Policy report.

The Lancet, 'Lancet countdown on health and climate change' (October 2017 and October 2021): <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01787-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01787-6/fulltext)> accessed 26 June 2023.

UN Environment Programme, 'Global Climate Litigation Report: 2020 Status Review' (January 2021): <<https://www.unep.org/fr/resources/rapport/rapport-mondial-sur-les-litiges-relatifs-au-climat-bilan-de-la-situation-en-2020>>; <<https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>> accessed 26 June 2023.