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***Climate litigation:
The impact of the Paris Agreement in national courts***

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Abstract:

The slowness and lack of ambition of climate policies have led, in recent years, to the development of a new type of litigation: climate litigation. Various States in the North and South have already been ruled against by national courts because of the inadequacy of their action to reduce greenhouse gas emissions, and litigation is multiplying throughout the world. Here, the international climate regime is likely to make a contribution the magnitude of which was somewhat unexpected. Indeed, the Paris Agreement is a relatively flexible treaty, leaving a very wide discretion to States as to its implementation. However, the way it was designed, and even though its provisions have no or little direct effect, the Agreement increases the pressure on States, including, and perhaps most importantly, at the domestic level. In this article, we show that the Paris Agreement, thanks to the involvement of civil society, has provided fuel for climate litigation in a decisive manner and offered national courts the opportunity to position themselves as key players of climate governance.

Keywords:

climate change; litigation; Paris Agreement; interpretation; international law

Climate change is a serious and urgent global threat that calls for profound changes in our societies. It constitutes a challenge for our legal systems, revealing their inadequacy to deal with such a vital issue. Beyond the distinctions between public and private law, between national and international law, climate change exemplifies and accelerates changes in the ways in which the law is made and applied in a globalised context. For all these reasons, climate change undoubtedly constitutes a good “laboratory” for governance, seeing as it requires permanent interaction between States, international organisations, non-state actors, businesses, experts, and citizens. In order to be powerful, these forces must push in the same direction and thus, at the very least, coordinate their actions through vertical and horizontal interactions.¹

On this subject, the slowness and lack of ambition of climate policies have led, in recent years, to the development of a new type of litigation: climate litigation. Around 2,300 climate-related lawsuits have been tried or are pending, and this number is still growing.² Various States in the North and South have already been ruled against by national courts because of the inadequacy of their action to reduce greenhouse gas emissions, and litigation is multiplying throughout the world. Legal action has also been brought by towns, cities, NGOs, groups of citizens (American children from Our Children’s Trust, Swiss senior women, a law student from New-Zealand...) against major corporations whose activities are allegedly causing global

(*) Aix Marseille Université, CNRS, UMR DICE, CERIC. This article builds on earlier work, in particular *L'éloge du flou ? L'Accord de Paris devant les juges nationaux*, Contributions aux mélanges en l'honneur de Mireille Delmas-Marty, Mare et Martin, Paris, forthcoming 2022.

¹ Mireille Delmas-Marty, *Aux quatre vents du monde*, Seuil, 2016, p.120.

² See the Sabin Center Climate Change Litigation databases <http://climatecasechart.com/climate-change-litigation/> (last accessed on 15 December 2021).

warming. Globalised and transnational, these proceedings in some respects break down national borders.³ Faced with what is perceived as a failure on the part of public authorities and companies, the law is increasingly relied on and used as a “weapon” to serve various objectives: to encourage public authorities or companies to take stronger measures to mitigate climate change, to implement more ambitious policies, to obtain compensation for damage suffered, to stop a project that emits large quantities of greenhouse gas, etc.

Here, the international climate regime is likely to make a contribution the magnitude of which was somewhat unexpected. Indeed, the Paris Agreement, which was adopted on 12 December 2015 and quickly entered into force, and which now counts 195 signatories and 191 Parties, is a relatively flexible treaty, leaving a very wide discretion to States as to its implementation. In order to convince (almost) all States to become Parties, the form and substance of the Paris Agreement were adjusted in comparison to its “predecessor”, the Kyoto Protocol. The compromise reached in Paris illustrates a certain evolution of the way States commit themselves. In this regard, the form and substance of the Agreement have been carefully crafted to allow for a consensus to be reached, a consensus that seemed unachievable a few months before. However, the way it was designed, and even though its provisions have no or little direct effect, the Agreement increases the pressure on States, including, and perhaps most importantly, at the domestic level. Indeed, in this article we will show that the Paris Agreement, thanks to the involvement of civil society, has provided fuel for climate litigation in a decisive manner and offered national courts the opportunity to position themselves as key players of climate governance.

I. The Paris Agreement, fuel for climate litigation

The Paris Agreement has boosted the explosion of climate litigation, providing an entry point for international law in these proceedings, and contributing to the emergence of a “global judge” figure.

1) The explosion of climate litigation boosted by the adoption of the Paris Agreement

The effects of the Paris Agreement have been amplified by more general developments, leading courts in many countries to rely increasingly on international law. After having long played a very marginal role in national courts, international law is now part of their daily routine.⁴ Measurable in quantitative as well as qualitative terms, this phenomenon has been confirmed by more general studies that link this development to the normative expansion of international law and to the increasing interdependence of States in the context of globalisation.⁵ The increased presence of international law is also the direct consequence of the growing openness of States to international law.⁶ All this is leading national courts to think “outside the ‘Westphalian’ box” marked by the lack of permeability between the international and national spheres.⁷

There are several reasons why the Paris Agreement has amplified this phenomenon, putting the field of climate change in the vanguard with regard to the use of international law by national courts. First of all, it is a treaty, and national courts are known to refer more readily to treaties than to international custom or court rulings, because of their advantages in terms of

³ See for instance “German court paves way for Peruvian farmer's suit against RWE”, Reuters, 30 November 2017.

⁴ Lord Bingham, “Foreword” in S. Fatima, *Using International Law in Domestic Courts*, Hart Pub., Oxford, 2005.

⁵ Yuval Shany, “National Courts as International Actors: Jurisdictional Implications”, *International Law Forum of the Hebrew University of Jerusalem Law Faculty*, Research Paper, N°22-08, 25 Oct. 2008, p. 5.

⁶ Jean d’Aspremont, “The Systemic Integration of International Law by Domestic Courts”, in *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, Hart Pub., 2014, p. 143.

⁷ Stephane Beaulac, “Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Courts”, *EUI Working Paper*, MWP 2007/03, p. 4.

clarity and ease of access for those not familiar with public international law.⁸ Second, the Paris Agreement is a treaty “for internal consumption”.⁹ Its provisions are mainly designed to penetrate national legal systems; their implementation makes it indispensable. This is all the more true given that the Agreement, in its design, combines the international definition of an ambitious collective goal of limiting global warming with an implementation tool, the so-called nationally determined contributions, the content, form and scope of which are almost entirely up to the Parties, to whom a very wide discretion is thus given. What could be analysed as a congenital weakness of the Agreement has actually “boosted” climate litigation and allowed claimants to define effective legal strategies.¹⁰ Third, the Paris Agreement was given an international control mechanism that is much less intrusive and much weaker than its predecessor the Kyoto Protocol. Combined with the fact that it is difficult to bring a case before an international court in the event of a violation, the shortcomings of international enforcement mechanisms here too lead to increased pressure on the national level with regard to implementation.¹¹ Lastly, the extensive media coverage of COP21, during which it was adopted, has put the Agreement in the spotlight; it is probably one of the best-known international treaties outside a circle of specialists. The publicity surrounding the IPCC report on 1.5°C, warning of the urgency and of the closing of the window of action has further strengthened the mobilisation of public opinion. The constitution of a real “international” of activist lawyers working for associations and forming, with a committed academic community, an international “epistemic community” at the service of climate did the rest.¹²

2) The Paris Agreement, an entry point for international law into climate litigation

Although the provisions of the Paris Agreement are only one of the elements invoked amongst other rules of international law, the Agreement is generally at the heart of arguments as well as decisions. It is almost always the entry point for other rules of international law. Here as well, this is a more general phenomenon that has already been described elsewhere. In this respect, some have spoken about a clustering of international law references, “as decisions that cite one kind of international legal material are likely to cite other kinds as well”.¹³ In particular, courts are often led to invoke other international sources — customary rules, soft law instruments — to help them interpret and apply treaty rules.¹⁴

In climate trials, claims are usually based on several sources of international and domestic law. Claimants demonstrate a certain inventiveness, inviting judges to combine sources and norms in a synergistic manner.¹⁵ Interpreting one norm in the light of another can then make these norms say more than if they were applied in isolation (and thus more than they say).

From the point of view of formal international sources, treaty rules are generally combined with customary rules, but sometimes also with soft law decisions of Conferences of

⁸ Wayne Sandholtz, “How Domestic Courts Use International Law”, *Fordham International Law Journal*, Vol. 38(2), 2015, p. 615.

⁹ Slim Laghmani, “Droit international et droits internes : vers un renouveau du *jus gentium* ?”, *Droit international et droits internes. Développements récents*, R. Ben Achour, S. Laghmani (dir.), Pedone, 1999, p. 34 [Our translation].

¹⁰ David Estrin, “Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts – Despite the Paris Agreement”, *CIGI Papers*, N°101, 2016, p. 5.

¹¹ Sandrine Maljean-Dubois, “Climate Change Litigation”, *Max Planck Encyclopedia of International Procedural Law (EiPro)*, 2019 [on line].

¹² Austin Sarat, Stuart Scheingold, *Cause Lawyering and the State in a Global Era*, OUP, Oxford, 2001; J. Gupta, “Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change”, *Review of Comparative, International and Environmental Law*, 2007, 16(1), p. 78.

¹³ Wayne Sandholtz, “How Domestic Courts Use International Law”, *op. cit.*, p. 597.

¹⁴ *Ibid.*

¹⁵ Christel Cournil, “Les droits fondamentaux au service de l'émergence d'un contentieux climatique contre l'État. Des stratégies contentieuses des requérants à l'activisme des juges”, in Martha Torre-Schaub, Christel Cournil, Sabine Lavorel, Marianne Moliner-Dubost (eds.), *Quel(s) droit(s) pour les changements climatiques*, Mare & Martin, 2018, p.199.

the Parties. In terms of substance, the rules of the international climate regime are combined both with general rules (such as customary duties of care) and with other specific rules. The combination of international climate law rules and international human rights law rules is also increasingly invoked.¹⁶ Courts are then asked to read the States' obligations regarding the protection of human rights in the light of their climate obligations, whether in a national court,¹⁷ or before international human rights protection bodies such as the United Nations Committee on the Rights of the Child¹⁸ or the European Court of Human Rights.¹⁹ The Urgenda case demonstrated a particularly synergistic interpretation of a combination of customary norms (the Dutch duty of care or no harm rule), treaty rules under international human rights law, together with the objectives and principles of the United Nations Framework Convention on Climate Change (UNFCCC).²⁰ This combination can be found in most similar cases, such as in Belgium, with *Klimaatzaak*, currently pending before the Brussels Court of Appeal, where the Court of First Instance found that there had been violations of Articles 2 and 8 of the European Convention on Human Rights, read in the light of the duty of care of the good family father (or the reasonable man in Common Law), a standard itself informed by the Paris Agreement.²¹

Finally, the IPCC reports have been relied on effectively in many cases. Although they have no legal value, as scientific reports, they have the advantage of reflecting the global consensus of scientists on the subject, a sort of "international truth". The summaries for policymakers that accompany the reports – and which are the parts relied on in court – also carry a particular weight since they are co-approved by scientists and representatives of States. In the *New-Zealand Thomson* case, the court thus noted that "The IPCC reports provide a factual basis on which decisions can be made".²² Furthermore, it held that the government should review its long-term objective every time the IPCC publishes a new report, viewing it as a "mandatory relevant consideration".²³

3) The Paris Agreement, a cornerstone for a "global" justice

In these cases, courts find support in the case law of other domestic courts. This is, here again, a more general phenomenon,²⁴ but one that shows very clearly in climate cases. The Internet and the publication of foreign decisions facilitate access to foreign legal decisions. This is all the more true in the field of climate change where two very regularly updated databases publish petitions and judgments.²⁵ Courts have become accustomed to looking at what other judges have written before them. They know the worldwide publicity that climate judgments enjoy. They also know that their decisions will be analysed and commented on well beyond their country, and that they may in turn inspire courts in other countries. This can work in favour of claimants, as it encourages courts not to be the ones to disappoint international public

¹⁶ Jackie Peel, Hari Osofsky, "A Rights Turn in Climate Change Litigation?", *Transnational Environmental Law*, 7(1), 2018, pp. 37-67.

¹⁷ See the abovementioned Decision of 2019 in the Urgenda case, §5.6.2.

¹⁸ Petition before the Committee on the Rights of the Child on 23 September 2019, Chiara Sacchi et al. c. Argentina, Brazil, France, Germany, Turkey. Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 106/2019, 21 September 2021.

¹⁹ With pending cases involving Portuguese young people, Swiss elders or an Austrian with temperature-dependent multiple sclerosis. See Christel Cournil, Camila Perruso, "Le climat s'installe à Strasbourg – Les enseignements des premières requêtes portées devant la Cour européenne des droits de l'Homme", *L'Observateur de Bruxelles*, 2021/2, n° 124, p. 24 ss.

²⁰ Urgenda, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, Hoge Raad, 20-12-2019, § 5.7.5.

²¹ See their main conclusions, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190628_2660_na.pdf (last accessed on 15 December 2021).

²² Thomson c. Minister for Climate Change Issues [2017] NZHC 733, §134.

²³ *Ibid.*, §. 94.

²⁴ Guy Canivet, "Les influences croisées entre juridictions nationales et internationales : Eloge de la 'bénévolence' des juges", *RSC* 2005, p. 799.

²⁵ The database of the Sabin Center mentioned above (<http://climatecasechart.com/climate-change-litigation/>) and the database of the Grantham Institute (https://climate-laws.org/litigation_cases).

opinion. This pressure has led several courts to issue press releases and/or full or partial translations, sometimes in several languages, on the very day their decision is made public. Finally, as they know that the courts of other countries apply international law in a similar way, national courts are more inclined to restrict their government's margin of action.²⁶ But they are not constrained by anything either, and they generally cherry-pick the judgements and reasonings that serve their own purposes, discarding others, usually without much explanation.²⁷

Relationships between national courts, which are based on soft power and “jurispersuasion”, rather than constraint, are slowly but surely shifting the classical model of territoriality and sovereignty with regard to the way legal rules are formed and applied.²⁸ For now, the movements are at the same level, or bottom-up, but it is conceivable that in the future national decisions will influence the outcome of litigation before international courts or bodies, strengthening the interaction between international law and domestic law. Thus, the recent decision of the German Federal Constitutional Court²⁹ could inspire the European Court of Human Rights in the case brought by Portuguese young people.³⁰ This emerging global community of courts is thus driven largely by the power of persuasion, personal contacts and claimants acting on a global “market” for justice.³¹

The strong mobilisation and the political sensitivity of cases also raise questions around the balance between the judiciary and the executive. As noted by E. Benvenisti, after a period during which national courts developed avoidance strategies in this area, “References to foreign law and international law are being transformed from the shield that protected the government from judicial review to the sword by which the government's (or governments') case is struck down”.³² At the very least, international law is used as a tool to critically review the legality of a government policy, in a manner quite comparable to the way in which international courts would have approached the same issue.³³ Many courts have found that they lacked jurisdiction on the basis of the political question doctrine and the principle of separation of powers. For example, in a case brought by representatives of indigenous peoples alleging that Canada's climate change policy violated their human rights, a federal court recently found that the issue raised was “beyond the reach of judicial interference”.³⁴

Taken as a whole, these phenomena illustrate how the processes of normative and judicial intertwining, very well described as early as 2013 by Mireille Delmas-Marty, are capable of “creating a movement that makes it possible, under certain conditions, to integrate and reconcile the multiple constraints of systems – national and international – which were initially based on different models”.³⁵ National courts thus become ‘organisers of clouds’, to use her beautiful metaphor.³⁶

²⁶ Eyal Benvenisti, “Judicial Misgivings Regarding the Application of International Law: an Analysis of the Attitudes of National Courts”, *European Journal of International Law*, 1993(4), p. 175.

²⁷ Anthea Robert, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law”, *International and Comparative Law Quarterly*, 2011, Vol. 60/1, p. 85.

²⁸ Paul Schiff Berman, “From International Law to Law and Globalization”, 43 *Columbia Journal of Transnational Law*, 2005, p. 537.

²⁹ First Senate of the German Federal Constitutional Court, 24 March 2021 (publication 29 April) BvR 2656/18.

³⁰ ECHR, Release of 13 November 2020, Req. n°39371/20, Cláudia Duarte Agostinho and others against Portugal and 32 other states introduced on September 7, 2020.

³¹ Anne-Marie Slaughter, “A Global Community of Courts”, *Harvard International Law Journal*, 2003, vol.44, p. 219.

³² Eyal Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts”, 102 *AJIL* (2008) 241, 243; “Judicial Misgivings Regarding the Application of International Law: an Analysis of the Attitudes of National Courts”, *op.cit.*, p. 159.

³³ Yuval Shany, “National Courts as International Actors: Jurisdictional Implications”, *op.cit.*, p. 5.

³⁴ Lho'imggin et al. v. Her Majesty the Queen, 2020 FC 1059, 16 November 2020 (under appeal).

³⁵ M. Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit (II)*, *op.cit.*, p. 63. [Our translation]

³⁶ M. Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit (II)*, *op.cit.*, p. 266. [Our translation]

II. National courts, major players of climate governance?

National courts contribute, through the decisions handed down in climate trials, to reintroducing a little harmony in a landscape marked by asynchrony (different speeds in different areas) or polychrony (different speeds in a single area),³⁷ and thus to reinforce the effectiveness both of the Paris Agreement and of national policies implementing it. By applying the Agreement more indirectly than directly, they can work towards the synchronisation of the global objective with national policies, or of the short-term greenhouse gas emission trajectories with longer-term carbon neutrality objectives.

1) An indirect rather than direct reliance on the Paris Agreement

In climate trials, international law is rarely applied directly, as a source of positive law, either because the legal system is dualist, or because the obligations in question are not viewed as self-executing and therefore cannot be directly invoked by individuals. However, the Paris Agreement, alone or in combination with other international obligations, has been successfully used in many cases to interpret domestic rules. The court then carries out a systemic interpretation (domestic law “in the light of”, including all of the relevant legal elements, but also factual or even moral elements), a teleological interpretation (the aim is to limit temperatures as decided in the Paris Agreement) and/or an extensive interpretation. The court here has more discretion in its assessment of whether it is appropriate to use international law, as well as in the choice of sources relied on, which may include unratified treaties or soft law instruments. Indeed, as an interpretative source, the international norm becomes subsidiary, as it is not the implementation of the Paris Agreement that the claimants are asking for, but that national policies implement the country’s international commitments or conform to a consensual standard of conduct.³⁸ The monist or dualist nature of the legal system thus becomes irrelevant.

When they contribute to ensuring the implementation of a State’s international obligations in the domestic legal order, national courts can, even if in a limited and random manner, be seen as a *de facto* international player fulfilling an international judicial function, in accordance with the role splitting theory, as defined by Georges Scelle.³⁹ This role is particularly important with regard to *erga omnes partes* obligations that no longer “stand” on their own simply thanks to the principle of reciprocity. Many academics have called for this, asking national courts to play a much more important role as instruments safeguarding the international legal order, by taking into account “meta-national” considerations, beyond short-term national interests.⁴⁰

2) Synchronising the global goal with national policies

Here, a provision such as Article 2 of the Paris Agreement, which defines in very general terms the global goal of limiting temperatures to well below 2°C and, if possible, 1.5°C, without sharing this burden between States, acquires a significance that many States had probably not anticipated. Although there is no obligation, no creditor, no debtor, the language of Article 2 is indeed clear and unequivocal.⁴¹ Whatever the legal value of national contributions, whether a legal system is monist or dualist, Article 2 is like a trap that risks closing itself on States, which will be asked by the courts to align their policies with this global objective. As noted by Hunter

³⁷ M. Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit (II)*, *op.cit.*, p. 227.

³⁸ Kim Bouwer, “The Unsexy Future of Climate Change Litigation”, *Journal of Environmental Law*, 2018/30(3), p. 492.

³⁹ Yuval Shany, “National Courts as International Actors: Jurisdictional Implications”, *op.cit.*, p. 2.

⁴⁰ A. Cassese, “Remarks Theory of ‘Role Splitting’ (dédoulement fonctionnel) in International Law”, *European Journal of International Law*, 1990, p. 230.

⁴¹ Lennart Wegener, “Can the Paris Agreement Help Climate Change Litigation and Vice Versa?”, *Transnational Environmental Law*, 2020, Vol. 9/1, p. 24.

et al.,⁴² the objective of the Paris Agreement becomes the widely accepted benchmark against which to review national climate policies or decisions to authorise a particular project, such as a new coal-fired power plant in South Africa.⁴³ Other courts, on the contrary, have held that greenhouse gas emissions do not constitute an “automatic and insuperable obstacle” to the approval of infrastructure projects, the decision-maker having discretion as to the weight to be given to such emissions in approval decisions,⁴⁴ or that the executive has considerable freedom of action in responding to the coronavirus crisis.⁴⁵ Thus, the case law is divergent. Use for the purpose of interpreting national law is indeed more flexible and discretionary than direct use; it nonetheless provides a real gateway for international law.⁴⁶

Courts here are led to operationalise the so-called principle of common but differentiated responsibilities, which is at the heart of international environmental law in general and of the international climate regime in particular. This principle has not been operationalised by the Paris Agreement, which does not define a carbon budget and does not share the effort between States. It leaves it up to the latter to define a fair national contribution, without this being subject to international control. Here as well, national courts have seized the opportunity to remedy this shortcoming by assessing the fairness (or lack thereof) of States’ commitments. In the Urgenda case, relying on Articles 2 and 8 of the European Convention on Human Rights, the court found that the Dutch State had to do “its part” even when dealing with a global problem. For the Dutch Supreme court, “this obligation of the State to do ‘its part’ is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands”.⁴⁷ Similarly, the recent decision by the German Federal Constitutional Court emphasised that the German contribution to the international effort must be determined so as to foster mutual trust between the contracting parties, and not to minimize efforts. The court considered that it could rely on various provisions of the Agreement (such as Articles 2.2 or 4.4) to operationalise the principle of common but differentiated responsibilities. Its decision also relied on the IPCC reports.⁴⁸ In the same vein, when examining the complaint filed in September 2019 by 16 children aged 8 to 17 years, including Greta Thunberg, pursuant to the third Optional Protocol to the Convention on the Rights of the Child, the Committee on the Rights of the Child held that “In accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change *does not absolve the State party of its individual responsibility* that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.”⁴⁹

3) Synchronising greenhouse gas emissions trajectories with longer-term carbon neutrality objectives

Commitments to carbon neutrality are multiplying, not only from companies, but also from States: by 2030 (Norway), 2035 (Finland), 2040 (Austria, Iceland), 2045 (Sweden), 2050 (EU, South Korea, Japan, Canada, New-Zealand), 2060 (China) or 2070 (India). This

⁴² David Hunter, Wenhui Ji, Jenna Ruddock, “The Paris Agreement and Global Climate Litigation after the Trump Withdrawal”, *Maryland Journal of International Law*, 2019, Vol. 34/1, p. 232.

⁴³ EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others, Case number: 65662/16, Judgment, 8 March 2017.

⁴⁴ ClientEarth v. Secretary of State, 21 January 2021, [2021] EWCA Civ 43 (appeal).

⁴⁵ With regard to the rescue plan for the airline KLM: Greenpeace Netherlands v. State of the Netherlands, Rechtbank Den Haag, 12 September 2020, ECLI:NL:RBDHA:2020:12440.

⁴⁶ Jean d’Aspremont, “The Systemic Integration of International Law by Domestic Courts”, *op.cit.*, p. 145.

⁴⁷ See the decision mentioned above of 2019 in the Urgenda case, §5.7.1. See also the decisions of the French Conseil d’État, *Commune de Grande Synthe et autre*, req. n°427301, 19 November 2020, 1st July 2021.

⁴⁸ Abovementioned Decision, §225.

⁴⁹ Aforementioned. [Our emphasis]

unexpected movement shows how far we have come in the five years since COP 21. It is very encouraging, as it could catalyse the action of other States and finally put us on the trajectory set by the Paris Agreement. It should therefore not be underestimated, even if States are struggling to define short- and medium-term trajectories consistent with this neutrality objective, trajectories without which this objective will remain wishful thinking. Here as well, courts have the opportunity to work on synchronising trajectories. In France, the *Grande-Synthe* case gave rise on 19 November 2020 to an initial ruling by the French Council of State that is very interesting from this point of view. The latter clarified France's climate commitments and their consequences for the administration of the State. In its decision, based on the reports of the French High Council on Climate, the French Council of State underlined the inadequacies of the policies put in place to achieve the set objectives. It regretted a "shift of the trajectory of emissions reduction which leads to the postponement of most of the effort after 2020, according to a trajectory that has never been reached until now", emphasising that "The most recent scientific data, in particular the reports published by the Intergovernmental panel on climate change, point, on the contrary, to a worsening of the climate risks if temperature rise remains constant (...)".⁵⁰ Another decision forces, *in fine*, the government to reconcile long-term objectives with the short-term carbon strategy and budgets.⁵¹ First, the French Council of State quashed the government's implicit refusal to take all useful measures to curb the curve of greenhouse gas emissions produced on national territory in order to ensure its compatibility with the greenhouse gas emission reduction objectives set both by national regulations and European Union law. Secondly, the high court enjoined the Prime Minister to take all necessary measures to curb the curve of greenhouse gas emissions to ensure its compatibility with said greenhouse gas emission reduction objectives. The ruling handed down in the so-called "Case of the Century" by the Paris Administrative Court goes in the same direction, illustrating how the State (or even a company) can find itself trapped by its own promises.⁵²

The recent German ruling is also very interesting from this point of view, in that it interprets the German Constitution in the light of an imperative of intergenerational justice. German law "must not place disproportionate burdens on the future freedom of the claimants". Furthermore, "It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO₂ budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom – something the claimants describe as an "emergency stop".⁵³ In a way, consuming a large part of the CO₂ budget in the coming years unacceptably aggravates the risk of serious losses of freedom for future generations, who will have no choice but to undergo a painful transition.

Within the limited framework of this research, which has focused solely on the obligations of States, without addressing litigation involving companies, and without in any way claiming to be exhaustive, we have shown how the Paris Agreement, described as a flexible, bottom-up treaty containing only procedural obligations, and whose transparency and international control mechanism lacks "teeth", can today produce a useful effect in national courts, who themselves do have very good "teeth". Vague international law gains legal certainty

⁵⁰ Decision of the French Conseil d'État mentioned above, *Commune de Grande Synthe et autre*, 19 November 2020. [Our translation]

⁵¹ Decision of the French Conseil d'État mentioned above, *Commune de Grande Synthe et autre*, 1st July 2021.

⁵² Mathilde Hautereau-Boutonnet, "'Affaire du siècle' : les promesses climatiques risquent d'engager ceux qui les font", *The Conversation*, 7 février 2021. See the judgment of the Paris Administrative Court, cases Nos 1904967, 1904968, 1904972, 1904976/4-1, Association Oxfam France, Association Notre Affaire à Tous, Fondation pour la Nature et L'homme, Association Greenpeace France, Decision dated 14 October 2021.

⁵³ Abovementioned Decision, § 188, §192.

through the intervention of national courts, who make up for the lack of an international control mechanism. Through their interpretation of States' international commitments, which go well beyond the Paris Agreement, national courts connect, harmonise, bring together and even hybridise international and national norms, with the various courts mutually inspiring each other across borders. National courts, through their cascading decisions, could thus be one of the keys to better combine, on the one hand, international commitments and national regulations and on the other hand, international ambition and State action. The urgency here is clear, as shown by the first part of the IPCC sixth assessment report, published in the summer of 2021. Indeed, this report highlights the reality of climate change: "Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since" the previous report. It also outlines the worst-case scenarios for the future of our planet.⁵⁴

⁵⁴ IPCC, *AR6 Climate Change 2021: The Physical Science Basis*, 2021 [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)] <https://www.ipcc.ch/report/ar6/wg1/> (last accessed on 15 December 2021).