ALERT MEMORANDUM

Climate Claims against Governments in Europe

July 16, 2021

In recent years, several initiatives throughout Europe have challenged governmental policies on climate change. Beginning with the landmark cases of *Urgenda* in the Netherlands[1] and *Friends of the Environment* in Ireland,[2] plaintiffs and strategic litigators have gained momentum in compelling governments to implement more ambitious climate legislation to ensure compliance with the Paris Agreement.

Most recently, Germany's Constitutional Court found a national climate law to be partially unconstitutional, a Belgian court held national authorities liable for negligent climate policy, and France's highest administrative court ordered the government to take additional measures to reduce greenhouse gas ("GHG") emissions by 40% by 2030.

Plaintiffs have generally relied on tort law and/or fundamental rights to underpin judicial challenges against governmental climate policies for being insufficient to limit the global average temperature increase to well below 2°C, as stipulated in the Paris Agreement.[3] Courts have shown themselves increasingly willing to allow class-action climate lawsuits and hold governments liable for failing to achieve emission reduction targets.

While this memorandum focuses on the developments in Europe, climate-related claims have become a global phenomenon.[4] They are part of a bigger movement regarding access to justice and strategic litigation to promote environmental, social and governance matters. Conversely, some claims have challenged State and EU-level climate action for being too strict.[5]

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[1] *Urgenda v The State of the Netherlands*, ECLI:NL:2019:2007 (December 20, 2019), available here.
[2] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] IESC 49 (July 21, 2020) available here.
[3] Article 2, Paris Agreement, United Nations 2015.
[4] *See* for an overview: Grantham Institute (LSE), 'Climate Change Laws of the World - Database' and Sabin Center (Columbia), 'Climate Case Chart – Database'.
[5] *See, e.g.*, *RWE v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4 and for a broader overview Mehreen Khan, 'EU urged to quit energy treaty as companies sue over climate action' in *FT.com* (February 7, 2021), available here.

I. Overview of Climate-related Claims

1. Netherlands

In 2015, the District Court of The Hague handed down the first ever judgment ordering a government to set more ambitious climate targets.[6] This landmark first-instance decision was upheld on appeal in 2018 and confirmed by the Supreme Court in 2019.

In a class action lawsuit, environmental group Urgenda Foundation, alongside c. 900 co-claimants, sought a court order requiring the State to reduce GHG emissions. They argued that the Dutch government was under a legal obligation to take action to reduce Dutch GHG emissions by 40% (or at least 25%) by 2020, or alternatively by 40% by 2030 (compared to 1990 levels). Failure to take such action, the claimants argued, would violate their human rights under the European Convention on Human Rights ("ECHR"),[7] as well as the government's respective duties of care under the Dutch Constitution[8] and the Dutch Civil Code.[9] The claimants based these emission reduction targets on the Fourth Assessment Report (2007) of the Intergovernmental Panel on Climate Change ("IPCC"),[10] which considered a reduction of 25-40% by 2020 necessary to avoid dangerous and irreversible global warming.

Under Dutch law, class actions can be initiated to protect public interests representing an unnamed group of individuals. Urgenda was allowed standing to represent the interests of the current generation of Dutch residents.

Ruling in favor of the claimants, the District Court of The Hague ordered the Dutch government in 2015 to lower its GHG emissions by at least 25% below 1990 levels by the end of 2020. Relying primarily on IPCC reports, the court considered that the government's existing pledge was expected to yield an emission reduction of 14-17% by 2020 and was therefore insufficient to avert dangerous climate change (*i.e.*, to meet the Netherlands' fair contribution toward the UN goal of keeping the global average temperature increase below 2°C). The court held that the government, in failing to take measures to protect its citizens against a legally relevant threat of irreversible damage, breached its duty of care under Article 6:162 of the Dutch Civil Code. The ruling was thus anchored in tort law, as the court dismissed Urgenda's claims under the Dutch Constitution (because the government has discretion in implementing its constitutional duty of care) and the ECHR (because Urgenda was not a "victim" as required by Article 34 ECHR[11]). Although the court suggested ways to meet the reduction mandate (*e.g.*, emissions trading and tax measures), it stopped short of imposing any particular policy.

In 2018, the Hague Court of Appeal upheld the District Court's decision on the grounds that the government violated Article 2 (right to life) and Article 8 ECHR (right to private life and family life).[12] The court found that Articles 2 and 8 placed a positive obligation on the government to protect its citizens against environmental situations that would adversely affect those rights.[13] Considering that a 25-40% emission

[6] The Hague District Court, *Urgenda Foundation v State of the Netherlands*, NL:RBDHA:2015:7145 (June 24, 2015), available here.

[7] Specifically, the claimants based their human rights claim on Article 2 (which guarantees the right to life) and Article 8 ECHR (which guarantees the right to respect for private life and family life).

[8] Under Article 21 of the Dutch Constitution, the government has a duty of care to ensure the country's habitability and the protection and improvement of the environment.

[9] Article 6:162 of the Dutch Civil Code.

[10] The IPCC is a scientific body established by the United Nations Environmental Program ("UNEP") and the World Meteorological Organization in 1988 with the aim of acquiring insights into all aspects of climate change, such as the risks, consequences and options for adapting to the consequences of climate change and preventing or limiting further climate change.

[11] Article 34 ECHR guarantees the right for any person, nongovernmental organization or group of individuals to submit an application as victims of a violation of the rights set forth in the ECHR perpetrated by any State party.

[12] The Hague Court of Appeal, *State of the Netherlands v Urgenda Foundation*, NL:GHDHA:2018:2610 (October 9, 2018), available here.

[13] Overruling the District Court, the Court of Appeal clarified that Urgenda could directly invoke ECHR provisions because the "victim" requirement of Article 34 ECHR restricted admissibility only to the European Court of Human Rights and had no bearing on Urgenda's access to Dutch courts.

reduction was required to avert the real and imminent threat of dangerous climate change, the court confirmed that the government must reduce emissions by at least 25% by 2020 to fulfill its duty of care. The court declined to answer whether tort law could also serve as a legal basis. The court further rejected the government's argument that a judicial reduction mandate would conflict with the separation of powers, because the judiciary is required to apply treaty provisions with direct effect (including Articles 2 and 8 ECHR) and because the non-specific nature of the order left the government sufficient discretion to determine how to comply with it.

The order to reduce emissions by at least 25% by 2020 was definitively upheld by the Dutch Supreme Court in 2019.[14] The Supreme Court agreed with the Court of Appeal that the government had a "positive obligation" under Articles 2 and 8 ECHR "to take appropriate measures to prevent dangerous climate change," requiring "as an absolute minimum" compliance with emissions targets. Although the Supreme Court recognized climate change as a consequence of collective human activities that cannot be solved by one State alone, it held that the Netherlands is individually responsible for failing to do its part to protect residents from the real threat of climate change, which jeopardizes the current generation's full enjoyment of Articles 2 and 8 ECHR. Finally, the Supreme Court affirmed that the ruling did not amount to an "order to enact legislation" in conflict with the separation of powers, because courts have an obligation to judge whether the government abides by the law when making political decisions, including treaty provisions with direct effect.

Widely considered to be a pioneer example of climate change litigation, the *Urgenda* ruling reverberated in a growing number of similar judgments around the world. A selection of climate cases that followed in the footsteps of *Urgenda* is presented below.

2. Belgium

Most recently, climate change claimants prevailed in Belgium, resulting in a finding of liability against the Belgian federal and regional governments for their negligent climate policy.

In 2015, the Belgian NGO Climate Case ("Klimaatzaak") lodged a claim, alongside c. 8,000 individual co-claimants and c. 58,000 other Belgian citizens who intervened in the proceedings (together, the "Claimants"), against the Belgian federal government and the country's three regions, *i.e.*, Flanders, Wallonia and Brussels-Capital. Inspired by the *Urgenda* case, the Claimants argued that the governments' failure to meet emission reduction targets violated their duty of care under the Belgian Civil Code,[15] as well as the Claimants' human rights under the ECHR[16] and the United Nations Convention on the Rights of the Child ("UNCRC").[17] In addition, they petitioned the court to order the governments to take all necessary measures to reduce GHG emissions originating from Belgian territory so as to reach the following reduction targets (compared to 1990 levels):

i. by 48%, or at least 42%, by 2025;

ii. by 65%, or at least 55%, by 2030; and

iii. to net zero by 2050;

under a periodic penalty of €1 million for each month of delay in reaching the 2025 and 2030 targets.[18]

On June 17, 2021, the Brussels Court of First Instance ruled that the governments breached Article 1382 of the Belgian Civil Code (setting out the general legal basis of tort liability) and Articles 2 and 8 of the ECHR by failing to take all necessary measures to

[14] Dutch Supreme Court, *State of the Netherlands v Urgenda Foundation*, NL:HR:2019:2007 (December 20, 2019), available here.

[15] Articles 1382 and 1383 of the Belgian Civil Code.

[16] Article 2 (right to life) and Article 8 ECHR (right to private and family life).

[17] Article 6 (child's right to life) and Article 24 UNCRC (child's right to heath).

[18] To support the targets referenced in their claim, Klimaatzaak cited numerous scientific reports, including the IPCC Assessment and Special Reports, available here.

prevent the impacts of climate change on the Belgian population.[19]

The court allowed standing to Klimaatzaak and all c. 58,000 co-claimants, thereby recognizing that each of the intervening citizens has a personal and direct interest affected by the real threat of dangerous climate change, which poses a serious risk to current and future generations living in Belgium.

On the merits, the court determined that the Belgian governments have neglected their duty to exercise due caution and diligence in pursuing their climate policy, based on three findings:

i. reduction of GHG emissions originating from Belgian territory has consistently fallen short of national, international and European commitments;

ii. Belgium's climate governance (a shared competence within the country's federal structure) has been failing for several years due to deficient cooperation between the federal and regional governments; and

iii. Belgium has since 2011 received yearly warnings from the EU on these two points.

Based on these observations, and underscoring that the authorities are aware of the certain risk of dangerous climate change for the country's population, the court found that the governments each breached their duty of care under Belgian tort law.

The court further held that the governments failed to take all necessary measures to prevent the effects of climate change on the Claimants' life and private life as required under Articles 2 and 8 ECHR.[20] In doing so, it affirmed the principle established in *Urgenda*, *i.e.*, that the global dimension of climate change does not absolve the governments of their duty to protect the Claimants' enjoyment of their fundamental rights.

Contrary to the Dutch courts in *Urgenda*, however, the Brussels court declined to issue an injunction ordering measures to ensure that specific emission reduction targets are reached. First, the court determined that the targets petitioned by the claimants were not legally binding on Belgium. Second, the court held that such a judicial order would contravene separation of powers by substituting the legislative or administrative authority in the exercise of their discretionary powers. Accordingly, the governments were held liable for their negligent climate policy, but no reduction mandate (and no periodic penalty) was imposed.

Although the ruling has been lauded as "historic," the non-imposition of a reduction mandate nonetheless led Klimaatzaak to announce it will appeal both at the national level and before the European Court of Human Rights ("ECtHR"). A direct appeal before the ECtHR would require bypassing the condition of exhaustion of national remedies, on grounds that a domestic appeal is not an adequate and effective remedy (given the urgency of climate change mitigation and significant delays in the Belgian judicial system).

3. Germany

In Germany, four petitions were submitted to the Constitutional Court claiming that the State failed to take appropriate legal actions to limit the increase in Earth's temperature to 1.5°C, or at least to well below 2°C, arguing that an increase above these thresholds would endanger lives and create a tipping point with unforeseeable consequences for the planet and its climate. They relied on several constitutional freedoms, such as the right to life, to property and a more general right to a future in accordance with human dignity and a fundamental right to an ecological minimum standard of living. While the court found two complaints of environmental associations to be inadmissible, it ruled on complaints

[19] Brussels Court of First Instance, *VZW Klimaatzaak v Kingdom of Belgium & Others*, no. 2015/4585/A (June 17, 2021), available here.

[20] The claimants could not directly invoke Articles 6 (child's right to life) and 24 UNCRC (child's right to heath) before a domestic court because those provisions do not confer any positive obligation on States as to how they are implemented.

of several young individuals, including some living in Bangladesh and Nepal.[21]

Under the premises that the German government granted climate protection through ratifying the Paris Agreement, the court decided on May 24, 2021 that the right to life and to physical integrity[22] and the right to property[23] were not violated due to the risks posed by climate change as such, because the legislator has considerable leeway in its strategy to reduce these risks. The court could not determine that the German strategy in general exceeded the decision-making scope of the legislator. The court concluded, however, that impairments and damages caused by climate change generally fall under these provisions, which can also give rise to an objective duty to protect future generations.

Nonetheless, the court found a violation of fundamental rights because the emissions allowed until 2030 under §3(1) and §4(1) of the Climate Protection Act[24] substantially narrow options to act on climate change post-2030. According to the court, this practically jeopardizes every fundamental freedom under the Constitution which would be restricted by inevitable climate measures post-2030, and creates a so-called "advance interference-like effect" because mandatory emission reductions under Article 20a[25] would be unilaterally offloaded onto future generations. Indeed, addressing climate change will at some point require a restriction of constitutional freedoms, and such restriction cannot be disproportionately imposed on post-2030 generations.

In balancing different fundamental rights, climate change does not take absolute precedence, but due to its increasing weight and irreversibility, contradicting measures have to meet strict requirements. These are not met by the argument that climate change can only be addressed on a global basis, since Article 20a encompasses required action by the legislator on supranational and national levels. This is supported by the fact that §1 of the Climate Protection Act expressively refers to the mandate of the Paris Agreement. On the other side, no expressive breach of Article 20a was found by the court, because of the uncertainties in the calculation of the exact emissions budget remaining.

Lastly, the court found that §3(1) and §4(1) of the Climate Protection Act do not satisfy the principle of proportionality in the distribution of efforts for climate neutrality under Article 20a. The current regulations would irreversibly postpone emission reduction burdens until post-2030, violating fundamental rights of the young plaintiffs "to a humane future." The impacts on future freedoms must be proportionate from today's perspective. The government needs to determine more concrete reduction targets for each individual year between 2022 and 2050, through updating its plan more than once, as initially planned in 2025.

Overall, the unanimous decision determines that the German Constitution obliges State actors to protect the climate and aim at climate neutrality. This obligation of Article 20a is not unconditional regarding other constitutional rights, but the importance of climate protection in this trade-off is increasing continuously as climate change progresses. The court stressed the international dimension of climate change and the necessity for international action, stating, however, that this does not allow the national level to escape from its responsibilities.

Reacting to the decision, the German government announced plans to achieve net-zero emissions by 2045 and agreed on a new roadmap for emission

[21] German Constitutional Court, Press Release No. 31/2021 of April 29, 2021 – Order of March 24, 2021, *1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20*, available (in English) here.

[22] Article 2 (2) German Constitution.

[23] Article 14 (1) German Constitution.

[24] German Climate Protection Act ("Bundesklimaschutzgesetz – KSG"), available here (German version).

[25] Article 20a German Constitution: "Protection of the natural foundations of life and animals: Mindful also of its responsibility towards future generations, the State shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

reductions, aiming at a 65% cut in carbon emissions by 2030 and 88% by 2040, compared to 1990 levels.[26]

4. United Kingdom

On April 20, 2021, the UK government set what it described as "*the world's most ambitious climate change target [in] law*," committing to reduce carbon emissions by 78% by 2035.[27] Climate change also featured prominently in the Brexit negotiations, to the extent that the Trade and Cooperation Agreement records the "*fight against climate change*" in the first paragraph of the preamble.[28]

Yet, the grounds upon which climate change cases can be brought in the UK remain relatively narrow in scope. The majority of cases are commenced by way of judicial review of a government policy or decision, which are, by their nature, procedural challenges. In recent years, these cases have predominantly raised complaints regarding improper consideration of the government's obligations under the Climate Change Act 2008 ("CCA"), the Paris Agreement, and/or equivalent commitments by the UK government regarding its net-zero targets.

The claims fall into two broad categories, although both types are typically premised on similar grounds: (i) planning permission and licencing claims that target fossil fuel and infrastructure projects; and (ii) claims intended to increase climate change mitigation measures.

On May 1, 2021, Plan B Earth ("Plan B"), a British charity established to support legal action against climate change, launched perhaps the most ambitious climate change claim against the UK government to date. Whilst previous cases have challenged specific government decisions or policies, Plan B is disputing the government's holistic approach to climate change, and criticizing the purported failure to act expeditiously to produce an adequate framework to combat climate change. Notably, the claim fails to identify any specific act, decision, or omission which forms the subject of the challenge.

It remains to be seen if this claim has any merit, particularly as the UK courts tend to adopt a conservative, non-interventionist approach to judicial review cases. Certainly, the government's response has been robust; in a letter from the Government Legal Department published by Plan B, the government dismissed the claim as representing a "*pure merits challenge*," which is not a permissible ground for judicial review.[29]

In *Heathrow Airport*,[30] the Court of Appeal stressed the limits of the courts' role in judicial review proceedings, stating that "*political debate*" and the "*substance of the policy*" are "*none of the court's business*".[31] Accordingly, the Court refused to be drawn into a debate on the merits and emphasized the fact that, in spite of its decision to set aside the relevant policy as unlawful, the government was free to reconsider the policy and reach the same conclusion, provided it did so in accordance with the proper statutory procedure.

Heathrow Airport was a highly contested case, arising from the government's Airports National Policy Statement ("ANPS"), which supported Heathrow Airport's proposals to construct a third runway.

[26] David Rising/Frank Jordans, 'Germany aims for net zero emissions by 2045, 5 years earlier' in *apnews.com* (May 5, 2021); 'German Cabinet approves landmark climate bill' in *dw.com* (May 12, 2021); 'Germany sets tougher CO2 emission reduction targets after top court ruling' in *reuters.com* (May 5, 2021).

[27] UK government press release (April 20, 2021), https://www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035.

[28] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (December 30, 2020, available here). The agreement includes multiple commitments on climate change, including the UK's commitment to implementation of the obligations in the United Nations Framework Convention on Climate Change process and the Paris Agreement (Article 8.5; see also Article COMPROV.5).

[29] Letter from the Government Legal Department to Mr Tim Crosland, Director of Plan B, dated January 14, 2021 (available here).

[30] *R (Friends of the Earth Ltd and Ors) v Heathrow Airport Ltd* [2020] EWCA Civ 214.

[31] *Id.*, 281-282.

Several NGOs commenced proceedings against the Secretary of State for Transport ("SoS"), challenging the legality of the ANPS on a number of grounds, including that the SoS had failed to take account of the Paris Agreement in reaching its decision.[32] The Court of Appeal agreed with the claimants, and set aside the ANPS on the basis that the SoS had breached his duties under the Planning Act 2008 by failing to (i) have proper regard to the Paris Agreement and (ii) explain how the ANPS took account of government policy (specifically the commitment to meet emissions targets in the Paris Agreement).

However, in its concluding paragraph, the Court emphasized that it did not find that the ANPS was "*necessarily incompatible with the [UK's] commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement*." On appeal, the Supreme Court unanimously overturned the decision, finding that the government's ratification of the Paris Agreement was not, of itself, a statement of policy for the purposes of the Planning Act 2008.

Similarly, the Court of Appeal in *Packham*,[33] which involved a challenge to the UK's high-speed rail project (HS2) for failure to take account of the government's emissions targets in accordance with the Paris Agreement and the CCA, found that there were no grounds to infer that the SoS had not given proper regard to its obligations. According to the Court, statutory and policy arrangements for meeting carbon budgets "*leave the Government a good deal of latitude in the action it takes to attain those objectives*."[34] In January 2021, the Court of Appeal rejected a similar challenge by ClientEarth regarding the national policy statement relating to the development of a natural gas plant.[35] Of the policy, the Court noted that the carbon emissions associated with a project were not, of themselves, an "*automatic and insuperable obstacle to consent*."[36]

Plan B has made a number of narrower challenges to government policy in previous years but has generally been met with limited success. In 2017, Plan B, among others, applied to the Court for judicial review of a decision by the Secretary of State for Business, Energy, and Industrial Strategy ("BEIS") not to revise the 2050 carbon emissions target under the CCA.[37] The CCA provides that BEIS may amend the carbon target if it is appropriate to do so in light of developments in scientific knowledge about climate change or European or international law or policy.[38] Section 3(1)(a) also requires BEIS to obtain and take into account the advice of the Committee on Climate Change, an independent body of climate change experts.

Plan B argued, among other things, that the decision not to amend the 2050 target was unlawful, and was based on a flawed interpretation of both the Paris Agreement and the purpose of the CCA. Plan B also argued that refusal amounted to a violation of the claimants' human rights under Articles 2 and 8 of the ECHR.

The Court found that BEIS was "*plainly entitled, having had regard to the advice of the Committee, to refuse to change the 2050 target*."[39] In respect of the human rights challenges, the Court held that this is an area "*where the executive has a wide discretion to assess the advantages and disadvantages of any particular course of action*" and that BEIS' decision was not arguably unlawful.[40]

That is not to say that the courts will not set aside a policy or decision, where it is clear the minister or

[32] Under the Planning Act 2008, policy statements of this description must: (i) provide reasons, including an explanation of how the policy takes account of government policy on climate change (s.5(8)); and (ii) be prepared having regard to the mitigation of, and adaptation to, climate change (s.10).
[33] *R (on the application of Christopher Packham) v Secretary of State for Transport and ors* [2020] EWCA Civ 1004.
[34] *Id.*, 87.
[35] *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and ors* [2021] EWCA Civ 43.
[36] *Id.*, 87.
[37] *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin).
[38] Sections 1(1), 2(1)(a), and 2(2) of the CCA.
[39] *Plan B Earth v BEIS*, 42.
[40] *Id.*, 49.

government body has failed to take account of material facts or failed to follow the statutory protocols in place when reaching a particular decision.[41] However, the courts continue to afford the government a great deal of deference in exercising discretion when making and implementing policy decisions.

Nonetheless, there is a significant volume of pending climate change cases currently before the UK courts, including challenges against: the decision to provide US$1 billion in financing to Mozambique to support liquefied natural gas development;[42] national policy statements relating to energy infrastructure;[43] the UK Emissions Trading Scheme;[44] the national policy statement on national networks;[45] and the new strategy for the UK Oil and Gas Authority.[46]

On March 11, 2021, the Secretary of State for Local Government ("SSLG") "called in" a planning permission application for the development of a coal mine in Cumbria, which was submitted by West Cumbria Mining Ltd. to Cumbria County Council in May 2017 and on four subsequent occasions, without a decision ever being reached. The call-in means that the SSLG will now decide the application following a public inquiry.

Although it is unusual to give reasons for a call-in, a letter from SSLG to the local council explained that the call-in decision was made on the basis that the Climate Change Committee recently published its recommendations for the Sixth Carbon Budget and that the application has been particularly controversial, garnering a significant number of proponents and opponents. For this reason, the SSLG concluded that the application should be resolved following a public inquiry, during which the conflicting positions could be properly explored.[47] Considerations of particular interest to the SSLG include the extent to which:

i. the development is consistent with government policies for meeting the challenge of climate change flooding and coastal change; and

ii. the development is consistent with government policies for facilitating the sustainable use of minerals.

What is clear is that the volume of climate change litigation in the UK is rapidly growing, and litigation is only likely to become more prevalent in coming years, particularly in light of the recent establishment of the Office for Environmental Protection, a public body which was established with the objective of contributing to environmental protection and holding the government accountable for its environmental commitments.[48]

5. France

France has witnessed significant dynamism in climate change litigation since the Paris Agreement was signed.

First, in a 2017 decision, the *Conseil d'État*, France's highest administrative court, held that the French Environmental Code required the State to take certain necessary precautions to limit air pollution[49], pursuant to Directive 2008/50 (EC) of May 21, 2008 on ambient air quality and cleaner air for Europe, as transposed into French law. This established the principle that limiting air pollution is a "results-based obligation" for the French Republic, meaning that it must determine

[41] *See, e.g.*, *Claire Stephenson v Secretary of State for Housing and Communities and Local Government* [2019] EWHC 519 (Admin), in which the Court set aside a section of the National Planning Policy Framework endorsing onshore oil and gas development (otherwise known as fracking) on the grounds that the government had clearly failed to take account of material scientific and technical evidence in reaching its decision, and that the public consultation process had been conducted in a manner that was both "*unfair and unlawful.*"
[42] *Friends of the Earth v UK Export Finance*, filed September 2020.
[43] *Vince v SOS for BEIS*, amended Statement of Facts and Grounds filed in the High Court, June 2020 (CO/1832/2020) (available here).
[44] *Elliott-Smith v Secretary of State for Business, Energy and Industrial Strategy et al*., issued September 2020.
[45] *Transport Action Network v Secretary of State for Transport*, amended Statement of Facts and Grounds filed in the High Court, December 2020 (CO/4575/2020) (available here).
[46] *Loach et al v UK Oil and Gas Authority*, filed May 12, 2021.
[47] Letter from Ministry of Housing, Communities and Local Government to Cumbria County Council, dated March 11, 2021 (available, here).
[48] The interim Office for Environmental Protection will be launched from July 2021.
[49] *Conseil d'État*, July 12, 2017, *Association Friends of the Earth*, n°394254.

and implement measures that will effectively reduce pollution levels under the thresholds set by the European Union.

Second, following a 2019 petition brought by a municipality particularly at risk of flooding due to rising sea levels, the *Conseil d'État* issued an order in November 2020 requiring the French government to justify, within a three-month period, how its GHG emission reduction efforts were consistent with its obligations under the EU's 2030 climate and energy framework[50]. The Court accepted interventions by certain environmental NGOs and the cities of Paris and Grenoble. On July 1, 2021, the *Conseil d'État* (i) noted that the current governmental strategy was insufficient to reach a 40% decrease of GHG emissions by 2030, (ii) annulled the government's refusal to take additional measures, and (iii) ordered the government to take additional measures by March 31, 2022 to achieve such target[51].

A finding of the *Conseil d'État* deserves particular mention. The Court found that the reduction in GHG emissions observed in 2020 "in the context of measures adopted since March 2020 to address the health crisis caused by the Covid-19 pandemic, which led to a sharp reduction in the level of activity and, consequently, in the level of greenhouse gas emissions" was "transitory" and "subject to rebounds," meaning that it could not be considered as "sufficient to demonstrate an evolution in greenhouse gas emissions" consistent with such targets. The Court had also held in its November 2020 order that while the case was primarily subject to French and EU law, the Paris Agreement must be considered in the interpretation of national law.

Third, on February 3, 2021, following a request filed by four environmental NGOs in March 2019, the Paris Administrative Court found that: (i) an action against the French State to seek compensation for ecological damage was admissible; (ii) the existence of such damage, not contested by the State, was established in this case with respect to climate change; and (iii) the French State had failed to meet its commitments to limit GHG emissions. The claimants were entitled to claim compensation in kind for the ecological damage caused by the French State's failure to comply with its own objectives for the reduction of GHG emissions, subject to a further investigation[52]. The court also imposed a symbolic penalty of €1 as compensation for the NGOs' moral damages, in order to compensate the impact on the collective interests defended by each NGO.

The court noted that compensation for ecological damage, which is a non-personal damage, is incurred mostly in kind. It is only if these compensatory measures are impossible or insufficient that the judge should order the liable party to pay damages. In the present case, the claimants had not demonstrated that the State would be unable to make reparation in kind for the ecological damage at issue.

The court thus found that the current stage of the investigations did not allow it to determine precisely what measures should be imposed on the State in order to repair the above-mentioned damage or to prevent its aggravation in the future. Consequently, it ordered a complementary investigation, to be completed within two months, before it could reach a decision on the merits.

Although the proceedings are still ongoing and the final decision of the court would be subject to appeal, this decision brings about a new dynamic to climate change litigation in France and sheds a light on the role of domestic courts in the fight against climate change.

Finally, these decisions must be read in conjunction with two significant developments regarding the fight against climate change in France, namely:

- The entry into force, in December 2020, of the Law on the European Public Prosecutor's Office, Environmental Justice and Specialized

[50] *Conseil d'État*, November 19, 2020, *Municipality of Grande-Synthe*, n° 427301.
[51] *Conseil d'État*, July 1, 2021, *Municipality of Grande-Synthe*, n° 427301, n° 427301.
[52] Paris Administrative Court, February 3, 2021, *Association notre affaire à Tous et autres*, n°1904967, 1904968, 1904972, 1904976/4-1.

Criminal Justice which, *inter alia*, introduces under French law a new deferred prosecution agreement on environmental matters and creates specialized jurisdictions for environmental matters;[53]

– The introduction on February 10, 2021 of the Bill on Combating Climate Change and Strengthening Resilience, which aims at implementing the June 2020 proposals of the Citizens' Climate Convention (CCC) and accelerating the transition towards a more carbon neutral and resilient society.[54]

6. Ireland

In July 2020, Ireland's Supreme Court delivered a significant judgment on the legality of the government's efforts on climate change in *Friends of the Irish Environment v Ireland.*[55] Ireland currently has the fourth highest per capita GHG emissions in the EU[56] and has committed to binding targets to reduce emissions along with the rest of the EU.[57] As part of the domestic measures to achieve these targets, the Irish government passed the Climate Action and Low Carbon Development Act 2015 (the "2015 Act"),[58] which sets out the government's strategy to tackle climate change. In December 2018, Friends of the Irish Environment ("FIE") challenged the National Mitigation Plan (the "Plan") devised under section 4 the 2015 Act.[59] The High Court rejected their claim in 2019[60] but FIE were granted leave to appeal directly to the Supreme Court.[61]

In the Supreme Court, FIE argued that the Plan was not fit for purpose as (i) it did not comply with the legislative requirements under section 4 (the "legality" argument) and (ii) it violated citizens' constitutional and ECHR rights (the "rights" argument).

By unanimous judgment of a seven-judge court, FIE won its case on the "legality" grounds, as the court found that the Plan was *ultra vires* (*i.e.*, outside the powers of) the government because it was "excessively vague or aspirational," meaning that it was not specific enough for the purposes of the 2015 Act.[62] The court held that the Plan did not set out a clear strategy for achieving the Act's goals which would be understandable to a reasonable reader, and explained that "a compliant plan must be sufficiently specific as to policy over the whole period to 2050."[63] In reaching this decision, the court attached "significant weight" to the views of Ireland's Climate Change Advisory Council, an expert body established under the 2015 Climate Act, which had described Ireland's emissions projections to 2035 in its 2018 Annual Report as "disturbing."[64]

FIE did not succeed on the "rights" argument for a number of reasons, principally (i) as a corporate entity, it did not enjoy the human rights claimed and (ii) the rights claimed ("a specific right [under the Irish Constitution] to a healthy environment") were too vague to be a constitutional right and did not add anything new to existing rights including the right to life and to bodily integrity.[65]

[53] Law n° 2020-1672 of December 24, 2020.
[54] Bill No. 3875 on combating climate change and strengthening resilience to its effects, February 10, 2021
[55] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] IESC 49 (July 21, 2020) available here.
[56] European Environment Agency, *Country profiles - greenhouse gases and energy 2020,* available here.
[57] *See* Submission by Latvia and the European Commission on Behalf of the European Union and its Member States (March 6, 2015).
[58] Climate Action and Low Carbon Development Act 2015.
[59] Section 4, Climate Action and Low Carbon Development Act 2015.
[60] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2019] IEHC 747 (September 19, 2019) available here.
[61] *Friends of the Environment CLG and The Government of Ireland, Ireland and the Attorney General* [2020] IESCDET 13 (February 13, 2020), available here.
[62] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2019] IEHC 747 (September 19, 2019) available here, paragraph 6.43.
[63] *Id.*, paragraph 9.2.
[64] EJIL: Talk, 'The Supreme Court of Ireland's decision in Friends of the Irish Environment v Government of Ireland ("Climate Case Ireland")' (September 9, 2020).
[65] The Supreme Court was reluctant to enumerate new rights but willing to recognize rights which "clearly derive" from the Constitution (*see* Supreme Court judgment, paragraph 8.4).

Despite the findings against FIE on the "rights" grounds, the Court left the door open to future claims in several interesting ways. In relation to the standing of a corporate entity to take a case where such an entity could not enjoy the human rights claimed, the Court noted that a more relaxed approach may be appropriate in certain cases where there are "weighty countervailing considerations," particularly where constitutional, European and ECHR rights are at issue.[66]

While the court did not engage in detail with the ECHR argument,[67] it did leave scope for an appropriate human rights-based claim to be brought under provisions of the Irish Constitution (including Article 10 which relates to natural resources, the right to property, and the "special position of the home").[68] The court noted that "*there may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged*" and stated that "*had standing been established or had similar proceedings been brought by persons who undoubtedly had standing, then it would have been necessary for [the] Court to consider the circumstances in which climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity.*"[69]

As an immediate tangible consequence of this landmark judgment,[70] the government was forced to revise the Plan to meet the requirements of the 2015 Act. On March 23, 2021, the government approved a new Climate Bill which is being pushed through Parliament as priority legislation.[71] The proposed law would *inter alia* commit Ireland to cutting emissions by 51% by 2030 and to net zero no later than 2050; require the government to adopt a series of five-year carbon budgets across all sectors; and require government ministers to appear before a climate committee each year to report on the performance of individual sectors.

The new draft legislation – a direct consequence of the *Friends of the Irish Environment* litigation – has been welcomed by FIE who noted that "*the targets are tighter, the duty to act is stronger, and the language is clearer*."[72]

7. Italy

On June 5, 2021, several NGOs, committees and individuals (including minors represented by their parents), launched the first climate-related litigation against Italy before the Civil Court of Rome.[73] The claim is the last step of a political campaign named "*Giudizio Universale*" – the "*Last Judgment*" – launched in 2019 by a group of social and environmental associations.

The plaintiffs request the Court of Rome to (i) find Italy's liability for failing to comply with the State's international obligations to fight climate change and reduce GHG emissions, (ii) order Italy to reduce such emissions by 92% by 2030 (compared to the 1990 levels)[74] and (iii) order Italy to inform Italian residents and citizens of the climate-related risks and of the policies adopted by the State to prevent and remedy such risks. The plaintiffs do not seek monetary compensation or invoke the illegitimacy of individual legislative and regulatory acts.[75]

[66] *See* Supreme Court judgment, paragraph 7.9.
[67] The Supreme Court considered human rights-based arguments to be analogous to constitutional rights arguments (*see* Supreme Court judgment, paragraph 7.23)
[68] *See* Aine Ryall, "Supreme Court ruling a turning-point for climate governance in Ireland" in *The Irish Times* (August 7,2020).
[69] *See* Supreme Court judgment, paragraph 8.14.
[70] As described by the UN Special Rapporteur on human rights and the environment, David R Boyd, *see* "Amidst a Climate and Biodiversity Crisis, Hope Emerges" (July 31, 2020).
[71] *See* Department of the Environment, Climate and Communications, Government approves landmark Climate Bill putting Ireland on the path to net-zero emissions by 2050 (March 23, 2021)
[72] *See* Friends of the Earth, "Climate Bill is a Big Step in the Right Direction" (March 23, 2021).
[73] *See* https://giudiziouniversale.eu/chi-siamo/.
[74] This percentage is obtained taking into account Italy's historical responsibilities in climate-altering emissions and its current technological and financial capacities, in accordance with the principles of equity and common but differentiated responsibility that characterize climate law. Those principles are to be taken into account in the calculation of the 'fair share', *i.e.*, the fair contribution that each country is required to make for the achievement of the objectives of the Paris Agreement.
[75] *See* the Abstract of the Writ of Summons; the Summary of the Claim. *See also* R. Luporini, *The 'Last Judgment': Early reflections*

The plaintiffs claim that Italy is well aware of the urgent need to reduce its emissions and of its international obligation to do so. However, they consider Italy's actions and policies to that effect insufficient. Notably, the plaintiffs argue that Italy's 2008-2014 emission reductions were largely due to the country's economic crisis and to the relocation of certain productive activities abroad, rather than to the implementation of effective climate policies. Likewise, they argue that Italy's current emission reduction commitments are not in line with the Paris Agreement's goal to keep warming "well below" 2°C and preferably below 1.5°C compared to pre-industrial levels,[76] and that Italy will not achieve its already modest emissions reduction target of 29% by 2030 (compared to 1990 levels), absent additional measures.[77]

The plaintiffs claim that Italy's inadequate climate policy caused and is causing serious interference with the enjoyment of certain fundamental rights of those within its jurisdiction, such as the right to life,[78] family life,[79] healthy environment and health,[80] but also more specific rights, such as the right to be informed about the scientific bases that underpin State policies,[81] and the right to a safe climate. According to the plaintiffs, such interference is in breach of Italy's obligations under the Italian Constitution,[82] the Italian Civil Code (mainly for extra-contractual liability),[83] as well as international[84] and EU law.[85]

As to the factual and evidentiary background, the plaintiffs rely in particular on the scientific reports rendered by the Intergovernmental Panel on Climate Change ("IPCC")[86] to argue that shared and uncontroversial scientific knowledge binds States and constitutes a parameter for evaluating their conduct, both at the international and national levels.[87] The plaintiffs also stress how Italy's geography and topography expose the country to enhanced climate change-related environmental risks, as well as to a general increase of hydro-geological risks.

In sum, the plaintiffs' goal is to have Italy adhere to the climate-related obligations that the State has sovereignly decided to assume. Should the plaintiffs prevail, the State will have to put in place and comply with measures that will make the objective of effective climate change mitigation achievable and transparently inform the public of such efforts.

II. Outlook

Governments will have to adapt their climate change strategies to meet the requirements set out by the courts. The decisions illustrate that reduction targets are not deemed sufficient, and that specific measures are required to achieve these targets.

on upcoming climate litigation in Italy, QIL 77 (2021) 27-49 available here.

[76] Article 2(1)(a) of the Paris Agreement.

[77] *See* the Abstract of the Writ of Summons; the Summary of the Claim.

[78] *See* Articles 2 and 3 of the Italian Constitution; Article 2 of the Charter of Fundamental Rights of the European Union ("CFREU"); Article 2 of the ECHR.

[79] *See* Article 7 of the CFREU; Article 8 of the ECHR.

[80] *See* Article 32 of the Italian Constitution; Article 37 of the CFREU.

[81] *See* the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), ratified by Italy on June 13, 2001; Article 6(a) of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; Article 6(a)(ii) of the United Nations Framework Convention on Climate Change ("UNFCCC"); Recital 45 of Regulation (EU) 2018/1999; Article 6 of Regulation (EC) 1367/2006.

[82] *See* Article 117(1) of the Italian Constitution.

[83] *See* Articles 1175, 1375, 2043 and 2051 of the Italian Civil Code.

[84] Italy is party to several UN treaties for the protection of human rights, the UNFCCC, the Paris Agreement, and is also a signatory to the Geneva Pledge for Human Rights in Climate Action which, together with the Paris Agreement, recognizes the existence of a link between human rights and climate change.

[85] The European Commission also brought several infringement proceedings against Italy for non-compliance with EU directives on environmental protection. The Commission found that several Italian regions had failed to comply with the limit values for nitrogen dioxide (NO_2) set by Directive 2008/50/EC, and the Court of Justice found that Italy had failed to fulfill its obligations under the same Directive, by systematically exceeding the limit values for concentrations of particulate matter PM10.

[86] The IPCC is the United Nations body for assessing the science related to climate change.

[87] *See* Article 191 of the TFEU; Article 3, n. 1, lett. c) of the Italian Law No. 132/2016.

At the moment, the majority of climate-related claims is brought against States and State entities.[88] However, these court decisions could also be the trigger for civil law litigation. Indeed, the principles established in *Urgenda* have been effectively extended to a private entity in a recent decision of The Hague District Court ordering Royal Dutch Shell plc to reduce its emissions by 45% by 2030.[89]

For example, the German Constitutional Court established that impairments and violations based on climate change fall within the scope of the rights to physical integrity and property.[90] This can be used as a basis for civil lawsuits to hold private actors accountable for damages to the respective rights, if the factual connection to climate change and actions of private actors can be proved. As science continues to advance rapidly in this regard and because it certainly will not be left unused by strategic litigators and NGOs,[91] it is necessary for companies to analyze and minimize their exposure to risks.

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[88] *See* Setzer/Byrnes, "Global trends in climate change litigation: 2020 snapshot", Policy report, Grantham Institute (July 2020).
[89] *See* our alert memorandum "Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company" (June 30, 2021).
[90] *See* under I.7.
[91] *See* R.F. Stuart-Smith, F.E.L. Otto, A.I. Saad *et al*., "Filling the evidentiary gap in climate litigation", *Nature Climate Change* (2021).